PROPOSITION 65 CLAIMS/
ADA DRIVE-BY CLAIMS
(CALIFORNIA AND HEADING THIS WAY)

Provided by Suzanne Henderson, Esq.
Squire, Sanders & Dempsey, LLP

TABLE OF CONTENTS

Page

I. SCOPE OF ARTICLE

This article will describe the major elements of a California Proposition 65 cause of action in the hospitality context, major defenses, warning language examples, and recent developments in proposed "global" settlements.

II. INTRODUCTION

One of the most difficult aspects of working on cases involving California's Proposition 65 is explaining to clients why a person who seems an awful lot like an extortionist is able to get away with suing them for having minute levels of certain chemicals in their FDA-approved products or for failing to put up signs warning visitors that tobacco smoke is bad.

In 1986, California voters passed Proposition 65, enacting the "Safe Drinking Water and Toxic Enforcement Act of 1986."[1] Prop. 65 requires the Governor to create a list of chemicals that are known to the State of California to cause cancer, birth defects, or other reproductive harm. Approximately 750 chemicals are now on the list, and more are being added.[2]

A business is required to provide clear and reasonable warning before knowingly and intentionally exposing a person to a listed chemical.[3] The Attorney General, District Attorney, City Attorney, or private enforcer may bring an enforcement action "in the public interest." Suits have been brought regarding exposures to consumer products, exposures in publicly-accessible buildings, and workplace exposures.

Although in the early years of Prop. 65, most suits were brought by the Attorney General, private enforcers now bring the vast majority of the suits. Due to the limited defenses available and the high litigation costs of a scientific-based defense, most Prop. 65 defendants settle instead of taking their case to trial. This perpetuates the common impression that Prop. 65 claims are, as one judge put it, "a form of judicial extortion."[4]

III. PLAINTIFFS

Proposition 65 suits are rarely brought by District Attorneys or City Attorneys. Some are brought by the Attorney General's office, especially those that the Attorney General's office considers notably

---

[1] CAL. HEALTH & SAFETY CODE (H&SC) §§ 25249.5-25249.13 (2003). For a historical background of Prop. 65 and its early results, see D. Roe, Environmental Defense Fund, "Framing Right-to-Know Laws: The Case of Proposition 65," *ICET Symposium IV* (Oct 5-6, 1989); R. Carrick, *The Proposition 65 Handbook* (2d ed. 1998). For a critique of Prop. 65's failure to incorporate risk assessment and counterproductive focus on chemicals of negligible concern, see D. Juberg, Ph.D., "California's Proposition 65 and Its Impact on Public Health" (American Council on Science and Health, Dec. 2000).

[2] 22 CAL. CODE OF REGS. (CCR) § 12000; *see* http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

[3] H&SC § 25249.6. Proposition 65 also prohibits the contamination of drinking water (§ 25249.5), but that aspect is outside the scope of this article.

[4] *Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454, 477-78 (2d Dist. 2001) (dissenting opinion: "Unconcerned about the practical effect of their decision, and undeterred by a plaintiff's admission that it has no evidence at all to suggest that the defendant is using an unsafe level of any listed chemical, my colleagues have endorsed and encouraged a form of judicial extortion.").

worthwhile. The vast majority of Prop. 65 suits, though, are brought by private plaintiffs suing "in the public interest." These plaintiffs' groups and their attorneys are frequently described as "bounty hunters."

In the hospitality context, there are two groups that are currently the most common Prop. 65 plaintiffs: the Consumer Advocacy Group and the Consumer Defense Group.

A. Consumer Advocacy Group – Reuben Yeroushalmi

The Consumer Advocacy Group (CAG) has been involved in Proposition 65 secondhand-smoke suits against hotels for over a decade.[5] As of December of 2003, the CAG had served over 1,420 60-day notices of intent to sue under Proposition 65.[6]

Reuben Yeroushalmi, who was admitted to the California bar in January of 1998, now represents CAG. Before becoming a lawyer, Reuben Yeroushalmi began his Prop. 65 career serving as the named plaintiff in Prop. 65 suits brought by attorney Moorse Mehrban.[7] In granting a demurrer in a case in which Yeroushalmi served as the named plaintiff, Judge Brett C. Klein stated: "This case is brought in the private interest, not in the public interest. . . . There are many nouns that one might attempt to use, metaphorically, to describe what this case is about. 'Bounty hunter,' the term used by defendants in their papers, is not one that I would use. I think, rather, the most appropriate metaphorical term would be 'racketeering.'"[8]

According to documents on file with the Secretary of State, CAG is a public benefit corporation with gross receipts of $615,000 in 2001. Of that amount, $272,500 was paid out in legal fees to Reuben Yeroushalmi, and $46,500 was paid to its treasurer, Moosa Saiedian. CAG's registered agent and its Secretary is Karen West, a licensed customs broker and CEO of Earth Customs, Inc./Earth Cargo, Inc., which operate out of the same business address as that for CAG.[9] At the time of its 1998 filing of Articles of Incorporation, CAG had three Directors, one of whom was Ben Yeroushalmi.[10]

B. Consumer Defense Group/The McKenzie Group – Anthony Graham

Since entering the Proposition 65 arena in September of 2000, the Consumer Defense Group (CDG), represented by Tony Graham, has served over 450 60-day notices of intent to sue. The McKenzie Group, which is also represented by the Graham & Martin firm, has served over 530 60-day notices, many jointly with CDG.

