

Date of Hearing: April 30, 2013

ASSEMBLY COMMITTEE ON JUDICIARY  
Bob Wieckowski, Chair  
AB 227 (Gatto) – As Amended: April 9, 2013

As Proposed to be Amended

SUBJECT: PROPOSITION 65: ENFORCEMENT

KEY ISSUE: SHOULD CERTAIN VIOLATIONS OF PROPOSITION 65 BE SUBJECT TO AN ALTERNATIVE ENFORCEMENT MECHANISM TO AVOID UNNECESSARY LITIGATION?

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

**SYNOPSIS**

*This measure is motivated by the author's laudable goal to prevent unnecessary litigation regarding alleged violations of the Safe Drinking Water and Toxic Enforcement Act (Prop. 65) where there is documented evidence of abusive claims while preserving the vital public protection goals and rights of the act. In consultation with stakeholders and experts, the bill as proposed to be amended precludes litigation as well as the payment of money in settlement for specified alleged violations relating to exposure to alcohol and food-related chemicals, tobacco smoke, and vehicle exhaust if the alleged violator has taken appropriate remedial measures and has not committed other prior offenses. The measure further provides that prescribed notices must advise the alleged violators of the law in a clear and reasonable fashion, and sets forth a mechanism for resolution of disputes regarding the application of these provisions and potential sanctions against the plaintiff. Supporters argue that the bill addresses the alleged problem in a manner that is reasonable and workable and consistent with the purposes and design of Prop. 65. While there are some outstanding technical concerns that the author will continue to discuss with stakeholders, apart from those issues there is no known opposition to the bill as proposed to be amended.*

SUMMARY: Revises the Safe Drinking Water and Toxic Enforcement Act. Specifically, this bill:

- 1) Prohibits any person who serves a notice of alleged violation as specified from filing an action for exposure against the alleged violator, or recovering from the alleged violator in a settlement any payment in lieu of penalties or any reimbursement for costs and attorney's fees, under the following conditions:
  - (1) The notice was served on or after the effective date of this statute and alleges that the alleged violator failed to provide clear and reasonable warning as required under Health and Safety Code section 25249.6 regarding:
    - (A) an exposure to alcoholic beverages, or to a chemical known to cause cancer or reproductive toxicity to the extent the chemical is formed on the alleged violator's

premises by necessary preparation of food or beverages which are sold on the alleged violator's premises for immediate consumption;

- (B) an exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises; or
- (C) an exposure to chemicals known to cause cancer or reproductive toxicity in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking noncommercial vehicles.

(2) Within 14 days after service of the notice, the alleged violator has:

- (A) corrected the alleged violation;
- (B) paid a civil penalty for the alleged violation of section 25496.6 in the amount of \$500, to be adjusted annually to reflect any increases in the cost of living in California, as indicated by the annual average of the California Consumer Price Index, per facility or premises where the alleged violation occurred, of which seventy-five percent shall be deposited in the Safe Drinking Water and Toxic Enforcement Fund, and twenty-five percent shall be paid to the person that served the notice as provided in section 25249.12; and
- (C) served on the person that served the notice a written statement, signed under penalty of perjury, that fully describes the actions taken to correct the alleged violation and attaches a true and correct copy of any warning provided as part of such actions.

(3) The alleged violator has not been served with a notice under paragraph (1) of subdivision (d) for an exposure identified in paragraph (1)(A),(B), or (C) of this subdivision within the previous five years for failure to provide clear and reasonable warning about the same exposure in the same facility or on the same premises.

- 2) Further provides that any notice subject to the subdivision above shall prominently include a clear and reasonable description of the terms of the subdivision, and provides that the lead agency may prescribe specific language for inclusion in the notice that meets this requirement.
- 3) Specifies that in the event of a dispute over whether an action is barred by this statute the alleged violator shall bear the burden of proving the applicability of subdivision (k) and its compliance with all requirements of paragraph (2) of subdivision (k). Upon the conclusion of an action brought pursuant to subdivision (d), if the trial court determines that the alleged violator has prevailed on the affirmative defense under subdivision (k), the court may, upon motion of that alleged violator or upon the court's own motion, review the basis for the belief of the plaintiff that the action was not precluded by subdivision (k). If the court finds that there was no credible factual basis for the plaintiff's belief that the action was not precluded by subdivision (k), then the action shall be deemed a violation of Section 128.7(b) of the Code of Civil Procedure. The court shall not find a factual basis credible if it is based on a legal theory of liability that is frivolous within the meaning of Section 128.5 of the Code of Civil Procedure.

- 4) Provides that nothing in subdivision (k) shall prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action pursuant to subdivision (c) against an alleged violator. In any such action, the amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation pursuant to paragraph (2)(B) of subdivision (k).
- 5) Finds and declares that subsection 25249.7 (k) is necessary to further the purposes of Section 25249.6, in terms of speed of compliance and reasonableness as contemplated by the Section.
- 6) Finds and declares that subsection (k)(2) shall be independent and severable from the rest of this enactment.
- 7) Further finds and declares that subsections (k)-(m) are necessary to further the purposes of the intent of fairness contemplated by the Safe Drinking Water and Toxic Enforcement Act of 1986 as evinced by the fairness factors outlined in Section 25249.10.
- 8) Specifies that this act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to avoid unnecessary litigation and to facilitate compliance with the Safe Drinking Water and Toxic Enforcement Act of 1986.

