

New Changes to Proposition 65: Welcome Relief or Added Burden?

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I. INTRODUCTION By now, many commercial enterprises that permit the legal sale or use of tobacco on their premises have been confronted with 60-day notice letters and civil complaints for allegedly failing to post the required warnings in violation of Health and Safety ("H&S") Code § 25249.5 ("Proposition 65"). Over 4000 notice letters have been issued prior to year's end by private enforcers seeking to avoid the application of new changes to Proposition 65.

Procedures contained in present law and rule were thought to prevent Proposition 65 enforcement abuses. However, concerns remained that plaintiffs' counsel were bringing frivolous suits. In addition, defense counsel, along with certain plaintiffs, were achieving settlements perceived as not protective of the public interest.

Senate Bill 471, effective January 1, 2002, provides additional requirements to fend off frivolous private enforcement actions. The new law imposes additional pre-filing requirements on private enforcers, establishes criteria for the assessment of civil penalties, and increases the roles of both the Attorney General and the Courts in the settlement process. While these new measures may stem abuses, they may actually increase the burdens imposed on those unfortunate enough to be caught in the cross hairs of the Proposition 65 enforcer.

II. DISCUSSION

A. The Certificate of Merit

In providing the Attorney General 60 days within which to review allegations of violations of the Proposition 65 warning requirements, a person seeking to enforce Proposition 65 will be required to include a "certificate of merit". This certificate must indicate that: (1) the person executing the certificate (either the attorney for the noticing party, or the noticing party) has consulted with one or more persons with "relevant and appropriate" experience; (2) this person has "reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action"; and (3) this person believes that there is a "reasonable and meritorious case" for the private action. Factual information in support of the certificate must be attached to the certificate that is forwarded to the Attorney General.

If the defense is ultimately successful and the court, based on its review of the certificate, concludes that "there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened", then the court may deem the case frivolous and order the private enforcer, his or her attorney, or both to pay reasonable expenses including attorneys fees to the successful party.

The legislature decided to make the certificate of merit off limits to discovery pursuant to H&S Code §25249.7 (h) (1). Only by engaging in the traditional, time-consuming and perhaps costly discovery, which the certificate of merit provision does not affect, may a defendant be in the position to demonstrate the case is frivolous.

B. New Penalty Criteria

Presently, Proposition 65 states that a violator of the provisions of Proposition 65 shall be liable for a civil penalty not to exceed \$2500 per day for each violation. If the complainant and alleged violator come to a settlement, one of the parties simply files the stipulation for entry of consent judgment, order approving the stipulation, and proposed judgment with the court which typically approves of the judgment.

New provisions insert penalty-assessment criteria patterned after several environmental statutes and regulations. In assessment of the penalty, the court is to consider the nature and extent of the violation, the number of, and severity of, the violations, the economic effect of the penalty on the violator, whether the violator took good faith measures to comply with the chapter and the time these measures were taken, the willfulness of the violator's misconduct, the deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole, and any other factor that justice may require. H&S Code §25249.7 (b) (2) (A) through (G). It is unknown whether the new criteria will significantly affect the settlement process.

C. New Role of the Court

Where the parties agree to settle the case, unlike present practice where either plaintiff's or defendant's counsel submits the stipulation to the court for approval, H&S Code § 25249.7 (f) (4) requires that plaintiff submit the settlement to the court for approval upon noticed motion. In addition, unlike present practice where the court by simple order may approve the stipulation for entry of judgment, H&S Code § 25249.7 (f) (4) requires that the court make specific findings. The findings are to include: (1) warnings required by the settlement comply with Proposition 65; (2) any award of attorney's fees is reasonable under California law; and (3) the penalty amount is reasonable based on the statute's criteria for penalty assessment. H&S Code § 25249.7 (f) (5) places the burden on plaintiff to produce evidence sufficient to sustain the above required findings.

Where the private enforcer and defendant seek to settle the case without hearing, of necessity, the parties will need to provide the court proposed stipulated findings demonstrating that the statutory criteria have been properly structured into the settlement. Otherwise, the court will need to conduct a hearing in order to make the required statutory findings.

These new procedures will place additional burdens on defendants seeking to reach settlement with private enforcers. It is unclear how involved courts will be in reviewing a proposed Proposition 65 settlement.

D. New Role of Attorney General

In addition to providing courts with new responsibilities in reviewing Proposition 65 settlements, pursuant to H&S Code §25249.7 (f) (4), the Attorney General is provided the opportunity to appear and participate in any proceeding on the merits of the settlement without intervening in the case. Again, it is unknown what criteria the Attorney General will employ in evaluating the adequacy of proposed settlements and what level of participation his office will choose in a particular case.

III. CONCLUSIONS

One may hope that the changes to Proposition 65, with the best of intentions on the part of the Legislature and the Attorney General, will have the desired effect of reducing frivolous Proposition 65 lawsuits. However, the non-disclosure provisions of the certificate of merit, the civil penalty assessment criteria, and the requirement for court findings create additional hurdles for defendants attempting to enter into a straightforward settlement under Proposition 65.