Proposition 65
Reforms to End Shakedown Lawsuits Can Improve How Public Is Warned

Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, is the most far-reaching consumer “right to know” law in the nation. Proposition 65 requires California businesses with 10 or more employees to provide a clear and reasonable warning before knowingly and intentionally exposing individuals to chemicals known to the state to cause cancer and/or reproductive toxicity.

Unfortunately, the positive aspects of Proposition 65 have been overshadowed by some attorneys who use the law solely for personal financial gain. Proposition 65 contains a private right of action provision, which allows private persons or organizations to bring actions against alleged violators of Proposition 65 “in the public interest.” This has led to the growth of a multimillion-dollar cottage industry of “citizen enforcers” who often enrich themselves by using the statute’s warning label requirements as an excuse to file 60-day notices and lawsuits to exact settlements.

The business community’s concern regarding Proposition 65 litigation abuse is well-founded and supported by statistical data provided by the California Attorney General’s Office in its Annual Summary of Proposition 65 Settlements. The summary shows that the volume of settlements and settlement amounts is consistently rising each year. In 2018, there were a total of 829 in-court settlements amounting to $35,169,924, compared to just 352 settlements amounting to $17,409,756 in 2013.

BASIC REQUIREMENTS OF PROPOSITION 65
Although Proposition 65 also prohibits listed chemicals from being discharged to sources of drinking water, the law is best known for its broadly crafted warning requirement. In order to comply with Proposition 65’s warning requirements, a business must follow three basic steps:

- Assess whether it releases, or its products contain, Proposition 65-listed chemicals;
- Determine whether individuals—consumers or bystanders—may be exposed to a listed chemical at levels that necessitate a warning (that is, “when” to warn); and
- Determine what the warning must say, if a warning is required (that is, “how” to warn).

California allows a business to use a chemical without providing warning as long as exposure does not exceed a specified threshold level. To be clear, the mere presence of a Proposition 65-listed chemical does not trigger the warning requirement; instead, the threshold question is whether the chemical would expose persons at levels that would require a warning.

Of the approximately 900 substances that are on the list of chemicals known to cause cancer, birth defects or other reproductive harm, the Office of Environmental Health Hazard Assessment (OEHHA) has developed threshold levels for about

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### PROPOSITION 65 SETTLEMENTS

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Source: California Attorney General
California Promise: Opportunity for All
2020 Business Issues and Legislative Guide

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300 to guide businesses in determining whether a warning is necessary. If the chemical is at or below the levels listed, the business has a “safe harbor” from providing a warning.

**RECENT MAJOR REGULATORY WIN FOR BUSINESS COMMUNITY**

For years, the OEHHA has proposed regulatory amendment packages often described by the agency as “merely clarifying existing law.” From the perspective of the business community, these “clarifying” amendments have consistently undermined the protections provided for businesses in the seminal Proposition 65 decision, *Environmental Law Foundation v Beech-Nut*, et al. The business community has pushed back successfully against these proposed amendments in every instance where OEHHA’s proposed regulations directly undermine and contravene the Beech-Nut holdings.

The Proposition 65 claims in *Beech-Nut* involved alleged failure to warn of exposure to lead in packaged fruits, vegetables and fruit juice products. In short, the *Beech-Nut* court held that Proposition 65 regulations do not require exposures to be assessed based on a single day, that the Proposition 65 statute and regulations support averaging for Maximum Allowable Dose Levels (MADLs) for Chemicals Causing Reproductive Toxicity determinations, and that the opinion to the contrary of the California Attorney General’s expert was not supported by any authorized OEHHA policy.

The *Beech-Nut* ruling provided businesses with clarity concerning applicable standards for determining whether potential exposures to Proposition 65 listed chemicals are below the “safe harbor,” or below the No Significant Risk Levels (NSRLs) for carcinogens or MADL for chemicals without an OEHHA safe harbor level. In sum, the *Beech-Nut* decision has protected businesses from plaintiffs seeking to impose Proposition 65 warning requirements for trace levels of chemicals that pose no significant risk from exposure.

In the waning days of the administration of Governor Edmund G. Brown Jr., on October 5, 2018, the agency instigated formal rulemaking and proposed two amendments to Sections 25821 (a) and (c) Level of Exposure to Chemicals Causing Reproductive Toxicity: Calculating Intake by the Average Consumer of a Product.

OEHHA’s proposals threatened the law’s longstanding average exposure-based approach to warnings—without justification and with significant cost and risk to California businesses. From the business community’s perspective, these two proposed amendments did not “clarify” existing regulations but instead presented entirely new regulatory requirements that had a direct impact on businesses’ Proposition 65 compliance efforts, as well as placing additional obstacles to a defendant meeting its burden of proof in litigation.

