CALIFORNIA'S PROPOSITION 65:

THE ENVIRONMENTAL LONG-ARM STATUTE'S EFFECT ON INDUSTRY

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Imagine receiving a notice from an environmental group in California accusing your company in Connecticut or Florida of violating California environmental laws regarding chemical exposures. The letter claims your company has not properly warned consumers about dangerous chemicals in your products and you may be guilty of discharging chemicals contained in the products to sources of drinking water in California. The group states that you have 60 days to come into compliance with the law or you will be sued in a California State court. The letter also demands that you pay a penalty of $2,500 per day for each product item your company has shipped to or sold in California for the last five years. You calculate that your monetary liability in the case could exceed $100,000,000.

On November 4, 1986, the voters of California passed an Initiative Measure called Proposition 65. The appeal of the proposition might have been in its title, which was "The Safe Drinking Water and Toxic Enforcement Act of 1986." With a name like that who could vote against it? This initiative was hotly debated with manufacturers, processors, distributors, and retailers, each considering some of the ramifications of this sweeping initiative. The proponents beat the drum of toxic polluters, contaminated drinking water, harm to children and the environment, generally painting Proposition 65 as the panacea of all environmental laws. Over two decades later we can assess the impact of Proposition 65 on California.

Although many of the cases brought under Proposition 65 have dealt with traditional "toxics," there is a trend which points to more and more emphasis on products which involve ingestion through the nose, mouth and skin. This trend is seen in nail polish, ceramic ware, wine, lead fishing weights and plumbing product cases, which recently have been or are being litigated in California Superior Courts.

The Proposition is divided into two distinct parts, warning requirements and discharge prohibitions. The law requires identification of certain chemicals known to the State of California to cause either birth defects or other reproductive harm or cancer. Once the chemicals are listed, then manufacturers, distributors and retailers are required to comply with the warning and discharge requirements.

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Section 25249.6 of the California Health and Safety Code requires persons in the course of doing business to provide clear and reasonable warnings to individuals whom they knowingly and intentionally expose to chemicals known to the State to cause cancer or reproductive toxicity. The provision is stated in the form of a prohibition that would prevent manufacturing or introduction into commerce of a product which contains one of the listed chemicals if a warning is not given. However, the language of the initiative is so broad that it appears to apply not only to the products themselves but also emanations from the plants where goods are produced. The definition of "in the course of doing business" is very broad. It basically encompasses all persons employing ten or more employees. City, county, state and federal employers and any entity operating a public water system are excluded.

The persons subject to the Proposition 65 warning provision must provide warnings within 12 months of the listing of the chemical. The warning must be "clear and reasonable." Therefore, the circumstances surrounding the exposure dictate to some degree how the warning may be given. The word "clear" appears to refer to the language of the warning itself. The language must convey to the reader that the product contains a chemical and that the chemical is known to cause reproductive toxicity or cancer. There is no requirement to mention the chemical or even the mechanism by which the chemical may cause harm.

For food, the warning must contain the following language: **"WARNING: Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in food or beverages sold or served here."** For fresh fruits, nuts, and vegetables, the warning is: **"WARNING: This product may contain a chemical known to the State of California to cause cancer, or birth defects or other reproductive harm."** Alcoholic beverages have their own warning, and there are general warnings for other consumer products.

Warning provisions are also provided for the workplace and for environmental exposures. Workplace signs should read: **"WARNING: This area contains a chemical known to the State of California to cause cancer." ... [or cause birth defects or other reproductive harm"]**. The language is the same for environmental exposure.

Regulations under Proposition 65 also address the method of giving the warnings. This is to fulfill the "reasonable" requirement of "clear and reasonable" in the law. Warnings for consumer products must be by conspicuous methods calculated to make it likely a reasonable consumer will read the warning. Methods suggested in the regulation involve labeling products or their packages, placing warning labels in the packages, placing signs at retail stores, or creating a system of signs, public advertising identifying the system, and a toll free information number. These general labeling requirements seem to apply to food products.

