

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

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*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 )  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

Oakland, California

November 9, 2015

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

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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  
1515 Clay Street, 20th Floor  
Oakland, CA 94612-0500  
(510)622-2183  
harrison.pollak@doj.ca.gov

ALSO PRESENT:

(See attendance sign-in sheet attached.)

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OAKLAND, CALIFORNIA

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

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PROCEEDINGS

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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.

1 dated October 8th, 2015. It was a request to hold a  
2 public hearing regarding the regulatory proposal. The  
3 request was made pursuant to Government Code Section  
4 11346.8, Subdivision (a).

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

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

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

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

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

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

13 Does anyone have any questions?

14 (Pause.)

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

18 (Pause.)

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





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

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

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

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

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

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

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

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

5 One last point is -- or second-to-last point  
6 is the economic interest disclosure that's referenced by  
7 incorporation of the Government Code -- I believe it's  
8 18703 to 18703.5 -- we think is an overreach. It  
9 doesn't -- most of that applies to public officials and  
10 shouldn't apply to private enforcers. It's not  
11 necessary to extend it to counsel as proposed. Counsel  
12 are not parties to these agreements. They're doing the  
13 work for their clients, and we believe that the  
14 inclusion of this term invades the counsel and clients'  
15 free speech and statutory rights and privileges and  
16 should not be permitted. And we would just like to  
17 point out, there could be greater clarity with the  
18 application of these new regulations to Prop 65  
19 discharge cases, as well.

20 Thank you.

21 COMMENT BY JAMES WHEATON

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

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

7           On both sides of the regulations, both with  
8 regard to the substantive decisions about how money is  
9 distributed for a Prop 65 case, as well as the review of  
10 attorneys' fees and ensuring that there is indeed a true  
11 public benefit in order to -- as the foundation for any  
12 kind of award of attorneys' fees under CCP 1021.5, I  
13 want to let you know that the Environmental Law  
14 Foundation, oh, many, many years ago would accept funds  
15 itself to be held -- used in a manner of a trust for  
16 various purposes to advance the interests of the  
17 statute, but -- and even did that in cases that we  
18 litigated with the Attorney General's Office, like the  
19 leaded faucet case. We discontinued doing that at least  
20 a dozen years ago and do not ourselves take any funds  
21 directly from the defendant as a settlement for a Prop  
22 65 case. And indeed, I'm not sure that we ever took  
23 money directly under Prop 65, because I know we  
24 discontinued it when there was an amendment to the  
25 Business and Professions Code and a statutory initiative

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

3 COMMENT BY RYAN HOFFMAN

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

10 A couple of -- a few comments on various  
11 topics. First would be the proposed changes to Section  
12 3203, striking the language setting forth the standard  
13 for evaluating the propriety of payments in lieu of  
14 penalties or additional settlement payments, as they're  
15 now referred.

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

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

3 In regard to the recordkeeping requirements  
4 proposed in Section 3204, we think that they are  
5 somewhat excessive. In general, the level of  
6 specificity that is being proposed in the new Section  
7 3204 would result in very time-intensive recordkeeping  
8 activities, to the point where many private enforcers  
9 would actually be forced to hire new staff simply to  
10 keep up. It would require things like a log of  
11 activities for each consent judgment as a method of  
12 following deadlines for each, following up separately on  
13 each activity, potentially creating separate bank  
14 accounts for each consent judgment to make sure funds  
15 can be directly tracked. This would be a really  
16 tremendous expenditure of resources with little to no  
17 perceptible benefit. The time and money that it would  
18 take to comply would be better spent on enforcement  
19 activities.

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



1 no logical analogy or corollary to private enforcers or  
2 their counsel. As a result, it's somewhat unclear why  
3 18703 is being incorporated into this definition. At a  
4 minimum, that should be clarified, and perhaps 18703  
5 should be stricken from the proposed regulation  
6 altogether.

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

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

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

1 5:00 o'clock.

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

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

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1 STATE OF CALIFORNIA )  
 ) ss.  
2 COUNTY OF ALAMEDA )

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

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

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

16   
17 NATALIE Y. BOTELHO  
18 CSR NO. 9897  
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