According to Graham, the Graham & Martin firm consists of himself, partner Michael Martin, and attorney Gayle McKenzie.[11] According to filings with the California Secretary of State, CDG and Consumer

---

[5] *See* Office of the Attorney General, "60 Day Notice Search" web site, *available at* http://prop65.doj.ca.gov/publicsearch.taf (60-day notices from CAG date to April of 1991).
[6] *Id.*
[7] *See, e.g., Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738 (2d Dist. 2001).
[8] Reporter's Transcript at 44-45, *Yeroushalmi v. Miramar Sheraton*, no. BC200421 (L.A. Sup. Ct., Jan. 8, 1999); *see also* D. Levin, "Lifting the Smoke Screen," *L.A. Daily J.* (Aug 3, 1999).
[9] *See* Consumer Advocacy Group, Inc., 2001 IRS form 990; Biographical information on Karen West at http://www.expertwitness.com/form/profile.phtml?uname=WEST.
[10] "Articles of Incorporation of Consumer Advocacy Group, Inc., a California Public Benefit Corporation" (July 29, 1998).
[11] Decl. of Anthony G. Graham at 3, *The McKenzie Group & Consumer Defense Group v. The California Hotel & Lodging Acc'n*, no. BC 290647 (L.A. Sup. Ct., June 12, 2003) (providing background information on each attorney).

Defense Group Action are both incorporated as for-profit companies. Graham is the president, CEO, CFO, and a Director of Consumer Defense Group Action, Inc; Gayle McKenzie is the Secretary and a Director; Michael Martin is the third Director.[12] There is no corporate filing information for The McKenzie Group. Graham describes CDG as being a 6-member organization.[13] As one defense attorney put it "Consumer Defense Group is the law firm of Graham & Martin, and vice versa."[14] Supervising deputy attorney general Ed Weil, in criticizing a proposed "global" settlement between the California Hotel & Lodging Association and the CDG and McKenzie Group, stated that the settlement provides for half the money to go to Graham's law firm, while the other half would go to the plaintiffs groups. "Their only activity," Weil is reported to have said, "is paying Graham & Martin." Graham conceded that virtually all of the plaintiffs' proceeds from cases have gone to legal fees.[15]

In an interesting turn of events, CDG recently sued CAG under California's Business and Professions Code section 17200, alleging that CAG knew the 60-day notices that preceded its secondhand-smoke cases are defective, and that CAG improperly reached more than $1 million worth of settlements in cases based upon these defective notices. The suit seeks restitution of the amounts of the allegedly-illegal settlements.[16]

IV. ELEMENTS

A. Summary of Elements

Prop. 65 states:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . . .[17]

In the hospitality context, plaintiffs commonly allege (1) that the building or its grounds contain products or substances that contain measurable levels of one or more Prop. 65-listed chemical, (2) that the defendant knows that the facility contains this substance, and (3) that customers, guests, and/or employees come into contact with the substance while visiting or working at the facility.

In the consumer-product context, plaintiffs commonly allege (1) that the product contains measurable levels of one or more Prop. 65-listed chemical, (2) that the defendant knows that the product contains this chemical, and (3) that consumers come into contact with the chemical through contact with or use of the

---

[12] Consumer Defense Group Action, "Statement of Information (Domestic Stock Corporation)" (March 4, 2003).
[13] Mike McCarthy, "Prop. 65 Warnings Hit Apartment Managers," *Sacramento Bus. J.* (Nov. 17, 2003), *available at* http://www.bizjournals.com/sacramento/stories/2003/11/17/story2.html?t=printable.
[14] *Id.* (quoting Scott Ferrell).
[15] D. Pfaff, "Lockyer Blasts 'Collusive' Prop. 65 Deals," *S.F. Daily J.* (Aug. 6, 2003); *see also* People of the State of California's Mem. of P. & A. in Opp. to Mot. for Order Entering Consent J. as to CH&LA Defs. at 18, *The McKenzie Group v. The California Hotel & Lodging Association*, no. BC290657 (L.A. Sup. Ct., July 25, 2003) ("As plaintiffs' counsel acknowledged . . . , all funds provided to CDG in settlement (other than a few specified 10% contributions to 'tobacco smoke related' organizations) have gone to his firm for attorney's fees.").
[16] Complaint, *Consumer Defense Group v. Consumer Advocacy Group*, no. BC301819 (L.A. Sup. Ct., Sept. 3, 2003); D. Pfaff, "Prop. 65 Plaintiffs Firm Sues Competitor," *Prop 65 News* (Sept. 15, 2003).
[17] H&SC § 25249.6.

product.

Plaintiffs need not allege anyone has in fact been harmed.[18]

B. "Person in the Course of Doing Business"

"Person" includes any company with ten or more employees.[19] "In the course of doing business" includes most acts of businesses and their employees.[20]

Best Western International, Inc. (BWI), represented by Squire, Sanders & Dempsey L.L.P., succeeded in obtaining dismissal of the Prop. 65 second-hand smoke suit against it by arguing that it is not the "person" liable under this statute. The chain, like many franchised systems, is comprised of independently owned and operated hotels. BWI moved for summary judgment, seeking dismissal of the claims against it on grounds that it does not itself own or operate any of the hotels at issue and therefore cannot be considered the "person" liable for any alleged violations of Proposition 65 at the nearly 300 hotels at issue. CDG opposed the motion, arguing that the relationship between the chain and its members was sufficient to establish liability under various agency and franchise theories. The court rejected these arguments, however, and granted BWI's summary judgment motion.[21]

C. "Knowingly Expose"

"Knowingly exposing" means knowledge of the exposure to the chemical, not knowledge that the exposure may violate Prop. 65.[22]

D. "Chemical Known to the State to Cause Cancer or Reproductive Toxicity"

Approximately 750 chemicals are now on the list, and a state program continues to add more to the list each year.[23] The most common chemical groups at issue in hospitality-industry suits are tobacco smoke and vehicle exhaust. Hospitality-industry suits have also been brought or threatened regarding chemicals resulting from combustion in gas or wood fireplaces, as well as mercury in seafood.

A toxicologist retained by several hotel chains identified the following as sources of potential Prop.

---

[18] *See SmileCare*, 91 Cal. App. 4th at 471-73 (plaintiff admitted it had no evidence defendants' use of chemical had caused injury to anyone, nor did it have evidence concerning the level to which individuals had been exposed; appellate court overturned defendants' summary judgment, finding plaintiff need not offer any evidence disputing the exposure defense until defendants made prima facie showing that exposure defense applied); J. Margulies, "Dental Amalgam Ruling Reveals Absurdity of Prop. 65," *Legal Backgrounder* (Feb. 8, 2002) ("Under the clear language of the statute as originally enacted and the implementing regulations, all a plaintiff needs to prove is that there is an exposure to a listed chemical – even a molecule will do, so long as it is 'detectable.'" (citing 22 CCR § 12901(g))).