For alcoholic beverages, the signs to be displayed are regulated, including font type and size. The warning may also be placed on the alcohol container or at individual tables if the serving establishment has them.

In the workplace, warning methods consist of the following alternatives: 1) a warning on the label of a product or substance present or used in the workplace; 2) a warning that appears on a sign in the workplace; or, 3) a warning which fully complies with the Hazard Communication Standard under the Occupational Safety and Health Act. For environmental exposures, the warnings may be given by signs posted in the affected areas, by mailing notices to affected individuals, or by making media announcements. These latter methods must be reaccomplished every three months.

No warnings need be given if the exposure levels to individuals do not exceed the levels set by the regulations or do not exceed the no significant risk levels for cancer or the no observable effect levels for reproductive toxicants. The levels are set based generally upon laboratory studies where animals have contracted cancer or shown evidence of reproductive harm after being exposed to the chemical.

The other major area of regulatory concern in Proposition 65 involves drinking water. The law prohibits the discharge of listed chemicals into water or upon the surface of the land above the threshold limits in such a manner that they pass or could pass into sources of drinking water. Sources of drinking water are defined as including both surface and groundwater. The source does not have to be an actual drinking water source but could be one designated by a water resources board as a potential drinking water source. The discharge prohibition addresses the "midnight dumper" and industrial polluters that release chemicals from their operations in such an uncontrolled manner that the chemicals may contaminate these drinking water sources. However, plaintiffs are getting creative in applying the discharge prohibition to other receptacles which could either discharge their content to a drinking water source or which act as a "source" themselves.

Like the warning provisions of Proposition 65, the discharge prohibition is based upon a level of exposure. For those chemicals which have a level listed in the regulations or may have a level promulgated under federal or state law, the proposition prohibits discharges at or above those limits. For those chemicals which have no level set, the regulations provide that the chemical cannot present a significant risk if exposure occurs over a lifetime at the level known to the state to cause cancer or if it does not create an observable effect for reproductive toxicants. As a further safety measure, the no observable effect level is divided by 1,000.

The regulations make a special exception for chemicals naturally occurring in food. Under this exception, there is no exposure under Proposition 65 if the exposure to a chemical occurs as a result of a naturally occurring chemical in the food. A naturally occurring chemical is caused by absorption or accumulation of the chemical naturally present in the environment. A chemical is naturally occurring only to the extent that human activity was not involved in its presence in the food. A chemical contaminant contained in food is naturally occurring only to the extent that it was not avoidable by good agricultural practices.

The primary enforcer of Proposition 65 is the Office of the Attorney General. However, such authority is also given to district attorneys and to certain city attorneys in cities with over 750,000 population. The proposition allows private citizens to bring suit after a 60-day notice requirement. The private plaintiffs are acting as private attorneys general, but the initiative allows these plaintiffs to collect 25% of the fines levied in the case. This unusual provision has spawned a new breed, called "plaintiffs for profit." A number of environmental groups still do not sue for money, but a growing number of plaintiffs for profit do. As a further incentive to these groups, attorneys fees and costs are awardable.

The penalties assessable under Proposition 65 for either a warning or a discharge violation are $2,500 per day, per violation. For every individual piece of merchandise or food product in the stream of commerce, the producer, distributor, or retailer can be liable for $2,500 per day, per piece. Plaintiffs may also seek equitable remedies, such as injunctions.

If the Attorney General or a district or city attorney elects to sue after a private plaintiff's group has given notice, the private plaintiffs may still press their suit. This happens in one of two ways. They may carve out a niche which is not covered by the State's suit, such as distinguishing products used for domestic and commercial use. They may also try to sue under California's Unfair Competition Act, alleging a violation of Proposition 65 as an unfair business practice. So far, defendants have been successful in keeping these plaintiffs out of suits where they merely use the unfair competition claim to circumvent the primacy of the Attorney General in Proposition 65 suits.

The initiative was passed in November 1986 as the panacea for correcting many environmental problems in California. Now there was a comprehensive scheme which regulated toxics at their real source, the manufacturers. Now, businesses would be motivated to reformulate their products because consumers would judge them by their warnings, warnings which revealed for the first time the existence of dangerous chemicals in the products but it has not turned out that way.

