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10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

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CARBONLESS COPY PAPER INJURY AND INFORMATION NETWORK, et al., Plaintiffs, **v.** **APPLETON PAPERS, INC., et al.,** Defendants.	308779 **ATTORNEY GENERAL'S OPPOSITION TO MOTION FOR APPROVAL OF SETTLEMENT (Health & Saf. Code § 25249.7(f)(5))** Date: March 23, 2004 Time: 9:30 a.m. Dept: 301 Judge: Hon. James Warren Trial Date: Not set Action Filed: 12/23/1999

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INTRODUCTION

The Attorney General exercises his statutory authority to object to the proposed settlement in this matter because it fails in two specific respects to meet the legal requirements for approval of a Proposition 65 settlement. First, it awards attorney's fees to the plaintiffs, although they have in no respect prevailed in this action, and therefore fees are not reasonable under California law. Second, it provides unrestricted awards of funds to the plaintiffs, which are not permitted by law.

LEGAL BACKGROUND

A. Proposition 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute passed as "Proposition 65" by a vote of the people in November of 1986. The warning requirement is contained in Health and Safety Code section 25249.6, which provides:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

No warning is required if the defendant shows that the exposure "poses no significant risk" (for cancer) or that it "will have no observable effect assuming exposure at one thousand (1,000) times the level in question[.]" (Health & Saf. Code § 25249.10(c).)

Proposition 65 provides that it shall be enforced through civil actions in courts of competent jurisdiction. (Health & Saf. Code § 25249.7 (a), (b).) Injunctions and civil penalties are expressly included as available remedies. (*Id.*) Enforcement actions may be brought by the Attorney General "in the name of the people of the State of California," by District Attorneys, and by certain city attorneys. (Health & Saf. Code § 25249.7(c).) Private parties may bring enforcement actions "in the public interest" if they provide a notice identifying the nature of the alleged violations to the alleged violator, the Attorney General, and local District Attorneys, and no public prosecutor commences an action within sixty days. (Health & Saf. Code § 25249.7(d).) This permits the private plaintiff to proceed "in the public interest" with no claim of injury to itself. At the same time,

the private party does not sue "in the name of the People of the State of California," as does the Attorney General.

B. SB 471

Concerned with settlements that "simply result in inadequate public warning in exchange for payments of attorney's fees," in 2001, the Legislature adopted SB 471, which made a number of changes to the citizen-enforcement provisions of Proposition 65. (Stats. 2001, c. 578 (S.B. 471), § 1.) (See Senate Bill Analysis, page 4, attached as Exhibit A to Request for Judicial Notice.) Among other things, SB 471 provided that settlements in private Proposition 65 cases must be submitted to the court by noticed motion, and may be approved only if the court makes the following findings:

(A) Any warning that is required by the settlement complies with this chapter.

(B) Any award of attorney's fees is reasonable under California law.

(C) Any penalty amount is reasonable based on the criteria set forth [in the penalty provision].

(Health & Saf. Code § 25249.7(f).) The plaintiff must produce the evidence necessary to sustain the findings. (*Id.*) The Attorney General must be served with all supporting papers, and is permitted to appear on the matter without intervening. (*Id.*)

Or course, even before SB 471, courts had authority to reject settlements that contain provisions that violate law or public policy. The court "may reject a stipulation that is contrary to public policy ...or one that incorporates an erroneous rule of law[.]" (*California State Auto Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 683.) Similarly, even where no specific law is violated, if a settlement violates an important public policy, it should not be approved. (*Mary R v. B & R Corp.* (1983) 149 Cal.App.3d 308, 316-317.)

C. The Attorney General's Authority

In addition to his aforementioned authority to bring actions in the name of the People under Proposition 65, the Attorney General reviews all sixty-day notices of violation and all proposed settlements. Acting pursuant to this authority, the Attorney General has adopted, through rulemaking procedures, a set of binding regulations governing the reporting of settlements to the Attorney General, and non-binding Settlement Guidelines, which advise litigants and the courts of the Attorney General's views and policies in reviewing proposed settlements. (See 11 Cal.Code Regs.

§§ 3000-3204.)

In addition, the Attorney General is constitutionally designated as the "chief law officer of the state" and has the constitutional duty to ensure that state law is adequately enforced. (See Cal.Const. Art. V, § 13; *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 353.) He also sues "in the name of the People of the State of California" under the Unfair Competition Law. (Bus. & Prof. Code § 17200.)

