

**JUDGING THE EFFECTIVENESS  
OF THE PROPOSITION 65 REFORMS:**

**IS THE WORST (BEST) OVER,  
OR IS THE WORST (BEST) YET TO COME?**

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On January 1, 2002, Senate Bill 471, the legislation we now refer to as the “Proposition 65 Reforms,” went into effect. These amendments to California’s Safe Drinking Water and Toxic Enforcement Act, the popular initiative commonly referred to as Proposition 65, were prompted by an outcry that “citizen enforcement” of Proposition 65 – in the form of “bounty-hunter” lawsuits where successful plaintiffs collected 25% of any civil penalty imposed, limitless payments in the form of “restitution” for collateral claims under the State’s Unfair Competition Law, as well as their attorneys fees and costs – was out of control.<sup>1</sup>

Indeed, Proposition 65 *was* out of control. Thousand of lawsuits were threatened every year. Hundreds were settled each year in a random process that was mostly about the desire of the plaintiffs and their attorneys to make money and the desire of the defendants to avoid costly litigation, and had little to do with safe drinking water or protection of the public from toxic chemicals. By some accounts, millions of dollars were collected and doled out to plaintiffs and their attorneys, and very little was turned over to the People.

The Proposition 65 Reforms did not change the substance of the law. Rather they were confined to its enforcement, amending the law in four ways. The first was the introduction into the law of seven factors that serve as guidelines to be considered by courts in assessing civil penalties. Cal. Health & Safety Code

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<sup>1</sup> As background, Proposition 65 prohibits any person "in the course of business" from discharging into drinking water any of more approximately 700 chemicals designated as "known to the State" of California to cause cancer or reproductive toxicity, Cal. Health & Safety Code § 25249.5, and from exposing any person in California "knowingly and intentionally" to such chemicals. Cal. Health & Safety Code § 25249.6. The act is enforced by civil lawsuits, which may be brought by the Attorney General, any District Attorney and certain City Attorneys where the violation is alleged to have occurred, and by any private citizen acting "in the public interest" where any public prosecutor failed to initiate a civil suit within sixty days after receiving a "notice of an alleged violation." Cal. Health & Safety Code § 25249.7. Violations are punishable by civil penalties of up to \$2500 per violation, per day. *Id.*

§ 25249.7(b)(2)(A)-(G). The second was a requirement that a bounty-hunter's notice of intent to sue ("Notice") be accompanied by a "Certificate of Merit," including factual information sufficient to support the Certificate. Cal. Health & Safety Code § 25249.7(d)(1). The third was a series of reporting requirements, requiring private plaintiffs to notify the Attorney General of: any suit filed under the Act, Cal. Health & Safety Code § 25249.7(e), any settlement or judgment in the case, Cal. Health & Safety Code § 25249.7(f)(1), and any corrective action taken as a result of the suit, Cal. Health & Safety Code § 25249.7(f)(2). The fourth was a requirement that any settlement be submitted to the court in the form of a motion to approve the settlement, demonstrating to the court that three criteria are satisfied: (1) any warning required by the settlement complies with Proposition 65; (2) any award of attorneys' fees is reasonable under California law; and (3) any penalty imposed is reasonable, based on the criteria referred to above.

Now, two years after the Proposition 65 Reforms took effect, we are called upon to judge them. In doing so, we raise three questions: Have the Reforms diminished the abuses of this law? Have they cured the problems with this law? Are further reforms necessary?

The answers, in my view, are Yes, No and Maybe So. Yes, because it appears that the number of lawsuits threatened and initiated under Proposition 65 has decreased substantially. No, because there continue to be too many suits focused on "gotcha" claims that are extremely costly to defend and do little to serve the public interest. Maybe So, because we don't know enough yet to predict the future. The number of cases appears to be declining, and defendants are beginning to defend them and to win. It only takes a few defense victories to put

plaintiff dollars at risk, and that may be all it takes to put some balance into the Proposition 65 litigation scheme.