[19] § 25249.11(a) & (b).

[20] 22 CCR § 12102(k).

[21] Statement of Decision re: Best Western Int'l, Inc.'s Mots. for Summ. J. & Joinder by Motel 6 Operating L.P., *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Mar. 28, 2002); *see also Consumer Defense Group v. Best Western Int'l, Inc.*, no. B158840 (2d App. Dist.) (CDG appeal pending).

[22] 22 CCR § 12102(n). For a detailed discussion of the "knowingly and intentionally" requirement, see W. Funderburk, Jr. & P. Muthig, "Defense Strategies in Proposition 65 Litigation," 9 *Envt'l L. News* 2 (Spring 2002).

[23] 22 CCR § 12000; *see* http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html

65 exposures in the hotel context:

- Secondhand tobacco smoke.
- Cleaning supplies and related activities.
- On-site construction.
- Furnishings, hardware, and electrical Components, including furniture, window treatment, locks, keys, electrical equipment, and carpeting.
- Personal hygiene and medical supplies, including soaps, shampoos, and first aid supplies. Also, the hotel water supply system may add lead to water from the faucets and other plumbing components.
- Combustion sources, including automobile engines, gas stoves, fireplaces, and candles.
- Office and art supplies and equipment, including carbonless paper, marking pens, copier machine chemicals, glues, crayons, and paints.
- Landscaping supplies and pesticide treatment, including fertilizers, soil amendments, and pesticides.
- Food and beverage service, including alcoholic beverages, and broiled and barbecued foods.
- Transportation-related exposures, including motor fuels and engine exhaust.
- Equipment and facility maintenance, including motor oil changes, carburetor cleaning, battery replacement, and facility repairs.
- Retail Sales.
- Recreation facilities, swimming pools, hot tubs and beaches, including beach sand, which can contain quartz sand, a form of crystalline silica.[24]

E. 60-Day Notice

A private enforcer is required to serve the alleged violator, the Attorney General, and certain others with a notice of intent to sue 60 days prior to filing any suit alleging violation of Prop. 65.[25] In the hospitality context, plaintiffs are notorious for using boilerplate 60-day notice language that may bear little relationship to the realities of any particular hospitality property. Many defendants have successfully challenged the sufficiency of the 60-day notice, resulting in dismissal of the suit.[26] It appears that almost all of the secondhand-smoke suits brought by the CAG and challenged on notice-sufficiency grounds have been dismissed.[27] The notice from CDG has been unsuccessfully challenged at least once.[28]

---

[24] Summarized from attachment to Decl. of James Embree, Ph.D., in Supp. of Defs.' Reply to State's Mem. of P. & A. in Opp. to Mot. for Order Entering Consent Judgments, *Secondhand Smoke Cases*, No. JCCP 4182 (L.A. Sup. Ct., Nov. 15, 2002) (see **Attachment 1**).

[25] H&SC § 25249.7(d)(1).

[26] *Yeroushalmi v. Miramar Sheraton*, 88 Cal. App. 4th 738, 740 (2d Dist. 2001) (notice must "state sufficient specific facts to enable the alleged violators and the appropriate governmental agencies to undertake a meaningful investigation and remedy the alleged violations prior to citizen intervention.").

[27] *See id.* (dismissing suits due to insufficiency of 60-day notice); Statement of Decision Re: Various Defs.' Mots. for J. on the Pleadings & Demurrers, *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Mar. 21, 2002) (finding 60-day notice insufficient). CAG's appeal of the *Secondhand Smoke* rulings is pending. *Consumer Advocacy Group, Inc. et al. v. Kintetsu Enterprises Co.*, no. B158840 (2d App. Dist.).

[28] The ruling found CDG's notice to Motel 6 to be sufficient. Statement of Decision re: Best Western Int'l, Inc.'s Mots. for Summ. J. & Joinder by Motel 6 Operating L.P., *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Mar. 28, 2002). Motel 6 did not appeal the ruling, and is in the process of settling. Telephone conversation with K. Weissmuller (Nov. 24, 2003).

Succeeding in challenging sufficiency of the notice might only serve as a stalling mechanism. Nothing prevents the plaintiff, or some other plaintiff, from retooling the notice and serving it again.[29] If in the mean time, the facility has posted sufficient warning signs and enough time has passed to exceed the statute of limitations, this stalling technique may provide the time necessary to escape liability entirely.

V. DEFENSES

Few defenses are available under Prop. 65:

- one-year statute of limitations;
- federal preemption;
- exposure within twelve months of chemical's listing;
- exposure poses "no significant risk" ("NSR") of cancer;
- reproductive toxicant will have "no observable effect" assuming exposure at 1000 times the level in question ("safe harbor level");
- product is a food, and the chemical occurs in the food naturally;
- sufficient warnings are already provided.

The burden is on the defendant to prove defenses.[30]

A. Statute of Limitations

Prop. 65 claims for penalties have a one-year statute of limitations.[31] Prop. 65 claims are often brought in conjunction with claims for violation of California's Unfair Competition law[32] and Consumer Legal Remedies Act,[33] in order to extend the statute of limitations to four years and include the possibility of additional damages categories. Unfair Competition allegations are based on allegations that the defendant's violation of Prop. 65 constitutes an unlawful business practice. If proven, this would allow the plaintiffs to obtain four years worth of penalties and damages, instead of the mere one year allowed under Proposition 65. However, the four-year Unfair Competition statute of limitation does not apply if there has not been a violation of Prop. 65 within its one-year statute of limitation: if warning signs were posted more than a year before the suit was filed, then there was no Prop. 65 violation within the statute of limitations, and no "unlawful" conduct to serve as the basis for the Unfair Competition claim.[34]

---

[29] *See Yeroushalmi*, 88 Cal. App. 4th 738 (dismissing suit against Sheraton and others due to insufficiency of 60-day notice); Statement of Decision Re: Various Defs.' Mots. for J. on the Pleadings and Demurrers, *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Mar. 21, 2002) (finding insufficient CAG 60-day notice to Sheraton and others).

