

California's Proposition 65 and PFAS: Defenses up?

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FEBRUARY 14, 2023

Overview

California's Proposition 65 applies to companies both in and outside of California. If your company manufactures, distributes, or sells a product that will ultimately be sold in California or online to California customers, Proposition 65 likely applies and should be a concern. In particular, a new wave of Proposition 65 liability focused on the chemicals known as PFAS has started.

Proposition 65 background

Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, was a ballot initiative intended to protect California drinking water from certain chemicals, and to inform California citizens about exposure to such chemicals.¹

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The exposures include environmental exposures, workplace exposures, and exposures from consumer products. Consumer product issues will be the focus of this article because litigation under Proposition 65 is strongly focused on consumer products.

Proposition 65 prohibits any company with 10 or more employees from knowingly and intentionally exposing the public to any listed chemical without first giving a clear and reasonable warning. Proposition 65 is designed as a "right to know" law more than a pure product safety law; in theory, Proposition 65 provides consumers with the information necessary to make informed decisions before purchasing a product.

The statute is enforced by both public prosecutors (typically the California Attorney General's office) and private party enforcers (commonly known as "bounty hunters") who seek injunctive relief, penalties and attorneys' fees against companies that are out of compliance.

Violations of Proposition 65 can lead to penalties of up to \$2500 per violation per day and can carry the possibility of paying a plaintiff attorneys' fees. Proposition 65 provides private parties the right to enforce this law on behalf of the People of the State (if the State chooses not to), which has spawned a cottage

industry of enforcement plaintiff attorneys capitalizing upon this plaintiff-friendly law.

When pursuing such actions for consumer product violations, the private enforcer can include product purchases by all consumers in California for one (1) year prior to the action. Effectively, this gives the right to the private enforcer to claim potentially enormous numbers of violations, leading to claims for enormous violations and fees. Businesses supplying consumer products must proactively avail themselves of all legal tools to ensure compliance and limit liability in the event of a claim.

Proposition 65 private enforcement actions tend to come in waves based on a chemical or group of chemicals that the Plaintiffs' bar believes presents new fertile hunting grounds. A first wave started with lead, and a second wave arose from a group of chemicals known as phthalates. A new wave is now starting with a large group of chemicals known as PFAS.

PFAS, what is it?

PFAS (per- and polyfluoroalkyl substances) are a class of thousands of chemicals, and they are found in many different consumer, commercial, and industrial products. PFAS have many beneficial properties, which has led to its use in many different industries and for varied products. PFAS can impart oil, water, stain and soil repellent barriers, chemical and temperature resistance, and surfactant properties to products, some of which are considered essential to health, safety, or modern life.

The durability that makes PFAS so valuable in so many consumer products, however, may create certain health risks. The chemicals are resistant to naturally breaking down, so they can accumulate in water, on soil, and in the body.

Some PFAS chemicals are no longer manufactured in the United States as a result of regulatory phase-outs, which includes PFOA and PFOS. Although PFOA and PFOS are no longer manufactured in the United States, they are still produced internationally and can be imported into the United States in many different types of consumer goods.

Products of concern

The following is a list of common consumer products containing PFAS:

- Water resistant clothing and footwear
- Upholstery and carpeting

- Cosmetics and dental products
- Electronics
- Paints and other coatings
- Firefighting foam, and equipment and protective clothing
- Medical products
- Paper and cardboard, including food packaging

PFAS are also often used in manufacturing processes, conduit linings, a variety of high-tech products, 3D printing processes, and in communications equipment.

PFAS litigation and regulation

The legal landscape for litigation and regulation related to PFAS has seen a seismic shift in the last few years. This shift has been fueled by toxicological and environmental studies that have generated information the Plaintiffs' bar argues supports such lawsuits and regulations, although these issues are strongly disputed in the science arena.

Over 6500 PFAS-related lawsuits have been filed in federal courts. Over 2500 of these cases are overseen in a Multidistrict Litigation proceeding by the United States District Court for the District of South Carolina, Judge Richard Gergel. We anticipate decisions to be made by Judge Gergel regarding safe thresholds for PFAS exposure to have far-reaching implications across the country for PFAS litigation.

PFAS chemicals added to the list

Following the national trend for expansion of PFAS regulations, California has expanded the Proposition 65 regulatory reach to include PFAS.

Under Proposition 65, the State maintains two lists of chemicals: one for carcinogens and another for reproductive toxicants. The List now exceeds over 900 such chemicals and the State updates the List annually with new additions.²

Chemicals on the List are commonly referred to as Listed Chemicals. With recent additions of certain PFAS to the List, PFAS appear set to take center stage on the Proposition 65 landscape, both from a litigation and regulatory perspective.

In 2017, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) were identified by the State as reproductive toxins and added to the List. Later, both PFOA and PFOS's listings were broadened to qualify as carcinogens as well. On December 31, 2021, the State added perfluorononanoic acid (PFNA) and its salts to the List.

Following a one-year grace period, enforcement for PFNA began on January 1, 2023. The State is also considering several other PFAS: PFHxS and PFDA. As research concerning the impacts of many PFAS is intensively proceeding, we would expect the State may identify further PFAS to add to the List in the near future.

Shields to Proposition 65 liability

Regulatory thresholds for amounts of listed chemicals

Safe harbor levels, which include No Significant Risk Levels (NSRLs) for carcinogens chemicals and Maximum Allowable Dose Levels

(MADLs) for reproductive toxins, have been established for many of the Listed Chemicals under Proposition 65. Exposure levels that are below the safe harbor levels are exempt from the requirements of Proposition 65. Unfortunately, California has not established these thresholds for any PFAS.

