Legal Backgrounder

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COURT RULING REVEALS ABSURDITY OF CALIFORNIA'S PROPOSITION 65

by

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It seemed like a "no-brainer." The plaintiff sued a dental organization, seeking to obtain penalties and force warnings for exposures to mercury — a Proposition 65-listed reproductive toxin — contained in dental amalgam fillings. After the plaintiff admitted in discovery it had no evidence that any consumers were being exposed to mercury at a level that requires a warning, the defendants moved for summary judgment, supported by an expert declaration that its products were considered "safe." The trial court granted the motion. The plaintiff appealed, and that is where it all fell apart for the defendants.

In *Consumer Cause, Inc. v. Smilecare, Inc.*, 91 Cal.App.4th 454, 110 Cal.Rptr.2d627 (2001), a deeply divided panel of the California Court of Appeal, Second Appellate District, Division One, reversed the trial court's order granting summary judgment. The appellate court did not base its ruling on evidence that dental amalgam fillings were actually dangerous, but because the defendant had not established its "highly technical, scientific" defense. According to the majority opinion, which in turn quoted an *amicus curiae* brief filed by California Attorney General Bill Lockyer, "'What is at issue . . . is not the "safety" of the product causing the exposure, but rather whether the exposure is one thousand times below the "no observable effect" level.'" 91 Cal.App.4th at 470. In her blistering dissent, Justice Miriam Vogel accused the majority of having "endorsed and encouraged a form of judicial extortion." 91 Cal.App.4th at 478 (Vogel, J., dissenting).

While many have compared Prop 65 lawsuits to extortion, *see*, *e.g.*, *Proposition 65's Effect on Small Business, Hearing Before the Committee on Small Business*, U.S. House of Representatives, Oct. 28, 1999 (GPO No. 106-38), Justice Vogel's belief that the result in this case was not intended by the voters is contrary to widely held perceptions regarding the intended effect of Prop 65. As absurd as it may seem, this is *precisely* the way the drafters of Prop 65 intended the law to work: so long as a plaintiff can prove a "knowing and intentional exposure," the defendant must prove that the exposure doesn't require a warning under the statute — even if there is no evidence that a product is actually dangerous for users. This LEGAL BACKGROUNDER will explain why the majority was correctly compelled to interpret a statute in a manner

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that leads to absurd and otherwise incomprehensible results, but will offer a ray of hope for businesses ensnared in future Prop 65 litigation.

Background on Prop 65. The ballot arguments in favor of the 1986 initiative trumpeted, "Our present toxic laws aren't tough enough," and proclaimed, "Proposition 65 gets tough on toxics." The Act was designed as a means to change existing regulatory schemes for toxic chemicals, where the government first had to prove a product was dangerous. Under Prop 65, "Use of chemicals known to cause cancer or reproductive toxicity is no longer considered 'innocent' until proven 'guilty' of harming public health by governmental agencies." William S. Pease, *Identifying Chemical Hazards for Regulation: The Scientific Basis and Regulatory Scope of California's Proposition 65 List of Carcinogens and Reproductive Toxicants*, 3 RISK 127 (1992) <http://www.fplc.edu/RISK/vol3/spring/pease.htm>. The portion of the Act at issue in *Smilecare* prohibits any "person in the course of doing business" from "knowingly and intentionally expos[ing] 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," with limited exceptions. CAL. HEALTH & SAFETY CODE § 25249.6. The exceptions include exposures to carcinogens that pose "no significant risk," and to reproductive toxins that "have no observable effect assuming exposure at one thousand (1000) times the level in question." CAL. HEALTH & SAFETY CODE § 25249.10(c). Prop 65 is enforced by private and public lawsuits, and the statute is extremely clear in conveying "the burden of showing that an exposure [is exempt] shall be on the defendant." *Id*.

***Ruling in* Smilecare**. The facts of *Smilecare* were simple. The plaintiff claimed that exposures to mercury from dental amalgam required warnings. The plaintiff admitted in its discovery responses that it had no evidence that the defendants' use of mercury had caused injury, and it had no evidence concerning the level of any exposures to mercury caused by the defendants. 91 Cal.App.4th at 471. The plaintiff also said that it did not contend that exposures were occurring at a level that required a warning. According to the plaintiff, it "*made no allegation* regarding the level of mercury to which defendants have exposed individuals." 91 Cal.App.4th at 472 (emphasis in original). The defendants offered these discovery responses, along with a declaration from a dentist who opined that dental amalgam is considered "safe," and that "there is no scientific evidence, to his knowledge, suggesting that amalgam fillings cause any adverse physical effect with the exception of allergic reactions in some people." 91 Cal.App.4th at 470. The declaration did not attempt to undertake a Prop 65 exposure assessment. The plaintiff produced no evidence in opposition, and took the tack that, since the defendants had "'not shown a complete defense under [§ 25249.10(c)], plaintiff has no evidentiary burden.'" 91 Cal.App.4th at 474.