[30] *SmileCare*, 91 Cal. App. 4th 454 (defendant who invoked affirmative defense has initial burden of production to make a prima facie showing that the defense applies).

[31] *Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 976-78 (2d Dist. 2003) (holding Prop. 65 claim for penalties has 1-year statute of limitations; expressing no opinion on statute of limitations applicable to claim for injunctive relief).

[32] BUS. & PROF. CODE § 17200, *et seq.*

[33] CIVIL CODE § 1750, *et seq.*

[34] *See Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1504-1505 (1st Dist. 1999) (if the conduct upon which an Unfair Competition claim is predicated is determined to be lawful, the Plaintiff cannot maintain a claim for unlawful business practices.).

B. Federal Preemption

Proposition 65 specifically provides an exclusion for federal preemption.[35] Defendants seeking the protection of preemption, though, have generally been disappointed.[36] Most of the recent preemption litigation has been in the context of FDA and OSHA preemption.[37]

1. Food, Drug & Cosmetic Act Preemption

FDA preemption is not likely to be an issue in the hospitality context, but it has been a source of recent developments in Prop. 65 case law. In the Nicotine Patch Litigation, the trial court found federal preemption: "Defendants have been expressly forbidden by the federal government from using the pregnancy warnings that Plaintiff contends are required by state law."[38] On appeal, the United States filed an amicus brief on behalf of defendants, asserting Prop. 65 enforcement was preempted; meanwhile, the California Attorney General filed an amicus brief in support of the plaintiff. The Court of Appeal found no preemption, but noted the federal government was hindering compliance.[39] The appeal is pending before the California Supreme Court.[40]

In another interesting preemption case, the trial court found Prop. 65 conflicted with and was preempted by federal regulation of prescription drug labeling for childhood vaccines containing thimerosal.[41] An appeal of the decision has been filed.[42]

In several previous cases, courts have held that Prop. 65 is not preempted by the Food, Drug and Cosmetic Act.[43]

2. OSHA Preemption

California's occupational safety and health plan (Cal. Hazard Communication Standard, or Cal. HCS), established pursuant to the federal OSHA, includes and incorporates Prop. 65.[44] This places the burden on employers to provide most necessary Prop. 65 warnings to their employees.

---

[35] H&SC § 25249.10(a).

[36] *See Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992) (no preemption by Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or Federal Hazardous Substances Act (FHSA)); *but see Nilsen v. City of Long Beach,* (L.A. Sup. Ct., April 2001) (Prop. 65 preempted by Hazardous Materials Transportation Act (HMTA)), *as reported in* D. Pfaff, "Judge Rules Prop. 65 Preempted in Railroad Case," *Prop 65 News* (Jan. 2002).
For a treatment of Prop. 65 preemption, see C. Locke & S. Lightner, "Federal Preemption of Prop. 65," *Prop 65 News* (July 2003).

[37] Note that H.R. 2699, the "National Uniformity for Food Act of 2003," currently pending before the House Subcommittee on Health, would preempt state laws requiring warnings and disclosures on food. The California Attorney General has expressed his opposition. Letter from Bill Lockyer, California Attorney General, to the Honorable Richard Burr, U.S. House of Rep. (Sept. 25, 2003).

[38] *Dowhal v. Smithkline Beecham* (S.F. Sup. Ct., Mar. 12, 2001).

[39] *Dowhal v. Smithkline Beecham*, no. A094460 (1st App. Dist., July 12, 2002).

[40] *Dowhal v. Smithkline Beecham Healthcare*, no. S109306.

[41] *The Vaccine Cases*, JCCP 4246 (L.A. Sup. Ct., May 16, 2003).

[42] *The Vaccine Cases v. Abbott Laboratories*, no. B168163 (2d App. Dist.).

[43] *Committee of Manufacturers and Distributors v. Stratton*, 92 F.3d 807 (9th Cir. 1996); *Gottesfeld v. Alva-Amco Pharmacal Cos.*, no. 300643 (S.F. Sup. Ct. 2001).

[44] 8 CCR § 5194(b)(6); 22 CCR § 12601(c) (outlining approved occupational warning methods).

Federal approval of the Cal. HCS plan specifically states that the Cal. HCS, including Prop. 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State. As a result, an out-of-state product manufacturer need not provide Prop. 65 warnings directly to the employees of a company that purchases the manufacturer's equipment.[45] In-state manufacturers of products or chemicals to be used in an in-state occupational setting should comply with Prop. 65's warning requirements and provide appropriate product label warnings.[46]

Regulations specifically state that "an employer may use the means of compliance in the general hazard communication requirements to comply with Proposition 65."[47] California hospitality employers should confirm that all identifiable sources of employee exposure to Prop. 65-listed chemicals are addressed through its Cal. HCS compliance program.

C. Exposure Within 12 Months of Listing

Proposition 65 warning violations can only occur after a chemical has been on the official State list for at least 12 months.[48]

D. No Significant Risk of Cancer

A defense is provided for a defendant who proves the exposure to a carcinogen poses "no significant risk [NSR] assuming lifetime exposure at the level in question."[49] For certain chemicals, NSR levels have been established by regulation,[50] but for the remaining chemicals, a defendant seeking to use the exception would need to prove the NSR level as well as prove its exposures fall below that level. The burden of showing that an exposure falls within the NSR exemption is on the party responsible for the exposure, and the showing must be based on evidence and standards of comparable scientific validity to the evidence and standards that form the scientific basis for the listing of the chemical. This defense generally requires the retention of an expert to perform an exposure assessment.[51] The cost of proving this defense in court is frequently estimated to be higher than the cost to settle, so few cases are litigated on a science-based defense.

