THE CHANLER GROUP

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Via Overnight Delivery

Trish Gerken
Senior Legal Analyst
Office of the Attorney General
2550 Mariposa Mall, Rm. 5090
Fresno, CA 93721

Re: Attorney General's Proposed Amendments to Proposition 65 Regulations

Dear Ms. Gerken:

This comment is respectfully submitted on behalf of The Chanler Group and citizen enforcers represented by our law firm as to the proposed amendments to the Attorney General's Proposition 65 Regulations involving section 3201(b)(2).

During the past five years, nearly two thousand manufacturers have agreed to reduce harmful levels of chemicals from products sold in California, hundreds of which did so because of actions brought by The Chanler Group's clients. The unique statutory and regulatory scheme that makes this good work possible—the great experiment that is Proposition 65—remains in force only by the grace of the electorate. For that reason, The Chanler Group applauds the Attorney General's continuing efforts to ensure that Proposition 65 retains its legitimacy in the public eye.

The Chanler Group is concerned, however, that some of the proposed amendments—those involving section 3201(b)(2), which addresses whether a defendant's agreement to reformulate a product has conferred a significant public benefit for purposes of the private attorney general statute—may prove to have unintended consequences. The Chanler Group therefore takes this opportunity to explain its concerns and to suggest how the proposed amendments might be revised to better conform to the Attorney General's expressed aims.

1. The proposed amendments do not make the current presumption of public benefit rebuttable; the amendments reverse the presumption.

As it stands, section 3201(b)(2) states that a defendant's agreement to reformulate a product by reducing or eliminating a listed chemical constitutes a sufficient showing of public benefit for purposes of Code of Civil Procedure, section 1021.5.

The initial statement of reasons for the amendment indicates that one of the goals is to make the presumption of public benefit rebuttable: "Subdivision (b)(2) of section 3201 has accordingly been revised *to make rebuttable* the presumption that reformulation constitutes a sufficient showing of public benefit for attorney's fees purposes." This statement was echoed in the notice of proposed rulemaking, which explained that the proposed amendment "would state that reformulation 'is presumed to confer a significant public benefit,' but *would make this presumption rebuttable*."

But the text of the proposed amendment doesn't make the presumption *rebuttable*; it *reverses* it: Under the proposed amendment, a defendant's agreement to reformulate a product would be deemed *not* to confer a significant public benefit *unless* the plaintiff produces evidence "that (a) at least some of the products in controversy in the action either are, or at some time were, above the warning level, and (b) such products will be below the warning level as reformulated" If such evidence was not presented, the court would be bound to find that the action conferred no significant public benefit. That default finding represents a 180-degree reversal from practice under the existing regulation.

It's possible, of course, that the DOJ intends to reverse the presumption, in which case the initial statement of reasons should be corrected. However, if the Department's intent is to make the presumption *rebuttable,* and not to *reverse* it, then the proposed amendments do not accomplish the objective. While The Chanler Group does not endorse the following language, what would accomplish the job is an amendment that reads as follows:

> Reformulation of a product, changes in air emissions, or other changes in the defendant's practices that reduce or eliminate the exposure to a listed chemical, in lieu of the provision of a warning, are presumed to confer a significant benefit on the public. This presumption may be rebutted by evidence showing that: (a) none of the products in controversy in the action was above the warning level before the action; or (b) the products do not fall below the warning level after reformulation.

2. *The Department may wish to consider whether it is necessary to specify the ways in which the presumption may be rebutted.*

The proposed amendment specifies two ways in which the presumption of significant public benefit may be rebutted: (a) by a showing that the all of the products in question were below the warning level before the action or (b) one or more products would be above the warning level afterward. Presumably, the presumption could also be rebutted in other circumstances.

Rather than attempting to delineate the myriad ways in which the presumption may be rebutted, the Department could simply leave the matter up to the courts. In that case, section 3201(b)(2) could read as follows:

> Reformulation of a product, changes in air emissions, or other changes in the defendant's practices that reduce or eliminate the exposure to a listed chemical, in lieu of the provision of a warning, are presumed to confer a significant benefit on the public. This presumption may be rebutted.

3. The Department should make it clear what "warning level" means reformulation level proposed in a given settlement.

The proposed amendment to section 3201(b)(2) hinges largely on the term "warning level":

> Where a settlement sets forth a standard or formula for reformulation, supporting evidence should show that (a) at least some of the products in controversy in the action either are, or at some time were, above the *warning level*, and (b) such products will be below the *warning level* as reformulated . . . . [emphasis added]

The term "warning level" could mean one of two things:

1. The "safe harbor" level (that is, the "no significant risk level" or the "maximum allowable dose level"), expressed in micrograms per day; *or*

2. The maximum amount of a specified chemical that a settlement agreement permits in a given product without an accompanying warning; usually expressed in parts per million.

There's no telling which of these two meanings a court might adopt. For the reasons discussed below, The Chanler Group suggests that the "warning level" must be the reformulation level proposed in a given settlement.

a. If "warning level" refers to the "safe harbor" level—and if the burden of showing a significant public benefit is on the plaintiff—then the proposed amendment would shift the burden to plaintiff to disprove defendant's "safe harbor" defense both before the product is reformulated and after, which is inconsistent with the burden placed on plaintiff by statute.

