Legal Backgrounder

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RULING CRITICIZING PROP 65 IS MIXED BLESSING FOR DEFENDANTS

by

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You already know how so-called "environmental watchdog" litigation goes in California. Take the example of Proposition 65,[1] which requires the executive branch to maintain a list of "chemicals known to the state to cause cancer or reproductive harm." The list includes ubiquitous substances such as engine exhaust, which no one wants to breathe but which is impossible to avoid completely. Proposition 65 lawyers find a business where people may be exposed to a substance on the list. They send a "notice of violation" as required by statute to trigger their right to sue.[2] After 60 days, they file a complaint on behalf of a straw plaintiff. Knowing that successful litigation requires expensive affirmative defenses, the business buys its peace by paying the plaintiff's inflated "attorneys' fees." A judgment is entered, which the business hopes will prevent future lawsuits by other bounty hunters. Another sign goes up in California: "WARNING: This area contains a chemical known to the State of California to cause cancer."[3] The plaintiff issues a press release claiming to have "protected" Californians, and asks for donations to support further litigation. This is a legal and effective way to make money in California. Hard to believe, but true.

Recently California's Court of Appeal for the Fourth Appellate District, noting that the bounty-hunter business is "so absurdly easy" and that the attorneys' fees are "objectively unconscionable," thwarted one bounty-hunter's business plan by allowing a non-party to appeal the trial court's approval of the settlement.[4] The Court of Appeal found that the settlement payments of more than $600,000 were unreasonable, rejected the settlement, reversed the entry of judgment, and ordered the case dismissed.[5] Among other comments providing balm to the wounded souls of shake-down victims, the court opined that

[1] *See* California Health and Safety Code § 25249.5 *et seq.*

[2] *See* California Health and Safety Code § 25249.7.

[3] *See, e.g.,* Title 22 California Code of Regulations § 12601(d)(3)(A).

[4] *See Consumer Defense Group v. Rental Housing Industry* Members (2006) 137 Cal.App.4th 1185, 1217 [40 Cal.Rptr.3d 832].

[5] *Id.* at 1221.

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the bounty hunters' "legal work merited an award closer to a dollar ninety-eight."

The court also introduced a new and helpful concept in Proposition 65 law: that a Proposition 65 notice must "differentiate the target businesses in Proposition 65 warning litigation from non-target businesses."[6] The court refused to accept the bounty hunter's common assumption that "all you need to have is ... a parking lot, and you are a 'violator' of Proposition 65."[7] Unfortunately for California's business climate, that assumption has long been accepted. It has resulted in meaningless warnings about engine exhaust in most privately-owned Californian parking garages and airports. (Government entities are exempt from Proposition 65, so courthouse parking lots need not post the warnings.) There are also warnings in most hotels and restaurants, and a growing number of warnings on consumer products. If Proposition 65 warnings are required to mean something, that will make a dramatic change for the better.

In the *Rental Housing* case, a Proposition 65 plaintiff organization sent two sets of 60-day notices to more than 170 apartment owners. The first set of notices claimed that the owners violated Proposition 65 because tenants and visitors were exposed to gasoline exhaust in the parking lots and tobacco smoke in areas where smoking was not prohibited. The second set of notices added alleged exposures to Proposition 65 chemicals contained in foam in the furniture, gas in the heating systems, paint on the walls, paper and ink in the fax machines and copiers, pesticides in the gardens, wires in the lights, and so on for "21 pages of single-spaced type."[8] The court held that the notices were invalid and described, in unusually colloquial language, how the issue arose:

> California's Attorney General became involved in the case by objecting to a settlement quickly arrived at by the front corporation prosecuting the private enforcement action on behalf of a law firm who consist of self-proclaimed bounty hunters, and a trade group representing the apartment owners and managers. The trade group wanted to buy its peace and was willing to pay off the law firm to obtain it, in return for which the owners would also get a favorable deal with regard to any future litigation concerning alleged Proposition 65 violations. The bounty hunter lawyers wanted to get paid hefty fees, which is what the whole thing was obviously about in the first place. The trial court, however, concluded that it did not want to stand in the way of two consenting parties willing to settle. The Attorney General ... timely appealed.[9]

The Attorney General argued, and the court agreed, that some of the exposures are "so unlikely as to be virtually imaginary." The court also pointed out the equal and opposite problem, to which the Attorney General had not objected: by alleging exposures from ubiquitous chemicals, the notices "apply to every single building in this state."[10] They assume that because the managers use products with warnings, such as pesticides, carpet cleaner and paint, the buildings must also require warnings. The court wrote:

> Without specific facts of specific exposures, that's not playing fair. It's just

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[6] *Consumer Defense Group v Rental Housing Industry Members, supra,* 137 Cal.App.4th at 1190.

