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Proposition 65: New Developments, New Problems

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California's Proposition 65 is a headache for companies doing business in the state. Among consumers, Proposition 65 is notorious for its pervasive, yet often ignored, warning signs. Among defense counsel, it is known for a lack of clarity and fundamental unreasonableness. And among plaintiffs' counsel, who routinely bring claims and force large settlements under the law's overly broad citizen-suit provision, it's like shooting fish in a barrel.

Two recent and ongoing developments in the Proposition 65 arena will significantly impact each of these groups in disparate ways, with plaintiffs and their counsel once again likely to be winners and defendants and the public losers. For additional useful information on Proposition 65, please click here.

Dischargers of Listed Chemicals Are New Targets

Proposition 65 is infamous for its duty-to-warn requirement, which states that a business must give a clear and reasonable warning prior to exposing people to certain levels of any listed chemical. The duty-to-warn requirement applies to product, environmental and occupational exposures. However Proposition 65 contains another key section, the duty to avoid the discharge of listed chemicals such that they potentially may make their way into sources of drinking water.

This no-discharge requirement is a broad limitation against the discharge of listed chemicals into surface water or groundwater, or onto land, that will "probably" pass into a source of drinking water. To date, the no-discharge requirement has taken a backseat, thanks to the ease with which the duty-to-warn provisions can be used to extract large settlements from businesses that find it more expedient to settle rather than prove their lack of liability. However, the no-discharge requirement may soon get its day in the sun as another easy path for litigants to pursue companies.

On June 10, 2015, the Center for Environmental Health, known for its frequent duty-to-warn suits,[1] filed a 60-day notice of violation against Seneca Resources Corp. alleging a violation of the no-discharge requirement. Seneca injects produced water into wells in California's Kern County. The CEH's notice alleges that the injection of produced water into wells results in groundwater contamination, which may impact drinking water, violating Proposition 65's no-discharge requirement.

Less than a month after the CEH issued its 60-day notice, the Environmental Research Center, another well-known Proposition 65 plaintiff, issued a 60-day notice of violation to Macpherson Energy Corp. and Macpherson Oil Co. The notice piggybacks on orders issued by both the State Water Resources Control

Board and the Division of Oil, Gas and Geothermal Resources alleging that Macpherson Oil injected produced water into underground sources of drinking water.

These allegations come in the wake of an admission by DOGGR that it had erroneously approved the injection of produced water into federally protected aquifers that DOGGR had misclassified.[2] This revelation has brought heightened scrutiny to the oil and gas industry's produced water reinjection practices by Proposition 65 plaintiffs.

It's too early to tell exactly what impact these notices ultimately will have if they are successful. However, if oil companies are not allowed to reinject produced water, this could result in major operational disruptions and substantial product cost increases that likely will be passed on to consumers.

Companies concerned about the increased use of Proposition 65's no-discharge requirement can protect themselves so long as they meet both of the following criteria: (1) the discharge will not cause a "significant amount" (i.e., a detectable amount) of a listed chemical to enter a source of drinking water and (2) the discharge conforms with every applicable regulation, permit, requirement and order applicable to the operation at issue. Unfortunately, meeting this exemption may not prevent plaintiffs from filing 60-day notices of violation, as the burden of showing that the exemption is met falls on the defendant.

New rules recently issued by DOGGR add a new twist to the above exemption. Until recently, the reinjection of produced water from oil and gas operations was exempt from most permitting requirements. However, DOGGR's regulations, which took effect July 1, 2015, impose a host of new requirements on this practice, including permitting, public notice and groundwater monitoring.

Those entities that discharge water such that it probably will pass into a source of drinking water will want to closely watch how the CEH and ERC cases unfold and consider whether their operations can take advantage of the limited exemption afforded under Proposition 65.

OEHHA's Revised Warning Regulations: A Missed Opportunity?

While over the years Proposition 65 has helped identify chemicals in products, it has also been extremely problematic. In 2013, California Gov. Jerry Brown proposed reforms to Proposition 65's duty-to-warn requirement in an effort to end ubiquitous shakedown lawsuits. Gov. Brown suggested several steps to improve the law and prevent its continued abuse by "unscrupulous lawyers".

Among the governor's goals were proposals to: (1) cap or limit attorneys' fees; (2) require a stronger demonstration by plaintiffs that they have information to support their claims; (3) require greater disclosure of plaintiff's factual allegations; (4) ease the state's ability to adjust the level at which Proposition 65 warnings are needed for chemicals that cause reproductive harm; and (5) require more useful information regarding exposures and how consumers might protect themselves.