E. No Observable Effect

---

[45] Occupational Safety and Health Administration, "Approval; California State Standard on Hazard Communication Incorporating Proposition 65," 62 Fed. Reg. 31159 (June 6, 1997); *see also* 8 CCR § 338(b) ("This approval specifically placed certain conditions with regard to occupational exposures on Proposition 65, including that it does not apply to the conduct of manufacturers occurring outside the State of California."); *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305 (9th Cir. 1997).

[46] *See* Metzger Law Group, "Proposition 65 in the Workplace: Are Chemical Manufacturers Obligated To Warn Downstream Users of Carcinogenic Hazards?" (undated), *available at* http://www.toxictorts.com/art_prop_65.html.

[47] 8 CCR § 338(d).

[48] H&SC § 25249.10(b).

[49] H&SC § 25249.10(c); 22 CCR § 12701-12721.

[50] 22 CCR § 12705, 12709; s*ee also* Office of Environmental Health Hazard Assessment, "Proposition 65 Status Report on No Significant Risk Levels for Carcinogens and Maximum Allowable Daily Levels for Chemicals Causing Reproductive Toxicity" (Sept. 8, 2003), *available at* http://www.oehha.ca.gov/prop65/getNSRLs.html .

[51] *See* 22 CCR §§ 12701-12721 (standards for risk assessment); *see Baxter Healthcare Corp. v. Denton*, no. 99CS00868 (Sacramento Sup. Ct., Oct. 3, 2002) (accepting other methodology to prove no risk); *see supra* note 18.

A defense is provided where exposure to a reproductive toxicant will have "no observable effect" assuming exposure at 1000 times the level in question ("safe-harbor level").[52] As with carcinogens, safe-harbor levels have been established for certain reproductive toxicants,[53] and proof of this defense requires a costly scientific exposure analysis.[54]

F. Naturally Occurring in Food Product

"Naturally occurring" Proposition 65-listed chemicals in foods are exempt from the Prop. 65 warning requirement.[55] A chemical is deemed "naturally occurring" only to the extent that it does "not result from any known human activity."[56]

G. Sufficient Warning

Proposition 65 does not say your business cannot expose people to listed chemicals – it just says you need to warn them first. Providing a fair and reasonable warning prior to exposure is a full defense to a Prop. 65 claim.[57]

Prop. 65 provides standardized warning language for some but not all circumstances.[58] Regulations require that the warning be made in a method "reasonably calculated . . . to make the warning message available to the individual prior to exposure. The message must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm."[59]

Additional information about warning language and warning placement is provided below in section *VIII.B. Warning Language and Placement*.

VI. PENALTIES

Proposition 65 authorizes civil penalties of $2,500 per day per violation, as well as injunctive relief.[60] Seventy-five percent of penalties collected go to the government's Safe Drinking Water and Toxic Enforcement Fund, and twenty-five percent may be kept by the government or private prosecutor.[61] In order to avoid payment of settlement funds to the government, many plaintiffs structure settlement language to describe the funds paid as "settlement amounts," charitable contributions, and attorney's fees – not "penalties." Recent regulations promulgated by the Attorney General's office notes that "Civil penalties, however . . . should not be 'traded' for payments of attorney's fees."[62]

VII. PROCEDURES

---

[52] H&SC § 25249.10(c); 22 CCR §§ 12801-12821.
[53] 22 CCR § 12805.
[54] 22 CCR § 12801; *SmileCare*, 91 Cal. App. 4th at 464 ("The calculation of the NOEL involves a highly technical, scientific inquiry."); *see supra* note 18.
[55] 22 CCR § 12501(a); *see also Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652 (2d Dist. 1991).
[56] 22 CCR § 12501(a)(3); *see also* letter from E. Weil, Deputy Attorney General, to R. Carrick & M. Corash (Sept. 28, 2001) (applying "naturally occurring" exemption to allegations of lead in chocolate).
[57] H&SC § 25249.6; 25249.11(f); 22 CCR § 12601.
[58] *See* 22 CCR § 12601.
[59] § 12601(a).
[60] H&SC § 25249.7(b).
[61] § 25249.12(c).
[62] 11 CCR § 3203(a).

Proposition 65 requires parties – primarily plaintiffs – to comply with several unusual procedural requirements. As described above, private plaintiffs are required to serve a 60-day notice prior to commencing litigation.[63] At the time it is served on the Attorney General, the 60-day notice must be accompanied by a confidential certificate of merit certifying that the plaintiff has consulted with an expert who believes there is a reasonable and meritorious case.[64] The plaintiff must notify the Attorney General that an action has been filed.[65] Any motion for summary judgment or motion for preliminary or injunctive relief, or other dispositive motion, filed by the plaintiff in an action alleging occupational exposures must be served on the Attorney General.[66] The plaintiff must report to the Attorney General any notice of appeal, decision of appellate court, and entry of judgment.[67]

In addition to the 60-day notice requirement, the most notable procedural aspect of Proposition 65 is the requirement that any settlement, other than a voluntary dismissal without consideration, must receive court approval upon noticed motion. The Attorney General must be served with notice of the motion at least 45 days prior to the hearing. The court must make certain findings regarding the sufficiency of any required warning, reasonableness of any award of attorney's fees, and reasonableness of any penalty amount. The Attorney General may appear and participate in the settlement-approval proceedings.[68] The Attorney General's office has also enacted regulations to guide courts in evaluating the appropriateness of various settlement terms.[69]

The negative result of these requirements is that there can no longer be any valid, confidential settlements of Prop. 65 claims. The positive result of these requirements is that the settlements now have greater *res judicata* effect – others would have a much more difficult time suing the facility for the same alleged violation, because a judge has already approved of the warning and other settlement terms.

VIII. HOW DO WE PROTECT OURSELVES? PURCHASING AND WARNING.

A. Liability Reduction Through Purchasing Assurances

One approach that retailers and distributors have taken to reduce their Prop. 65 exposure is to require the manufacturers of products that they sell to sign a form specifically assuring that their product complies with Proposition 65 and that they will indemnify and defend the purchaser with regard to any alleged Prop. 65 violations involving their product. In the hospitality context, this approach could be used in acquiring furnishings, guest products, and gift-store items to help ensure that these products are in compliance. Additionally, if a facility receives notice of intent to sue, it may be helpful either from the litigation or public relations perspective for the facility to be able to state that it requires all of its vendors to assure that their products comply with Prop. 65.

