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Prop 65 Continues To Cause Headaches For Calif. Companies

Law360, New York (February 21, 2014, 5:46 PM ET) -- Manufacturers, distributors and retailers of personal care products witnessed a significant uptick in 60-day notices filed under Proposition 65 during 2013.

California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Cal. Health & Safety Code §25249.5 et seq.) —commonly referred to as Proposition 65 — has long required businesses in California to warn consumers and employees about the presence of chemicals known to cause cancer or reproductive harm.

When privately enforced, citizen plaintiffs must provide businesses 60-days notice of the warnings violation before filing suit. These notices are also sent to California's attorney general, along with a certificate of merit and any data or other information supporting the certificate.

Manufacturers, distributors and retailers of cosmetics and personal care products have seen varying levels of activity from Proposition 65 plaintiff citizen groups in the past. In 2011 and 2012, citizen plaintiffs focused on products containing di(2-ethylhexyl) phthalate ("DEHP"). While the listing of DEHP affected manufacturers and retailers across a number of products and industries, cosmetics and toiletry bags were heavily targeted.

However, the cosmetic and personal care products with greater exposure concerns — skin care, hair care and makeup application products — appeared in about 100 60-day notices filed with the attorney general between 2005 and 2012, with most of those notices stemming from alleged exposure to 1,4 dioxane, formaldehyde and diaminotoluene — common ingredients in some shampoos, soaps, body washes and hair coloring products. Each was listed as a chemical known to the state to cause cancer some time ago — 1988 for 1,4 dioxane and formaldehyde and 1990 for diaminotoluene.

Compare these numbers with those from 2013 when the added listings of chemicals commonly found in cosmetic and personal care products — titanium dioxide ("TIO2") in 2011, and diethanolamine ("DEA"), cocamide diethanolamine ("C-DEA") and benzophenone in 2012 — resulted in at least 40 60-day notices filed with the attorney general within a six-month period from June to December.

Of these notices in 2013, approximately 17 have proceeded to citizen lawsuits, four of which reported to the attorney general that settlements were pending. The good news is that, so far, the complaints filed pursuant to the 60-day notices involving DEA and C-DEA have not included "piggy back" causes of action under California's robust consumer protection statutes.

The increase in the 60-day notices filed against the personal care products industry came in the same

year that the growing cry for Proposition 65 reform prompted Gov. Jerry Brown to take action by proposing amendments. Proposition 65 was initially passed as a ballot measure, and any amendments require a two-thirds majority vote in the state legislature.

For this reason, legislative reform to Proposition 65 has been difficult to achieve. For example, the requirement that a citizen plaintiff submit a certificate of merit to the attorney general along with the 60-day notice of violation — one of the most noteworthy Proposition 65 reforms — occurred nearly a decade ago.

Though the certificate of merit amendment did not require that the data and reports filed with the certificate be made available to alleged violators when notified, this reform is significant nevertheless because the attorney general's office has shown a willingness to weigh in on the data's adequacy. It did this for certain claims involving lead in lipstick and more recently in 2012 for claims involving cosmetic cases and bags containing DEHP.

With the stated goal of curbing perceived abuses by private Proposition 65 enforcers, who may file claims just to secure a quick settlement with hefty attorney's fees, the governor's proposals included:

- imposing caps on attorney's fees;
- requiring greater support for, and disclosure of, information that forms the basis for the plaintiffs' alleged warnings violation;
- for reproductive toxicants, providing the state with the ability to adjust the level at which Proposition 65 warnings are needed for no observable effect levels ("NOELs") based on human data; and
- limiting the amount of settlement money allocated for purposes other than civil penalties — for example, by requiring a showing that any payments in lieu of penalties ("PILP") have a connection to the specific basis for the case beyond funding the litigation.

While the attorney general has provided guidance to courts in approving Proposition 65 settlements and in assessing the reasonableness of attorney's fees (Cal. Code Regs., tit. 11, §3200 et seq.), this has not necessarily led to a reduction in the fees actually collected. According to the 2010, 2011 and 2012 attorney general summaries of Proposition 65 settlements, attorney's fees comprised the vast majority of settlement payments.

In 2011, attorneys collected more than 73 percent of the total $16.2 million in settlements, and in 2012, more than 71 percent out of $20.4 million was allocated to attorney's fees. Also in 2012, only $3 million (less than 15 percent) went toward civil penalties and $2.8 million (13.72 percent) went toward PILP. We will have to wait until the attorney general posts its 2013 settlement summary to assess the extent to which this trend continues.

