3 Developments You Need To Know About Calif.'s Prop 65

Law360, New York (April 24, 2015, 11:10 AM ET) -- Proposition 65 requires persons providing goods and services to California consumers to provide clear and reasonable warnings for knowing and intentional exposures to any of the more than 900 chemicals listed by the state as causing cancer or reproductive toxicity. All three branches of government rendered important determinations during the first quarter of 2015: a court of appeal affirmed a major defense victory on how Proposition 65 exposures to lead in foods can be assessed; the executive branch, through the lead Proposition 65 agency, the Office of Environmental Health Hazard Assessment, promulgated major new warning regulations; and the California Legislature is considering new curbs on frivolous Proposition 65 lawsuits. Companies doing business in California should heed the changing Proposition 65 landscape.

Judiciary

In Environmental Law Foundation v. Beechnut Nutrition Corp., et al., plaintiff alleged defendants failed to provide a Proposition 65 warning regarding exposure to lead in certain baby foods, fruit juices and packaged fruit. Lead is naturally occurring in the environment and fruits and vegetables under ordinary growing conditions can “uptake” lead from soils. Yet defendants did not prevail on a “naturally occurring” defense. Rather, defendants prevailed at trial by showing that the average consumer’s reasonably anticipated rate of exposure to lead in the products, when properly evaluated to account for nondaily consumption, did not exceed the “safe harbor” of 0.50 micrograms. The court of appeal affirmed in a published opinion. The ruling is seminal because citizen and public enforcers had argued for years that a Proposition 65 violation for exposure to lead in food must be based on the amount of lead in a product consumed on a single day. Defendants established that, when a product is not eaten daily, lead exposures should be averaged over the time intervals between eating occasions.

The dietary supplement industry stands to gain a great deal by this ruling. For the past several years, nearly 10 percent of all Proposition 65 notice letters issued have targeted dietary supplements. As foods, exposure to lead in dietary supplements must be averaged over the time between eating occasions, just as the exposure to baby foods, fruit juices and packaged fruit was averaged.

The court of appeal also rejected plaintiff’s argument against averaging multiple lead test results within a lot and across lots. Private prosecutors regularly support pre-litigation certificates of merit, required under the law, with a single test result from a single lot (allegedly) above the warning trigger level. However, the average of all available test results across lots and within lots may affirm that there is no Proposition 65 violation for the product at issue. This ruling eventually should result in a more accurate warnings, and fewer “precautionary” warnings accepted merely to end costly litigation. Defendants now have a judicially approved roadmap, which might work in other cases, for defending against some Proposition 65 claims.

Executive

The Office of Environmental Health Hazard Assessments is the lead agency for implementing Proposition 65. On Jan. 16, 2015, the OEHHA gave notice of a proposed rule-making to repeal and replace the regulations governing “clear and reasonable” warnings. The proposed rules would make significant changes including:

1. restricting the supplemental information that may be provided along with a Proposition 65 warning;
2. allocating between retailers and manufacturers the burdens of complying with Proposition 65;
3. requiring that “safe harbor” warnings for exposure(s) to one or more of 12 highlighted chemicals specifically name the chemical(s);
4. requiring safe harbor warnings be provided prior to purchase and not just prior to chemical exposure;

5. requiring safe harbor warnings to be preceded by a hazard triangle and printed in color and/or multiple languages under certain circumstances.

At a public hearing on March 23, 2015, the OEHHA heard from representatives of several industries about the economic burdens and possible increase in litigation these changes might create.

The OEHHA also proposed changes to the regulations governing environmental and occupational exposures and new regulations for specific exposures involving food and alcoholic beverages, prescription drugs, dental care, raw wood, furniture, diesel engines, passenger vehicles, enclosed parking facilities, amusement parks, petroleum products, service stations and designated smoking areas. Stilted as it is, the existing warning regime at least is well-understood. If the proposed regulations are adopted, the warning landscape will change and uncertainties may arise.

