

**Product Liabilities You Never
Anticipated: A California Prop. 65
Executive Briefing**

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May 28, 2008

Presenter



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California Environmental Practice

- Growing and significant California environmental practice
- Covers all areas of California and federal environmental law
- Over ½ century of environmental law experience—including governmental agency and practical business experience
- On the “cutting edge” of environmental law trends



California Environmental Practice

- Facility Siting, Expansion and Permitting
- Global Climate Change
- Air Quality, Water Quality
- Hazardous Waste (RCRA)
- CERCLA (Superfund)
- Toxic Tort and Class Actions
- Environmental Due Diligence/Transactions
- Safe Drinking Water and Toxic Enforcement Act (Proposition 65) and Product Liability Laws
- Counseling, Regulatory and Litigation



What We Will Cover Today...

- Product liability laws—an overview
- Proposition 65
- Developing a Proposition 65 strategy to minimize liability
- You received a 60-Day notice, now what?



Product Liability Laws

- CA Phthalates Law (AB 1108)
- CA Toxics In Packaging Prevention Act (AB 455)
- Federal Consumer Product Safety Modernization Act (HR 4040)
- Recalls/Industry Initiatives



Proposition 65 Overview

- A voter initiative
- Addresses concerns about exposure to substances which cause **cancer or reproductive toxicity**
- Prohibits discharging **listed chemicals into drinking water** sources
- Prior to exposing **individuals**, clear & reasonable warnings must **be given**



Proposition 65 Overview To Whom Does It Apply?

- **Businesses with 10 or more employees**
- That **expose** individuals to listed chemicals at miniscule levels
- **Exposures** can occur as follows:
 - **Consumer** products' use, manufacture, or sale
 - **Environmental** discharge of listed chemicals
 - **Occupational** exposures to listed chemicals



Proposition 65 Overview Who Enforces The Law?

- California Attorney General
- County District Attorneys, and
- Any person, after issuing a 60-day notice, when no public prosecutor has commenced and is diligently pursuing an action



Proposition 65 Overview

What Penalties Can Be Assessed?

- Civil penalties of up to \$2,500 per exposure per day
- Injunctions may be obtained to prevent threatened or occurring violations



Developing A Proposition 65 Strategy To Minimize Liability

- Compliant warnings
- Product audits
- Exposure analysis (HRA)
- Testing frequency and protocols
- Downstream issues
- Upstream Issues

WARNING:

This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.



You Received A 60-Day Notice Letter What Is It?

- Citizen's notice of violation
- Describing
 - Noticing party name
 - The name of the alleged violator(s)
 - When the violation allegedly occurred
 - Each listed chemical involved
 - The route and type of exposure
- Certificate of Merit
 - Supporting documentation



You Received A 60-Day Notice Letter Now What?

- Plaintiffs are not all equal
- Industry (joint) defense groups?
- Engaging counsel
- Reformulation
- Considering settlement and terms
- Recalls
- Public relations



Proposition 65 Litigation Settle or Defend?

- Assess your options
- Is insurance coverage available?
- Who is liable?
 - Owners, operators, franchisees, manufacturers, etc.
- Evaluate cost of defending vs. settling and moving on



Proposition 65 Litigation Can I Be Sued Again If I Settle?

- So long as the new suit is not for a new violation, the claim should be dismissed
- No guarantee -- anyone can sue
- Our success in preventing follow-on claims has been excellent



Proposition 65 Strategy Overview Some Things To Keep In Mind....

- 60-day notice means you will be sued
- Consider your strategy early on
- Tender to responsible party
 - Defend
 - Settle
- Early settlement can reduce fees, costs and penalties

Call Us

Questions?

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