- The first amendment, “the Average Concentration Proposal” for food products, solved no actual problem that OEHHA could identify, yet would have significantly affected manufacturers and agricultural growers. To evaluate exposure levels under Proposition 65, concentration data—just like consumption data—must reflect what is typical. The Average Concentration Proposal would have effectively excluded cross manufacturing facility averaging from a case-specific consideration of the data, thereby distorting the determination of the reasonably anticipated rate of exposure and significantly raising the burden on defendants when receiving a 60-day notice.

- The second proposed amendment, “the Arithmetic Mean Proposal,” would have established an assumption that the arithmetic mean statistical method shall be used to calculate the rate of intake or exposure for average users of all consumer products unless more specific and scientifically appropriate data are available. This proposal was inconsistent with sound principles of statistics and data evaluation, where the appropriate measure of average depends on the facts and data in specific cases and is not amenable to a one-size-fits-all proposal.

The California Chamber of Commerce, along with coalition partners, submitted multiple comment letters challenging the agency’s proposed amendments. On July 5, 2019, OEHHA abandoned the Arithmetic Mean Proposal and revised the proposed language for the Average Concentration Proposal. The CalChamber-led coalition provided a second set of comments again challenging OEHHA’s justification for the revised Average Concentration Proposal. On September 9, 2019, OEHHA officially rescinded the Average Concentration Proposal. In doing so, the Agency put to rest (for now) these two issues that if adopted, would have upended *Beech-Nut* and significantly increased production costs, testing costs, litigation costs and the number of required Proposition 65 warnings.

**CALCHAMBER LAWSUIT AGAINST CALIFORNIA ATTORNEY GENERAL**

On behalf of its members, the CalChamber filed a lawsuit on October 7, 2019 to stop the multitude of Proposition 65 warnings for the presence of acrylamide in food.

The lawsuit filed against California Attorney General Xavier Becerra, who is responsible for enforcing Proposition 65, asks the U.S. District Court, Eastern District of California to stop
the Attorney General and private enforcers from proceeding with Proposition 65 litigation over acrylamide in food.

Currently, Proposition 65 requires any business that produces, distributes or sells food products containing acrylamide to provide a warning unless the business can prove in court, with scientific evidence, that the level poses no significant risk of cancer. Many businesses have chosen to forgo the expense and uncertainty of litigation and settled with private enforcers while providing warnings for acrylamide.

The CalChamber’s complaint argues that these warnings are misleading because “neither OEHHA nor any other governmental entity has determined that acrylamide is a known human carcinogen…."

The lawsuit has two goals: to protect companies’ First Amendment rights while also protecting the rights of consumers to receive truthful information.

The CalChamber argues that companies should not be forced to provide unsubstantiated and highly controversial acrylamide warnings or face potentially costly enforcement actions initiated by the Attorney General or private enforcers. Moreover, the CalChamber argues, by mandating warnings for acrylamide in food, Proposition 65 is forcing individuals and businesses to say something false and misleading.

Acrylamide is not a chemical that is added intentionally to food products. Rather, it forms naturally in many types of foods when they are cooked at high temperatures, whether at home, in a restaurant or in a factory. Common sources of acrylamide in the diet (and subjects of Proposition 65 litigation) include baked goods, breakfast cereal, black ripe olives, coffee, grilled asparagus, French fries, peanut butter, potato chips and roasted nuts.

To date, more than 560 60-day notices have been filed for alleged violations of the Proposition 65 warning requirement for alleged exposures to acrylamide.

More than 500 of these 60-day notices relate to acrylamide in food products. The CalChamber’s lawsuit seeks to limit this recent trend of shakedown lawsuits with regard to acrylamide that are exploiting Proposition 65 for financial gain, exacerbating overwarnings, and raising costs on food products in California.

**CALCHAMBER POSITION**

The CalChamber supports the underlying intent of Proposition 65, which is to ensure that consumers can make reasoned and informed choices when they purchase consumer products or enter certain establishments. Unfortunately, the intent of Proposition 65 has been undermined by ever-increasing attempts to use the law solely for personal profit, which has exploded into a million-dollar cottage industry. For this reason, the CalChamber ardently supports reforms to end frivolous, “shakedown” lawsuits, improve how the public is warned about dangerous chemicals, and strengthen the scientific basis for warning levels and initial listings.

Although achieving these goals legislatively has proven nearly impossible, the CalChamber remains committed to initiating or supporting legislative efforts that seek to restore the original intent of the law. Whether reforms are proposed in the legislative or regulatory forum, the CalChamber will continue to engage policy makers and OEHHA to ensure that any proposed changes to Proposition 65 are in line with the original intent of the statute.

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