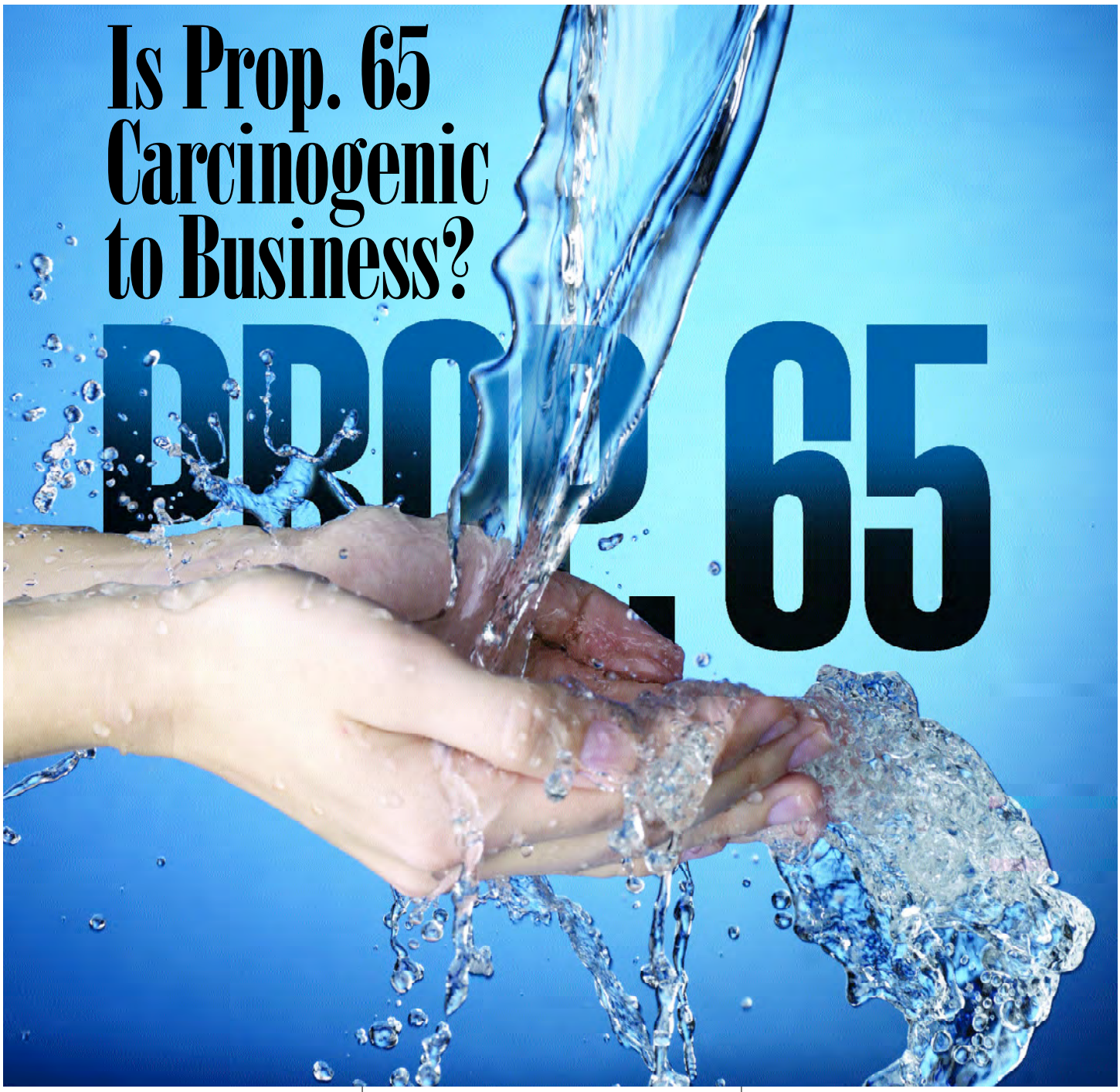
# Is Prop. 65 Carcinogenic to Business?






