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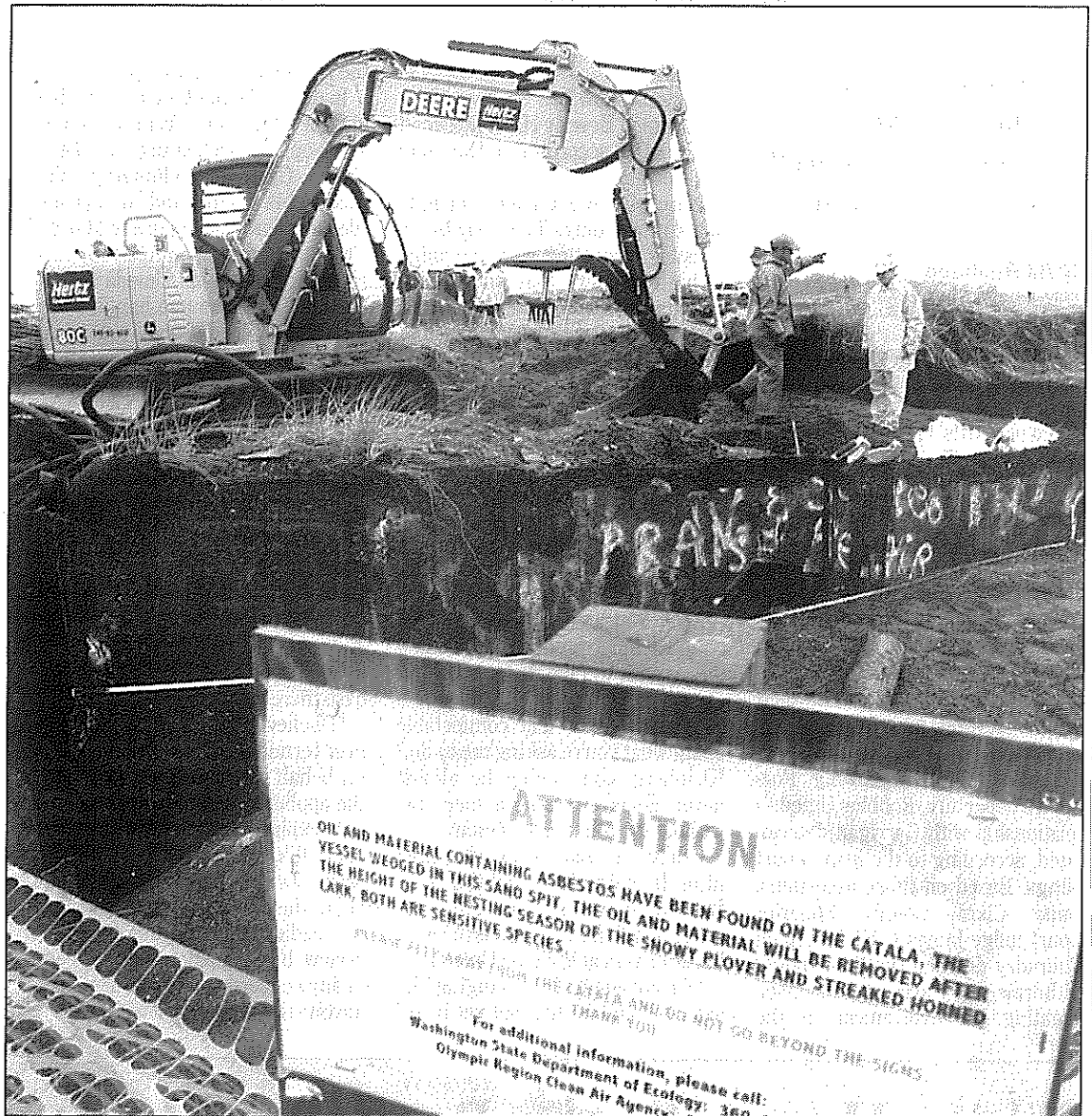
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Prop. 65: 25 Years and Still Going Strong

By James Scadden
and Rosemary Carson

In 1986, California voters approved Proposition 65 to address concerns about exposure to toxic chemicals. Twenty-five years later, enforcement of the statute has not lost its punch. Indeed, Prop. 65 is irresistible to the "green movement" which has ushered in a new source of energy for Prop. 65 vigilantes. In February, at least four separate actions were filed for failure to comply with Prop. 65. Surging activity is also targeting an ever widening range of industries, as these recent actions involve manufacturers, distributors, and retailers of belts for clothing that contain lead, "messenger bags" that contain lead, and protective book covers that contain the chemical DEHP.

The scope of potential liability continues to broaden as the Office of Environmental Health Hazard Assessment (OEHHA) regularly adds to the list of Prop. 65 chemicals. In February, OEHHA listed acrylamide (used in pesticides and defoliants) and tribufos (found in french fries and potato chips and other foods when produced by heating over 248 F). Keeping the pressure on, in March, OEHHA issued "Notice of Intent to List" such diverse compounds as "ethanol in alcoholic beverages," "leather dust," and "salted fish, Chinese-style" joining other pending compounds including clomiphene (a fertility drug), haloperidol (an anti-psychotic drug), and TDCPP (a flame retardant).



A sign warns of the presence of hazardous substances.

