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Strategies For Avoiding Calif.'s Prop 65 Trap

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You receive an email from a client asking “What’s this, and what do we do next?” and an attachment entitled “60 Day Notice of Violation.” Uh-oh, your client has just received a 60-Day Notice of Violation of California’s Proposition 65 — a consumer warning statute instituted 25 years ago and a bear trap to nearly every business in the state. There is no substitute for knowing the technical workings of the statute, but understanding how these cases resolve and how to avoid common mistakes can make the difference between getting a toe trapped, or an entire leg.

Depending on the type of product at issue, your client may be lucky to get out of harm’s way by opting into a settlement negotiated by other defendants. If the client is not eligible for an opt-in, you can still mitigate the exposure to costs by using the vast amount of public information regarding other settlements.

What Is an Opt-In Settlement?

Opt-in settlements have long been a hallmark of Prop 65 litigation. They are, just as they sound, an option for defendants to simply opt to settle a potential Prop 65 violation rather than to litigate with a private plaintiff and/or public enforcer (usually the state attorney general or a city attorney).

The opt-in settlements are typically the byproduct of lengthy negotiations between a defendant (often a representative member of a trade association) and the party that issued a 60 Day Notice for a particular chemical and product group. They must be approved by a trial court, and typically have a limited time for opting in.

The statute makes Prop 65 cases exceptionally burdensome to defendants — and nearly all result in

payment to plaintiffs. The opt-in is essentially a short cut that avoids much of the litigation, which often increases expense without any benefit to your client. It is, in many ways, the least repugnant choice on a menu full of bad results.

How Does an Opt-In Settlement Work?

Typically, Prop 65 cases are settled by the defendant entering into a consent judgment that contains injunctive provisions limiting the manner in which it manufactures or distributes the products in question, and monetary provisions. The monetary provisions are generally broken into two or three categories — civil penalty, cy pres and the plaintiff’s attorney’s fees and costs.

When cases are settled individually, each figure is negotiated and variable depending on the number of violations, the degree of the defendant’s knowledge and amount of litigation involved. Opt-in settlements usually have various settlement categories with monetary amounts predetermined based on a defendant’s position in the chain of commerce and/or number of products at issue.

Attorneys’ fees are also set. By way of example, in a current opt-in, *Held v. Aldo Group Inc.*, the settlement amounts range from \$46,000 to \$28,000 inclusive of penalties and fees.[1] The injunctive terms will apply to all defendants that opt-in, regardless of size.



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Is an Opt-In Right for My Client?

Opt-in settlements are generally very specific to both a chemical and a product. The Aldo settlement referenced above is limited to companies that sell or manufacture fashion accessories containing DEHP.

[2] Prior to Aldo, there was a large opt-in that focused on glass and ceramic products containing lead and lead paint.[3] Whether or not your client is eligible is entirely dependent on whether or not it sold products that are subject to an existing opt-in, and if it believes it cannot obtain a better result from litigating the alleged violation.

While each case will possess different facts, the primary determinant of whether or not an opt-in is appropriate will be the economic realities of Prop 65 litigation. As noted earlier, a successful plaintiff is permitted to recover their reasonable attorneys' fees and costs.[4]

A quick investigation into supporting declarations show that plaintiffs attorneys often report hourly rates that mirror large national firms — i.e., \$450 for associates of up to \$900 for partners. Thus, it does not take a significant amount of litigation, or even negotiating a settlement for a plaintiff's attorney to incur at least \$20,000 in time.

It is also important to remember that while your file was opened when your client sent the 60 Day Notice to you, the plaintiff's attorney began billing time to the file during its investigation into the alleged violation which includes testing the product, researching whether your client has sufficient employees to be subject to the statute[5], and drafting the 60 Day Notice.

Moreover, because of the requirements to support a 60 Day Notice, it is not uncommon for a plaintiff to have put in roughly \$10,000 to \$15,000 in fees and costs into a case before the defense even starts. If a complaint is drafted and discovery occurs, the plaintiff can quickly incur more than \$25,000, while you may have incurred more than \$10,000 — exposing

your client to nearly \$35,000 before a penalty figure is assessed. It is this reality that can make an opt-in a reasonable economic alternative.

My Client Was not Eligible to Opt-In, Now What?

If your client is left to litigate its case without the alternative of an opt-in, then it is important for you to make very savvy litigation decisions. As discussed above, the ability of the plaintiff to recover attorneys' fees makes litigation very costly for a defendant, since they are essentially paying two law firms to fight amongst themselves. However, this does not mean you cannot mitigate much of that exposure. (Practitioner's Note: be prepared for some very animated conversations when your client learns about the plaintiff's ability to recover its fees.)

1) Use the 60 Day Notice period to build your case.

Prop 65 requires a 60 Day Notice period before any private litigation can commence.[6] This gives you time to think like a plaintiff and work with your client to fully assess the potential scope of the violation: How many potential violations occurred? Do tests show the listed chemical in excess of statutory limits? What have other defendants with similar violations settled for with this plaintiff?[7]

Once you have collected all the information from your client and reviewed the prior settlements you can advise your client about what to expect and meaningfully engage the plaintiff.

For purposes of this article, we're going to assume the review of your client's products show that violations occurred. With this knowledge, your singular goal is minimize the financial burden to your client and to negotiate favorable injunctive terms.

