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California Governor Proposes Reforms to Proposition 65, Seeks To Prevent Abuse of Statute by "Unscrupulous Lawyers"

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California Governor Edmund Brown has added his voice to a number of California legislators calling for an overhaul of the state's Safe Drinking Water and Toxic Enforcement Act of 1986 – better known as Proposition 65 (the number of the ballot initiative that resulted in its enactment). Governor Brown says that the California environmental and consumer protection statute, which allows for enforcement by private citizens and an award of attorney's fees to their lawyers, is "being abused by unscrupulous lawyers." If implemented, the Governor's proposed reforms would reduce the financial incentives for plaintiffs to pursue baseless Proposition 65 claims.

Proposition 65's Warning Regime and Private Enforcement

One of the key provisions of Proposition 65 requires businesses to provide clear and reasonable warning to consumers before exposing them to any chemicals that California has determined cause cancer or reproductive harm. Cal. Health & Safety Code § 25249.6. This statute is the genesis of the ubiquitous product warning label: "Warning: This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm." *See* 27 Cal. Code of Regs. § 25603.2. Proposition 65's warning provision has been applied broadly by California, which has issued regulations setting out required warnings for restaurants and bars serving food and alcoholic beverages, as well as any establishment or workplace with an environment that may result in exposure. *See* 27 Cal. Code of Regs. § 25603-25605.

A violation of Proposition 65 can subject a company to steep penalties of up to $2,500 a day. Cal. Health & Safety Code § 25249.7(b)(1). The statute is enforced by one of two mechanisms; an action may be brought by public enforcement entities, such as the Attorney General, district attorneys, or city attorneys, or one may be brought by private citizens acting "in the public interest." Cal. Health & Safety Code § 25249.7(c), (d). The vast majority of Proposition 65 cases, however, are brought by private parties. In 2011, the last year reported on the Attorney General's website, 11 of the 338 Proposition 65 cases settled were brought by the Attorney General, while private plaintiffs brought the remaining 327.

Plaintiffs who collect penalties under Proposition 65 are entitled to keep twenty-five percent of those penalties; the remaining seventy-five percent must be contributed to California's Office of Environmental Health Hazard Assessment. Cal. Health & Safety Code § 25249.12. Additionally, private plaintiffs who settle Proposition 65 cases are permitted to negotiate a payment of attorney's fees. Cal. Health & Safety Code § 25249.7(f)(4). Not surprisingly, most private settlements allocate much more of the total settlement amount to attorney's fees than to penalties. In 2011, of the $15.9 million in total Proposition 65 settlements with private plaintiffs, $11.8 million went to attorney's fees.

Proposition 65's Potential for "Shake-Down Lawsuits"

The prospect of attorney's fees through a quick settlement provides a perverse incentive to plaintiffs' lawyers to engage in what the Governor's office characterized as "frivolous 'shake-down' lawsuits." As that office noted in its May 7 press release, the statute is "abused by some lawyers, who bring nuisance lawsuits to extract settlements from businesses with little or no benefit to the public or the environment."

The potential for Proposition 65 abuse is exacerbated by the difficulty defendants face in disposing of meritless claims at an early stage in litigation. In order to refute plaintiffs' cursory allegations that the defendant's product or business exposes consumers to toxic chemicals, the defendant must engage in costly laboratory testing, expert report preparation, and extensive litigation, often even if the product had been tested previously and determined not to require a Proposition 65 warning label. Moreover, the defendants are often not physically located in California. For these reasons, the economic realities of Proposition 65 pressure defendants to settle early in the litigation – often before a complaint is even filed, during the pendency of the statute's required 60-day notice period – rather than defend their products or business practices on the merits.

Ostensibly, counsel for Proposition 65 private plaintiffs must execute a "Certificate of Merit" backed up by sufficient factual support to show that there is a reasonable and meritorious case for the private action. Cal. Health & Safety Code § 25249.7(d)(1). However, the factual support for this Certificate is served only on the Attorney General, and not the business purportedly in violation of Proposition 65. *Id.* Furthermore, the factual support for the Certificate is not subject to discovery. Cal. Health & Safety Code § 25249.7(h)(1). Thus, in practice, it is extremely difficult for a defendant to test the adequacy of the factual support underlying the plaintiff's claim. Indeed, only upon the conclusion of a private action, and only if the trial court determines that there was no actual or threatened exposure to a listed chemical, can the trial court review the factual support underlying the Certificate of Merit (and only *in camera*) to determine whether the claim was frivolous. Cal. Health & Safety Code § 25249.7(h)(2). Because the vast majority of Proposition 65 cases settle, plaintiffs face a very low probability that a judge will ever probe the factual support for their action and allow a malicious prosecution claim to proceed.

Governor Brown Proposes a Number of Reforms To Curb Proposition 65 Abuse

On May 7, 2013, Governor Brown issued a press release noting that, despite the noble intentions underlying Proposition 65, the statute has nonetheless "been abused by some unscrupulous lawyers driven by profit rather than public health." As an example of the type of abuse he hoped to curb, Governor Brown cited a series of Proposition 65 notices sent to banks, claiming that the banks' failure to post warnings near bank entrances and ATMs was in violation of the statute, because smokers lingering in those areas exposed individuals to secondhand smoke and the banks were responsible for those smokers' behavior. These notices (the issuance of which the Attorney General criticized as being potentially unlawful) were characterized by the Governor as having no basis and containing misrepresentations.

Governor Brown pledged to discuss with lawmakers and stakeholders a number of reforms designed to curb such abuse, including the imposition of caps on attorney's fees, requiring a stronger factual showing by plaintiffs before they can initiate litigation, requiring greater disclosure of information by plaintiffs, and limiting the amount of settlement money being allocated for purposes other than civil penalties. In addition to these reforms, Governor Brown also announced that he will discuss providing the State with more flexibility in setting chemical levels required for warnings and ensuring the public has access to more useful information about exposure. The Governor explained that his proposals for reform constitute "an effort to improve the law so it can do what it was intended to do – protect Californians from harmful chemicals."

Governor Brown's call for reform comes only a few months after a bill was introduced in the California State Assembly that is designed to reduce the adverse impact of Proposition 65 on businesses by providing businesses that receive a notice of violation with an opportunity to correct the violation prior to the commencement of litigation.

Read Governor Brown's press release here. Read the proposed Proposition 65 amendment, AB 227, here.

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