[7] *Id.* at 1189.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 1212.

> pulling a list off the internet of products that are already covered by Proposition 65 warnings and saying – well, at least *some* of these products might be carried into an apartment, and since we don't see a Proposition 65 warning in the lobby, we get to collect attorney fees. . . . If all the notice conveys is that –well, it's building with paint, furniture and a parking lot — or if the notice is so much shot-gun boilerplate of every carcinogenic molecule currently known —then meaningful review is impossible. ... The targeting of businesses just because they have furniture and paint and electric lights is just another way of saying that the target is not meaningfully differentiated from any other business.[11]

As noted above, the idea that a Proposition 65 plaintiff must find something specific to the target is novel. Bounty hunters have routinely chosen inescapable chemicals like engine exhaust or lead. The former is a nearly universal byproduct of industry present wherever there are cars, trucks, or planes. (Yes, airport terminals also inform patrons that they are being exposed to chemicals known to cause cancer. *Welcome to California*.) The latter is an element so widely present in nature and in manufactured goods that a inexpensive sensitized swab will show that it is present nearly everywhere. As the court in the *Rental Industry* case complained, "a common place item, such as a chair, doesn't have to contain any significant amount either, just a few molecules will do."[12] Thus any business that has a parking lot or sells consumer goods could be accused of violating Proposition 65, and would then be required to choose between an uncertain and expensive legal defense in which it must prove its defense at trial, or a settlement with the bounty hunter. This could not happen if bounty hunters were truly required to specify violations that distinguish one business from another.

The outcome of this case was certainly favorable for the defendants, in that the cases against them have been dismissed without requiring them to make hundreds of thousands of dollars in settlement payments. On the other hand, the court held:

> Because we only opine on the notices and the attorney fees, our decision is not *res judicata* for any future [P]roposition 65 litigation against any of the trade group members brought by the Attorney General, or any party other than plaintiff or any party represented by [plaintiff's counsel].[13]

The defendants, then, do not have the benefits of a Proposition 65 settlement, which can provide some protection from other bounty hunters.

The court's motivation for undoing the parties' bargain was the Proposition 65 provision for review of civil litigation by the Attorney General. In a statute intended to prevent "abuse" of Proposition 65, the California Legislature in 2002 required settling parties to apply for the court's approval of any settlement, and to notify the Attorney General (another frequent Proposition 65 plaintiff) of the application.[14] The Attorney General is also allowed to "appear and participate in any proceeding" without formally intervening in the case.[15] The court in the *Rental Housing* case not only expressed concern about the plaintiff's being

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[11] *Id.* at 1213.

[12] *Id.* at 1215.

[13] *Id.* at 1221.

[14] California Health and Safety Code § 25249.7(f)(5), added by Stats. 2001 c. 578 (S.B. 471).

[15] *Id.*

"rewarded for shaking down the defendants for ubiquitous trivia," but also about the "perversity" of a settlement "obtained by bargaining away the public's interest in warnings that might actually serve some public purpose."[16] The court apparently intended by its decision to prevent Proposition 65 actions from settling before the Attorney General has an opportunity to investigate and intervene.

While the Attorney General's Proposition 65 legal staff are experienced and skillful lawyers, sincerely motivated for the public good, they have neither the power nor the will to protect businesses from common shake-down tactics by professional plaintiffs. In regulatory "guidelines" propounded to explain how the office will review settlements,[17] the AG identifies "issues that are likely to occur frequently" in Proposition 65 litigation, such as:

- Settlements that require warnings in the absence of any evidence of exposure to a listed chemical
- Settlements requiring "minor or technical changes" to the appearance or location of an existing warning
- Attorney fee declarations "relying on memory or re-created records"

The Attorney General's regulations emphasize that shake-down lawsuits by bounty hunters are commonplace. They do not provide substantial protection for businesses in California. The Attorney General objected to the settlement not just because it extracted money from the defendants with no clear public good, but also because it purported to provide *res judicata* protection for the defendants. At the Attorney General's request, the court modified its opinion on April 20, 2006, to add, "This opinion should in no way be read for the idea that the Attorney General could be bound by private settlements in private Proposition 65 suits."[18]

In granting the Attorney General's appeal the court left defendants vulnerable not only to further public prosecution but also to other bounty hunters.

In sum, *Consumer Defense Group v. Rental Housing Industry Members* contains gratifying language and proposes a concept that could introduce some sense into Proposition 65 notices of violation. At the same time, it deprives the defendant apartment owners of the little protection they had bargained for in their settlement agreement.

[16]*Rental Housing, supra*, 137 Cal.App.4th at 1219.

[17]Title 11 California Code of Regulations § 3200 *et seq.*

[18]*Rental Housing, supra*, 137 Cal.App.4th 1185, 1208, fn. 14.