Associated Press

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While benefits to the environment can be worthwhile, Prop. 65 has its share of snares and often debated virtues. As emphasized in *Consumer Def. Group v. Rental Hous. Indus. Members*, Prop. 65's provisions "make the instigation of Prop. 65 litigation easy — and almost absurdly easy." (137 Cal. App. 4th at 1215). Some plaintiffs have succumbed to monetary motivation by setting up shell charitable organizations to receive settlement "donations." Others have issued press releases describing heroic efforts to protect Californians from bad chemicals and request donations for future litigation. Unfortunately, economic incentives sometimes overshadow legitimate environmental concerns or injuries.

Defending these actions is a strain on corporate resources, as attested to by defendants in the ongoing Prop. 65 fish oil case that began one year ago when Mateel Environmental Justice Foundation lawyers filed suit against manufacturers and retailers of fish oil, shark oil, fish liver oil and shark liver oil supplements. While some believe that impact of a Prop. 65 violation on sales of a product or service might be negligible, it is unchallenged that substantial financial impact will result. According to state attorney general's office, Prop. 65 settlements in 2008 totaled \$24.5 million. Violators can also be enjoined, penalized up to \$2,500 per violation per day, and an unfair-competition law violation may piggyback on a Prop. 65 claim, which also provides for \$2,500 per violation if a public prosecutor brings the action. A plaintiff can also recoup attorney fees under Code of Civil Procedure Section 1021.5 if the suit is successful.

To avoid scrutiny, it is imperative that any corporation doing business in California be thoroughly aware of, diligently monitor, and internally verify strict compliance with Prop. 65. Here's what companies need to know and how to protect themselves. Prop. 65, known as the Safe Drinking Water and Toxic Enforcement Act of 1986, requires the state, through the OEHHA, to publish and update a list of chemicals known to cause cancer, birth defects, or other reproductive harm. Here is a procedure to challenge listing of a substance. The list currently contains approximately 100 chemicals. Prop. 65 applies to companies

with 10 or more employees that operate or sell products in California, and it requires a company to issue a "clear and reasonable" warning before knowingly and intentionally exposing anyone to a listed chemical. The warning can be issued in a variety of ways, such as labeling a listed chemical, posting signs at a worksite, or publishing notices in a newspaper. Once listed, a business has 12 months to comply with the warning requirements. A company is also prohibited from knowingly discharging a listed chemical into a drinking water source. It has 20 months to comply with this prohibition once a chemical is added to the list.

A warning must be given for a listed chemical unless the business demonstrates that exposure to it poses "no significant risk level" of cancer or "no observable effect level" of birth defects or reproductive harm. The first is defined as the level of exposure to the listed chemical every day for 70 years that would result in no more than a 1/100,000 chance of developing cancer for an exposed person. The second is defined as the level of exposure determined to not cause harm to humans or laboratory animals divided by 1,000. If a business exceeds 1/1000 of this limit, it must post a Prop. 65 warning notice.

OEHHA has developed a list with specific dosage levels — safe harbor levels — for each chemical to assist a business in determining whether a warning is necessary or discharge of a chemical into a drinking water source is prohibited. A business has safe harbor from Prop. 65 requirements if exposure to a chemical occurs at or below its OEHHA level. A business may, however, choose to provide a warning simply based on its knowledge about a listed chemical's presence without evaluating the exposure level.

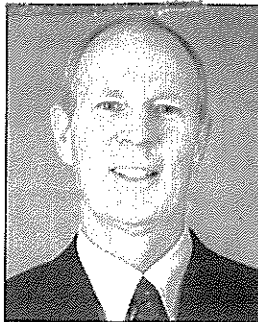
Once a substance has been listed, the state attorney general is charged with enforcement, but district or city attorneys may also act. In practice, it is mostly private attorneys filing cases on behalf of a citizen or organization who prosecute these suits on the general public's behalf. To do so, the citizen or organization initially files a proper 60-day notice with

the alleged violator, the attorney general, and the district attorney, city attorney, or prosecutor in whose jurisdiction the alleged violation occurred.

If the notice alleges a failure to warn, the citizen or organization must also include a certificate of merit (including supporting factual information) indicating the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise; the expert has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action; and the expert

believes there is a reasonable and meritorious case for private action. A citizen or organization can proceed with a lawsuit if the government chooses not to bring suit 60 days after notice to the company. A public or private Prop. 65 prosecutor is entitled to 25 percent of all civil and criminal penalties awarded against the defendant.

Companies should verify that the notice meets Prop. 65 requirements, as cases have been dismissed due to inadequacy of notice. A good faith effort should also be made to comply with Prop. 65 standards during the investigatory period because, in assessing a penalty, the judge will review a notice recipient's action after notice is received.



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Several defenses exist. A company can show that discharge was accidental or negligent, thus negating a knowing and intentional allegation. Demonstrating good faith efforts to comply by testing the air or consulting an environmental expert further undermine a knowing and intentional violation. A company could also prove scientifically that the claimant's exposure to the listed chemical did not meet the level of risk of cancer, birth defects or reproductive harm. Caution is warranted because an appellate court did recently reverse a summary judgment for a dental office when it did not show by scientific evidence that a small amount of mercury in dental amalgam was 1,000 below no observable effect level.

When preparing defenses, focus on these court identified factors: the nature, number and severity of the violations, the economic effect of the penalty on the violator, whether and when the violator took good faith measures to comply with Prop. 65, the willfulness of the violator's misconduct, the deterrent effect that penalty imposition would have on both the violator and the regulated community as a whole, and any other factor that justice may require.

The "green movement" is now a front-page part of every company's brand reputation with a prominent place in every politician's platform. In order to prevent the green light from turning red, all companies must be on heightened alert to take the necessary precautions and responses to make sure Prop. 65 does not become a larger risk management and liability issue than it already is.