The *Smilecare* majority reviewed the statutory language and the exposure assessment methodology in the Prop 65 regulations, noting that the process "involves a highly technical, scientific inquiry." 91 Cal.App.4th at 464. A defendant must establish the "maximum dose level" (1/1000 of the "no observable effect level"), and then determine if the "reasonably anticipated rate of intake or exposure for average users of the consumer product" exceeds that maximum dose level. 91 Cal.App.4th at 463-65.

The majority then analyzed the showing that the defendants had made under California law governing summary judgment. Since the defendants would bear the burden of proof at trial, they were required to make a preliminary showing on each element of the affirmative defense. The court explained that if the defendants failed to produce substantial evidence to support each element of the affirmative defense, the granting of summary judgment "'would have to be reversed, *even if the plaintiff failed to produce a scintilla of evidence challenging that element.*'" 91 Cal.App.4th at 468, quoting *Huynh v. Ingersoll-Rand*, 16 Cal.App.4th 825, 830-31 (1993) (emphasis in original).

The majority found that the expert's declaration was insufficient to establish the affirmative defense for two reasons. First, it did not set forth an exposure assessment in accordance with the Act and implementing regulations. Second, there was no showing that he was a toxicologist or had any expertise in risk or exposure assessment, and he was therefore not qualified. 91 Cal.App.4th at 469-71. Thus, the declaration did not help the defendants' meet their burden.

The majority concluded that the discovery responses did not mandate summary judgment because the plaintiff had no burden to produce any evidence until such time as the defendants had met their initial burden. 91 Cal.App.4th at 473. Furthermore, the court held that, by admitting it had no evidence of a specific level of exposure, the plaintiff had not actually admitted that the level was below that which required a warning. 91 Cal.App.4th at 474. Accordingly, there was no basis for the trial court to have entered summary judgment for the defendants.

Justice Vogel's dissent recognized the practicalities Prop 65 enforcement actions have created for businesses. She noted the high cost of performing Prop 65 exposure assessments, and the fact that they do not guarantee that summary judgment will be granted. Under these circumstances, "What's a dentist or doctor to do? Settle with the plaintiff, of course. Save the cost of the assessment. Save the legal fees. Get rid of the case." 91 Cal.App.4th at 478, (Vogel, J. dissenting). Justice Vogel agreed with the majority's construction of the Prop 65 exemption and the summary judgment rules, but stated her belief that "the statutory scheme has another requirement ignored by my colleagues — that, to survive summary judgment, the plaintiff must have at least a good faith belief that the defendant is using an unsafe amount of a listed chemical." 91 Cal.App.4th at 478-79, (Vogel, J. dissenting).

As bizarre as it seems, when one analyzes the ballot arguments and the political climate surrounding the initiative, Justice Vogel's common sense approach of requiring a "good faith belief" of a violation actually runs contrary to the intent of Prop 65. While the result of the *Smilecare* decision is absurd by nearly any measure, that absurdity is completely consistent with the Act. Under the clear language of the statute as originally enacted, and the implementing regulations, all a plaintiff needs to prove is that there is an exposure to a listed chemical — even a molecule will do, so long as it is "detectable."[1] Indeed, so long as the statute places the burden on the defendant to prove the exposure is exempt, the defendant *is* guilty until proven innocent.

Winds of Change for Prop 65? As originally adopted by the voters, Prop 65 prohibits any amendments by the California Legislature unless they are approved by a 2/3 majority in both houses. Also, any amendment can only "further the purposes" of Prop 65 (whatever that means). These twin limitations had stifled modest attempts at reform over the last 15 years, including the Attorney General's attempt in 1997 (AB 3160) to have some oversight over private enforcement actions before they are filed. Largely because of the negative impact of bounty hunters who bring cases without any evidence in the hopes of a quick settlement, and defying the conventional wisdom about such an attempt, Attorney General Lockyer sponsored successful Prop 65 reform legislation that was signed by Governor Gray Davis. The bill, SB 471, amended Prop 65's citizen suit provision effective January 1, 2002, and may effectuate the "good faith belief" Justice Vogel thought should be required, by creating a new procedural hurdle that a plaintiff will need to clear before bringing an enforcement action.