On Jan. 16, 2015, the OEHHA gave notice of a second proposed rule-making to create a website providing supplemental information "explaining" the various Proposition 65 warnings provided by businesses. The comment period for both rule-makings ended April 8, 2015. The California Chamber of Commerce submitted comprehensive comments on behalf of more than 170 companies representing nearly every major business sector. Several companies and other trade associations submitted comments directly. In total, 60 separate comment letters were submitted; the vast majority expressed concern and objected to the proposed rulemaking. If the OEHHA substantially changes the proposed rule-making as a result of the comments submitted, stakeholders will be given another opportunity to review and comment.

Legislature

Proposition 65 has been on the books for nearly 30 years but legislative amendments have been rare. Under California law, a two-thirds vote of the state legislature is required for amendments to Proposition 65. This is a difficult hurdle. The most recent effort, A.B. 543, was introduced earlier this year by Assembly Member Quirk. The bill seeks to address Gov. Jerry Brown's goal, articulated in May 2013, to curb frivolous Proposition 65 litigation.

Since adoption by California voters in 1986, approximately 20,000 pre-suit notice letters have issued under Proposition 65. Some of those notice letters have been issued to companies that undertook the time, effort and expense to conduct exposure assessments and determined no warning was required. However, because the burden of proof in Proposition 65 cases is imposed on the defendant, private plaintiffs have been able to leverage the time and expense of litigation to compel settlements, via unnecessary litigation, from these and other defendants. This dynamic creates a perverse incentive against the investment of resources into exposure assessments by companies subject to Proposition 65. A.B. 543 seeks to realign company and public incentives. As drafted, the bill would clarify that there is no knowing and intentional exposure under Proposition 65 if there is an exposure assessment that meets three specified criteria:

1. it is conducted by a qualified scientist in accordance with the OEHHA's regulations;
2. it evaluates the same chemical in or from the relevant source that is the subject of the alleged exposure and concludes the exposure evaluated does not requiring a warning; and
3. it is documented in writing and signed by the qualified scientist before the company receives a pre-suit notice letter.

On April 6, the bill was slightly amended to narrow the definition of qualified scientist and strike language that would have expressly applied to a company decision to forego a specific warning as to the "list of 12" chemicals highlighted by the OEHHA in its proposed rule-making. The bill was re-referred to committee,

and must be passed by the full state assembly by June 5 to be considered by the state senate this year.

If enacted, the bill would allow a company to stop frivolous litigation in its tracks, without having to pay a ransom, where the company has a proper exposure assessment, as defined in the law. Companies would be incentivized to invest in exposure assessments and reformulate where appropriate to ensure that there is no exposure requiring a warning. The public benefits are numerous. Yet passage of the bill remains uncertain. Also, even if adopted the first test cases under the law likely will involve litigation.

The future of A.B. 1252 similarly may be bleak. Introduced by Rep. Brian Jones, the bill would preclude private plaintiffs from filing a lawsuit against a small business, with 10 to 24 employees, that pays a set civil penalty and cures an alleged Proposition 65 violation within 14 days of receiving notice thereof. Under those circumstances, a lawsuit would provide no public benefit, because Proposition 65 compliance will have already been achieved. The public coffers will receive 75 percent of the civil penalty and the private plaintiff that alerted the small business to the violation will receive 25 percent of the civil penalty. It is a win-win situation, yet the bill failed to pass a committee vote on April 14, 2015, and it is now under reconsideration.

Conclusion

Three things in the world of Proposition 65 that are certain are: (1) California companies should reach out to their legislators to express support for A.B. 543 and A.B. 1252; (2) all companies doing business in California should continue to support their trade organizations, as further comment on the OEHHA's proposed rule-making is likely; and (3) defense counsel should embrace the Beechnut ruling and push back on purported Proposition 65 violations premised on a single test result.

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