*by Travis J. Burch*

## Proposition 65—Introduction

"Welcome to California. Entering this State is known to cause cancer and birth defects and other reproductive harm." In effect, this is what the countless warnings posted everywhere from gas stations, to probably, the parking structure you park in every day, tell us. These placards are in most cases, not the result of meticulous scientific studies, but instead the courtesy of Proposition 65. If you represent a client that owns commercial property in California, employs workers, or sells, manufactures, distributes, or stores products in California (in other words, if you have a client doing business in California), you should have a basic understanding of Proposition 65. This article will provide you with: 1) a basic overview of the history and operative language of Proposition 65; 2) some fundamental problems with the statutory scheme; and 3) how to respond if your client receives a notice of intent to sue under Proposition 65.

## Political Background and Overview

Proposition 65, also known as the California Safe Drinking Water and Toxic Enforcement Act of 1986, readily passed in November 1986 as a ballot initiative. *See* Cal.Health & Safety Code §§25249.5 *et seq*.; *see also* Assembly Bill 1332; Assembly Bill 3160. The ballot initiative language stated that Californians have a right to protect themselves and the water they drink, and prevent other exposures to chemicals that cause cancer, birth defects, or other reproductive harm. *See also* Assembly Bill 1332, Assembly Bill 3160. In accordance with the Act, the California Office of Environmental Health Hazard Assessment ("OEHHA") annually publishes a list of chemicals known to cause cancer, birth defects, or other reproductive harm. *See* Cal.Health & Safety Code §25249.8(a). There are currently about 800 chemicals on the list which require businesses to provide a warning before knowingly and intentionally exposing anyone to any of the 800 listed chemicals. *See* Cal.Health & Safety Code §25249.6. Additionally, a warning must be given unless the business can demonstrate that exposure to the chemical poses "no significant risk level" of cancer, or "no observable effect level" of birth defects or reproductive harm. *See* Cal.Health & Safety Code §25249.6. The term "no significant risk level" means the level of exposure to the listed chemical every day for 70 years that would result in not more than 1/100,000.00 chance of developing cancer for an exposed person. *See* 22 Cal.CodeReg. §§12701–821.) The term "no observable effect level" means the level of exposure determined not to cause harm to human or laboratory animals divided by 1,000. *See* Cal.Health & Safety Code §25249.8; *see also Consumer Advocacy Group, Inc. v. Kintetsu Enters. of Am*., 141 Cal.App.4th 46, 59 (2006) (finding no judicial controversy as to chemicals parties agreed fell within "no significant risk level" provided under Prop. 65); *see also ConsumerCause, Inc. v. SmileCare*, 91 Cal.App.4th 454, 477 (2001) (reversing summary judgment for defendant dental office where dental office did not show by scientific evidence that small amount of mercury in dental amalgam was 1,000 below no observable effect level). If exposure is 1/1000 of the no observable effect level, then the business must provide a Prop. 65 warning notice. The OEHHA provides a safe harbor level for each chemical to assist business in determining whether a warning is necessary. (Office of Environmental Health Hazard Assessment. (2010, June). NOTICE OF REVISION TO THE BASIS FOR LISTING A CHEMICAL: CHLORSULFURON. Retrieved from http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.)

In sum, because of the sheer number of listed chemicals and minimal amounts triggering warning requirements, there are countless goods or services in California that fall within the purview of Proposition 65. We will now analyze the frustratingly imprecise language comprising the statutory scheme of Proposition 65.

