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February 2017 | **"PROTECT YOURSELF"**



## **WARNING! | Defending Against Proposition 65**

*"A bounty hunter is an individual who seeks out fugitives ("Hunting") for a monetary reward ("Bounty") for apprehending by law, if such laws exist."*

### **INTRODUCTION:**

**Welcome to California. Bring your checkbook.**

California's Proposition 65, and particularly its private party enforcement ("bounty hunter" provisions), have created a massive, expensive, baffling headache for companies doing business in California for the past 30 years. The law requires warnings of chemical exposures for chemicals which often pose no real risk. Proposition 65 has become an enormous money machine for the attorneys representing both sides. Cases almost never make it to court, and the lawyers in the "Proposition 65 bar," who deal with each other every day, routinely settle five-and-six-figure cases at the expense of businesses all over the country.

The law creates a system for arbitrary, expensive judgments – particularly for out-of-state companies. Here is the scenario for companies from out-of-state; One day, out of nowhere, they get a letter from a law firm they have never heard of. The letter informs the company that (a) A product they import, manufacture, provide parts for, or sell, causes cancer and/or birth defects; (b) They are going to be sued in 60 days; and (c) There's a number to call to discuss settlement. *They have just been cornered by a Proposition 65 bounty hunter!* After reviewing all options, consulting with attorneys, and learning a lot about a law they didn't even know existed, it looks as if there is no choice. If the company wants to keep doing business in this state, it's going to cost them!

### **HOW PROPOSITION 65 WORKS:**

California's Proposition 65, the "Safe Drinking Water and Toxic Enforcement Act of 1986," is a textbook example of unintended consequences. The legislation was originally designed to create a market mechanism for minimizing the presence of toxic chemicals in California, particularly the water supply. It requires the Attorney General to create and regularly update a list of chemicals "known to the State of California to cause cancer, reproductive or developmental harm." However, the law also encourages and rewards lawsuits by organizations and individuals (often known as "bounty hunters") against businesses, located anywhere, who sell products containing even trace amounts of these chemicals in California. The result has been the development of a legal cottage industry in California.

The statutory scheme of Proposition 65 provides for the following regulations:

- A state Agency maintains and updates two lists: one of chemicals “known” to the state to cause cancer, and one of chemicals known to cause developmental or reproductive harm. While some of the chemicals are generally accepted as being harmful to humans, many others have reached the list as a result of animal testing involving extraordinarily sensitive laboratory animals to massive, prolonged exposure to very high doses.
- Once a chemical is listed, it becomes unlawful for any company to “expose” a person in California to it without first giving “clear and reasonable warning” of the exposure. A violation is actionable even if the company knew nothing of the law and had no idea it was acting illegally. The court may award penalties of up to \$2,500 per day for each violation. In the absence of a warning, every exposure is a violation; potential penalties can easily reach hundreds of thousands or even millions of dollars for companies with significant sales volume.
- For example: For a dry cleaner, a “warning” means a posted sign or label stating some variation of the following: “Warning: This product contains chemicals known to the State of California to cause cancer, reproductive harm, developmental harm.” This is known as the “safe harbor warning,” and the exact language and application are subject to very precise regulations.
- Although the California Attorney General does undertake some enforcement, most Proposition 65 enforcement actions are *filed by bounty hunters*. Individuals or environmental organizations often file enforcement actions against dozens or even hundreds of companies – many of them from outside California – each year. *The bounty hunters need not have been personally exposed to the chemical, need not have suffered any damage, and need not have any connection whatsoever with the product, the chemical, or the company.*

#### **WHO BENEFITS \$\$\$:**

California law provides that a public interest plaintiff's lawyer can recover attorney's fees. **A Proposition 65 plaintiff's firm's legal bills are paid by the defendant! Bounty hunters receive 25% of the penalties recovered:** however, attorney's fees can rapidly mount to six-figure digits. Dozens of basically identical lawsuits are filed every year.

