Chemicals to be listed under Prop. 65 without review

By Jim Arnone, Patricia Guerrero, DJ Moore and Elissa McClure

In a significant defeat for the business community, the 1st District Court of Appeal has reversed a decision that allowed the Office of Environmental Health Hazard Assessment (OEHHA) to add new chemicals to the Proposition 65 list of carcinogens and reproductive toxicants without first providing an opportunity for meaningful scientific or public review.

The court’s decision in Cal. Chamber of Commerce v. Brown, No. A125493 (1st Dist. June 6, 2011), upheld the trial court’s decision that OEHHA may automatically add to the Proposition 65 list those chemicals identified as “hazardous” under Labor Code Sections 6382(b)(1) and (d). Those sections reference substances identified as human or animal carcinogens by the International Agency for Research on Cancer (IARC) and substances within the “scope” of the federal Hazard Communication Standard.

This decision may expose these businesses to the risk of Proposition 65 liability for failing to warn consumers, workers, or the general public of their exposure to many substances that are not generally considered to be carcinogens or reproductive toxicants.

By rejecting the Chamber’s claims, the appellate court ultimately agreed with the Superior Court that the OEHHA can add new chemicals to the Proposition 65 list as carcinogens or reproductive toxicants. Because the appellate court determined that (the “Labor Code mechanism”) is mandatory, OEHHA is expected to use this mechanism to add a broader range of chemicals to the Proposition 65 list in the future.

Importantly, the court’s decision suggests that affected businesses may have very limited grounds to challenge a Proposition 65 listing decision made through the (“Labor Code mechanism”). Since the (“Labor Code mechanism”) requires automatic listing of chemicals identified through this mechanism to add a broader range of chemicals to the Proposition 65 list in the future.

This decision may expose these businesses to the risk of Proposition 65 liability for failing to warn consumers, workers, or the general public of their exposure to many substances that are not generally considered to be carcinogens or reproductive toxicants. This, in turn, could result in substantial civil penalties of up to $2,500 per day for each violation.

Because this ruling is likely to expand the Proposition 65 list of carcinogens and reproductive toxicants greatly, and therefore could increase greatly the number of businesses that can be caught unaware, it is a good time for all companies to review their practices for Proposition 65 compliance. This is especially important for companies located outside California, as those businesses are often the targets of Proposition 65 suits.

Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health and Safety Code Sections 25249.5-25249.13), prohibits businesses from exposing the public to chemicals “known to the state to cause cancer or reproductive toxicity” without prior warning.

The law also bars businesses from discharging such chemicals into drinking water. Proposition 65’s list of “chemicals known to the state to cause cancer or reproductive toxicity” must be “revised and republished in light of additional knowledge at least once per year.” OEHHA is charged with implementing and enforcing Proposition 65.

The Proposition 65 list includes “at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d)” (“the Labor Code mechanism”). (Health and Safety Code Section 25249.8(a).)

Proposition 65 provides three additional methods that may be used to add further chemicals to the list:

A chemical is known to the state to cause cancer or reproductive toxicity...if in the opinion of the state’s qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity (the “expert review mechanism”), or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity (the “authoritative bodies mechanism”), or if the state determined that a chemical..., or if in the opinion of the state’s qualified experts it has been shown to be hazardous (the “Labor Code mechanism”).

With limited exceptions, OEHHA has relied primarily on the expert review, authoritative bodies, and labeling mechanisms to update the Proposition 65 list since 1987. In 2007, OEHHA invoked (the “Labor Code mechanism”) in a proposal to add several commonly used chemicals to the Proposition 65 list as reproductive toxicants, including hexafluorosilicate (used in the production of polystyrene for textile coating) and nitrous oxide (commonly used as an anesthetic in surgery and dentistry). Several business groups objected to OEHHA’s proposal, and on Nov. 21, 2008, the Chamber filed suit seeking, among other things, a declaration that (the “Labor Code mechanism”) is invalid (for creating the initial Proposition 65 list in 1987, a declaration that OEHHA cannot use the (“Labor Code mechanism”) to add new chemicals to the Proposition 65 list, and an order directing OEHHA to remove chemicals added to the Proposition 65 list using the (“Labor Code mechanism”).

The Superior Court ruled for the Chamber and the Chamber appealed. The appellate court ultimately agreed with the state, holding that OEHHA, at a minimum, must use the (“Labor Code mechanism”) in annually reviewing and republishing the Proposition 65 list, and chemicals identified by the (“Labor Code mechanism”) must include chemicals in the initial Proposition 65 list as carcinogens or reproductive toxicants. Because the appellate court determined that (the “Labor Code mechanism”) is mandatory, OEHHA is expected to use this mechanism to add a broader range of chemicals to the Proposition 65 list in the future.

Importantly, the court’s decision suggests that affected businesses may have very limited grounds to challenge a Proposition 65 listing decision made through the (“Labor Code mechanism”). Since the (“Labor Code mechanism”) requires automatic listing of chemicals identified through this mechanism, there is little case law suggesting that the court will be able to challenge whether the scientific evidence supporting the identification of a chemical as a carcinogen or reproductive toxicant is sound, regardless of how weak that evidence may be.

Businesses affected by the Chamber of Commerce’s successful challenge may face significant exposure and liability under Proposition 65, making it more important than ever to be vigilant in tracking the Proposition 65 list and evaluating options to comply.

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