In the Matter of the Investigation of: PRIVATE PARTY ENFORCERS OF PROPOSITION 65

PROCEEDINGS - Vol. 1

November 9, 2015

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BEFORE THE DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

STATE OF CALIFORNIA

In the Matter of the	)
	)
Investigation of:	)
	)
PRIVATE PARTY ENFORCERS OF	)
	)
PROPOSITION 65	)
_____	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Oakland, California

November 9, 2015

Pages 1 - 21

Reported by: Natalie Y. Botelho, CSR No. 9897

I N D E X

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ATTACHMENT

Attendance sign-in sheet

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APPEARANCES

FOR STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE:

OFFICE OF THE ATTORNEY GENERAL
BY: HARRISON M. POLLAK,
DEPUTY ATTORNEY GENERAL
and
SUSAN FIERING,
SUPERVISING DEPUTY ATTORNEY GENERAL
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ALSO PRESENT:

(See attendance sign-in sheet attached.)

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OAKLAND, CALIFORNIA

NOVEMBER 9, 2015 - 2:03 P.M.

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PROCEEDINGS

MR. POLLAK: The Department of Justice, Office of the Attorney General, has proposed to amend Title 11, Division 4 of the California Code of Regulations concerning Proposition 65 enforcement actions brought by private parties. The amendments would affect settlement terms, penalty amounts, and attorneys' fees in civil actions filed by private persons in the public interest pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65.

A Notice of Proposed Rule Making was published in the California Regulatory Notice Register on September 25th, 2015, in Register No. 39-Z, starting at page 1679. The noticed and related rule-making documents were posted on the Attorney General's Web site the same day and mailed to approximately 100 interested parties.

On October 13th, the AG's Office received a written request from Chris Heptinstall, the executive director of the Environmental Research Center, Inc.

dated October 8th, 2015. It was a request to hold a public hearing regarding the regulatory proposal. The request was made pursuant to Government Code Section 11346.8, Subdivision (a).

On October 22nd, 2015, the Attorney General's Office announced it would hold this public hearing. We posted on our Web site a notice with the time, date, and place of hearing, and we mailed it to the same 100 or so interested parties that received the Notice of Proposed Rule Making.

During today's hearing, anybody who wishes to speak may do so. We ask that you come up to the podium, speak into the microphone so that all of us can hear you, and that before you start in on your comments, you introduce yourself, spell your name if needed, and your affiliation. Which reminds me, I didn't introduce myself, although there were only two of you out there when I started.

But I am Harrison Pollak, Deputy Attorney General in the Attorney General's Office here. P-O-L-L-A-K. And with me today is Supervising Deputy Attorney General Sue Fiering, who I asked to come so she could open the door as needed.

So as you can see, the hearing is being transcribed by a certified court reporter. The

transcript will be included in the Minister of Record for the rule making. Today's hearing will end when all business is conducted or at 5:00 p.m., whichever is sooner.

I should also say that -- oh, I have it back here, so I will say it. As with written comments, we will consider all relevant matter presented to us during today's hearing before the completion of the rule making. So while we might not and probably won't respond here at the hearing, we will respond to all of the comments at some point during the rule making or when we issue our final rule.

Does anyone have any questions?

(Pause.)

MR. POLLAK: Okay. And can I get just a show of hands -- you won't be committed to this, but just how many of you intend to come up and make comments?

(Pause.)

MR. POLLAK: All right. I've seen about two and a half, three. Okay. So I'm not going to place a time limit on comments, but I would ask that you try to keep your comments succinct and stick to the point. And also remind you that you can -- some of you have submitted written comments. The close of the written comment period is today at the close of business.

So with that, I will ask our first commenter to come to the podium, and proceed.

COMMENT BY MATTHEW MACLEAR

MR. MACLEAR: Good afternoon. My name is Matthew Maclear. I'm here on behalf of Equa Terra Aeris Law Group and on behalf of interested parties, including Environmental Research Center. I'd like to tell the Attorney General's Office thank you for the opportunity to provide oral comments on our proposed Title 11 rule making.

