



Water Pipe Manufacturer Not Liable Under Prop. 65, Appeals Court Rules

LITIGATION, PROPOSITION 65, APPELLATE CASES, PRODUCTS OF INTEREST, WARNINGS

By ROGER PEARSON, December 22, 2022

A manufacturer of a water pipe, that when used can produce marijuana smoke—a Proposition 65-listed carcinogen—does not have to place a warning on their product, the 1st District Court of Appeal has ruled.

Although the water pipe—manufactured by a company named Sream, Inc.—is intended primarily for use with tobacco products, it can be used with marijuana products that produce marijuana smoke. Environmental Health Advocates (EHA), a Prop. 65 private plaintiff group sued Sream alleging that the water pipe should have been labeled with a Prop. 65 cancer warning. After both EHA and Sream filed their initial pleadings, Sream sought dismissal of the case via a motion on the pleadings. The trial court judge granted the motion and this appeal followed.

The appellate court upheld the lower court ruling. **Environmental Health Advocates v. Sream Inc.**¹⁾, 1st District Court of Appeal, filed September 26, 2022.

The 1st District Opinion

The 1st District opinion first noted that a Prop. 65 warning is only required where a business "exposes" any individual to a Prop. 65-listed carcinogen or reproductive toxicant. Since the Prop. 65 statute does not define "expose" the court turned to the regulations governing the statute—**Health and Safety code section 25249.6**²⁾. Citing the original set of Prop. 65 regulations adopted by the Health and Welfare Agency, the court concluded that the statute, as interpreted by the agency, prohibits acts that "directly" bring a consumer into contact with a listed chemical. The purpose of Prop. 65, according to the court, is to allow consumers to make "informed choices" about coming into contact with a chemical. "Interpreting the term 'expose' in section 25249.6 to require a warning for any act that directly brings a consumer into contact with a listed chemical allows consumers to make such informed choices," according to the opinion.

Given this reading of the Prop. 65 regulations, the court then concluded that EHA's allegations were insufficient to constitute a cause of action under Health section 25249.6.

The court then disposed with alternative arguments by EHA as follows:

- Remedial Nature of Prop. 65. EHA argued that the trial court did not acknowledge past court decisions, which have said that Prop. 65 should be broadly interpreted as a remedial law intended to protect the public. The court noted that this argument has a flip side in that too broad an application of the law would result in a proliferation of unnecessary warnings that "could distract the public from other important warnings on consumer products."
- "Reasonably Foreseeable Use" Standard. EHA argued that a warning was required for Sream's water pipe, because it is "reasonably foreseeable" that consumers will use the pipe to consume marijuana. EHA based this argument on **Health and Safety code section 25600.1(e)**³⁾ of the Prop. 65 regulations, which defines a "consumer product exposure" as one that results from the foreseeable use of a consumer product. In rejecting this argument, the court pointed out that the above section is part of Article 6 of the regulations, which is defined as being used only to determine whether a warning is required for a given exposure under Section 25249.6 of the statute. Thus, the referenced section cannot be used to determine whether there is an exposure in the first place, according to the court. The court goes on to reject various other arguments by EHA for use of the reasonably foreseeable standard. The court acknowledged the concept of "reasonable foreseeability," but concluded that none of the examples of it cited by EHA demonstrate the court's basic conclusion; that there must be a "direct" contact with a listed chemical in order to constitute exposure under Prop. 65.
- Attorney General Letters. EHA argued that the trial court ruling was inconsistent with a number of letters from the California AG opining as to whether a particular Prop. 65 violation notice validly alleged an exposure. The letters are largely not relevant to the type of exposure alleged here, according to the court. However, in 2011 the AG issued a letter in response to notices alleging that consumers were exposed to alcoholic beverages through the sale of alcoholic drinking games, such as "beer pong game sets." The AG urged the withdrawal of the notices pointing out that the products might have an indirect effect on alcohol consumption depending on how the product is used, but not a direct exposure. The court suggested that this is consistent with the use of the water pipe in this instance in that any exposure depends on how the pipe is used.

Abuse of Discretion in Denying Leave to Amend

Finally, EHA argued that even if the motion for judgment on the pleadings was properly issued, the lower court erred in denying EHA leave to amend. In rejecting this argument, the court pointed out that EHA had failed to offer any additional allegations to show that Sream's water pipe products directly bring consumers into contact with marijuana smoke.

The opinion was authored by Cindee Mayfield, a Mendocino County Superior Court Judge sitting by designation. Mayfield was joined by Associate Justices James A. Richman and Therese M. Stewart.

Attorneys Shaun A. Markley, Craig M. Nicholas, and Jake W. Schulte of Nicholas & Tomasevic, LLP and Noam Glick of Glick Law Group represented Environmental Health Advocates in the case. Sream Inc. was represented by: Catherine W. Johnson and Julia S. Thrower of Environmental General Counsel.

*Editor's Note: Roger Pearson is married to counsel for Sream Inc. Catherine W. Johnson.

Resources for this article

1. Environmental Health Advocates v. Sream Inc.

<https://prop65clearinghouse.com/cases/7082>

2. Health and Safety code section 25249.6

https://california.public.law/codes/ca_health_and_safety_code_section_25249.6

3. Health and Safety code section 25600.1(e)

<https://prop65clearinghouse.com/documents/78689>