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Proposition 65 Remains a Significant Cost of Consumer Products Business

For companies in the supply chain for consumer products sold in California, the California law known as Proposition 65 is well worth considering. Private enforcement of Prop. 65 is so widespread that many companies have been forced to learn about this law. For those still unaware of Prop. 65 and those aware but hoping they will not be targeted, taking proactive steps to address the law is likely the most economical path forward, both financially and in terms of company resource drain and stress.

The basic structure of Prop. 65's product warning provisions is: no entity shall knowingly and intentionally[1] supply a product to Californians that could expose Californians to a listed carcinogen or reproductive toxin, without providing a clear and reasonable warning with the product. This prohibition/requirement applies to all companies in the supply chain for products sold in California, regardless of physical presence in California. Manufacturers, distributors, retailers, and other supply chain entities all may be subject to liability.[2] Even entities with fewer than 10 employees often are swept up in enforcement actions, despite a carve-out for such entities, as a result of contractual commitments made (often unwittingly) with other supply chain entities.

The California agency that administers Prop. 65 maintains a list of known carcinogens and reproductive toxins. There are currently approximately 1,000 chemicals on the list and California continues to add new chemicals.

Prop. 65 authorizes penalties up to $2,500 per day per violation. Private plaintiffs can enforce Prop. 65 and can recover their attorney's fees and a percentage of the penalties imposed. This structure has led to the development of an aggressive Prop. 65 plaintiffs' bar. Private plaintiffs and firms have polished their practices to the point

of being able to extract nuisance-value settlements very efficiently. As a result of the internet warnings requirement of Prop. 65, plaintiffs can manage an enforcement practice without ever visiting a defendant's location.

As of writing, the California Attorney General's office reports 333 out-of-court settlements thus far in 2022, and 78 consent judgments (settlements reached after the filing of a Prop. 65 lawsuit). Many of these settlements involved entire supply chains. Prop. 65 settlement agreements are publicly available here.[3] That webpage lists defendants of all sizes and levels of sophistication.

Companies faced with private enforcement actions very often respond by settling and agreeing to treat their products as though they require a warning, even if it's less than clear that a warning is truly required by the law. This essentially sets up two possible paths for companies that have not yet evaluated Prop. 65 or been the target of enforcement – evaluate Prop. 65 proactively, on your own terms, with the aim of preventing an enforcement case; or wait until an enforcement case, and then urgently implement a warning program under the scrutiny of a California private enforcer (whose attorney's fees you'll likely pay). Proactive compliance is normally more economical than forced compliance.

The California Office of Environmental Health Hazard Assessment's (OEHHA) primary Prop. 65 webpage is a useful starting place for those looking to learn about this law.

This post was drafted by Paul Jacobson, an attorney in the Kansas City, MO office of Spencer Fane LLP. For more information, visit www.spencerfane.com.

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[1] The fact that the statute only prohibits "knowingly and intentionally expos[ing]" California consumers ends up being much less helpful to defendants than it might seem. In the Prop. 65 context, ignorance is not bliss.
[2] Or, even if technically exempt from liability, they may still get caught up in an enforcement action.
[3] An informative starting place is the "Out-of-Court Settlements" link, which allows for review of all out-of-court settlements by year, starting with 2016.