While ATA and its clients applaud the goals of transparency and increasing protection of penalties going to OEHHA, and accountability, there are several questions that are raised by these proposed regulations, including some of the mechanisms, the standards, the necessities, the assumptions, and the effects of the proposed amended regulations.

Starting with the elimination of the additional settlement payments and out-of-court settlements, my clients believe that out-of-court settlements with additional settlement payments, with proper Attorney General oversight, could achieve the same public health protected purposes and benefits of Prop 65 in-court settlements.

Eliminating additional settlement payments and

out-of-court settlements will increase the costs of settlement and litigation to both parties, delay protective and publicly beneficial remedies reached through these settlements, deny the benefits conferred on the public and the companies through effective and efficient out-of-court settlements. It increases the burden and expense on the enforcers in the companies. It will reduce the incentive to settle, which is a stated goal of the courts of the state of California, and it will overload the already overburdened courts with ministerial acts which could be accomplished through greater AG oversight.

As a proposal, we would like the Attorney General's Office to consider providing for similar requirements for out-of-court settlements as stated for in-court settlements, involve the Attorney General's Office earlier in the settlement process to provide the assurances that they seek as indicated in the regulations, and that would thereby allow out-of-court settlements to include additional settlement payments, albeit with greater AG oversight.

With regard to the attorneys' fees section, the public benefit, the proposed regulations point out that it's related to products. Not all the warning cases that are brought under 25249.6 are about products,

and so we believe the focus should be on the level of chemical in question, not simply on the products.

With regard to the reformulation standards proposed, the proposed language increases the likelihood of delays of public benefits, increases the cost, and will delay settlement and increase the likelihood of trials on the centrally contested issues that could be construed as admissions.

Reformulation -- oh, pardon me. Strike that. With regard to specifically additional settlement payments, the proposed new increased nexus requirements will have many unintended costly consequences. First and foremost, discounting future private -- or future Prop 65 enforcement and reduction of exposure to Prop 65 listed chemicals, it shouldn't -- is not warranted.

Those goals provide substantial public benefits by identifying potential violators, reducing chemical exposures, and enhancing consumer choice based on the warrants. The additional requirements impose specific accounting rules such that it could be construed as requiring separate accounts for each different case. It is -- could -- it would be unwieldy and is unnecessary, the level of detail that's being required. It puts form over substance and would focus on creating checklists for submission and approval as

opposed to the substantive improvements that are gained through Prop 65 enforcement. And simply requiring those things to be available is more appropriate than having to include them in every settlement.

One last point is -- or second-to-last point is the economic interest disclosure that's referenced by incorporation of the Government Code -- I believe it's 18703 to 18703.5 -- we think is an overreach. It doesn't -- most of that applies to public officials and shouldn't apply to private enforcers. It's not necessary to extend it to counsel as proposed. Counsel are not parties to these agreements. They're doing the work for their clients, and we believe that the inclusion of this term invades the counsel and clients' free speech and statutory rights and privileges and should not be permitted. And we would just like to point out, there could be greater clarity with the application of these new regulations to Prop 65 discharge cases, as well.

Thank you.

COMMENT BY JAMES WHEATON

MR. WHEATON: Good afternoon. Jim Wheaton with the Environmental Law Foundation. W-H-E-A-T-O-N. Thank you, Mr. Pollak and Ms. Fiering for the chance to converse with you about the new post rules. As I

understand it, these are not actually regulations binding on the parties, but rather publications or guidelines the Attorney General intends to use in their own review of settlements and then to inform the courts. And perhaps over time the courts will begin to adopt some of these, as well, and we welcome that effort.

