

Are you on the Prop 65 “Bounty Hunter” Radar? Beware, Online Sale of Wine Into California Could Cost You \$2500 a Pop!

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In the last few weeks, Plaintiff John Devlin has initiated more than 50 Notices of Violation or “Threatened Violation” under California's Safe Drinking Harbor and Toxic Enforcement Act of 1986 (“Prop 65”) alleging multiple companies, mostly wine distributors and online retailers, have sold alcoholic beverages into California without a clear and reasonable Prop 65 warning being posted on the online product page or at the online point of sale.

California’s Prop 65 is a hazardous chemical right-to-know statute that requires “clear and reasonable” warnings for products sold or distributed into California where an exposure to any one of more than 950 listed chemicals may occur above certain “Safe Harbor” levels. A company defending against such an enforcement action has the burden of proving an exemption from the warning requirement or compliance therewith. Civil penalties can be assessed up to \$2500 per violation per day. Any citizen of California can initiate a Prop 65 enforcement action under the state’s civil enforcer statute, and their attorney can collect attorney fees and costs.

The recent Notices allege that a multitude of companies are selling or distributing products (primarily wine) containing certain Prop 65 chemical listings via the internet or online means without the requisite warning being provided. The Prop 65 chemical listings allegations are for: (1) Ethyl alcohol in alcoholic beverages – added as a reproductive toxicant on October 1, 1987; (2) Alcohol beverages when associated with alcohol abuse – added as a carcinogen on July 1, 1988; and (3) Alcoholic beverages – added as a carcinogen on April 29, 2011. The alcohol chemical listing is not new and the regulatory agency, the California Office of Environmental Health Hazard Assessment (OEHHA), previously addressed the prospective pervasive issues presented from alcohol retail sales in California by providing an opportunity for businesses to correct the alleged violation for alcoholic beverages consumed on the their premises. The “quick fix” compliance measure requires completion of the following within 14 days of being served with a Prop 65 Notice of Violation: violation corrected by warnings provided or sales halted; agreement to pay a civil penalty of \$500 (amount to change on April 1, 2019) to the private enforcer within 30 days; and notification to the private party in writing that the violation has been corrected. The OEHHA has also provided guidance to establishments that sell alcohol in California either for consumption on the premises or consumption off the premises by establishing specific regulations that identify the content and methods of transmission for alcohol warnings that will be deemed “clear and reasonable.”

Although the Prop 65 warnings for alcohol are not new (they are posted in nearly every restaurant and liquor store in California), the requirement that warnings be provided either prior to, or during, sales of the product when purchased online is a “new” requirement that went into effect on August 30, 2018. In 2016, the OEHHA adopted new regulations to the Prop 65 warning requirement such that, by following the regulations, the warning would be deemed “clear and reasonable” and thus Prop 65-compliant. There was a 2-year grace period provided with the new regulations. This allowed companies until August 30, 2018 for companies to modify, revise or adjust their regulatory warning protocols to ensure compliance. Adherence to the regulatory specifications serves as protection against potential Prop 65 enforcement actions. The “new” online/internet warning requirement states, for internet purchases, a warning “must be provided by including either the warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase.” See California Code of Regulations, Title 27, Art. 6, Subarticle I, section 25602(b). Under the new regulation, an internet warning will not be considered “prominently displayed” if the online purchaser “must search for it in the general content of the website.” *Id.*

Since August 30, 2018, there were only a handful of Prop 65 enforcement actions that specifically focused on alleged non-compliance with the new online/internet warning requirement until the recent wave of Notices that is. The recent slew of Prop 65 Notices initiated by private enforcer John Devlin primarily focused on online retailers of wine may just be the beginning. The \$500 “fix-it” ticket option is not available for online purveyors, and considering the private enforcer can backtrack to when the regulation took effect, the civil penalties at stake can be excessive. (NOTE: normally, there is a one-year statute but the regulation took effect less than a year ago). Because Devlin, or any other ambitious private enforcer, can uncover non-compliance with the simple click of a button, it is advisable to take preemptive and preventative measures now.

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