Vendor assurances should not be relied upon exclusively, because they would not cover previously-purchased products, and because many product manufacturers believe their products comply with Prop. 65 yet are still sued for alleged failure to comply.

B. Warning Language and Placement

[63] H&SC § 25249.7(d)(1).
[64] § 25249.7(d)(1); 11 CCR §§ 3100-3103.
[65] H&SC § 25249.7(d)(2); 11 CCR § 3002.
[66] 8 CCR § 338(d).
[67] H&SC § 25249.7(f)(1); 11 CCR § 3004.
[68] H&SC § 25249.7(f)(4)-(5); 11 CCR § 3003.
[69] 11 CCR §§ 3200-04.

The provision of a clear and reasonable warning prior to exposing a person to a listed chemical is a complete defense to a Proposition 65 action. Unfortunately, the law and implementing regulations do not provide clear guidelines on what language should be used and where it must be posted to eliminate liability.[70]

1. General Warning Language and Placement

Proposition 65 provides standardized language for some circumstances, such as the warnings necessary in areas where alcohol is served.[71] The regulations do not provide general warning language for all Prop. 65 exposures, nor is it clear where warnings must be posted in order to provide sufficient coverage.

Regulations require that the warning be made in a method "reasonably calculated . . . to make the warning message available to the individual prior to exposure. The message must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm."[72] Plaintiffs may argue that a general warning is not sufficiently specific to provide the warning necessary under the law. They may argue, for instance, that a warning sign at the front door that warns of chemicals somewhere in the area or the facility is not specific enough to sufficiently warn against exposure to, for instance, lead in power cord coverings or chemicals produced by a fire in a fireplace.[73] Due to the difficulty in determining which specific exposures require warnings, and an interest in liability avoidance, many hotels choose to post general warning language.

For the purpose of warning of exposures to the public and to employees in the context of a hotel or motel, the following language is typical:

> WARNING: This area contains chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm.
>
> Health & Safety Code Section 25249.6

Some variations on this language include a specific reference to tobacco smoke: "This area contains chemicals, including tobacco smoke . . . ." Other variations *only* warn of tobacco smoke, leaving the facility operator open to suit for exposure to other chemicals. In part as a result of language agreed to in certain secondhand-smoke suits, some facilities resort to serial warning – posting the warning about tobacco smoke above a warning of asbestos fibers, both of which are above a broad and general Prop. 65 warning.

Warning language is commonly placed on plaques or stickers. Although there are no guidelines for the size of the sign or the font for this warning in this application, the standard warning on a building is no smaller than 12-point bolded font and frequently is larger. Many hotels have warnings only at the front entrance. Better coverage would be achieved by posting the warning outside each exterior entrance to the hotel, each entrance to any enclosed parking structure, and in the location where other employee notifications are placed (e.g., the employee break room, bulletin board, or handbook). For even greater protection, hotel owners may consider placing the general warning language at each of the following locations: at each elevator; near any pool or other outside area where smoking is common; and in each room or storeroom where chemicals are stored, such as supply closets and pool maintenance rooms.

---

[70] For an overview of Prop. 65 warning issues, see C. Rechtschaffen, "The Warning Game: Evaluating Warnings Under California's Proposition 65," 23 *Ecology L.Q.* 303 (1996).
[71] *See* 22 CCR §12601; 11 CCR § 3202.
[72] § 12601(a).
[73] *See, infra, VIII.B.5.a. Specificity of Warning.*

2. Tobacco Warning

Additionally, for the purpose of warning of tobacco smoke in guest rooms where smoking is allowed, many facilities have voluntarily, or as a term of settlement, placed the following language within each smoking room and/or in each hallway of smoking areas:

> WARNING: This area contains chemicals, including tobacco smoke, known to the State of California to cause cancer and/or birth defects or other reproductive harm.

or

> WARNING: As a result of smoking in designated areas, this facility contains chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm.

Due to the large number of secondhand-smoke suits and the variation in settlement terms, the Attorney General's office created regulations that specify that the following language and sign location, while not specifically required, should be considered by the court to be acceptable in settlement agreements:

> 1. Location of signs. (A) For hotels or apartment buildings in which entry to guest rooms or apartments is on an enclosed hallway and there is a common ventilation system, the sign should be posted at main and subsidiary entrances to the building (including any entrance from a parking structure), and at the registration counter or administrative office open to the public or guests. (B) For hotels or apartment complexes in which entry to guest rooms or apartments is to areas open to ambient air; signs should be posted at a kiosk or gate where cars drive in, if any, and at the registration counter or other administrative office open to the public or guests.
>
> 2. Language of Signs. The following language is appropriate and legally sufficient:
>
> "WARNING: This facility allows smoking in some areas. Tobacco smoke, and many of the chemicals in it, are known to the state of California to cause cancer, and birth defects or other reproductive harm. [Optional: Smoking is permitted only in the following areas of this facility: (identify areas, e.g., "swimming pool area," "foyers," "designated guest rooms," "outdoor patios.")]"[74]

Utilizing tobacco-specific language like the warning provided by the Attorney General's office would necessitate also using a general warning in order to address potential exposures other than tobacco smoke.

3. Food Warning

Along with grocery stores and restaurant chains, at least one hotel and restaurant group has been targeted in an action regarding mercury compounds in seafood. This has prompted the California Hotel &

[74] 11 CCR § 3202(c).

