

New Settlement Terms for California's Prop 65 Become Effective Oct. 1



Article By

[Food and Drug Law at Keller and Heckman
Keller and Heckman LLP
The Daily Intake](#)

- [Environmental, Energy & Resources](#)
- [California](#)

Friday, September 30, 2016

Amendments to California's Proposition 65 settlement terms, penalty amounts, and attorney's fees in civil actions filed by private persons become effective October 1, 2016.

- By way of background, Proposition 65—also known as the Safe Drinking Water and Toxic Enforcement Act of 1986—prohibits knowingly exposing any individual to a listed chemical without first providing a “clear and reasonable warning” to such individual. Private citizens may initiate Proposition 65 enforcement actions and, when they do so, they are entitled to 25% of any penalties assessed by the courts and attorney's fees. An additional form of payment, called “payments in lieu of civil penalties” (PILPs), also is permitted under the Attorney General's Proposition 65 enforcement regulations. PILPs are funds paid to plaintiffs or plaintiffs groups to fund environmental activities, public education programs, and/or funds to the plaintiff for additional enforcement of Proposition 65 or other laws. Under the current payment scheme, the vast majority of payments under the statute go toward attorneys' fees and PILPs. These payments are not shared with OEHHA.
- The California Attorney General's Office proposed the amendment to Prop 65 in September 2015 in an effort to:
 1. Ensure that the Office of Environmental Health Hazard Assessment (OEHHA) receives the civil penalty funds specified in Proposition 65;

2. Limit the ability of private plaintiffs to divert the statutorily mandated penalty to themselves or to third parties, in the form of Additional Settlement Payments (ASP);
 3. Increase the transparency of settlements in private party Proposition 65 cases, to ensure that any monies allocated to ASP are spent on matters with a sufficient nexus to the litigation and to the State of California; and
 4. Reduce the financial incentives for private plaintiffs to bring and settle Proposition 65 cases that do not confer substantial public benefit, without discouraging cases and settlements that do confer such benefit. (See: [Final Statement of Reasons](#).)
- The new regulations ([Title 11, Division 4, California Code of Regulations](#)) limit the circumstances under which civil penalties can be diverted to plaintiffs and their attorneys by eliminating PILPs and establishing payments called Additional Settlement Payments (ASPs). ASPs are defined as payments that are not civil penalties, attorneys' fees, or costs. The ASPs are meant to "offset" civil penalties and require plaintiffs to demonstrate to a judge that the offset is in the public interest. Furthermore, the amount of ASPs in a settlement should not exceed the State's 75% share of any noncontingent civil penalty, and the recipient is required to describe with specificity the uses to which funds will be put.
 - Currently, defendants faced with a Proposition 65 suit may decide to settle and reformulate, even when a listed chemical is likely present in a product at a level below which a warning would be required. The new regulations specify that reformulation of a product to reduce or eliminate the exposure to a listed chemical, in lieu of the provisions of a warning, must confer a significant benefit on the public. More specifically, "Where a settlement sets forth a standard or formula for reformulation, supporting evidence should show that at least some of the products in controversy in the action either are, or at some time relevant to the litigation were, above the agreed-upon reformulation standard or formula, or else the mere agreement to a reformulation standard or formula may not establish the existence of a significant public benefit."
 - In comments to the proposed regulation, the California Chamber of Commerce suggested adding the underlined phrase in section 3201(b)(2): "When a settlement sets forth a standard or formula for when a given product requires a warning, supporting evidence should show that at least some of the products in controversy in the action contained concentration levels of a listed chemical or chemicals that either are, or at some time relevant to the litigation were, above the agreed-upon standard or formula itself may not establish the existence of a significant public benefit." The AG rejected that proposal, stating that the reformulation standard for settlements over food products or dietary supplements may be expressed as a daily exposure based on the expected daily intake, rather than a concentration.
 - Many of the comments received on the initial proposal supported the proposed amendment, but suggested that they did not go far enough to curb abuses. While the amendment is intended to provide OEHHA with more money, it could

result in higher settlement costs for defendants, especially since attorney fees are not limited.

© 2020 Keller and Heckman LLP

Source URL: <https://www.natlawreview.com/article/new-settlement-terms-california-s-prop-65-become-effective-oct-1>