EXISTING LAW:

- 1) Under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from knowingly discharging or releasing such a chemical into water or any source of drinking water, except as specified. (Health and Safety Code section 25249.5 *et seq.*)
- 2) The act imposes civil penalties upon persons who violate those prohibitions, and provides for the enforcement of those prohibitions by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest. The act requires any person bringing an action in the public interest, or any private person filing an action in which a violation of the act is alleged, to notify the Attorney General, the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and the alleged violator that such an action has been filed. (Health and Safety Code section 25249.5 *et seq.*)

COMMENTS: The author explains the reason for the bill as follows:

Prop. 65, the Safe Drinking Water and Toxic Enforcement Act, was enacted by ballot initiative in 1986. It was intended to protect Californians and their drinking water from chemicals known to cause cancer, birth defects or other reproductive harm, and to inform citizens about exposure to such chemicals.

Since its enactment, Prop. 65 has been an effective tool to keep toxic chemicals out of the state's water supplies and has raised awareness about possible exposure to carcinogens.

Unfortunately, there have been some who have taken advantage of provisions in the proposition to ensnare businesses in lawsuits, with the hope of obtaining settlement payments that were never contemplated by the voters when they passed Prop. 65.

These lawsuits are instigated by parties who target businesses that, for various reasons, have neglected to display the proper Prop. 65 warning sign. Prop. 65 was motivated by voters' laudable wish to inform and protect Californians from the potential exposure to dangerous chemicals, not as a money-making venture. Businesses such as restaurants or coffee shops or bars – places that must provide Prop. 65 warnings for serving baked goods, beer, wine, or coffee, because these everyday things happen to contain substances deemed to pose some health risks – should be helped to comply with the intent of the law.

Many of these lawsuits never get to a courtroom. They are settled out of court, sometimes for tens of thousands of dollars, because business owners do not have the means to hire attorneys, and fear becoming entangled in protracted legal proceedings that could result in significant damages and attorney's fees.

AB 227 intends to reduce or eliminate frivolous legal actions brought under Prop. 65 where plaintiffs are seeking damages for alleged violations that involve a retail business either neglecting to have a sign posted, or posting in a manner that isn't visible enough to the public. There has been a recent wave of violation notices sent to businesses like bars, restaurants and coffee shops, (places that must post signs because of alcohol or byproducts of coffee roasting) because of improperly posted signs or signs that were not up due to an honest oversight. These are cases where the business owners are not exposing customers to unknown, dangerous chemicals. Rather, they are serving things like the aforementioned coffee or alcohol and are more than happy to post the proper signage.

Unfortunately, under the current regime, the cost to put up a sign can be in the thousands or tens of thousands of dollars due to the cost of settling these suits brought by private attorneys. The punishment appears to be disproportionate to the business' oversight. This measure seeks to bring the severity of the punishment more in line with the severity, or lack thereof, of the violation.

AB 227 will return Prop. 65 to what the voters intended it do: punish violators who pollute our state's waterways or expose workers to dangerous carcinogens and to inform consumers of the risks in products they may purchase.

This Bill Would Establish Important New Limits On the Right To Sue Or To Collect Money In Settlement For Specified Alleged Violations of Prop. 65 That Have Been The Subject Of Alleged Abuses. As proposed to be amended, the bill precludes litigation as well as the payment of money in settlement for specified alleged violations relating to exposure to alcohol and food-related chemicals, tobacco smoke, and vehicle exhaust if the alleged violator has taken appropriate remedial measures and has not committed other prior offenses. The measure further provides that prescribed notices must advise the alleged violators of the law in a clear and

reasonable fashion, and sets forth a mechanism for resolution of disputes regarding the application of these provisions and potential sanctions against the plaintiff.

More specifically, the bill prohibits any person who serves a notice of alleged violation as specified from filing an action for exposure against the alleged violator, or recovering from the alleged violator in a settlement any payment in lieu of penalties or any reimbursement for costs and attorney's fees, under the conditions set forth above.

The bill further provides that any notice subject to the subdivision above shall prominently include a clear and reasonable description of the terms of the subdivision, and provides that the lead agency may prescribe specific language for inclusion in the notice that meets this requirement.

In addition the bill specifies that in the event of a dispute over whether an action is barred by this statute the alleged violator shall bear the burden of proving the applicability of subdivision (k) and its compliance with all requirements of paragraph (2) of subdivision (k). Upon the conclusion of an action brought pursuant to subdivision (d), if the trial court determines that the alleged violator has prevailed on the affirmative defense under subdivision (k), the court may, upon motion of that alleged violator or upon the court's own motion, review the basis for the belief of the plaintiff that the action was not precluded by subdivision (k). If the court finds that there was no credible factual basis for the plaintiff's belief that the action was not precluded by subdivision (k), then the action shall be deemed a violation of Section 128.7(b) of the Code of Civil Procedure. The court shall not find a factual basis credible if it is based on a legal theory of liability that is frivolous within the meaning of Section 128.5 of the Code of Civil Procedure.