On both sides of the regulations, both with regard to the substantive decisions about how money is distributed for a Prop 65 case, as well as the review of attorneys' fees and ensuring that there is indeed a true public benefit in order to -- as the foundation for any kind of award of attorneys' fees under CCP 1021.5, I want to let you know that the Environmental Law Foundation, oh, many, many years ago would accept funds itself to be held -- used in a manner of a trust for various purposes to advance the interests of the statute, but -- and even did that in cases that we litigated with the Attorney General's Office, like the leaded faucet case. We discontinued doing that at least a dozen years ago and do not ourselves take any funds directly from the defendant as a settlement for a Prop 65 case. And indeed, I'm not sure that we ever took money directly under Prop 65, because I know we discontinued it when there was an amendment to the Business and Professions Code and a statutory initiative

that changed the way the Business and Professions Code could be litigated, and that had been our principal vehicle for using funds to advance the public purposes. When that was passed in 2004, we just said, "We will do it no longer," and we have not now for well over ten years and probably close to a dozen or more. So that part doesn't effect us particularly. And on the attorneys' fees, certainly documenting fees and the basis for any attorney fee claim has been standard procedure forever.

My only caution on that side is please don't make the burden of documentation and justification as to every jot and tittle of time so burdensome it would create in effect a second litigation over attorneys' fees, which I know the Attorney General's Office has, at least since the time of Attorney General Van de Kamp, has always said is at least a meritorious kind of litigation, not just litigation over fees. So let's be sure to streamline that and keep it accountable, but not create an administrative burden for your office, for us, or for the courts.

The only other thing I'd mention on the substantive side, with regard to the practice of having payments in lieu of penalties and having those funds then directed anywhere other than the statutory

direction of 75 percent to the State and 25 percent to the plaintiff, is a perhaps unintended potential consequence. And for this I draw on some experience over in the class action side, consumer class actions. And the issue I want to raise is the potential involvement, or rather, the approval of the defendant in the action in where the money goes and to what purposes it is put.

And I'm going to specifically reference cases that were done several years ago now involving bank credit card fees and charges and practices, sometimes over privacy, sometimes over charges, sometimes -- whatever it was, consumer credit cards. And as those neared settlement, the question arose of what to do with any funds that were being disgorged. Difficult sometimes to get that money back to the individual credit card holders in very, very small amounts. And so they used various cy pres remedies to direct the funds other than directly back to the consumers.

And there is actually a statute in the Code of Civil Procedure that unclaimed funds from class actions have to go to certain designated places, legal services, to consumer protection that's related -- and the word "Nexus" is used, I believe, in the statute, or perhaps just says, "related to the nature of the transgression

alleged." And yet where the defendants had control over where the funds were going to be directed, we saw over and over again cases in which the credit card companies or banks were insisting that the funds go to their preferred places, and those often had nothing to do with consumer protection. We saw them going to places like the Boys Clubs, Chambers of Commerce, and other favored charities of the defendant or defendants.

In one case someone did a study and they tracked -- I don't want to name the bank because I don't want to get it wrong, but the settlement with the bank and the list of places the cy pres funds were going matched the previous year's charitable donations of the bank. That kind of thing, of course, does nothing to advance anyone's interest.

So the key thing is to ensure that in writing your guidelines, you make it clear that the approval of the defendant in the action is not required for distributing the funds. And I raise that because some of the Prop 65 in-lieu payments have been used for grant purposes, for instance, where the funds will be distributed later, where by definition the defendant has no role. By frontloading the decision of where the money goes into the settlement itself for approval by the judge, a practice we don't take issue with, it

raises the specter that the defendant's approval for distribution of money will always be required, and that gives them leverage that it should not have.

So perhaps some language in the guidelines to the effect of, "The plaintiff's choice of where it shall go shall be justified," or perhaps even prefatory language specifically saying, "The defendant's approval is not required." But so I could see, for instance, a procedure by which a settlement fund was being distributed, it was created in the settlement and approved by the Court, with the approval, of course, of both parties as to the amount.

And there might be a separate appendix or separate pleading even describing the plaintiff's choice of where the money would be distributed and their justification for the Court's approval, but it was the plaintiff alone, not the plaintiff and defendant proposing that, to ensure there wasn't a kind of self-dealing potential by the defendants in trying to control the distribution of the funds.

With that, I have nothing further to add, and I thank you for the opportunity.

MR. POLLAK: So for those -- this is Harrison Pollak again. For those who just came in, we're taking comments in no particular order. So if anybody wants to

speak, please step up, introduce yourself, and speak away.

