

Vol. 22 No. 29

July 27, 2007

CALIFORNIA'S ATTORNEY GENERAL ACKNOWLEDGES PROP 65 ABUSE

by
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Sometimes it's good to say what goes without saying.

Last year a California Appellate Court¹ said what everybody knows about California's Proposition 65. The court noted that bringing a Proposition 65 bounty-hunter action is so "absurdly easy" that the attorneys' fees paid by defendants to avoid litigation are "objectively unconscionable."² Private plaintiffs can state a cause of action by alleging that cars in the parking lot emit exhaust, furniture stuffing contains formaldehyde, PVC coating on wires contains lead, and dried paint on the walls contains cadmium. "Dried paint. Furniture. Parking lots. Wiring. Really."³

Now Edmund Brown, Jr., California's former governor and new Attorney General, writes in a letter to one of California's more prolific bounty hunters, Clifford Chanler, that some of Chanler's common practices "do not appear to be in the public interest"⁴ because he takes large attorneys' fee awards from small retailers who have no liability under Proposition 65. While the Attorney General's tone is more measured than that of last year's appellate opinion, the message is clear and firm. The Attorney General told Chanler, "[Y]our clients have collected significant sums of money from businesses that have little or no liability for past violations, and an amount of attorney fees that appears to exceed a reasonable amount."⁵ While this is not news to anyone who has tried to do business in California, only to be greeted by extortionate lawsuits, this acknowledgment by the state's Proposition 65 enforcer and his chief Proposition 65 deputy is a hopeful sign. Some background on California's Proposition 65: The statute was enacted by initiative in 1986, after ballot pamphlets claimed the law

¹*Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal. App. 4th 1185, see also Lisa L. Halko, "Ruling Criticizing Prop 65 Is Mixed Blessing for Defendants," Washington Legal Foundation LEGAL BACKGROUNDER, vol. 21 no. 22, July 2006.

²*Id.* 137 Cal.App.4th 1185, 1217.

³*Id.* 137 Cal.App.4th 1185, 1212.

⁴See letter dated May 11, 2007, from Edmund G. Brown, Jr., and Edward G. Weil, to Clifford Chanler re Proposition 65 Glassware and Ceramics Cases, available on the California Attorney General web site at http://ag.ca.gov/prop65/pdfs/Chanler_51107_letter.pdf ("AG letter"), at 1.

⁵AG letter, *id.*, at 3.

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would target “certain chemicals that are scientifically known –not merely suspected, but known – to cause cancer or birth defects.” The law was supposed to “tell businesses: Don’t put these chemicals in our drinking water supplies.”⁶ The list of “chemicals known to cause cancer or birth defects” now includes about 850 substances, many listed as “probable animal carcinogens” with no evidence of causing harm to humans.

Proposition 65 is enforced entirely through litigation. To state a cause of action, a plaintiff need only show that a listed chemical is present in a consumer product, and that the defendant business is “knowingly” exposing Californians to that product. As a prerequisite to the lawsuit, the plaintiff must send the defendant a notice describing the exposure. Sixty days after sending the notice, the plaintiff may sue. Most plaintiffs use the notice to establish the element of knowledge, because many of the alleged exposures are surprising, especially to retailers. Very few shop owners know that lead, a listed chemical, may be present in costume jewelry, poker chips, PVC coatings for electrical wires, or brass. A sixty-day notice may be the first time the retailer has heard that a product might contain lead.

The Attorney General’s letter notes that where retailers did not know about the lead, there would be no liability for past exposures. Where retailers either post warnings or stop carrying the product after receiving the notice, “there would be no continuing liability, and little likelihood that the court would award a penalty.”⁷

Nevertheless, Chanler routinely sues those retailers and collects large attorneys’ fee awards in settlement. The Attorney General’s records, which are compiled from required settlement reports, show that Chanler collected \$9.1 million in attorney fees between 2002 and 2006 just from cases filed over decorated glassware. (Decorations outside the drinking area of glasses are allowed to contain lead and cadmium under Consumer Product Safety Commission regulations, but they require a warning under Proposition 65.) Often the complaint and the consent judgment are filed simultaneously. This is because all Proposition 65 settlements must be approved by a court. For the court to award attorneys’ fees under California law, it must find not only that the settlement provides a “significant public benefit,” but also a “necessity for private enforcement.”⁸ The Attorney General’s letter notes that when retailers post warnings or stop selling the product after receiving a 60-day notice, “there is no apparent need for a case to be filed, and these standards may not be satisfied.”

