Assembly Bill (AB) 693 – Proposition 65 Lawsuits
***Sponsor:* Asian Food Trade Association**

SUMMARY

AB 693 proposes changes to the Safe Drinking Water and Toxic Enforcement Act of 1986 (more commonly known as "Prop. 65") in an effort to curb abuse by some private enforcers. The changes would allow an entity to correct the alleged violation, and would requires a judge to approve compliance with the law and whether penalties and attorney's fees are reasonable in situations involving a settlement for an alleged violation. Private enforcers are also required to provide an alleged violator with the basis for the Certificate of Merit, upon filing a 60-day notice.

BACKGROUND

In 1986, voters approved Prop. 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, which requires California businesses to provide a clear and reasonable warning before knowingly and intentionally exposing individuals to chemicals known to cause cancer and/or reproductive toxicity. Failure to comply with the act exposes a business to civil penalties of up to $2,500 per day. The intent of the law is to allow consumers to make informed choices when they purchase products or enter certain establishments. Business with fewer than 10 employees are exempt from the act.

The Office of Environmental Health Hazard Assessment keeps a list of all substances known to cause cancer or reproductive toxicity. The list includes more than 900 chemicals. Though the law only requires businesses to post warnings, some businesses have voluntarily renovated their facilities or updated their manufacturing processes to eliminate, or otherwise reduce, the use of listed chemicals. For example, the plastic face of a "Curious George" doll once contained high lead contents. Because of Prop. 65, the face is now made entirely of cloth with no detectable lead.

Currently, private enforcers can bring a lawsuit in the "public interest". However, before a private enforcer can sue under Prop. 65, it must give the alleged violator more than a 60-day notice of their intent to bring an action. The 60-day notice must also include a certificate of merit, which states that the person executing it has consulted with experts in reviewing exposure data and concludes there is cause for a lawsuit.

Simultaneously, the private enforcer provides a copy of the 60-day notice and certificate of merit to the Attorney General (AG) and public prosecutor where the alleged violation occurred. In addition to the 60-day notice and certificate of merit, the AG and prosecutor also receive the factual basis for the lawsuit, such as exposure data showing a violation occurred. This information allows the AG and prosecutor to decide if they want to pursue an action on behalf of the public.

Under current law, the factual basis for the certificate of merit is not provided with the 60-day notice to the alleged violator. While the alleged violator can use the civil discovery process to obtain the factual basis, it can require the alleged violator to spend tens of thousands of dollars in legal fees just to obtain the basis for the lawsuit. This process lends itself to unscrupulous attorneys leveraging small businesses for settlements. In most cases, the small business is not likely to spend tens of thousands of dollars in legal fees just to get the factual basis for the lawsuit; so, it settles out of court just to end the matter quickly and not risk losing in court. But settling out of court means these cases are not reviewed and approved by a judge to ensure the settlement is complying with the law, or that attorney's fees and penalties are reasonable.

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According to the numbers, these lawsuits represent a growing problem for small businesses. In 2007, there were 332 60-day notices filed with the AG's office. In 2019, there were 2,405 60-day notices filed with the AG. Since 2017, there is an average of more than 2,491 60-day notices filed on an annual basis. Meanwhile, settlements bring in millions of dollars. The average settlement is over $31,000. In 2020, settlements annually totaled $19,970,208.

AB 693 addresses these issues by giving certain businesses a time period to come into compliance with the law before a lawsuit can be filed, by requiring a judge to approve settlements, and by requiring the private enforcer to provide the factual basis for the certificate of merit to the alleged violator at the time they file a 60-day notice.

SOLUTION

Specifically, this bill would prohibit an enforcement action from being filed in the public interest, for an exposure in a food product by a supplier or distributor of the food product, if the supplier or distributor, among other things, labels the food product with the required warning and submits an affidavit to the Attorney General stating that the food product was labeled within 14 days after service of notice.

Additionally, it would require the factual information sufficient to establish the basis of the certificate of merit, which is served on the Attorney General, to also be attached to the certificate of merit that is served on each alleged violator.

Finally, it would also require a person acting in the public interest to submit all settlements that are generated by an alleged violation of the act to the court, and would additionally require the court, in order to approve the settlement, to find that neither the plaintiff nor the attorney representing the plaintiff has received any compensation from the alleged violator unless that compensation is disclosed in the settlement or in a prior court-approved settlement and is authorized by applicable law.

SUPPORT

- Asian Food Trade Association (Sponsor)
- Oriental Food Association

BILL STATUS

Amended on March 18, 2021.

FOR MORE INFORMATION

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