

PLAINTIFF OUTLINE PROP 65 CLEARINGHOUSE FRESHMAN ORIENTATION

Burden of proof is the distinguishing hallmark of Proposition 65 it governs everything

I. Investigation

A. Read journals

1. Most likely chemical candidate
2. Routes and media of exposure

B. Get Samples for Analysis

1. Check for warnings
2. Buy samples (use investigator)
3. Design experiment
4. Conduct experiment
5. Take samples and send to lab.
 - a. Use investigator
 - b. Use lab certified for medium to be tested
 - 1.) Food?
 - 2.) Water?
 - 3.) Air?

C. Investigate company size

1. <\$5m/year? Discard
2. Review service issues
 - a. Hague Convention?
 - b. Nobody home agent for service
3. Possibility of Industry-Wide Settlement?

D. Review AG database for similar or identical cases

E. Decide whether to initiate enforcement action

II. 60 Day Notice Letter

- A. 27 CCR 25903 spells out what must be in the Notice and what need not be in it
- B. Simpler case is better than complicated one
 - 1. Think about what settlement might require
 - a. Release can only cover what was in letter
 - 1.) Name every relevant chemical
 - 2.) Name every possible route of exposure, i.e., ingestion, dermal contact, inhalation
 - b.) No need to name retailers if you have manufacturer/importer/distributor. Naming retailers can provide leverage against manufacturer, though.
 - 2. Get familiar with warning regulations, which have a strong bearing on who must be noticed and who may not be worth noticing – 25 CCR 25600.2 – Responsibility for Providing Warnings. This will help determine who must be noticed, who might be noticed, and who you probably don't want to notice
- C. Certificate of Merit. Read AG Regs at 11 CCR 3000 et seq.
 - 1. Have consulted an expert. Lab counts as an expert
 - 2. Have evidence to support each element of plaintiff's affirmative case.

Exposure, lack of warning, duty of defendant to warn, number of employees – recite in statement to AG included along with one of the copies to AG, the evidence you have on each of these elements and how you got it. More said the better.
 - 3. If not enough, AG might write a "case-has-no-merit letter."
- D. Send OEHHA summary and Offer to Settle. If food/acrylamide and/or coffee shop, include the 25903 Appendix B
- E. Send notice and upload it to AG database (if you want). No benefit to plaintiff in doing this.
 - 1. Send it by first class mail to each DA in state if a state-wide product. If a particular shop or restaurant or business or an environmental exposure,

then just to the DA for county where the violation happens. If you want coverage in San Francisco, Los Angeles, San Diego or Santa Clara County, also send a copy of Notice to City Attorneys for SF, LA, SD and SJ.

III. Complaint. All the usual Civil Procedure Code provisions apply in terms of content format, service.

- A. Attach a copy of Notice Letter and incorporate by reference. Recite that you included a signed certificate of merit, that you sent the summary, etc. Make sure that all the OEHHA documents you send are the up-to-date ones.
- B. Allege your affirmative case. No need to get elaborate about it. Make the bare bones allegations you need.
- C. Upload to AG database.

IV. Litigation

- A. Defendants Answer invariably contains up to forty affirmative defenses, each one of which is conclusory pleaded. Standard for affirmative defenses is the same as for Complaint – have to make factual allegations that cover the elements of the affirmative defense. Consider demurring to the Answer if it has conclusory pleaded affirmative defenses.
- B. Conduct discovery early. Don't put it off in the hope of avoiding work on a case you think is going to settle. You get paid for your work, but only work you do. 1021.5.
- C. In obtaining evidence to support exposure and to rebut the 25249.10 affirmative defenses of NSRL or MADL, think like a scientist. Obtain good scientifically defensible data
- D. Rebutting 25249.10 affirmative defenses. This is the meat of Prop 65 litigation. The defense bar has a sophisticated stable of toxicologists who know Prop 65 and who are persuasive witnesses. Rebutting these defenses is not as easy as it might look. Find a persuasive, aggressive expert witness of your own. Consider conducting direct testimony via declaration with cross examination in person.
- E. Consider bifurcating the case between liability and penalty phases. It simplifies discovery.
- F. Sometimes it makes sense to deal with a particular issue first. This can be done on MSJ, but consider getting consent to simply try just that issue first. Disposing

of this issue will either dispose of the case or make it much easier to settle on favorable terms.

V. Settlement

- A. Talk settlement early
- B. Be open and provide what evidence of level of exposure. Reputation is important in settling cases. Don't want reputation as a bullshitter. If nothing to hide, don't hide it.
- C. Release can only cover past violations. Injunctive relief can spell out warning and method of transmission and then recite in CJ that compliance with these procedures will be deemed compliance with Prop. 65. Consider reformulation standard – no need to warn if reformulation standard met. Must actually require changing the product, can't settle for what the product is already doing – AG will, rightly, object and you won't be entitled to any fees.
- D. Consider industry-wide settlement. Feel free to call AG on these issues and get their advice about industry-wide settlements. They care more about these.
- E. Upload to AG database.

VI. Get consent judgment approved. 25249.7 has the findings the court has to make in order to approve the settlement. Warnings adequate, civil penalty appropriate, attorneys fees reasonable.

- A. Must be by noticed motion with 45 days notice to AG.
- B. Generally , but not necessarily, CCP section 1021.5 factors govern reasonability of attorneys fees.