## Drafting Problems

As is often the case with the law of unintended consequences, the problem lies not in the actual intent and spirit behind the Proposition—after all, who thinks being exposed to carcinogenic chemicals is good—but in the mechanisms used to implement and enforce the statute, including the burden of proof in Proposition 65 litigation. (*See* 22 Cal.Code Reg. §§12701–821.) Compounding these problems, the legislature is relatively hamstrung to change the law. Under California law, ballot initiatives may not be changed, revoked, or modified unless a two-thirds majority of the California Assembly and California State Senate Pass, and the Governor sign, a bill promulgating such a change. (Quinn, Tony (2009) "Origins of a Stalemate," California Journal of Politics and Policy: Vol. 1: Iss. 1, Article 7.) Given the universal "green" fever sweeping business and political spheres of influence, such change is not forthcoming—additionally the California Legislature has attempted to amend the Proposition numerous times since its passage into law—all for naught. Indeed, the California legislature has attempted to pass amendments to the law, including revisions to: the enforcement provisions (Assembly Bill 1332), requirements that citizen enforcers first obtain consent from the Attorney General's office (Assembly Bill 3160) and efforts to modify the level of exposure deemed to present a "significant risk" (an unusually high 1,000–fold safety margin). All efforts have failed. *See* Assembly Bill 1332; *see also* Assembly Bill 3160.

## Enforcement

Prop. 65 is enforced by civil actions brought by the California Attorney General, any district attorney, or city attorneys for cities with populations exceeding 750,000. *See* Cal.Health & Safety Code §25249.7(b). However, private parties (who are not required to have been exposed to any of the chemicals) "acting in the public interest" may initiate an action provided the citizen or organization initially files a 60 day notice with the alleged violator, the attorney general, and the district attorney, or city attorney in whose district the alleged violation occurred. *See* Cal.Health & Safety Code §25249.7(c). If the notice alleges a failure to warn, as opposed to discharge in water supply, the notice must include a certificate of merit indicating: 1) the person executing the certificate consulted with one or more persons with relevant and appropriate experience or expertise; 2) the expert has reviewed facts, studies, or data regarding the exposure to the listed chemical that is the subject of the action; and 3) the expert believes there is a reasonable and meritorious case for private action. *See* Cal. Health & Safety Code §25249.7(d)(1).) This information is not discoverable, although it must be forwarded to the attorney general and other prosecuting agencies. *See* Cal.Health & Safety Code §25249.7(d)(1).

In reality, the attorney general and other prosecuting agencies can not allocate the resources to investigate every technical violation of the law. This fact compounded with the fact that any party acting in the public interest can initiate an action against a business, has given rise to a proliferation of bounty hunter suits. *See* Cal.Health & Safety Code §§25249.7(c),(d). These are a handful of groups that bring lawsuits purportedly in the public interest, but may also have a pecuniary motivation through the potential of recovering 25% of any penalties assessed and attorneys' fees. *See* Cal.Health & Safety Code §§25249.7(b), 25192(a)(2). This sum can quickly add up given that penalties for violating Prop. 65 can be as high as $2,500 per violation per day. *See* Cal. Health & Safety Code §25249.7(b)(1). Attorneys' fees can be recovered under California Code of Civil Procedure 1021.5. *See* Cal.CCP Code §1021.5. Although the statute does not prohibit a prevailing defendant from recovering attorney's fees under §1021.5, a prevailing defendant would have an uphill battle demonstrating it litigated for the public good. *DiPirro v. Bondo Corporation*, 153 Cal.App.4th 150, 197–98 (2007); *see also* Cal.CCP Code §1021.5.

In sum, because the governmental agencies are likely to pluck the most egregious cases from the tree of justice, the marginal cases are left for the so-called public interest groups, that are not required to have suffered any injury in fact. Adding insult to injury, despite not having

to have suffered any injury in fact, even the marginally meritorious claimant wields excessive leverage by operation of the de facto one way attorney's fees provision and daily aggregating penalty provision. As will be seen below, this leverage swells exponentially with the statutory burden shifting under Proposition 65.