PROCEDURAL BACKGROUND

A. History Of This Case

This case was filed in December of 1999, alleging that the defendants violated Proposition 65 by failing to warn individuals using "carbonless copy paper" that use of such products exposes them to a number of chemicals known to the state to cause cancer and reproductive harm. The plaintiffs are the Carbonless Copy Paper Information Network, an unincorporated association ("CCPIN"), and ten individuals.[1] While the caption of the complaint states that the complaint is brought "on behalf of themselves, all those similarly situated, and in the interest of the general public," the remainder of the complaint is somewhat different. The body of the complaint alleges that the plaintiffs "are bringing this enforcement action in the interest of the public pursuant to [Proposition 65 and the Unfair Competition Law]." (Complaint, Par. 13, attached as Exhibit B to Request for Judicial Notice.) The causes of action asserted are under Proposition 65, under the Unfair Competition Law (for unlawful acts consisting of violation of Proposition 65), and under the Unfair Competition Law for various misleading and deceptive practices. (Complaint, Pars. 41-65.) While the complaint states that the individual plaintiffs "have suffered personal and emotional injuries resulting from CCP [Carbonless Copy Paper]," nowhere do the plaintiffs allege that they have been adversely affected or harmed by the alleged violations of Proposition 65, assert a cause of action on behalf of any individual in his or her own behalf, or seek any relief for any individual.

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1. All of the plaintiffs provided a pre-suit sixty-day notice of violation under Proposition 65, except for Susan McLeod. Provision of the notice is a condition precedent for any private person seeking to sue under Proposition 65.

On August 21, 2000, the court sustained defendants' demurrer to all claims based on exposures to chemicals alleged to occur in the workplace, on the ground that they were preempted by the provisions of the federal Occupational Health and Safety Act ("OSHA"). (See Khorrami Dec., Par. 4.) In 1997, the federal Occupational Safety and Health Administration approved the incorporation of Proposition 65 occupational exposure requirements into California's federally-approved State Plan for Occupational Safety and Health, an action necessary to assure that state occupational safety requirements are not preempted by federal law. (See Supplement to California State plan; Approval (June 6, 1997) 62 Fed. Reg. 31,159, attached as Exhibit B to Request for Judicial Notice.) Federal OSHA specifically conditioned the approval on the provision that the requirements of Proposition 65 "may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State." (*Id.*) This was the basis for the ruling finding preemption.

Since that time, one plaintiff, Nancy Rutigliano, voluntarily dismissed her claims. Eight others (CCPIN and seven individuals), are no longer represented by Khorrami & Associates, and are appearing in propria persona. (Khorrami Dec., Par. 5.) Thus, the settlement presented is only on behalf of two individuals: Rita Shaw and Susan Vaughn. According to the text of the settlement, the remaining plaintiffs (other than Brenda Smith), may join in the settlement if they so choose. (Consent Judgment, Par. 1.1, page 2, at lines 15-16; hereinafter, e.g., "CJ Par. 1.1 (2:15-16)".)

B. Terms Of The Settlement

The settlement states that it constitutes "a full, final and binding settlement between the Settling Plaintiffs, on behalf of themselves and on behalf of the general public in California and all Defendant Related Parties" with respect to "settled claims" (CJ, Par. 3.3. (6:16-18).)[2]

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2. (See also CJ, Par. 7.2 (10:15-17, 25-28).) The fact that the settlement purports to bind the "general public" does not render it binding on the Attorney General. Under both Proposition 65 and the Unfair Competition Act, the Attorney General sues "in the name of the people of the State of California[.]" (Bus. & Prof. Code § 17204; Health & Saf. § 25249.7(c).) Such language signifies that the action is brought under the sovereign authority of the state, which resides in the people. (Govt. Code § 100.) The distinction is not merely semantic, but reflects a different status and authority granted to the Attorney General. Nor does the fact that the Attorney General has reviewed the settlement render the settlements binding on him, since SB 471 expressly provided that it did not alter the law concerning the preclusive effect of settlements. (Health & Saf. Code § 25249.7(f)(6).)