The regulations were promulgated a short time after the initiative passed. The first list of chemicals was published in February 1987. Warnings for these new chemicals had to be given within 12 months of listing. The discharge prohibition took effect 20 months after listing. The law provided for a Scientific Advisory Panel which would advise the Governor on the listing of chemicals. There was also a mechanism for individuals to obtain regulatory guidelines and safe use determinations for their products and processes. Basically, these are in the form of advisory determinations by the agency as to whether Proposition 65 applied to a particular activity.

The first cases brought to enforce Proposition 65 seemed to focus on traditional chemicals and their exposure to individuals. Early on, mantles from lanterns, commercial paints, typewriter correction fluid and sterilizers got most of the attention. This was in keeping with a traditional notion of what Proposition 65 was supposed to do.

The next spate of cases demonstrated a disturbing trend. Plaintiffs turned on the wine industry and filed a series of lawsuits, not to address alcohol, but to address lead. The cases began with plaintiffs claiming that the foil wrappers which covered the tops of wine bottles were laced with lead and that some of the lead was actually getting into the wine as it was being poured. This was causing an exposure to lead against which the wineries were not warning. After litigating and settling the issue of lead foil, plaintiffs then brought claims against the same defendants in another set of lawsuits that the wine itself contained lead.

With the first cases involving ingestion of a substance on the books, plaintiffs turned to other receptacles for their lead content. Cases appeared attacking ceramic ware, table ware, crystal decanters, china, food products and plumbing products. The only difference between all these cases was that the faucet cases involved the discharge prohibition as well as the warning provision of Proposition 65.

As has been seen, plaintiffs have targeted and have successfully litigated on the warning issue as to a variety of products. Clearly, the ingestion pathway is popular with these plaintiffs mainly because exposure is very easy to prove. Plaintiffs are also targeting lead. Again this is no accident because lead is ubiquitous and the regulatory level (0.5 ppb) for exposure is very low. The question is how long will it be before these groups identify products distributed on a national basis that have the potential to expose persons in California to listed chemicals.

Food products provide an environment which could be ripe for attack because the industry uses so many highly regulated products. Preservatives, additives, production chemicals, pesticides, herbicides and unknown contaminants provide a wealth of material for plaintiffs in these cases. As long as there is a level set by state and federal government for these substances, there is a fighting chance to defend such lawsuits. In a particular case, however, this exemption could be lost if there is an indication that chemicals regulated under Proposition 65 are in the food supply. Of course, the exemption involves only the warning provision.

Other industries manufacturing durable goods, such as appliances, household goods, residential housing construction material, school and office products, etc. are vulnerable under Proposition 65 because these products may contain listed chemicals or they may use chemicals in the manufacturing process. With the minimum levels of exposure promulgated under California law, a manufacturer cannot be certain its products meet California exposure limits without conducting extensive and expensive chemical testing. In other words, California is regulating these chemicals at such minute amounts that traces of them which may be present in a manufacturing process can cause a violation of the statute, providing a basis for litigation.

There are many other areas in industrial activities which could be targeted by Proposition 65 plaintiffs. There are many steps in material selection, refining of raw materials, finishing of goods, packaging, and shipping products where Proposition 65 would apply directly. Most obvious is the application of Proposition 65 to the workplace. Is industry currently in compliance with worker warning requirements for all the Proposition 65 listed chemicals? Further,

there may be stormwater runoff issues at a manufacturing plant where the runoff may contain chemicals and these chemicals may be passing to a source of drinking water. And there may also be production wastewater discharges which contain some of these chemicals.

In order to protect itself, industry needs to scrutinize its operations to ensure that worker exposures to chemicals or discharges are limited. There also must be diligence in the quality control of chemicals used in the manufacturing of components as well as the finished products. Industries in the United States have the highest standards for protection of health and safety. Proposition 65 is fast becoming an important part of the regulatory control of manufacturing and production processes.

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