



April 13, 2021

The Honorable Assembly Member Ed Chau
California State Assembly
State Capitol, Room 5016
Sacramento, CA 95814

**SUBJECT: AB 693 (CHAU) PROPOSITION 65: ENFORCEMENT
HEARING SCHEDULED – APRIL 21, 2021
OPPOSE UNLESS AMENDED – AS AMENDED MARCH 18, 2021**

Dear Assembly Member Chau:

The California Chamber of Commerce and the organizations listed respectfully must **OPPOSE UNLESS AMENDED** your **AB 693**, which would amend the Safe Drinking Water and Toxic Enforcement Act of 1986, also known as Proposition 65, to include a 14-day cure provision for food suppliers or distributors, a new requirement for plaintiffs to provide underlying data to defendants, and a complete prohibition on out of court settlements. For the reasons articulated below, the Coalition strongly opposes the prohibition to out of court settlements because it will further exacerbate the already abusive Prop 65 litigation climate, disproportionately impact small businesses by removing a critical option to resolve Prop 65 enforcement actions, and overburden California's already busy courts.

CalChamber and members of the coalition would support the remaining two provisions of **AB 693** in their goal of providing greater transparency in Prop 65 litigation and providing food manufacturers, suppliers and distributors with an opportunity to correct an alleged Prop 65 violation before any "gotcha" lawsuit is filed – but the Coalition cannot do so because of the prohibition on out of court settlements contained in **AB 693**.

- **Banning Out-of-Court Settlements Will Exacerbate Prop 65 Litigation Abuse and Increase Attorney's Fees and Costs**

AB 693 would deny California businesses their right to settle Prop 65 disputes out of court. For many businesses, especially smaller businesses that cannot afford to retain legal counsel, this often provides them with a quicker and more cost-effective resolution. That option should be preserved.

The business community's concern regarding Proposition 65 litigation abuse is well-founded and supported by statistical data provided by the California Attorney General's Office in its Annual Summary of Proposition 65 Settlements. Year after year, the Attorney General's summary shows that the volume of settlements and settlement amounts is consistently high and trending upward. The year 2020 was no exception. Even amid the COVID-19 global pandemic (that shuttered all non-essential businesses, disrupted global supply chains and resulted in millions of job losses), private enforcement of Prop 65 was at an all-time high in 2020. Private enforcers issued 45 percent more notices in 2020 than in the prior year. In 2021 alone, private enforcement attorneys have secured more than \$5.1 million in settlements, of which more than \$4.2 million was for attorneys' fees and costs (almost 85%).¹

Publicly available data going back more than 20 years shows businesses that go through a court-approved settlement process, on average, pay substantially more attorneys' fees and costs, resulting in much larger settlements (3 times as much) for trial attorneys.² Comparing 2021 as one example³:

Out of Court Prop 65 Settlements in 2021

- 165 settled cases totaling \$3,081,940 and \$2,710,684 in attorneys' fees/costs.
- Average settlement: **\$18,678**
- Average Attorneys' fees: **\$16,428**

Court-Approved Prop 65 Settlements in 2021

- 34 judgements totaling \$2,147,498 and \$1,638,178 in attorneys' fees/costs.
- Average settlement: **\$63,161**
- Average Attorney fees: **\$48,181**

By forcing all businesses to settle in court, **AB 693** provides a gift to trial attorneys by compelling all settling parties to utilize their services. It will increase attorneys' fees and costs to businesses by an average of

¹ See California Office of the Attorney General's Annual Reports of Settlements, Year 2021, available at: <https://oag.ca.gov/prop65/annual-settlement-reports>

² Comparing Annual Reports of 2021 Out-of-Court Settlements to 2021 Court-Approved Judgments (date: 04/13/2021)

³ *Id.* (data updated reflects settlements up to 04/13/2021)

200%.⁴ In fact, this estimate is likely too low because the defendant's own legal fees and costs are not reflected – meaning that even more money is going to attorneys and not benefiting the public. **AB 693** would force additional and unnecessary costs onto businesses at a time when most cannot afford it. Businesses should utilize their limited time and resources for dealing with COVID-19 compliance and safety protocols and should not be forced into litigating Prop 65 cases that could have been settled out of court. Finally, it must be emphasized that any business that wants to seek a court-approved settlement has that option today under existing law.

- **Existing Law Requires All Out of Court Settlements to Be Made Public**

Contrary to any arguments that out of court settlements lack transparency and hide Prop 65 violations, the California Legislature passed SB 1269 (Alpert) more than 20 years ago requiring all Prop 65 settlements to be reported to the California Attorney General and made public. As part of that report, the settlement amount and information on any corrective action being taken must be included. By doing so, this Legislature ensured more than two decades ago that all Prop 65 out-of-court settlements are fully transparent to the California Attorney General, public and the Legislature.

