



2022 Prop. 65 Clearinghouse Annual Conference

**Show Me the Money: How to Make Prop. 65
Attorney Fees More Transparent**

Participants



- Moderator: David Sadwick, Asst. Chief Counsel, DTSC
- Panel:
 - Michael Green, CEO, CEH
 - Catherine Johnson, Principal, Environmental General Counsel
 - Malcolm Weiss, Partner, Hunton Andrews Kurth
 - Lucas Williams, Prof. and Staff Attorney, GG University School of Law

Prop 65: Top Noticing Parties*

Noticing Parties	
Noticing Party	Notices**
Ecological Alliance	1627
Environmental Health Advocates	873
Consumer Advocacy Group	857
Keep America Safe & Beautiful	485
Key Sciences	402
Anthony Ferreiro	352
Ema Bell	345
Environmental Research Center	341
Precila Balabbo	258
Public Health and Safety Advocates	229

* Source: Hunton Andrews Kurth Notice Tracker (<https://www.huntonak.com/en/proposition-65-notice-tracker.html>).

* From January 1, 2020 through August 31, 2022.

Settlement Amounts: 2018-2022

The following shows both court-approved judgements and out-of-court settlements from 2018-2022 (to August 31, 2022).

Year	Total Judgments	Total Dollars Judgments	Total OoC Settlements	Total Dollars Settlements	Total
2018	367	\$24,687,814	472	\$9,922,860	\$34,610,674
2019	284	\$17,514,451	615	\$12,509,067	\$30,023,518
2020	192	\$10,885,518	435	\$9,315,665	\$20,201,183
2021	167	\$11,867,256	659	\$13,577,400	\$25,444,656
2022 (to date)	105	\$7,063,007	465	\$10,382,450	\$17,445,457...

Source: Office of California Attorney General, <https://oag.ca.gov/prop65/annual-settlement-reports>

Code of Civil Procedure § 1021.5

- Upon motion, a court may award **attorneys' fees** to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: **(a)** a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, **(b)** the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and **(c)** such fees should not in the interest of justice be paid out of the recovery, if any.

Relevant Regulations – 11 CCR § 3201

(b) Public Benefit.

(1) In a case alleging *failure to warn*, a settlement that provides for the giving of a clear and reasonable warning... for an exposure that appears to require a warning, is presumed to confer a significant benefit on the public. If there is no evidence of an exposure for which a warning plausibly is required, there is no significant public benefit, even if a warning is given....

(2) 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.

Relevant Regulations – 11 CCR § 3201

(d) Reasonable Fees. Hourly fees should be those reasonable for attorneys of similar skill and experience in the relevant market area. Once a lodestar fee is calculated, a multiplier of that amount is not reasonable unless a showing is made that the case involved a substantial investment of time and resources with a high risk of an adverse result **and** obtained a substantial public benefit. No fees should be awarded based on additional time spent in response to the Attorney General's inquiries or participation in the case, unless specifically identified and approved by the court.

(e) Documentation. All attorney's fees and any investigation costs sought to be recouped in a Settlement should be justified by contemporaneously kept records of actual time spent or costs incurred, which describe the nature of the work performed. Declarations relying on memory or recreated, non-contemporaneously kept records may raise an issue concerning the accuracy of the time estimate.

HSC Section 25249.7(g)(h)(2)

(2) Upon the conclusion of an action brought pursuant to subdivision (d) with respect to a defendant, if the trial court determines that there was no actual or threatened exposure to a listed chemical, the court may, upon the motion of that alleged violator or upon the court's own motion, review the basis for the belief of the person executing the certificate of merit, expressed in the certificate of merit, that an exposure to a listed chemical had occurred or was threatened.... If the court finds that there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened, then the action **shall** be deemed frivolous....



Discussion/Questions?