The Attorney General also did the math on the amounts of attorneys’ fees collected, characterizing them as “unwarranted”⁹ because Chanler collected fees for investigation (i.e. looking up product lists in defendants’ on-line catalogs) and for filing complaints, settlements, and motions for court approval. In one example noted by the Attorney General, Chanler claimed 100 hours of attorney time for what was essentially filling out boilerplate forms.

Nor are plaintiffs’ attorneys the only ones profiting from Proposition 65 settlements. Some defendants have been hit with so many Proposition 65 lawsuits that they have also begun to seek

⁶See Argument in Favor of Proposition 65, California Ballot Pamphlet, General Election, Nov. 4, 1986, p. 54.

⁷AG letter, *supra*, at 4.

⁸See California Code of Civil Procedure section 1021.5.

⁹AG letter, *supra*.

reimbursement for their attorneys' fees. They negotiate with plaintiffs to include an "opt-in" provision to a Proposition 65 settlement, setting a price for new defendants to bind themselves to the judgment. In 2005, the San Francisco Superior Court approved a judgment known as the *Boelter* settlement,¹⁰ in which Chanler and a group of defendants selling decorated glassware negotiated an opt-in program setting fixed fees for companies to be added as defendants to the settlement. The opt-in fees go partly to the state, partly to plaintiffs, partly to plaintiffs' attorneys' fees, and partly to a defense firm that "administers" the settlement. Opt-in fees from the *Boelter* settlement have now reached almost \$10 million, with over \$1 million paid to the defense firm and over \$8 million paid to Chanler and his clients. (The defense firm contributed part of their share to charity.)

The Attorney General's letter notes in passing that his office "questioned the propriety of the fees charged by attorneys for defendants" in the *Boelter* settlement, and that Chanler reduced his fees under the settlement as a result of the Attorney General's concerns.¹¹

What does the Attorney General propose to do about Chanler's practice of collecting excessive attorney fees from businesses with no liability? The letter states three options the Attorney General's Proposition 65 team is considering. They may undertake an information campaign to alert businesses about the Proposition 65 standards and Chanler's practices. They may more closely scrutinize settlement documents and fee applications, objecting to settlements that require payments from businesses with no liability. Or, they may bring their own Proposition 65 lawsuits to preempt Chanler's complaints.

This is not the first time the Attorney General's Proposition 65 team has acted to weed out the very worst Proposition 65 bounty-hunters' tactics. They have written numerous letters to Proposition 65 plaintiffs whose supporting data fails to meet even Proposition 65's meager factual standards. In 2002, when acrylamide was discovered in fried and baked foods, they attempted to discourage plaintiffs from filing Proposition 65 actions while FDA and WHO were investigating the matter. (Under then-Attorney General Bill Lockyer they later joined the actions, attempting to obtain warnings for French fries, toasted-wheat cereal, potato chips, and other foods.) In 2004 they sued Morse Mehrban, a plaintiff's attorney who routinely failed to report his Proposition 65 settlements or to obtain court approval. That action eventually resulted in a \$20,000 judgment against Mehrban.¹²

The public policy of Proposition 65 is fundamentally flawed, because it ignores safety and refuses to balance risks and benefits. Instead, Proposition 65 sets a standard of ritual purity from "chemicals," requiring warnings for trace elements of listed substances without regard to the warnings' unintended harm. Nevertheless, Proposition 65 is the law of California, supported by California's congressional delegation and governor, and enforced by its Attorney General. The Attorney General's Proposition 65 team have a long history of attempting to use their influence to mitigate the worst bounty-hunting practices, while complying with and enforcing the law's intent and explicit terms. Although no concrete steps are promised in the recent letter to Chanler, we can expect that the letter

¹⁰See *Brimer v. The Boelter Companies*, San Francisco Superior Court case no. CGC-05-440811, order entered Aug. 18, 2005.

¹¹AG letter, *supra*, at 3.

¹²See *People v. Consumer Cause, Inc.*, Los Angeles Superior Court case no. BC316912, order entered Jan. 18, 2006.

means what it says, and that consequences will follow for bounty-hunters who take the most flagrant advantage of the most vulnerable small businesses.

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