Despite these numbers and other concerns with so-called Proposition 65 "bounty hunters," the governor's reforms did not garner widespread support in the state legislature, and, instead, businesses were left at the end of the year with A.B. 227 — signed into law on Oct. 5, 2013 — which grants businesses 14 days after receiving notice from citizen plaintiffs to post a warning, eliminate the exposure or agree to pay a civil penalty.

If businesses take any of these actions within 14 days, citizen plaintiffs are prohibited from filing suit. Although this legislation provides a more cost-effective solution for businesses facing a Proposition 65

challenge, A.B. 227 was narrowed to apply primarily to establishments that sell alcoholic beverages on the premises or prepare and sell food and beverages for immediate consumption. It also provides relief to businesses that may expose nonemployees to tobacco smoke, where smoking is permitted, or to engine exhaust, such as in parking garages. Until there is broader support for real reform, relief from the Proposition 65 private enforcers may need to come from the courts and regulators.

Despite the lack of broad legislative reform, 2013 did provide some helpful limitations. In August, the Alameda County Superior Court decided Environmental Law Foundation v. Beech-Nut Corp., which clarified the means by which businesses can measure exposure to a product for purposes of determining if such exposure falls within the established safe harbor levels.

Before Beech-Nut, the court in DiPorro v. Bondo Corp. in 2007 upheld a finding that a defendant, in proving that exposure to a chemical falls below the NOEL, can apply an “average consumer” standard in circumstances where there is high variability in usage among product consumers.

In Beech-Nut, the consumer good at issue was food, and the court held that companies can average human exposure to alleged chemicals over time in assessing the levels that will trigger a Proposition 65 warning. The court specifically pointed to intermittent rather than daily consumption of a particular food. Beech-Nut may offer much-needed clarification for manufacturers.

Further, litigating Proposition 65 cases on unspecified technical issues such as exposure levels is undoubtedly expensive and time-consuming, which is why some companies succumb to settlement as the most cost-effective response to a Proposition 65 suit.

The outcome of the pending DEA and C-DEA lawsuits may provide additional insight into companies’ willingness to defend these actions. While no safe harbor levels have been established to date for DEA or C-DEA, at least one defendant in the 2013 lawsuits has asserted a defense that exposure to the chemical poses no significant risk.

2014: The Year Ahead

What will 2014 bring for manufacturers, distributors and retailers of cosmetics and personal care products?

For starters, the California Office of Environmental Health Hazard Assessment ("OEHHA") continues to signal its intent to adopt regulations on the Proposition 65 warnings front. During the Nov. 21 Developmental and Reproductive Toxicant Identification Committee and Dec. 5, 2013, Carcinogenic Identification Committee meetings, OEHHA attorneys described their ongoing project to revise the warnings regulations.

OEHHA has proposed modifying the warnings requirements for Proposition 65 to include more detailed information, such as a statement that an individual will be exposed to a listed chemical and the health effect (e.g., cancer, male reproductive toxicity, female reproductive toxicity, developmental toxicity, etc.) for which the chemical(s) involved was listed.

For example, a warning could read: “Warning: Using this product will expose you to lead, a chemical known to cause cancer, birth defects and other harm to a developing baby. Wash hands after touching this product. For more information go to “www.oehha.ca.gov/warnings.” The agency conducted a preregulatory workshop in July to seek public input. Any proposed changes to Proposition 65 warning

regulations will be accompanied by additional opportunities for public comment.

In addition, in a September Federal Register notice, the National Toxicology Program ("NTP") published a list of 20 chemicals that were nominated for inclusion in the Report on Carcinogens ("RoC"), including popular ingredients in cosmetics, such as aloe vera, Ginkgo bilboa extract, Kava kava extract and polyacrylates.

NTP will now consider these substances for formal evaluation and possible inclusion in the RoC as either known or reasonably anticipated to be human carcinogens. Additional opportunity for public comment will be available if the agency decides to formally evaluate any of these substances. Their listing could significantly affect manufacturers and retailers of cosmetic and personal care products because the NTP is a recognized authoritative body for purposes of formally identifying chemicals known to cause cancer under Proposition 65. Title 22, Cal. Code of Reg., §12306(m)(3).

Manufacturers, distributors and retailers of personal care products can and should monitor these potential developments during the next 12 months and be prepared to weigh in as additional opportunities for public comment become available.

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