2) Delay the commencement of litigation.

The first way to keep costs down is enter into a tolling agreement with the plaintiff to delay the filing of a complaint. As with all plaintiffs, the number one con-

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cern is maintaining the statute of limitations. Prop 65 presents an even bigger issue because the statute of limitations remains unsettled. Plaintiffs will generally claim it is three years, while defendants argue for a single year. With this in mind, many plaintiffs want to file their complaint on day 61 after issuing the notice so as to not lose any time.

Assuming you've done your diligence, you should be ready to reach out to the plaintiff by about day 50 to ask for a tolling agreement to allow for the parties to discuss settlement.

3) Educate the plaintiff.

Assuming the plaintiff agrees to the tolling agreement, you should be prepared to informally share the potential number of violations from your client. Whether or not you seek a confidentiality agreement is up to you, but much of the information will be subject to discovery so the more cost-effective method may be to have you client prepare a spreadsheet with sales volume that withholds vendor information and sales figures.

Often, this will help to open productive settlement discussions with reasonable plaintiffs attorneys, but because the statute allows "the economic effect of the penalty on the violator" to be used in determining the civil penalty some plaintiffs may wish to dig further.[8]

It is very important to keep in mind that the plaintiff's lawyers have a significant amount of leverage over the running of these cases because unless there is a defect with the 60 Day Notice or an obviously faulty test result, the burden shifts to the defendant, meaning that protracted litigation only benefits the plaintiff's attorney.

4) Propose injunctive terms your client can meet.

In order to comply with Prop 65, a business must either put clear and reasonable warnings on its products or manufacture them in a way that does not cre-

ate an exposure to a listed chemical. When a plaintiff brings a Prop 65 action, it will most often seek reformulation — manufacturing the product so that there is no exposure.

Whether or not your client reformulates is entirely discretionary, the statute does not require it; instead, it only mandates that a product provide a "clear and reasonable warning." [9] However, whether or not your client reformulates will most likely affect the civil penalty it will pay. [10]

You can determine whether or not reformulation is reasonable by reviewing other settlement agreements for similar products. If all of the other defendants have reformulation provisions, chances are the industry has already reformulated and replacement products are already available.

By way of example, in a recent settlement negotiated for a client, the plaintiff was seeking reformulation standards that exceeded both Prop 65 and federal limits. We reached out to the client's manufacturer who advised of its limitations, which were above the plaintiff's demands but in compliance of both state and federal law, and negotiated reformulation at the statutory levels.

Whatever scenario your client presents, it is important to know up front what is practical and what is not. You are trying to minimize expense and insure that they are not subject to any further violations.

5) Attorneys' Fees

Assuming you have been able to negotiate through the first two issues without significant litigation, this should be a less painful experience for your client. While the right to attorneys' fees is not clearly enumerated within Prop 65, they are referenced and permitted under the Code of Civil Procedure section 1021.5. Because the amount of attorneys' fees paid to the plaintiff will be included in the settlement, it is reviewed by the trial court that must approve the entire settlement. [11]

It is at this point your client may want to be particularly tough in negotiations, but it is important to know that the plaintiff still has leverage. This is because if the parties cannot agree on an amount for attorneys' fees, the plaintiff can petition the court under a motion for an award of fees, which will include the costs of bringing the motion.

However, if you have done your diligence during the 60 Day Notice period, you have prepared your client for what to expect from the plaintiff's demand. Additionally, if you have taken the lead in most of the litigation, you will have diffused most of the post notice work done by the plaintiff.

Once all the terms are reached, the plaintiff will file a motion to approve, and assuming it is granted, your case will be fully resolved and reported to the attorney general's website.

Conclusion

While Prop 65 may be one of the most ubiquitous aspects of daily life in California (look around and you'll start to see warnings everywhere), and its litigation is the playground of a very limited group of attorneys, understanding how the statute works and making savvy decisions can be the difference in fully resolving a case in six months for a comparatively low amount or spending years running uphill, only to wind up where you would have been had you known which traps to avoid.

Often, opting-in and not fighting is the most cost effective alternative for the client. If that option does not exist, by using the 60 Day Notice period to think like a plaintiff and work up the case, you are allowing your client to pay only one attorney rather than two.

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1. *Held v. Aldo Group, Inc.*, SF Superior Court CGC-10-497729
 2. Fashion Accessories are defined by the settlement.
 3. *Brimer v. The Boelter Compaines*, SF Superior Court CGC-05-440811.
 4. *Cal. Civ. Code §1021.5; Cal. Health & Safety Code §25249.7*
 5. *Cal. Health & Safety Code §25249.11(b)*.
 6. *Cal. Health & Safety Code §25249.7(d)*.
 7. Each 60 Day Notice and settlement is catalogued and made available for public review at www.ag.ca.gov/prop65.
 8. *Cal. Health & Safety Code §25249.7(b)(2)(C)*.
 9. *Cal. Health & Safety Code §25249.6*.
 10. *Cal. Health & Safety Code §25249.7(b)(2)(D)*.
 11. *Leeman v. Burger King* (Sacramento Superior Court 06AS02168) *Attorney General's Objection To Attorney's Fees*; reprinted at http://ag.ca.gov/prop65/pdfs/leeman_v_burgerking.pdf