On the other hand, the post-Reform cases appear to require a greater investment on the part of plaintiffs' attorneys, and thus are becoming more difficult to settle cost-effectively. Moreover, the "low-hanging fruit" that used to be the mainstay of plaintiffs' claims – the hundreds of paints, adhesives, cleaners and solvents – where Proposition 65 warnings (arguably) were missing and (easily) could be added to a label that already contained a long list of warnings in order to promote settlement of a Proposition claim, may have been exhausted. More recent Proposition 65 targets address more sophisticated consumer products, pharmaceutical products and, importantly, the food supply. As a result, the stakes in Proposition 65 cases are getting higher.

***Yes, the Proposition 65 Reforms have been successful, because the number of suits threatened and initiated have decreased.*** The website maintained by the Attorney General, <http://prop65.doj.ca.gov>, lists all of the Proposition 65 Notices issued since 1988. Some recent figures follow:

<b>YEAR</b>	<b>NO. OF PROPOSITION 65 NOTICES FILED</b>
1999	665
2000	443
2001	4380
2002	2013
2003	647
2004	131

Analysis of these figures alone would produce only a simplistic analysis of the effectiveness of the Reforms. The number of Notices issued in any given year is deceptive, because noticing practices vary from plaintiff to plaintiff, and even from case to case. For example, most of the Notices filed by “Citizens for Responsible Business, Inc.” in 2001 against automobile dealerships name only one alleged “violator” per Notice. There were literally hundreds of these Notices. By contrast, a single notice filed by “Center for Environmental Health” and the “Environmental Working Group” in 2004 against distributors of farm-raised salmon identified fifty-one alleged “violators.” Moreover, the Notices alone do not indicate how many cases actually were filed. Finally, neither the Notices nor the number of cases brought are indicators of the merits of the underlying claims.

The Office of the Attorney General has provided an alternative accounting of the number of Notices filed, which appears to take into account the number of parties noticed rather than just the number of Notices filed.

<b>YEAR</b>	<b>NO. OF PROPOSITION 65 NOTICES FILED</b>
1999	5998
2000	1130
2001	5686
2002	4164
2003	1730
2004	???

On either basis, but particularly on the basis of the second count, one cannot help but see a trend in the declining number of Notices filed over the past two

years. This would reinforce the general impression around the defense bar that fewer cases are being brought.

From our side of the courtroom, we can speculate that the Certificate of Merit requirement has made a real difference. The number of creative claims available to be made appears to be endless. If a failure-to-warn allegation has any merit, then it should not be too great of a challenge to produce some exposure data sufficient to satisfy the burden that the Certificate entails – somewhat akin to “probable cause.” Apparently, the time, expense, or diligence required to prepare an adequate Certificate seems to be having a very significant effect. It seems reasonable to conclude that less of the marginal cases, frivolous in the eyes of the defense bar, are being brought.

*No, the Reforms have not cured the problems with Proposition 65, because there continue to be too many suits focused on “gotcha” claims that are extremely costly to defend and do little to serve the public interest.* Analysis of the Notices filed in 2003 and 2004 is illuminating. Forty-one of the Notices filed in 2003 were for alleged exposure to tobacco smoke. Thirty-five identical notices were filed by the Consumer Defense Group (all against different defendants), alleging exposure to tobacco smoke and diesel and gasoline engine exhaust. Two hundred ninety-two Notices were filed by the Consumer Defense Group against hotels and property management companies, alleging exposure to a laundry list of chemicals in order to facilitate settlement. The plaintiff in those suits is being sued by another plaintiff, Consumer Advocacy Group, who claims that the Consumer Defense Group settlements and the underlying lawsuits were filed collusively to moot the Consumer Advocacy Group claims.

Moving to discharge cases, there were sixty-one Notices filed by Communities for Better Environment in the gas-station cases. These are largely “tag-along” claims against petroleum companies whose underground storage tanks at service stations were being replaced, and any contamination from leaking tanks was being remediated as a result of other State and federal laws. The plaintiffs filed their Notices based on records filed with the agencies overseeing remediation activity.