## Drafting and Burden of Proof

Mechanically, Prop. 65 works like this: The California Regulations define exposure as used in the Health and Safety Code broadly, including, the cause to ingest, inhale, or contact via body surface. (*See* 22 Cal.Code Reg. §12601(d).) If an item is on the list, Prop. 65 requires a warning before exposing people to the product containing the item. The critical (and for defendants, expensive) part is in the burden-shifting provision of Health and Safety Code §25249.10, which places the burden on the defendant to demonstrate that the exposure to the chemical poses no significant risk, or no observable levels. *See* Cal.Health & Safety Code §25249.10. Remember quantitatively, the term "no significant risk level" means the level of exposure to the listed chemical every day for 70 years that would result in not more than 1/100,000.00 chance of developing cancer for an exposed person. *See* 22 Cal.Code Reg. §§12701–821. The term "no observable effect level" means the level of exposure determined not to cause harm to human or laboratory animals divided by 1,000. As Justice Sills noted in an excoriating, if not humorous opinion regarding Prop. 65 litigation, "the burden shifting provisions make it virtually impossible for a private defendant to defend a warning action on the theory that the amount of carcinogenic exposure is so low as to pose "no significant risk" short of actual trial. *See* Cal.Health & Safety Code §25249.10(c). "There is no way a defendant is going to be able to carry its burden on demurrer based on allegations in the complaint, and a defendant will probably not be able to carry that burden on summary judgment either. . . . Rather, in a case of a negligible, even microscopic 'exposure,' it may take a full scale scientific study to establish the amount of the carcinogen is so low that there is no need for a warning under Health and Safety Code Section 25249.10." *Consumer Defense Group et al. v. Rental Housing Industry Members*, 137 Cal.App.4th 1185, 1214–15 (2006).

In other words, a plaintiff can easily file a claim just because a good has one of the 800 chemicals—despite the fact that the amount might be infinitesimally slight—and it is up to the defendant to hire experts to conduct a scientific study and even then will require a trial on the merits.

## Defending Prop. 65 Litigation

So your client receives a 60 days notice from a private lawyer (as opposed to the Attorney General) informing your client that its product contains one of the 800 of so chemicals known by the State of California to cause cancer or birth defects or other reproductive harm. What is your next step?

## Small Business/Government Exception

First, as a threshold issue, Prop. 65 excludes government agencies and businesses with less than 10 employees. *See* Cal.Health & Safety Code §25249.11(b). Therefore, always confirm with your client whether it has 10 employees.

## Strict Notice Requirement

Next, analyze the 60 day notice for fatal defects. Because the statutory framework encompasses legislation which assesses civil penalties, which in part go to government coffers, due process is implicated. *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America et al.*, 150 Cal.App.4th 953, 963 (2007). As a condition precedent to establishing a citizen's right to proceed in the public interest on that matter, and to collect funds for the public treasury, the notice requirement should not be dismissed as a mere technicality. *Yeroushalmi v. Miramar*, 88 Cal.App.4th 738, 743 (2001). The notice may be deficient in a number of respects. It may fail to provide a reasonably accurate time period which the violation is alleged to have occurred. *See* 22 Cal.Code Reg. §12903(b)(2)(A). It may fail to state facts describing how the alleged exposure occurs. *See* 22 Cal.Code Reg. §12903(b)(3). It may fail to properly link a listed chemical to the alleged offending product or service. *See* 22 Cal.Code Reg. §12903(b)(2)(D). It might fail to contain a certificate of merit, provide a summary of Prop. 65 prepared by the Office of Environmental Health Hazard Assessment, or not be delivered to the Attorney General, or other public prosecuting agency where the exposure was alleged to have occurred. *See* 22 Cal.Code Reg. §12903(c)(2). These are just a few items to be scrutinized. Because of the due process concerns, and maybe certain court's distaste of bounty hunter suits in general, courts have been willing to dismiss complaints with deficient 60 days notices at the pleading stage without leave to amend. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (due process requires that the alleged violator, as well as the public enforcement agency, must be provided with specific information concerning the alleged violation prior to initiation of the lawsuit); *Consumer De! Group v. Rental Hous. Indus. Members,* 137 Cal.App.4th 1185 (2006) (holding plaintiff's presuit notices provided to attorney general and trade group were inadequate because almost all allegations were so broad as to apply to every single building in California); *Yeroushalmi v. Miramar Sheraton*, 88 Cal.App.4th 738 (2001) (finding consumer group's notices to appropriate prosecutors and agencies were inadequate due to lack of specificity as to what constituted violations; thus, citizen enforcement suits could not be maintained).

