

California Court Bars Successive Prop. 65 Lawsuits

LITIGATION

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Prop. 65 Clearinghouse News

Until recently, no published appellate decision had squarely answered a key question in the minds of companies that have settled Proposition 65 cases with private plaintiffs: Can another private plaintiff sue for the same alleged violation? In November 2008, the California Court of Appeal issued a decision, which is now final, in [Consumer Advocacy Group v. ExxonMobil Corp.](#), providing important guidance on this issue.¹ Under the court's reasoning, the answer is no, unless equity dictates a different result.

Since its enactment in 1986, over 20,000 claims have been brought under Proposition 65 by private enforcers. It is triggered by the discharge or release of any of over 800 chemicals and by exposures to consumers involving levels of these chemicals above very low thresholds.

Proposition 65 may be enforced by the California Attorney General, public enforcers such as district attorneys, and private plaintiffs suing "in the public interest." A plaintiff may seek injunctive relief, civil penalties of up to \$2,500 per violation per day, and reasonable attorneys' fees and costs. A plaintiff is not required to show that anyone has suffered harm, only that a required warning was not provided.

Consumer Advocacy Group (CAG) sued several oil companies alleging they had violated Proposition 65 by allowing benzene, toluene, and lead to be released into drinking water sources at certain sites. These alleged acts also were the subject of a prior Proposition 65 action concerning releases of benzene and toluene at the same sites. The earlier case was brought by a different private plaintiff?Communities for a Better Environment (CBE). The earlier action had been settled and a court had approved the settlement as a consent judgment.

ExxonMobil moved for summary judgment or summary adjudication in the Consumer Advocacy Group action, asserting that CAG's claims were barred by the doctrine of *res judicata* because they had been settled previously. The trial court granted summary judgment in favor of ExxonMobil, and CAG appealed.

The doctrine of *res judicata* holds that cases already decided should not be relitigated. To establish a defense under *res judicata*, three elements must be satisfied:

1. The issues decided in the prior adjudication are identical with those presented in the later action;
2. The party against whom the doctrine is raised was a party or was in privity with a party to the prior adjudication; and

3. There was a final judgment on the merits in the prior action. Even if these threshold requirements are established, however, *res judicata* will not apply as a defense if fairness dictates a different result.

Court of Appeal's *res judicata* Analysis

The appellate court found that the two Proposition 65 lawsuits against ExxonMobil were not identical. Although the claims covered the same sites where the releases allegedly occurred, the prior CBE settlement explicitly covered only claims regarding releases of benzene and toluene, and not claims regarding lead, which were additionally alleged by CAG. Accordingly, the court reversed the trial court's ruling on summary judgment. Despite its ruling, the court evaluated the remaining prongs of the *res judicata* test.

The court found that CAG was "in privity" with CBE, the plaintiff in the earlier settled action, under the *res judicata* test. The court noted that privity exists where the relationship between the original and subsequent plaintiffs is sufficiently close. The court found that CBE was an adequate representative of CAG's interests because CBE had filed its Proposition 65 lawsuit in a representative capacity "in the public interest." Furthermore, Proposition 65 only allows a private plaintiff to sue in the public interest. Therefore, the two plaintiffs shared an identity of interest.

Finally, the court found that CBE's and ExxonMobil's settlement, which was approved and entered by the court as a consent judgment, was a final adjudication on the merits. Under Proposition 65, most settlements of complaints brought by private plaintiffs are court-approved. Such settlements of Proposition 65 actions will, therefore, meet this prong of the *res judicata* test.

The Second Appellate District's decision in Consumer Advocacy Group is consistent with other California caselaw on *res judicata*.² This published appellate decision, however, represents the first such case deciding the *res judicata* defense in Proposition 65 cases.

Significance of the Consumer Advocacy Group Decision

Under Proposition 65, a defendant who settles with a private plaintiff in a consent judgment will generally have a *res judicata* defense if a future private plaintiff tries to bring a lawsuit on the same settled claims. However, if a future claim is brought regarding different listed chemicals, different sites where releases have allegedly occurred, different consumer products, or a different type of exposure (consumer product, occupational, or environmental), for example, it may be more difficult for a *res judicata* defense to prevail. Furthermore, this decision does not address whether *res judicata* would apply to bar a future Proposition 65 claim brought by a public?as opposed to private?enforcer.

Footnotes

1. Consumer Advocacy Group v. ExxonMobil Corp., 168 Cal. App. 4Th 675 (2008).

2. 2 See, e.g., *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1065 (1998); *Am. Int'l Indus. v. Super. Ct.*, 72 Cal. App. 4th 1376, 1388-89 (1999) (ordered depublished).