Thus, 389 of the 647 Notices filed in 2003 can be placed in the categories of organized mischief or opportunistic profiteering. Proposition 65 lawsuits against service station owners who are pulling tanks and remediating their sites under the supervision of government agencies do more to line the plaintiffs’ and attorneys’ pockets than they do to prevent “discharges” to drinking water. Similarly, Prop 65 warning cases for gasoline and diesel exhaust and cigarette smoke do little to advance the public good. Is there a human being in California who needs a Proposition 65 warning to know that petroleum fumes should be avoided? Or cigarette smoke? Yet, these suits to vindicate alleged warning violations are expensive to defend, and do little to “benefit” the public other than add one more Proposition 65 warning sign in the long procession of signs from the airport, to the office building, to the parking garage, to the bar, and to the gas pump. And the collusive suits? They speak for themselves.

***Maybe So; further reforms may be necessary as Proposition 65 moves into more sophisticated litigation.*** Many in the Proposition 65 community have observed that a greater percentage of the smaller number of cases are being filed

actually are being litigated, and many on their merits. Fiercely. And the defense is winning its share.

For over ten years, the goal in most Proposition 65 cases has been settlement. The overwhelming majority of Proposition 65 suits have been warning cases, brought by private party plaintiffs, where financial concerns were at least as important as any public benefit and settlements could be achieved through negotiation and creative warning schemes. Our successful defense in *As You Sow v. Shell Oil Company* (San Francisco Superior Court) may be the only noteworthy exception, where the value of an internationally accepted warning system established under federal law was important enough to compel the company to defend the case fully.<sup>2</sup>

Now, the interests that are threatened by Proposition 65 cases are more vital, and thus the need to defend against Proposition 65 claims appears to be greater and more frequent. To cite recent examples, a group of national and international food and candy companies recently was compelled to defend, successfully, claims that ingestion of chocolate resulted in unwarned exposure to lead. *American Environmental Safety Institute v. Mars, et al.* (Los Angeles Superior Court). A number of manufacturers and distributors of pipe and other plumbing supply products, in two very similar cases, were forced to defend against claims that their products resulted in the “discharge” of lead to drinking water. *Mateel Environmental Justice Foundation v. E.A. Gray Company, et al.*; *As You Sow v. Conbraco Industries* (San Francisco Superior Court).

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<sup>2</sup> Complete citations and pleadings for cases discussed in this paper are available from Prop 65 News.

Recent suits against pharmaceutical manufacturers fit the same paradigm. Manufacturers of nicotine gum – the smoking cessation product – cannot accede to plaintiff’s demands for Proposition 65 reproductive toxicity warnings where the U. S. Food & Drug Administration has forbidden them as medically inappropriate. Thus they are compelled to take their defense of preemption under the Federal Food, Drug and Cosmetic Act to the California Supreme Court, and likely beyond, rather than settle. *Dowhal v. SmithKlineBeecham* (Supreme Court of California).

The recent acrylamide controversy adds another vexing element to the mix. Scientists around the world are perplexed at the appearance of acrylamide in fried foods, and have nary a clue as to how to eliminate the substance. The toxicological community is equivocal, at worst, as to whether exposure to substance in this form presents any real threat to health. Under these circumstances, the Attorney General, presumptive guardian of the public interest, urged private party plaintiffs to refrain from bringing Proposition 65 suits against California restaurant operators, and thus allow the scientific community to give the issue appropriate deliberation. Yet, plaintiffs brought suit, anyway. *Council for Education and Research on Toxics v. McDonald’s, et al.* (Los Angeles Superior Court) When the Superior Court stayed the case to allow for the Office of Environmental Health Hazard Assessment to review the matter, plaintiffs petitioned the Supreme Court to force the case to forward. (At the time of this writing, the petition is pending.) Whenever the litigation resumes, we should expect a defense that is extremely vigorous and extremely costly. Yet, if science is not yet ready to address the acrylamide question, can we legitimately expect the courts to do so? Only if we believe that Proposition 65 lawsuits resolve all controversies.

These high stakes cases appear to represent the new, post-reform Proposition 65. The fewer cases that are being filed are more difficult and expensive to bring, and more difficult and expensive to resolve. Much is riding on who wins, and who loses. Depending on your perspective, plaintiff or defendant, the worst (or best) may be over. And the best (or worst) may be yet to come.