1 The parties specifically stipulate that "no Proposition 65 warning is required." (CJ, Par. 5.1 (7:10-11).) The manufacturer defendants agree to "create and maintain a website containing the 'CCP Informational.'" (CJ, Par. 5.1. (7:12-13).) That document is a 163-word description of carbonless copy paper, with the following information concerning toxicity:

> In its December 2000 report considering the safety of CCP, the National Institute of Occupational Safety and Health ("NIOSH") concluded that there is no evidence that current exposures to CCP present a risk of systemic reactions. For individuals who may experience symptoms of skin, eye or upper respiratory tract irritation when using certain types of CCP products under some conditions, NIOSH recommends implementing normal industrial hygiene and work practices, such as maintaining appropriate indoor air quality and ventilation and periodic hand washing.

(CJ, Ex. D.) This message will be maintained for one year. (CJ, Par. 5.2 (7:21-220).) The "CCP Informational" also will be provided by the manufacturers to their California customers. (CJ, Par. 5.3 (8:2-8).) They also provide their customers with a reference to the website that contains the "Informational." (CJ, Par. 5.4 (8:15-23).)

Monetary Payments of up to $165,600 are provided. (CJ, Par. 6 (9:25-28).) This consists of a payment of $90,000 in attorney's fees and costs to plaintiffs' counsel and a payment of $12,600 in consideration of the release of the Settled Claims" to each plaintiff who signs the agreement. (There appears to be a discrepancy in the figures, because after payment of $90,000 in attorney's fees, only $75,600 remains, which is not sufficient to pay $12,600 to each potential settling plaintiff.)

ARGUMENT

A. The Attorney's Fee Recovery Is Not Reasonable Under California Law

The plaintiffs have not successfully enforced any right affecting the public interest in this case, and therefore cannot be considered in any sense to be a prevailing party to whom attorney's fees may be awarded.

In order for the award of fees to be "reasonable under California law,"as required by SB 471, there must be some basis upon which the Court could conclude that the plaintiff is entitled to fees. In Proposition 65 cases, a prevailing plaintiff could obtain fees pursuant to Code of Civil Procedure section 1021.5 as a "successful party" in an action that "has resulted in the enforcement of an important right affecting the public interest[.]" For a plaintiff to meet this standard, "there must be *some* relief to which the plaintiff's actions are causally connected." (*Miller v. California Commission*

on the Status of Women (1985) 176 Cal.App.3d 454, 457 (emphasis in original).) A plaintiff is not considered "successful" if it only prevails on a technical, procedural, or insignificant claim. (*Schmier v. Supreme Court of California* (2002) 96 Cal.App.4th 873.)

The Attorney General's Settlement Guidelines (11 Cal. Code Regs. §§ 3200-3204) follow this judicial guidance, stating that in determining whether a plaintiff is "successful" and therefore entitled to fees under Code of Civil Procedure section 1021.5, the settlement must be examined to determine whether the plaintiff has obtained relief. Relief adequate to constitute the requisite public benefit may consist of a "clear and reasonable warning" or of reformulation of the product. (11 Cal. Code Regs. § 3202(b).) Since the settlement does not provide a warning, and expressly acknowledges that none of the products in question require a warning, it does not meet this guideline.

In essence, three things have happened in this case. First, the claims concerning occupational exposure were dismissed as preempted by federal law. Second, the plaintiffs have stipulated that no warning is required for the products when used as consumer products. Clearly, neither of these facts could justify an award of fees.

Third, the only "relief" provided is the "CCP Consumer Informational." The CCP Informational is not sufficient to constitute "success" in this matter. Assuming that it is entirely accurate, it simply cannot be read to in any respect warn the public of any hazards associated with CCPIN. Indeed, it states that there are no "systemic" dangers. The parties do not claim that this would constitute a "warning" under Proposition 65, but instead stipulate that no warning is required. The Attorney General does not (in this memorandum) quarrel with that resolution of the case. He simply points out that the plaintiffs cannot be said to have succeeded in a manner that would render the payment of attorney's fees reasonable under California law.

The desire of the defendants to pay some amount of fees in order to bring an end to the matter is understandable, but the Legislature has interposed important limitations on these settlements in order to assure that they are resolved in the public interest. Plaintiffs have in essence stipulated to resolve their claims against them. If this plaintiff is a "successful party," then every plaintiff is a successful party. The private attorney general fee statute "reflect[s] a legislative purpose of encouraging initiation of actions to vindicate statutory and constitutional rights, as well as important

public policies, in circumstances in which the expense of litigation would otherwise deter private parties from doing so." (*In re Head* (1986) 42 Ca.3d 223, 232-233.) If a plaintiff may collect fees even where it loses, regardless of whether any legal rights are vindicated, then plaintiffs would have an incentive to bring even meritless cases, which is not consistent with the goal of the statute.