Nevertheless, in the context of litigation, defendants can employ expert witnesses to conduct testing and risk analyses in order to seek a court ruling establishing NSRLs and MADLs. If the defendant can then show that any exposures were below these thresholds, the defendant is exempt from liability. Such efforts, however, are often prohibitively expensive unless the litigation presents the possibility of significant liability exposure.

Compliant warnings

Companies selling or supplying products into California containing Listed Chemicals are permitted to do so under Proposition 65, as long as the products contain a Proposition 65-compliant warning. When properly warning, a company can avoid Proposition 65 liability, despite however much Listed Chemical is in the product.

Recent Proposition 65 notices

Gordon Rees Scully Mansukhani regularly monitors the Proposition 65 Notices of Violation to keep on top of any trends, so that we may promptly inform our clients who may be impacted.³

Significantly, we have noticed an important trend over the last several months: a dramatic increase in the number of Notices targeting products with PFAS. Recent Notices have targeted outerwear clothing and rain jackets, baby bibs, bath pillows, duffel bags, umbrellas, shower liners, crib mattress pads, tablecloths, paper straws, and numerous cosmetics.

Top tips for companies to help protect against Proposition 65 liability

The recommended protocol for complying with Proposition 65 will vary depending upon where a company falls in the overall supply chain. In general, under Proposition 65, the most onerous duties are intended to lie with the highest entity in the chain, the manufacturer. Nevertheless, retailers also have responsibilities that must be addressed.

To minimize the potential for Proposition 65 liability, companies should consider the following:

- (1) **Establish a compliance policy.** A written compliance plan is essential to maximizing protection against Proposition 65 liability. The plan should establish the responsible employment title(s) for the employee charged with these duties and identify those steps the company will take to comply. In the event of enforcement, this effort can also minimize penalties by showing the diligence and good faith effort to comply.
- (2) **Identification of suspect products.** Although companies are well advised to be cognizant of any potentially present Listed Chemicals in products, for PFAS purposes, those product categories described above are a good starting point for the assessment of products potentially containing PFAS. In addition, maintaining awareness of the addition of new

PFAS as Listed Chemicals in California is important to ensure compliance.

- (3) **Communication with supply chain partners.** Communication is vital for all entities in the supply chain. Companies should require their suppliers to provide certifications or testing results that show, ideally, that Listed Chemicals are not present in the materials. Additionally, requiring its suppliers to provide a warranty that all materials supplied are in compliance with all legal requirements is helpful.
- (4) **Indemnity/hold harmless agreements.** When possible, a company should obtain indemnity/hold harmless agreements from suppliers requiring the suppliers to defend and indemnify the company in the event the products or materials supplied are represented as compliant with Proposition 65, and then a Proposition 65 enforcement Notice is, nevertheless, served on the company.
- (5) **Product testing:** Depending upon the circumstances, product testing can be considered, including all PFAS Listed Chemicals. Attorney involvement should also be considered if testing, as attorney-client privileges may be important. Also, companies obtaining product from upstream suppliers should request any testing results conducted by the suppliers.
- (6) **Proper warnings:** Proposition 65 provides a “safe harbor” for those products containing a compliant warning. The law allows for both long-form and short-form warnings. The long-form warnings require the identification of at least one Listed Chemical, whereas the short-form warnings generically identify carcinogens and/or reproductive toxicants.
- (7) **Caveat regarding long-form warnings.** When considering warnings, in the quest to avoid Proposition 65 liability, some companies will provide a Proposition 65 warning regardless of any specific information actually requiring the warning. We recommend extreme caution in attempting to achieve Proposition 65 compliance by providing long-form warnings identifying PFAS without information confirming the presence of PFAS. The regulatory landscape for PFAS is evolving rapidly, and some states, including California, have banned the use of PFAS in certain products. Thus, a long-form Proposition 65 warning concerning PFAS (without any specific supporting data) raises the potential for triggering liability under other laws.

- (8) **Manufacturer warning issue.** If manufacturers are supplying products to their distributors or retailers without the Proposition 65 warning on the product or its packaging, the manufacturers must provide these customers with the proper Proposition 65 materials (shelf signs, tags, etc.) to enable the customers to make the product compliant with Proposition 65 warning requirements. This is tricky, however, because the customer must confirm receipt of the notice and display the warning signs or other materials provided by the manufacturer. This process of notice and confirmation must be repeated every year in order to satisfy Proposition 65 regulations. When practical, simply applying the Proposition 65 warning to the product or the packaging is preferable.
- (9) **Retailer warning issue.** Retailers will frequently tender the defense of Proposition 65 Notices to its upstream suppliers. The 2018 Proposition 65 regulatory amendments help provide retailers with support in efforts to emphasize these legal responsibilities for upstream suppliers. Nevertheless, when the upstream suppliers are international companies, retailers’ efforts to tender the liability defense to these companies can often fail. Thus, retailers should remain cognizant of the risks of purchasing products that may contain PFAS (such as those categories identified above) from outside the country.
- (10) **Conduct proper scientific assessment to support defenses in litigation.** When necessary in significant litigation, it is vital that companies retain experienced counsel to develop the complicated scientific assessment necessary to show, when possible, that any exposures to PFAS from the subject product are below the NSRL or MADL. When properly proved up, this affirmative defense in Proposition 65 can defeat the lawsuit.

Gordon & Rees regularly counsels clients seeking to comply with Proposition 65 and defends clients in Proposition 65 lawsuits.

Notes

¹ California Department of Toxic Substances Control, About Proposition 65, <https://bit.ly/3lsdSGJ>.

² California Department of Toxic Substances Control, Chemicals Considered or Listed Under Proposition 65, <https://bit.ly/3llgejH>.

³ State of California Department of Justice, Attorney General, 60-Day Notice Search, <http://bit.ly/3YNNuWg>.

About the author



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This article was first published on Westlaw Today on February 14, 2023.