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Proposition 65 Alert #6

Following a period of relative inactivity concerning the Notices of Intent to Sue served by Consumer Advocacy Group (CAG) and Environmental World Watch (EWW) in late 2001 and early 2002, it appears that these groups are preparing to file suit and begin prosecution of their Proposition 65 claims. This Bulletin describes the latest developments concerning these issues and outlines certain actions to assist noticed companies in preparing for and responding to such claims.

Ongoing Standstill Agreement

In March 2002, at the urging of numerous business groups including AGC California, the Attorney General entered into a written agreement with CAG and EWW concerning the 60-Day Notices. The agreement provided that the parties would engage in a "constructive effort" to resolve the issues and violations raised by the Notices, and that neither CAG nor EWW would file any lawsuit based on the Notices without first providing the Attorney General with 30 days advance notice.

As of this date, neither CAG nor EWW has officially terminated the agreement. We have been informed, however, that both groups are considering termination, and that they intend to file lawsuits against any party receiving a 60-Day Notice that does not enter into a "tolling agreement" with the groups. The purpose of the agreement, CAG and EWW explain, is to delay the effect of certain statutes of limitations affecting their claims and to permit the parties to enter into settlement discussions that might resolve the claims without the need for active litigation. CAG and EWW have not yet provided any proposed form for the tolling agreement. We will circulate a Bulletin addressing any proposal once our attorneys have had the chance to review it.

Establishing a Relationship with Counsel and Preparing for a Joint Defense

Before entering or rejecting any proposed agreement from CAG and EWW, it is *essential* that each noticed company *fully* understand its options and the potential effect of each course of action. Accordingly, for those companies who have not yet consulted or retained legal counsel in connection with the 60-Day Notice, we recommend that you do so now. If you require, AGC California can recommend a number of highly experienced Proposition 65 attorneys throughout the state who can assist you. Several of these counsel are already working with AGC California or other AGC California members and thus can be expected to provide especially efficient service. Such counsel should also be able to assist you in creating and implementing any appropriate warning program. ***For a list of counsel, please contact John Hakel at (323) 263-1500.***

Additionally, as we have reported in prior Bulletins on the issue, AGC California and its counsel have been working with other affected industry and trade groups to understand and defend (on an industry-wide basis) against the claims asserted by CAG and EWW. As litigation looms, however, to ensure that AGC California and *you*, the affected companies, are able to work confidentially, effectively, and most efficiently in opposing these claims, we recommend that *all member companies that have received a 60-Day Notice* consider entering into a formal Joint Defense Agreement.

The Agreement has been circulated among a number of related trade groups and would apply to and protect all signatories. The Agreement would not only protect the confidentiality of communications among parties and facilitate the sharing of information, but also provide a basis for sharing common costs of defense, including any experts that may be necessary to address and oppose plaintiffs' claims. Finally, participation in a joint defense group by you or your counsel would ensure you the opportunity to participate and remain informed concerning discussions on these issues (including any settlement discussions) with the Attorney General and/or the plaintiffs. *If you are interested in reviewing the proposed Joint Defense Agreement – without any obligation to sign or to participate in the joint defense – please call John Hakel at (323) 263-1500.*

Attorney General's Proposed Emergency Regulations

Recently, the Attorney General published proposed regulations affecting future notice and settlement obligations under Proposition 65. AGC California continues to work with the California Chamber of Commerce and other business and industry groups to provide comments on the proposed regulations, and to support changes and additions to clarify and bring equity to businesses' existing obligations under Proposition 65. We will keep you informed concerning the status of the proposed regulations.