A Prop 65 enforcer will now need to include a "certificate of merit" with any 60-day notice of violation. CAL. HEALTH & SAFETY CODE § 25249.6(d)(1), as amended by SB 471. The certificate must contain the representation of the party or attorney that he or she has consulted with an appropriate expert, and "believes that there is a reasonable and meritorious case for the private action." *Id*. Any underlying data must be disclosed to the Attorney General with the certificate. And, if a court determines at the conclusion of a case that there was no actual or threatened exposure, it may review the certificate of merit, and deem a matter frivolous if "there was no credible factual basis for the certifier's belief that an exposure to a listed

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[1]The plaintiff does have the minimal burden of showing that the exposure is "detectable." *See* 22 CAL. CODE REGS. § 12901(g) (no "exposure occurs unless a listed chemical is detectable as provided in this section.").

chemical had occurred or was threatened." CAL. HEALTH & SAFETY CODE § 25249.7(h)(2), as added by SB 471.

As one might suspect, the process that led to the adoption of SB 471's "reforms" was as strange as anything else you might find connected with this law. The Attorney General announced his intent to offer a legislative reform package in March 2000. He claimed reform was needed due to the actions of certain bounty hunters that created negative public perception of the Act, as well as a proliferation of needless warnings given by businesses to avoid litigation or settle baseless lawsuits. Although he invited input from the business community, most in that community were caught completely off guard when the reform bill showed up as an Assembly amendment to a drinking water standards bill that had been passed by the California Senate without any reference to Prop 65. Many trade groups and defense attorneys commented that the bill as it was then structured was not going to impact most of the bounty hunter litigation, and complained that they had been left out of the process. Business groups were also quite concerned that, if the Legislature passed SB 471, there would be no more "reform" (bad reform was worse than no reform at all).

The Attorney General explained that he had spent much time meeting with environmental groups to remove their opposition to the concept of reform; considering the makeup of California's Legislature, any mainstream environmental opposition would have killed the bill. The Attorney General and the bill's author, Senator Byron Sher, ultimately did accept a small number of suggestions from industry. The most important commitment was to continue the dialogue on reform in the second legislative session in 2002, so that industry concerns could be addressed. Joining the Attorney General in that commitment were Senator Sher and David Roe of Environmental Defense (one of Prop 65's architects and authors). Given the legislative record of both the Attorney General (a longtime California senator) and Senator Sher, their commitment, along with Mr. Roe's, removed the industry opposition to the bill. A short session on potential continued reform has been held, but it remains to be seen whether additional and more meaningful reforms can be crafted.

Of course, even reform is not without controversy. Bounty hunters trying to beat the effective date of SB 471 flooded the Attorney General with nearly 4,000 60-day notices in December 2001. The Attorney General responded strongly to what appeared to be baseless notices. The potential application of SB 471 to these notices (served without certificates of merit), as well as other potential responses are being evaluated.

We will not know for some time whether SB 471's minimal hurdles will impact Prop 65 enforcement as greatly as the *Smilecare* decision undoubtedly will. It is unclear whether courts will limit the certificate of merit requirement to the issue of mere exposure; as opposed to requiring a "good faith belief" that exposure is occurring at a level that requires a warning. Moreover, in many Prop 65 cases, plaintiffs do develop exposure assessments that they claim show exposure at a level that requires a Prop 65 warning, even where there is no evidence that the product is actually unsafe to consumers. Unfortunately, SB 471 will not be of any help in that situation. For that reason, there may be no way to stem the tide of useless and confusing warnings, unless the potential of future reform is realized.

California as a "Wonderland" for Business? Yet, perhaps, the lessons of *Smilecare* are clear to future defendants. First, those who wish to do business in California remain well cautioned to remember Alice's discussion with the Cheshire Cat.[2] Second, if the plaintiff says it has no evidence of an exposure at a level that requires a warning, then go ahead and file your motion for summary judgment — but support it with a declaration that performs an exposure assessment. Then, you can take the plaintiff's admissions,

[2] "'But I don't want to go among mad people,' Alice remarked. 'Oh, you can't help that,' said the Cat: 'we're all mad here. I'm mad. You're mad.' 'How do you know I'm mad?' said Alice. 'You must be,' said the Cat, 'or you wouldn't have come here.'" Lewis Carroll, ALICE'S ADVENTURES IN WONDERLAND.

Justice Vogel's dissent, and SB 471, and smile, knowing that you will do to the plaintiff what Prop 65 enforcers have been doing to businesses for the last 15 years.