If you are a Proposition 65 defendant, you have basically three options. You can settle - You can fight, which almost nobody ever does - Or you can use the *Baxter* defense. The Baxter company was defended by a San Francisco law firm. In effect, the Baxter company, when sued under Proposition 65, sought a court order that makes Proposition 65 irrelevant. Their strategy should be evaluated by every company sued in a Proposition 65 case.

#### **DEFENSE AND SETTLEMENT**

There is a specialized Proposition 65 defense bar operating in California made up of a small group of attorneys, who have represented industry in enforcement actions since the proposition was enacted.

Defense models have been three consistent themes:

1. While Proposition 65 is a difficult statute for companies to deal with, *it is not without its defenses*. A company may be able to defend an alleged carcinogen by showing that *the exposure poses no significant risk of cancer* to humans at the levels in question.
2. In the case of an alleged developmental or reproductive toxicant, the company can defend by showing *no observable effect* assuming exposure at one thousand (1000) times the level in question.
3. *Statute of Limitations* defenses; defenses based on the number of employees the company had at the time of exposure.

Settlement is nearly always the case. Proposition 65 cases almost never make it to trial, because of the expense, the time and the headache. Proposition 65 plaintiffs settle these cases for a combination of (a) injunctions ordering warnings in the future; (b) penalty payments; (c) attorney fee payments. The possibility of being liable for attorney's fees gives defendants a powerful incentive to settle these cases quickly.

**Targeting Entire Industries:** Increasingly, Proposition 65 plaintiffs' firms will target entire industries. When this happens, a hired defense attorney firm will recruit a lot of other defendants, settle the case and collect fees from everyone involved. Process:

- Be retained by one of the larger companies in the industry;
- Assemble an ad hoc "industry group" consisting of as many of the defendant companies as possible, receiving a retainer from each;
- Negotiate a group settlement;
- Negotiate an "opt-in" provision.

### **Baxter Healthcare v. Denton: A Different Approach**

Baxter Healthcare Corporation is one of the world's largest manufacturers of intravenous bags and tubing as prescription medical devices; regulated by the Food and Drug Administration..., meaning that their labeling is subject to FDA approval. They were sued for the use of the chemical DEHP. Baxter and other manufacturers of similar devices began receiving Proposition 65 notices and lawsuits seeking injunctions, penalties and attorneys' fees for exposing patients to DEHP without "clear and reasonable warning."

Laboratory testing clearly proved that although DEHP causes liver cancer in laboratory mice and some rats, it is not carcinogenic to larger animals. Nonetheless, because it is carcinogenic to at least some animals, DEHP is on the Proposition 65 list of chemicals "known to the State of California to cause cancer."

Baxter put forth that, based on all available science, there was no human cancer risk. Baxter decided to defend itself rather than settling because they were unwilling to give warnings to patients which (a) were untrue; (b) were likely to disturb, mislead, and potentially harm them; and (c) would be inappropriate interferences with physician-patient communications. **Baxter sued the State of California**, seeking a declaration under Proposition 65 that it had no obligation to warn because DEHP poses no significant risk of cancer to humans; a technical defense permitted by the statute.

In a two-week trial against California's Attorney General's office, Baxter demonstrated the scientific consensus: DEHP simply was not, and could not be, a human carcinogen.

While the State argued only bounty hunters and the Attorney General had the right to pick and choose which products and which exposures would be the subject of Proposition 65 litigation, **the trial court disagreed**. It held the preponderance of the evidence showed that DEHP posed no significant risk of cancer to humans. Accordingly, Baxter had no obligation to warn patients, or anyone else, that they were being exposed to carcinogens.

The trial court's ruling was affirmed on appeal, in a published opinion.

The trial court's opinion is available for viewing at

[http://tiny.cc/Baxter\\_SuperiorCt2002](http://tiny.cc/Baxter_SuperiorCt2002)

The opinion of the Court of Appeal affirming it is available at

[http://tiny.cc/Baxter\\_AppellateCt2004](http://tiny.cc/Baxter_AppellateCt2004)

The Official citation to the case is Baxter Healthcare Corporation v. Denton (2004) 120 Cal.App.4<sup>th</sup> 333.

**For more Information and referrals to expert attorneys, contact:**

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