

AG's Office Suggests Acceptable Content of "Public Interest" Release

LITIGATION

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One of the features of almost all settlements of private party Proposition 65 lawsuits is a so-called "public interest release." This release is usually insisted upon by the settling defendants in order to have the settlement constitute a res judicata defense against further Prop. 65 claims based on the same set of facts.

The Attorney General's office, which reviews all such settlements, has sent a [letter](#) to 18 attorneys who have in the past initiated private party lawsuits leading to settlements. In the January 10 letter, Supervising Deputy Attorney General Susan Fiering, states that the AG's office has become concerned with the form of the release that private parties purport to give "in the public interest." Fiering suggests that the releases have "become more and more convoluted and, in many cases, are either over broad, meaningless, or affirmatively misleading." She concedes that much of the responsibility for this lies with defendants "whose interest is to maximize protection against future lawsuits." Fiering then provides an example of a release, which she suggests provides the maximum amount of protection a private party suing in the public interest is authorized to give. She also notes that AG's office intends to scrutinize future settlements and will object to any proposed settlement that is "ambiguous" or is broader than the private party "suing in the public interest is entitled to give."

Fiering first notes that under Prop. 65 a private plaintiff lawsuit is brought "in the public interest" and that the complaint and settlement should refer to this statutory terminology. She also notes that the public interest release should cover only those violations specified in the 60-day Notice of Violation that precedes the lawsuit. She then goes on to suggest the following release:

"Plaintiff acting on its own behalf and in the public interest releases Defendant [and other specified entities] from all claims for violations of Proposition 65 through the Effective Date based on exposure to [Covered Chemicals] from [Covered Products] as set forth in the Notice(s) of Violation.

Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to [Covered Chemicals] from [Covered Products or Covered Facilities] as set forth in the Notices of Violation(s)."

The terms "Effective Date," "Covered Chemicals," "Covered Products," and "Covered Facilities" should either be defined terms in the settlement agreement, or the release should list the actual chemicals, products, and facilities covered.

Fiering contends that the above release paragraph provides the full extent of the release that can be given by a private plaintiff acting in the public interest, and provides the defendant "with full protection for past violations and precludes private parties from maintaining actions in the future based on conduct sanctioned in the judgment to the extent that the agreement constitutes *res judicata*."

Finally Fiering notes that the private plaintiff acting on its own behalf (and not in the public interest) can then provide whatever further relief it negotiates with the defendant, so long as it is placed in a separate paragraph. The AG's office will take no position on the proper scope of private entity releases.