Lodging Association (CH&LA) to recommend posting of warnings of Prop. 65 chemicals present in foods or beverages sold or served at the establishment.[75] According to the CH&LA, the Attorney General's office has indicated that food warning language should be posted at each public entrance to a free-standing restaurant.[76] Sign location presents difficult issues where food is served in outdoor areas or separate buildings that a visitor may access without passing a Prop. 65 warning. Under such circumstances, CH&LA recommends including a food warning in room service menus, at the entrance to each meeting banquet room, and at outdoor service areas or entrances to these areas.[77]

4. Explanatory Brochure – Proposed "Global" Settlement

In an effort to preemptively address as many potential Prop. 65 claims as possible, several hotels and associations have negotiated with CDG to seek a "global" settlement.[78] Initially, these settlements sought to settle all potential Prop. 65 claims, including a long laundry list of possible exposures.[79]

The Attorney General's office objected, arguing that the warnings are not "reasonably associated with the source and location of the exposure," warnings are inadequate because they fail to identify the products to which they refer, telling consumers that information is available at the registration desk is not adequate, the 60-day notices were inadequate, payments in lieu of penalties are not related to the purpose of the statute, and attorney's fees are not adequately documented.[80] As a result of the Attorney General's objections, the settlements with individual hotel chains were scaled back to address a handful of exposure scenarios: secondhand tobacco smoke, combustion sources, furnishings, and engine exhaust.[81]

The California Hotel & Lodging Association sought a broader global settlement, but met again with strongly-worded objections from the Attorney General's office. The Attorney General's office argued that the proposed settlement would turn enforcement of Prop. 65 "into a collusive enterprise that only provides immunity for businesses and remuneration for private attorneys." "This settlement . . . would not encourage businesses to comply with Proposition 65, but rather to shop for a friendly plaintiff and put together a global settlement." The Attorney General's office also objected that the settlements were "breathtakingly overbroad and hypothetical."[82]

---

[75] J. Abrams, California Hotel & Lodging Ass'n, "Memorandum: Proposition 65 Food/Beverage Warnings" (May 7, 2003), *available at* www.chlaonline.com.
[76] *Id.*
[77] *Id.*
[78] *See, e.g.*, Hilton Settlement; Notice of Entry of Stipulated Consent J. Between Pl. Consumer Defense Group & Def. Pacifica Hotel Co., *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., July 18, 2003) ("Pacifica Settlement" substantially similar to Hilton Settlement); *The McKenzie Group & Consumer Defense Group v. The California Hotel & Lodging Association*, no. BC290647 (L.A. Sup. Ct.).
[79] *See supra IV.D. Chemicals Known to the State to Cause Cancer or Reproductive Toxicity;* Exhibit B to Decl. of Anthony G. Graham in Supp. of Jt. Mot. & Mot. to Approve [Proposed] Stipulated Consent J., *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Oct 3, 2002); Attachment to Decl. of James Embree, Ph.D., in Supp. of Defs.' Reply to State's Mem. of P. & A. in Opp. to Mot. for Order Entering Consent Judgments, *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Nov. 15, 2002) (see **Attachment 1**).
[80] People of the State of California's Mem. of P. & A. in Opp. to Mot. for Order Entering Consent J., *Secondhand Smoke Cases*, No. JCCP 4182 (L.A. Sup. Ct., Nov. 12, 2002).
[81] *See* Hilton Settlement at 7.
[82] People of the State of California's Mem. of P. & A. in Opp. to Mot. for Order Entering Consent J. as to CH&LA Defs. at 2, 19, 21, *The McKenzie Group v. The California Hotel & Lodging Association*, no.

As before, the Attorney General's opposition resulted in a revised, scaled-back scope of the "global" settlement; the resulting proposed CH&LA settlement is quite similar to the Hilton settlement, but includes coverage for food and beverage exposures.[83]

The currently-proposed CH&LA settlement also seeks court approval of settlement language purporting to determine certain chemicals and exposures to not require a Prop. 65 warning:

> With respect to . . . soots and tars, creosotes, mineral oils (related to their presence in certain combustion sources using natural gas, propane, sterno fuels, candles and matches); lead acetate, hexachloro-cyclohexane isomers (related to their presence at salons); lead and lead compounds and di(2-ethylhexyl) phthalate (related to their presence in excercise [sic] rooms); anabolic steroids, testosterone, streptomycine sulfate, 2,3,7,8-tetrachlorodibenzo-para-dioxin, polychlorinated dibenzo-p-dioxins (meats); alfatoxins (based on their presence in cereals, grains and peanut butter) it has been determined by the Parties after discussion with the Attorney General's Office and an evaluation by a certified industrial hygienists, that such materials and chemicals, based upon common industry practice and usage within the hospitality industry, do not give rise to an exposure which requires a Proposition 65 warning . . . .[84]

These "global" settlements would require that a brochure on Prop. 65 exposures be made available at or near the registration desk.[85] Warning signs would be placed at each public entrance into buildings[86] or at primary entry points to buildings,[87] as well as on an employee bulletin board or handbook. The warning language would make reference to the available brochures:

> WARNING:
>
> This Facility Contains Chemicals Known to the State of California to Cause Cancer and Birth Defects or Other Reproductive Harm. A Brochure With More Information on Specific Chemical Exposures is Available at the Front Desk.[88]

The Hilton Settlement also requires warnings of tobacco smoke be placed inside each guestroom designated for smoking or at the elevator landing on each floor designated for smoking.[89] The Hilton Settlement requires sign size and font comply with regulations applicable to alcoholic beverage warnings.[90] The CH&LA Proposed Settlement appears to require signs comply with the requirements for environmental

---

BC290657 (L.A. Sup. Ct., July 25, 2003) ("AG Opp. to CH&LA Consent J."); *see also* D. Pfaff, "Lockyer Blasts 'Collusive' Prop. 65 Deals," *S.F. Daily J.* (Aug. 6, 2003).

[83] Pls.' Notice of Mot. and Mot. for Approval of Settlement with All Named Defs., *The McKenzie Group and Consumer Defense Group v. The California Hotel & Lodging Association*, no. BC290647 (L.A. Sup. Ct., June 13, 2003) ("CH&LA Proposed Settlement").

[84] CH&LA Proposed Settlement at 12.