- **Burdens California's Judicial System by Forcing Cases That Otherwise Could Have Settled into Court**

The ability of the courts to provide meaningful access to justice for the citizens of California is directly correlated to the judicial workloads. By banning out-of-court settlements, **AB 693** would arbitrarily force hundreds of Prop 65 cases into California's judicial system *even where both the defendant and plaintiff are willing to settle*. In doing so, the bill places tremendous pressure on California courts and risks overburdening the system - leading to more delays, more costs and more attorney's fees – with no rational public benefit.

- **Two Remaining Provisions Further the Purpose of Prop 65 by Providing Greater Transparency and a Right to Cure**

Unfortunately, our concerns with **AB 693's** prohibition on out of court settlements prevent us from supporting otherwise laudable provisions in the bill. The provision in **AB 693** providing a 14-day right to cure for food manufacturers and distributors is analogous to existing law under Prop 65 whereby retailers and restaurants also have a right to cure. The Coalition believes this right to cure provision should be extended not only to food manufacturers and distributors, but other sectors suffering similar onslaughts of Prop 65 litigation. Finally, the provision requiring trial attorneys to provide underlying data to defendants furthers the purpose of Prop 65 of providing greater transparency and information regarding alleged Prop 65 chemical exposure in consumer products.

Prop 65 was passed by California voters more than 30 years ago to provide consumers with more information about the products they are consuming in order to make better informed decisions about the chemicals in products that may cause cancer, birth defects, or other reproductive harm – it was never intended to serve as a law to enrich trial attorneys.

For these reasons, we must **OPPOSE UNLESS AMENDED** your **AB 693** until the bill is amended striking the out-of-court settlement provision.

Sincerely,



Adam J. Regele
Senior Policy Advocate

⁴ Comparing average out-of-court settlement of \$18,678 to average court-approved settlement of \$63,161.

On behalf of the following organizations:

American Bakers Association, *Kelly H. Knowles*

American Chemistry Council, *Tim Shestek*

American Frozen Food Institute, *Donna Garren*

American Supply Association, *Stephen Rossi*

Association of Home Appliance Manufacturers, *Sriram Gopal*

Auto Care Association, *Aaron Lowe*

Brea Chamber of Commerce, *Heidi L. Gallegos*

California Building Industry Association, *Nick Cammarota*

California Food Producers, *Trudi E. Hughes*

California Manufacturers & Technology Association, *Lawrence Gayden*

California Restaurant Association, *Katie Hansen*

California Retailers Association, *Steven McCarthy*

Carlsbad Chamber of Commerce, *Bret Schanzenbach*

CAWA – Representing the Auto Parts Industry, *Rodney Perini*

Chemical Fabrics & Film Association, Inc., *Jennifer M. Oblock*

Chemical Industry Council of California, *Lisa Johnson*

Chino Valley Chamber of Commerce, *Zeb Welborn*

Civil Justice Association of California, *Jamie Huff*

Consumer Healthcare Products Association, *Carlos Gutierrez*

Flexible Packaging Association, *Ram Singhal*

Frozen Potato Products Institute, *Sanjay Gummalla*

Garden Grove Chamber of Commerce, *Sindy Spindle*

Greater Riverside Chambers of Commerce, *Andrew Sall*

Hach Company, *James C. Lee*

Household & Commercial Products Association, *Christopher Finarelli*

Independent Bakers Association, *Elizabeth Velandar*

Industrial Environmental Association, *Jack Monger*

North Orange County Chamber of Commerce, *Theresa Harvey*

Oceanside Chamber of Commerce, *Scott Ashton*

OPEAA - Representing the Outdoor Power Equipment Parts & Accessories Industry, *Brandon Martin*

Outdoor Power Equipment Institute, *Daniel J. Mustico*

Oxnard Chamber of Commerce, *Nancy Lindholm*

Personal Care Products Council, *Tom Myers*

Pleasanton Chamber of Commerce, *Steve Van Dorn*

Power Tool Institute, *Susan Young*

Rancho Cordova Area Chamber of Commerce, *Diann H. Rogers*

Redondo Beach Chamber of Commerce, *Dominik Knoll*

San Gabriel Valley Economic Partnership, *William R. Manis*

Santa Maria Valley Chamber of Commerce, *Glenn Morris*

South Bay Association of Chambers of Commerce, *Elise Swanson*

Southwest California Legislative Council, *Gene Wunderlich*

Specialty Equipment Market Association, *Christian Robinson*

Tulare Chamber of Commerce, *Donnette Silva Carter*

Writing Instrument Manufacturers Association, *David H. Baker*

cc: Chair and Members, Assembly Environmental Safety & Toxic Materials Committee
Legislative Affairs, Office of the Governor