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PERSPECTIVE

To defend the impossible: How to defend cases under California's Proposition 65

By Howard Smith

Sometimes you just have to fight it out. This includes cases brought under Proposition 65, the California Safe Drinking Water and Toxic Enforcement Act of 1986, codified in Health and Safety Code Sections 25249.5 et seq. (all statutory references here are to the H&S Code unless stated otherwise). While Prop. 65 cases normally settle early, numerous defenses do exist.

Section 25249.6 sets forth warnings that certain businesses must provide as follows: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10."

Prop. 65 does not apply to all businesses; it only applies to a "person," which under Section 25249.11(a) is defined to include "an individual, trust, firm, joint stock company, corporation, company, partnership, limited liability company, and association." Under Section 25249.11(b), the act does not include "any person employing fewer than 10 employees in his or her business; any city, county, or district or any department or agency thereof or the state or any department or agency thereof or the federal government or any department or agency thereof; or any entity in its operation of a public water system as defined in Section 116275." Any business with nine or less employees is not subject to Prop. 65.

Prop. 65 is not a strict liability statute. Under Section 25249.6, a party can only be responsible for a violation when it "knowingly and intentionally" fails to post the required warning. The term "intentionally" has not been defined for purpose of the statute, but California Code of Regulations, Title 27 Section 25102(n) defines "knowingly" as: "'Knowingly' refers only to knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring. No knowledge that the discharge, release or exposure is unlawful is required. However, a person in the course of doing business who, through misfortune or accident and without evil design, intention or negligence, commits an act or omits to do something which results in a discharge, release or exposure has not violated Section 25249.5 or 25249.6 of the Act." Accordingly, there can be no violation unless a plaintiff proves the defendant knew specific listed chemicals were in fact discharged. *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 659 (1991).

Section 25249.10 provides exemptions from the warning requirement. One is "an exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8."

"In any action brought to enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant." Section 25249.10(c). Under this standard, the Defendant's burden is to not to show no identified chemicals are released, but only to show the claimed exposure "poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity." Section 25249.10.

This burden may be met by having an air quality survey conducted to determine the worst-case scenario of exposure potentially involving "chemicals known to the state of California to cause cancer or reproductive toxicity" and that this worst-case scenario posed no significant health risk, assuming lifetime exposures at the levels determined during the survey.

The statutory penalties available under Prop. 65 are subject to the one-year statute of limitations of Code of Civil Procedure Section 340. Unfortunately as with most continuing violations, the statute does not begin to run at the time of the first violation, but instead it should be measured from the date of the last alleged violation. *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America*, 150 Cal. App. 4th 593, 581 (2007). However, with the violation continuing, a plaintiffs recovery would be limited to one-year before the filing of the complaint. *See Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 981 (2003) (inquiry focused upon one-year prior to the filing of the complaint).

Under Section 25249.7(b)(1) the available statutory penalties are "not to exceed two thousand five hundred dollars ($2,500) per day for each violation." This is not an invitation to simply multiply $2,500 by a full year. Instead, the amount of any recoverable statutory penalties is quite limited. The California attorney general posts settlements under Prop. 65 for each calendar year, the majority of which are against product manufacturers involving potentially thousands of violations. These settlements average less than $100,000: (1) 2019, 300 settlements which averaged $79,050 with attorney fees of $44,211; and (2) 2018, 367 settlements which averaged $85,254 with attorney fees of $49,941. ■

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