The bill also provides that nothing in subdivision (k) shall prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action pursuant to subdivision (c) against an alleged violator. In any such action, the amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation pursuant to paragraph (2)(B) of subdivision (k).

Lingering Concerns Regarding Intent Language. While the substantive provisions of the bill appear to have been resolved with the proposed amendments, there are less critical but still outstanding anxieties among some groups regarding the proposed findings and declarations the author would add to the bill regarding its relationship to the purposes of Prop. 65. Specifically, the bill would find and declare:

- 1) That subsection 25249.7 (k) is necessary to further the purposes of Section 25249.6, in terms of speed of compliance and reasonableness as contemplated by the Section.
- 2) That subsection (k)(2) shall be independent and severable from the rest of this enactment;  
and
- 3) That subsections (k)-(m) are necessary to further the purposes of the intent of fairness contemplated by the Safe Drinking Water and Toxic Enforcement Act of 1986 as evinced by the fairness factors outlined in Section 25249.10.

The outstanding concerns are to the effect that these proposed findings are inoperative, unneeded, overbroad and potentially confusing. The Committee is advised that the author and stakeholders remain optimistic and committed to resolving these remaining concerns.

ARGUMENTS IN SUPPORT: In support of the bill, the Consumer Attorneys of California state:

By narrowly focusing on the issue at hand, the bill, as proposed to be amended, avoids unintended consequences on other Proposition 65 enforcement actions that are serving the important goals of the ballot initiative. This will also maximize the chances that the bill satisfies Proposition 65's requirement that any amendments must "further its purposes." Proposition 65, Section 1 (reproduced at Health & Safety Code § 25249.5, Historical and Statutory Notes).

There is a workable solution to the problem presented.

The proposed amendments narrowly focus on the types of pre-suit notices that have raised concerns: (1) pre-suit notices sent to restaurants, cafes and other small businesses for failing to post warnings about the health hazards of consuming alcohol; (2) pre-suit notices sent to apartment buildings and other establishments where smoking is allowed for failing to post warnings about the health hazards of secondhand smoke; and (3) pre-suit notices sent to parking facilities for failing to post warnings about the health hazards of gasoline engine exhaust.

By narrowly focusing on the issue at hand, the bill avoids any unintended consequences on other Proposition 65 enforcement actions that are serving the important goals of the ballot initiative. This will also maximize the chances that the bill satisfies Proposition 65's requirement that any amendments must "further its purposes." Proposition 65, Section 1 (reproduced at Health & Safety Code § 25249.5, Historical and Statutory Notes).

The bill tracks existing law by providing an opportunity for an alleged violator to recovery monetary sanctions if the court determines that there was no credible factual basis for the plaintiff's belief that the violation had not been cured. This is the same mechanism that currently exists in Proposition 65 when a court determines that there was no credible factual basis for the plaintiff's allegation that there was an exposure to a listed chemical. See Health & Safety Code § 25249.7(h)(2).

Author's Proposed Refining and Narrowing Amendments. In consultation with interested stakeholders including the Attorney General's office, the author proposes the helpful amendments set forth in the summary above to more precisely focus on the concerns that motivate the legislation, revising proposed subdivision (k), adding three additional subdivisions, two new findings sections, and an urgency clause.

REGISTERED SUPPORT / OPPOSITION:

Support

Air Conditioning Trade Association  
American Coatings Association  
Apartment Association, California Southern Cities

BIOCOM

California Apartment Association  
California Assisted Living Association  
California Association of Health Facilities  
California Automotive Business Coalition  
California Business Properties Association  
California Chamber of Commerce  
California Citizens Against Lawsuit Abuse  
California Construction & Industrial Materials Association  
California Craft Brewers Association  
California Dental Association  
California Framing Contractors Association  
California Grocers Association  
California Hotel and Lodging Association  
California Independent Grocers Association  
California Independent Oil Marketers Association  
California Independent Petroleum Association  
California Metals Coalition  
California Restaurant Association  
California Retailers Association  
California Service Station & Auto Repair Association  
Civil Justice Association of California  
Clovis Chamber of Commerce  
Consumer Specialty Products Association  
Culver City Chamber of Commerce  
Duarte Chamber of Commerce  
East Bay Rental Housing Association  
National Association of Theatre Owners of CA/NV  
National Federation of Independent Business  
NOR CAL Rental Property Association  
Palm Desert Chamber of Commerce  
Plumbing-Heating-Cooling Contractors Association of California  
Rancho Cordova Chamber of Commerce  
San Fernando Valley Chamber of Commerce  
Simi Valley Chamber of Commerce  
United Chambers of San Fernando Valley  
Valley Industry & Commerce Association  
Visalia Chamber of Commerce  
Western Electrical Contractors Association

Opposition (as proposed to be amended)

None on file

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334