COMMENT BY RYAN HOFFMAN

MR. HOFFMAN: Hello. I am Ryan Hoffman. I am here speaking on behalf of interested parties. And I want to start out by, of course, thanking our hosts of the Attorney General's Office for having us here to have this conversation about how we should proceed in amending these regulations.

A couple of -- a few comments on various topics. First would be the proposed changes to Section 3203, striking the language setting forth the standard for evaluating the propriety of payments in lieu of penalties or additional settlement payments, as they're now referred.

In general, Section 3203, the proposed changes would strike the existing language and replace it with a general comment that the plaintiff must demonstrate to the satisfaction of the Court it is in the public interest to offset the subject penalty. It appears that language in the proposed Section 3204 is intended to serve the same function as the language currently in Section 3203, but this isn't expressly stated, and it's also not made precisely clear which portions are intended to serve as criteria to inform the Court, so I

think it would be useful to do something to clarify those particular points.

In regard to the recordkeeping requirements proposed in Section 3204, we think that they are somewhat excessive. In general, the level of specificity that is being proposed in the new Section 3204 would result in very time-intensive recordkeeping activities, to the point where many private enforcers would actually be forced to hire new staff simply to keep up. It would require things like a log of activities for each consent judgment as a method of following deadlines for each, following up separately on each activity, potentially creating separate bank accounts for each consent judgment to make sure funds can be directly tracked. This would be a really tremendous expenditure of resources with little to no perceptible benefit. The time and money that it would take to comply would be better spent on enforcement activities.

Perhaps more importantly, it would be, frankly, impossible for a private enforcer to know in advance how it needs to allocate money that it's receiving through payments in lieu of penalties or additional settlement payments such that it could be stated precisely in consent judgments.

For example, if we were to say that a consent judgment would allocate 50 percent of additional settlement payments to new enforcement activities, such as creating -- generating research and notices of violations and 50 percent to existing litigation activities, taking depositions, filing fees, expert witnesses, and then sometime later down the line encounter a situation where they needed far more money to engage in litigation activities than they had previously planned, they would then be locked into the particular allocation that they had specified in the earlier consent judgments, and this could affect the enforcement activities.

Couple of comments on the economic interest disclosure provision found in Section 3204, sub (b)(6)(B). First of all, it's a little bit unclear exactly how the information that's drawn into this section from other sections -- Code of Regulations Section 18703, 18703.5 -- are to be applied to private enforcers. For example, the Section 18703 describes criteria for determining whether or not an action affecting an official's economic interest is permissible by comparing its effect on the official's economic interest with its effect on the interest of members of the public in that official's jurisdiction, but there is

no logical analogy or corollary to private enforcers or their counsel. As a result, it's somewhat unclear why 18703 is being incorporated into this definition. At a minimum, that should be clarified, and perhaps 18703 should be stricken from the proposed regulation altogether.

A second concern regarding this provision would be that the proposed definition of economic interest is sufficiently general that determining whether or not it applies could in some circumstances be an unreasonable burden. A particular example would be where a person involved in a settlement has invested in a mutual fund. It would then be incumbent upon that individual to investigate whether or not any company that the mutual fund had invested in had any involvement in the Proposition 65 settlement. This could be a very expensive, time-consuming proposition that serves no discernible public benefit. This portion of the regulation should be clarified to limit the scope of the economic interests that it is deemed to apply to.

I think that's all I will say for the moment. Thank you.

MR. POLLAK: Anyone else have any more comments? Speak now or forever hold your peace. Actually, speak now or submit them in writing by

5:00 o'clock.

Okay. Well, then, we will consider this public hearing closed. Thanks, everyone.

(Whereupon, the proceedings were concluded at 2:37 p.m.)

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STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, the undersigned, a Certified Shorthand Reporter in the State of California, hereby certify that the foregoing proceedings were reported by me and were thereafter transcribed under my direction into typewriting, and that the foregoing is a full, complete, and true record of said proceedings.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceedings and caption named, nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of November, 2015.

NATALIE Y. BOTELHO
CSR NO. 9897