Finally awarding attorney's fees in a case found largely to be preempted by the federal Occupational Safety and Health Act may conflict with the directions of federal OSHA in approving the incorporation of Proposition 65 into California's federally-approved State Plan for Occupational Safety and Health. (See Supplement to California State plan; Approval (June 6, 1997) 62 Fed. Reg. 31,159.) Federal OSHA required that the state take action "to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is Federally approved." (*Id.*) Enabling a private plaintiff to collect attorney's fees in a matter in which the claims of the case were found to be prohibited by federal OSHA would encourage litigation contrary to federal OSHA's express direction.

B. The Unrestricted Payments to the Plaintiffs Are Not Legally Permissible

Any payment collected under Proposition 65 must in some way be authorized by the underlying statutes or authorities upon which the claim is based, and there is no authority here for the unrestricted payment of $12,600 to each settling plaintiff.

Proposition 65 *does* provide for a source of unrestricted payments to plaintiffs: 25% of any civil penalty collected. Under Health and Safety Code section 25259.7(b), a private plaintiff may collect a civil penalty. Of that penalty, 75% is paid to the Governor's designated lead agency for Proposition 65 implementation, the Office of Environmental Health Hazard Assessment, and the remaining is awarded to the plaintiff. (Health & Saf. Code § 25249.12.) Decried by opponents of the initiative as the "bounty hunter" provision, this provision reflects the judgment of the voters with respect to the amount of personal reward that the plaintiff in a Proposition 65 case should receive. Thus, a plaintiff may retain 25% of any civil penalty collected. A plaintiff may not circumvent this requirement by simply designating the funds as a "payment" and keeping 100% of the money.

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While the fact that a particular form of relief is not authorized by the statute being enforced does not, in and of itself, preclude the court from approving a settlement containing such relief, such payments must further the statutory purpose of the law being enforced. (*Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 116, *Rayan v. Dykeman* (1990) 22 Cal.App.3d 1629, 1634.) Thus, some settlements in Unfair Competition Law cases are in effect "cy pres restitution," whether so denominated or not. In that context, the Supreme Court has noted that whether a court will find the funding of an activity proper, "depends upon its usefulness in fulfilling the purposes of the underlying cause of action." (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.) As a result, any such payment must be restricted in some manner to assure that it is used for purposes furthering the underlying objectives of the suit. Again, the Attorney General's guidelines address this issue, providing that "Payments in Lieu of Penalties" may be awarded in settlements, but that the payments must "have a nexus to the basis for the litigation, i.e., the funds should address the same public harm as that allegedly cause by the defendant(s) in the particular case." (11 Cal. Code Regs. § 3203(b)(1).)[3/]

Accordingly, the payments here are simply awards of compensation to plaintiffs who have not sued to enforce any individual claim, and are not legally permissible.

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3. Nor does the claim for deceptive practices justify any payment here. While the complaint seeks "restitution" the payments are not identified as such, and no plaintiff has asserted in the complaint any specific injury or purchase of defendants' products necessary to sustain such an award.

CONCLUSION

The settlement provides an award of attorney's fees where the plaintiffs have in no respect prevailed, and provides an impermissible grant of unrestricted funds to the plaintiffs. Accordingly, the motion to approve must be denied.

Dated: March 11, 2004

Respectfully submitted,

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: *Carbonless Copy Paper Injury, et al. v. Appleton Papers, Inc., et al.*

No.: 308779

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, P.O. Box 70550, Oakland, CA 94612-0550.

On March 11, 2004, I served the attached

ATTORNEY GENERAL'S OPPOSITION TO MOTION FOR APPROVAL OF SETTLEMENT (Health & Saf. Code § 25249.7(f)(5))

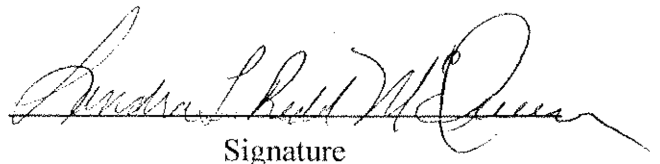
by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the CALIFORNIA OVERNIGHT (for California recipients) **and** UPS NEXT DAY AIR (for non-California recipients), addressed as follows:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 11, 2004, at Oakland, California.

Sandra L. Redd McQueen

Typed Name



Signature

Carbonless Copy Paper Injury, et al. v. Appleton Papers, Inc., et al.
San Francisco County Superior Court No. 308779

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