## Government Preemption

After receiving a 60 day notice of Prop. 65 violation, it might behoove a business to contact one of the governmental prosecuting agencies also provided notice and invite them to sue your client. Did you just read that correctly? Yes, although it is not normal protocol for counsel to invite the government to sue one's own client, this might be a rare instance where your client will be better off litigating against arguably a more even-handed governmental entity. Remember, if a governmental agency decides to pursue the case, the private plaintiff cannot. *See* Cal.Health & Safety Code §25249.7(d)(2). Therefore consider the alternative—a bounty hunter litigator probably more concerned with driving up fees and operating on behalf of a shell client (so client control should not be a real concern for the bounty hunter).

## Statute of Limitations

Prop. 65 suits are guided by the one year statute of limitation period under Code of Civil Procedure §340. *See* Cal.CCP Code §340. However, failure to provide an adequate warning ends up being the type of injury that by its nature, courts consider a continuing harm, leading to renewed limitations period. *See Consumer Advocacy v. Kintetsu Enterprises*, 129 Cal.App.4th 540, 569 (2005). This presents problems in the context of consumer products and

environmental exposures. However, posting the appropriate warnings will at least stop a renewing of the limitations period and start the clock. *See Consumer Advocacy v. Kintetsu Enterprises*, 129 Cal.App.4th 540, 568–69 (2005).

## Res Judicata

What happens if your client has already been sued somebody for a Prop. 65 violation? If it was the same product or type of exposure, your client may be able to seek cover under the doctrine of res judicata. Note the doctrine applies when: 1) the issues decided in the prior adjudication are identical with those presented in a later action; 2) there was a final judgment on the merits in the prior action, and 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication. *See Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 60 Cal.App.4th 1053, 1065 (1998). Therefore, a settlement and stipulated judgment will protect a defendant from successive claims by the same Plaintiff.

## Best Defense Is an Unstoppable Offense

If your client has the financial gravitas, it can take the offensive and mount a frontal attack on the chemical's listing. The defendant in *Baxter Healthcare Corp. v. Denton*, 120 Cal.App.4th 333 (2004) employed this strategy by bringing a declaratory relief action to have the court declare defendant had no duty to warn about medical devices which contained the listed chemical 2 di-ethylhexyl phthalate. *See Baxter Healthcare Corp. v. Denton*, 120 Cal.App.4th 333, 359 (2004). The appellate court upheld the trial court's finding that defendant proved by a *preponderance* of the evidence that the chemical in its products posed no significant risk of causing cancer in humans, only liver cancer in mice and rats. *See Baxter Healthcare Corp. v. Denton*, 120 Cal.App.4th 333, 348–49 (2004). The very fact that chemicals requiring warning are not necessarily carcinogenic in humans should illustrate the dire imprecision with which the law was written. *See Baxter Healthcare Corp. v. Denton*, 120 Cal.App.4th 333, 367 (2004).

## Conclusion

In closing, although well-intentioned, Proposition 65 is at worst, a mechanism allowing bounty hunter law firms to shake down businesses in the same vein as the infamous and now disbarred Trevor Law Group. *See* Halko, L. Lisa, *Ruling Criticizing Prop 65 is Mixed Blessing for Defendants,* Legal Backgrounder: Washington Legal Foundation 21, pp. 1–4 (July 7, 2006), and at best, the poster child for what is wrong with California's proposition system. In either event, as this article has hopefully made explicit, instigation of Proposition 65 litigation is easily initiated and claimants can exploit the broadly crafted statutory language in their favor. Although the author omitted an analysis of all of the statutory language for the sake of brevity, (i.e., what constitutes "knowingly and intentionally" exposes, what is in the "course of doing business") hopefully you now have a sense of some of the likely defenses you can assert on behalf of your client if they receive a 60 day notice of intent to sue under Proposition 65. Additionally, it goes without saying that because an ounce of prevention is worth a pound of cure, if your client has any chance of implicating the purview of Proposition 65, it might consider placing a warning label on its product to prevent being sued.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