[85] Hilton Settlement at 10; Pacifica Brochure (**Attachment 2**); CH&LA Proposed Settlement at 112; CH&LA Proposed Brochure (**Attachment 3**).

[86] CH&LA Proposed Settlement at 11.

[87] Hilton Settlement at 10.

[88] Hilton Settlement at 10; CH&LA Proposed Settlement at 11 (substantially similar).

[89] Hilton Settlement at 11.

[90] Hilton Settlement at 11; 22 CCR § 12601(b)(1)(D).

exposures, which cross-refers to sign requirements for pesticide warnings in agricultural fields (though this may be an error).[91]

The California Apartment Association (CAA) is currently negotiating a global settlement and warning program for apartment complexes. Similar to the CH&LA proposed settlement, the CAA settlement is expected to cover a broad range of exposures and include warning signs as well as additional pamphlets or other source of detailed information. CAA is grappling with novel issues, including the provision of additional information in facilities that have no reception desk, and the question of whether a warning is necessary on individual condominiums and single-family homes managed by a business with more than 10 employees.[92]

5. No Guarantees These Warnings Will Protect You

a. Specificity of Warning

Prop. 65 plaintiffs have argued that warnings should specify the source of exposure so consumers will know what to avoid. In objecting to the proposed CH&LA settlement, the Attorney General's office highlighted the regulation that requires warnings to be "reasonably associated with the location and source of the exposure."[93] The Attorney General argued against "vague, all-encompassing warnings." It remains to be seen whether any plaintiffs groups will challenge the Prop. 65 compliance of hotels with general warnings on the grounds that these general warnings do not adequately identify the source of the exposure.

b. No Truly Global Settlement Available

The earlier CH&LA proposed global settlement was the most global of settlements sought, and the Attorney General's office vehemently opposed it for exactly that reason.

> [T]he breathtakingly overbroad and hypothetical scope of this proposed settlement evades the statutory process . . . . Rather than ask this Court to resolve a case by approving a settlement, the parties are asking this Court to grant a permit defining compliance for all circumstances in the future, even though those circumstances have never arisen. . . .
>
> . . .
>
> Plaintiffs already advised the Court that they are preparing a settlement with the California Apartment Association, so if this settlement is approved, there will no doubt be a "global" apartment house settlement. Presumably, this will be followed by an "office building settlement," perhaps a "factory settlement," and a "retail store settlement," until ultimately every conceivable violation of Proposition 65 is covered by a "global settlement," and the law no longer can be enforced.[94]

---

[91] CH&LA Proposed Settlement at 11; 22 CCR § 12601(d); 3 CCR § 6776.

[92] California Apartment Association, "Prop. 65 Update" (Sept. 24, 2002), *available at* www.caanet.org/asp-bin/getfile.asp?ID=2018; Telephone conversation with D. Carlton, Vice President, Policy & Research, California Apartment Association (Dec. 12, 2003).

[93] AG Opp. to CH&LA Consent J. at 12; 22 CCR § 12601(d)(2).

[94] AG Opp. to CH&LA Consent J. at 2, 20.

They say that like it's a *bad* thing.

The Attorney General's opposition continues: "The proposed settlement contradicts the letter and spirit of the law, turning enforcement of the law, and the procedures of this Court, into a collusive enterprise that only provides immunity for businesses and remuneration for private attorneys."[95] The businesses here are only seeking some feasible program that they can institute to assure compliance – and the laws and regulations as written, and as interpreted by the Attorney General's office, fail to provide or even allow for such a feasible compliance program. Seeking a compliance program through the crafting of settlement agreements is a good idea, but has been fought tooth-and-nail by the Attorney General's office. Perhaps the key for a future compliance program will be found tucked in a footnote in the Attorney General's opposition papers: "If defendants seek broader, more all-encompassing warnings, they should proceed by way of a rulemaking petition."[96] To this author's knowledge, there is not yet any movement by the hospitality industry to seek enactment of regulations specifically approving a regulatory compliance program of the type envisioned by the earlier proposed global settlements.

IX. BEYOND CALIFORNIA

In the 17 years since California's Proposition 65 was passed, toxic labeling initiatives similar to Prop. 65 are reported to have been considered or placed on the ballot of eleven other states.[97] These other initiatives have not been passed, possibly because of the many reported difficulties California businesses have faced in complying with California's law. In the consumer product arena, product warning or formulation changes required to comply with or settle Prop. 65 suits generally result in nation-wide product formulation or labeling changes. In the hospitality context, facilities located outside of California are beyond the reach of California's liability laws, though the statute may have some impact to the extent products being used or sold may carry a California warning label. Time will tell whether any other states or the federal government will institute a toxics warning requirement that is similar to, in addition to, or preempts California's requirements.

[95] *Id.* at 20-21.
[96] *Id.* at 15 n.9.
[97] K. Powers, Grocery Manufacturers of America, "Warning on Product Labels – Proposition 65" (2003), *available at* http://www.gmabrands.com/publicpolicy/docs/whitepaper.cfm?docID=271.

Attachments:

Attachment 1: Brochure Proposed with Hilton Settlement, But Rejected by Court Following Opposition by Attorney General (Attachment to Decl. of James Embree, Ph.D., in Supp. of Defs.' Reply to State's Mem. of P. & A. in Opp. to Mot. for Order Entering Consent Judgments, *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., Nov. 15, 2002)).

Attachment 2: Brochure Approved in Pacifica Settlement (Exhibit D to Stipulated Consent J. Between Pl. Consumer Def. Group & Def. Pacifica Hotel Co., *Secondhand Smoke Cases*, no. JCCP 4182 (L.A. Sup. Ct., July 18, 2003)).

Attachment 3: Brochure Proposed in California Hotel & Lodging Association "Global" Settlement (Attachment E to Pl.'s Notice of Mot. and Mot. for Approval of Settlement with All Named Defs., *The McKenzie Group and Consumer Defense Group v. The California Hotel & Lodging Association*, no. BC290647 (L.A. Sup. Ct., June 13, 2002)).

The contents of this article are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

December 2003

PaloAlto/62157.5