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## The Far Reach Of California Proposition 65

In 1986, California voters approved an initiative to address their growing concerns with exposure to toxic chemicals. That initiative became the Safe Drinking Water and Toxic Enforcement Act of 1986, better known by its original name of Proposition 65. When the initiative came up, it was not directly contemplated that it would apply to products being sold at retail. However, over the years Proposition 65 has significantly evolved and given rise to thousands of lawsuits against retailers and manufacturers of products that contain “hazardous substances,” including lead, phthalates, cadmium, and acrylamides. In light of the far reach that has developed under Proposition 65, any foreign business selling, distributing and/or manufacturing items in the United States should be well aware of its potential application.

### *Why Should I Care About California If I Don't Do Business There?*

Due to the size of California’s economy, its regulations have become the practical national standard for products. In addition, one need not be doing business in California to be in the chain of Proposition 65 litigation. Imagine a Massachusetts manufacturer that sells to a New Jersey distributor which in turn sells to a retailer doing business in New York. Should one of the items sold to the retailer doing business in New York end up in California, the manufacturer, the distributor and retailer could be potentially be named as defendants in a Proposition 65 lawsuit, and the venue would be in California.

### *Required Warning Label*

Proposition 65 requires California to publish a list of chemicals – updated at least once a year – known to cause cancer or birth defects or other reproductive harm. Over 900 such chemicals have been identified by the State since the list was first published in 1987, including formaldehyde, benzene, crystalline silica, and some heavy metals. Proposition 65 prohibits businesses from knowingly exposing persons in California to any of these chemicals without first providing a “clear and reasonable warning.” A proper warning must state in clear, reasonable and legible language that the product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

Safe harbor levels (levels of exposure that trigger the warning requirement) have been established for many of the chemicals listed under Proposition 65. Businesses that cause exposures greater than the safe harbor level must provide Proposition 65 warnings. In the absence of a safe harbor number, regulations provide guidance for calculating “no significant risk levels” to obviate the necessity of a warning label. As many attorneys have built their businesses entirely on filing Proposition 65 lawsuits, many businesses prefer



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to place a Proposition 65 warning even if there is severe doubt that their products really may show human exposure that causes any health risk.

***Enforcement***

The greatest threat of Proposition 65 is that, in addition to the state and local district attorneys, private citizens can enforce the statute and recover penalties and litigation costs (the so-called environmental bounty hunter provision), plus attorney fees. A plaintiff may seek injunctive relief as well as penalties of \$2,500 per violation per day. From 2005 to 2010 private parties entered into approximately 1,020 settlements relating to Proposition 65, requiring total payments of \$74.9 million (which did not include the costs of defending the suit or reformulating products), or \$73,000 per settlement on average. In 2011, almost 75% of the total \$15.9 million paid in 327 private suit settlements was for plaintiffs’ legal fees

Settlements have pertained to a wide range of consumer products, including, vitamin supplements, crystal, dinnerware, cookware, glassware, products containing brass (such as faucets), beverage dispensers, cappuccino makers and other heating vessels, medical devices, food items, children’s toys, cosmetics and a wide variety of personal care products (e.g., shampoo, sunscreen, lotions). Proposition 65 settlements often result in reformulation of products so that they contain fewer chemicals and other substances known to cause cancer or reproductive harm.

***Compliance***

Retailers and manufacturers whose products could foreseeably end up in California should ensure Proposition 65 compliance by learning upfront whether or not their products contain chemicals listed under Proposition 65 and, if so, should post Proposition 65 warnings. Doing so will insulate retailers and manufactures from liability.