The following hypothetical depicts a case that is somewhat complex, but one that is by no means as complicated as they come. Assume the following:

- The defendant manufactures and sells skin lotion containing the listed chemical toxene, a carcinogen;
- The concentration of toxene in the lotion is 100 parts per million, and the lotion has the same specific gravity as water, so that a cubic centimeter of it contains 100 micrograms of toxene;
- Although the OEHHA has determined the NSRL for inhaled and ingested toxene (twenty and ten micrograms per day, respectively), it has yet to determine the NSRL for transdermal exposure, and the parties dispute the issue;
- The defendant's skin lotion contains other ingredients that may or may not increase the normal transdermal absorption rate (the parties dispute this issue as well);
- There is no consensus about (a) the amount of skin to which consumers typically apply the lotion; (b) the amount of lotion that they typically apply to a given area of skin; or (c) the frequency with which they apply it; the parties dispute all of these issues; and
- After two years of litigation—during which time the parties have each conducted consumer surveys, commissioned laboratory experiments, and deposed one another's experts—the defendant agrees to reformulate its lotion to reduce the concentration of toxene to 20 parts per million.

Under these assumptions, the plaintiff would first have to rebut the defendant's affirmative defense and show, by a preponderance of the evidence, that the non-reformulated product containing 100 ppm toxene caused an exposure at a level above the NSRL and therefore was not exempt from a warning. Then, the plaintiff would have to show by a preponderance of the evidence that the reformulated products at 20 ppm cause an exposure falling within the safe harbor and, therefore, are exempt from the warning requirements.

The plaintiff will not be able to meet this burden without mounting the same sort of evidentiary showing that would have been called for at trial to overcome the defendant's affirmative defense. There are simply too many unanswered questions—questions that, in all likelihood, two years of expensive litigation failed to resolve to either side's satisfaction. That uncertainty—combined with the expense of continued litigation—was precisely what prompted the parties to settle in the first place.

Under the proposed regulations, the showing demanded of a plaintiff seeking approval of a settlement will be significantly *more extensive* than the showing he would need to make at trial while also requiring the court to essentially make the same findings it would have to make after a full trial on the merits.[1] At trial, after all, the burden of establishing both the "safe harbor" level and the level of exposure caused by the defendant's products is on the defendant. But under the proposed regulation, those burdens would be shifted to the plaintiff, who in addition would need to prove the *post*-reformulation exposure level as well. Moreover, he would need to make all of those showings under the tight deadlines associated with motion practice.

b. If "warning level" refers to the "reformulation" level the proposed regulation would require plaintiff to show the products actually exceeded the reformulation level before settlement and will actually fall below the reformulation level as reformulated, which is more appropriate under the voter initiative.

If the term "warning level" means the level that the defendant has promised to achieve (*i.e.*, the reformulation level contained in the settlement agreement), then the Department would essentially be requiring the following: (1) A statement from the plaintiff that one or more products contained the chemical-at-issue at levels above the reformulation level; and (2) some sort of certification from the defendant that, at the required date, the products will actually be reformulated. The Chanler Group does not object to providing the information, in fact, The Chanler Group would also recommend to its clients that they include a statement in any motion to approve a settlement, to the effect of: "After consultation with one or more experts/consultants, we are unaware of any evidence that reformulated products containing the listed chemical at levels below the reformulation level would require a health hazard warning." Thereafter, if the Department (or anyone else with standing) wanted to rebut a presumption of public benefit, he or she could do so by, for example, producing relevant evidence demonstrating that products containing the chemical at issue below the reformulation level would, in fact, require a warning.

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[1] Any regulation that requires a trial court to essentially conduct a mini-trial on exposure in order to approve of a settlement is sure to bring Proposition 65 litigation to a grinding halt. At the very least, the amendment would lead to an exponential increase warnings for previously of hidden toxicants in consumer products rather than substantial, if not the total, elimination of the regulated toxicant. There is, however, an easy fix: Rather than requiring a finding based on a preponderance of the evidence (as the proposed amendment seems to do), the regulation should specify that the plaintiff need only make out a *prima facie* case. This is, after all, the level of proof called for by the governing statute—Health and Safety Code section 25249.7(f)(5)—which specifies that a plaintiff seeking approval of a settlement "has the burden of producing *evidence sufficient to sustain each required finding*" (emphasis added).) It is also consistent with the rule in other contexts where settlements must meet with court approval. (*See, e.g.*, *Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (explaining that courts called upon to approve of settlements in class actions do "not decide the merits").)

Assuming that the Department agrees that "warning level" should be interpreted as reformulation level, then the resulting section 3201(b)(2) would read as follows:

> Where a settlement sets forth a standard or formula for reformulation of a product, changes in air emissions, or other changes in the defendant's practices that reduce or eliminate the exposure to a listed chemical, in lieu of the provision of a warning, that provision should be deemed to establish the existence of a significant public benefit. The presumption may be rebutted by evidence that (a) the products in controversy contained the listed chemical at a level below the standard or formula for reformulation set forth in the settlement and (b) as reformulated the products contain the listed chemical at a level above the standard or formula for reformulation set forth in the settlement.

Very truly yours,

Clifford A. Chanler