The governor's concerns were well-founded. In 2014, Proposition 65 plaintiffs brought in nearly $29.5 million on 663 reported settlements. Seventy-one percent, or over $21 million, went to plaintiffs' attorneys as fees and costs, with the majority of the claims brought by a handful of plaintiff lawyers.[3]

Given the governor's common-sense recommendations for reform, many were optimistic when the Office of Environmental Health Hazard Assessment began the rule-making process for new warning regulations. Perhaps the new regulations would reinvigorate the original premise of Proposition 65 as a straightforward right-to-know law, and help reduce the number of frivolous claims.

Unfortunately, the OEHHA has so far failed to move forward in any meaningful way on the governor's suggestions. Rather, its proposed changes appear to be aiming to make compliance with the warning requirements more complicated. After several drafts, the OEHHA released its latest proposed rule-making in January 2015. This proposal essentially ignores the governor's goals. If finalized, these warning

regulations will add several new weapons to plaintiff attorneys' arsenals and require the inclusion of language that, far from providing clarity, will likely result in further confusion.

This confusion is amply demonstrated by a proposed provision requiring a product containing any of 12 identified chemicals[4] at a level such that a warning is required to expressly list the chemical(s) by name in the warning that accompanies the product. While the OEHHA states some basis for choosing these 12 chemicals, the rationale for creating this "dirty dozen" list is essentially indiscriminate, and more importantly will not help consumers in their buying practices.

Currently, businesses are already faced with the difficult decision of either providing a warning out of an abundance of caution (potentially causing lost sales), or conducting testing and performing an exposure assessment to determine whether the product requires a warning (and then having to defend the testing and exposure assessment later at great cost if they receive a notice of violation). With this proposed provision, businesses will have to decide not only whether to warn, but will also have to list any of the 12 chemicals if they are present.

Other additions to the warning requirements will create further burdens for businesses. Among them are requirements to provide warnings in all languages included on the product label, to add a symbol of a black exclamation point on all warnings and a host of product and location specific requirements. In addition, if finalized as currently written, the regulations will require warnings for consumer products to be provided prior to purchase, as opposed to the current standard of prior to exposure, limiting the types of available warning methods. Each of the proposed new requirements lacks sufficient clarity to prevent plaintiffs' attorneys from using the ambiguity as a club to force settlements, even when exposures do not require warnings.

One of the most troubling and vague aspects of the proposed new rules would require an environmental warning to be posted in the affected area, which "must clearly identify the area for which the warning is being provided." It's unclear how this requirement is meant to be applied, and whether a warning sign must identify each space, or type of space, for which the environmental warning is required. How exactly a business will comply to ensure a plaintiff does not issue a notice of violation based on the wording and location of a warning is impossible to tell.

Today, most notices of violation focus on a company's failure to provide a warning. However, under the proposed regulations, plaintiffs will have fodder to attack the sufficiency of the warning, opening the door for a new class of Proposition 65 claims. This increased litigation risk will be coupled with the costly and time-consuming process for businesses to replace current warnings that adorn their buildings, facilities, garages, products, furniture, equipment and vehicles. It has been estimated that finalizing the regulation in its current form could cost businesses up to $818 million over 12 years as a result of increased testing, litigation, implementation of new warnings and other identified costs.[5]

A final draft of the regulations is expected later this year. While it is possible that the OEHHA will take into account the numerous concerns raised by the regulated community and revise the rules to create a saner and more effective Proposition 65 warning, the agency has given little reason for optimism. For those who believe Gov. Brown's original reform ideas were well-intentioned, we encourage you to engage in the process by contacting his office and the OEHHA to share your opinions.

Conclusions

Proposition 65 affects companies doing business in California, and these recent developments are likely to considerably increase its impact. Despite the governor's call to temper the burdens that the statute imposes, the hoped-for change does not appear likely to materialize.

NOTES

[1] In 2014 alone, the CEH pulled in over $6.1 million from Proposition 65 duty-to-warn settlements.

[2] Letter from Steve Bohlen, State Oil and Gas Supervisor, and Jonathan Bishop, Chief Deputy Director, State Water Resources Control Board, to Jane Diamond, Director, Water Division of U.S. Environmental Protection Agency Region IX (Feb. 6, 2015), available here.

[3] Office of the Attorney General, Proposition 65 Settlement Executive Summary 2014, available here.

[4] The “dirty dozen” are acrylamide, arsenic, benzene, cadmium, carbon monoxide, chlorinated tris, formaldehyde, hexavalent chromium, lead, mercury, methylene chloride and phthalates.

[5] Andrew Chang & Co. LLC, The Business Cost of Proposed Changes to Article 6 of Proposition 65, (April 8, 2015).