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criminal enhancement purpose. 9th Cir.

Family Law

■ **IN RE GILBERTO M.:** Failure to challenge lack of notice or failure to appoint counsel in juvenile court proceedings precluded raising those issues on appeal. C.A. 5th

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Emissions Data Could Fuel Prop 65 Suits

By **TODD WOODY**

In what could signal a new wave of Proposition 65 litigation against polluters, the state attorney general is suing McDonnell Douglas Corp. for failing to warn the public about toxic emissions at four of its plants. The AG's chief weapon: data supplied by McDonnell Douglas.

The state contends the aircraft manufacturer exposed hundreds of thousands of Southern Californians to excessive levels of lead, methylene chloride and other carcinogens and reproductive toxins without providing proper warnings as required by Prop 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.

The two superior court complaints filed last week in Los Angeles and Orange counties stem from a review of health risk assessments submitted to the state by McDonnell Douglas and other companies under the 1987 Toxic Hot Spots Act. In a cooperative effort, the AG's office, local prosecutors and the state's major environmental groups have been scouring hundreds of risk assessments, the last in a

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MAYA ALI/RIJZ

MICHAEL FREUND: The environmental plaintiffs attorney says corporations are now trying to back away from emissions data they furnished to the state.

Emissions Data Could Fuel More Prop 65 Suits

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series of increasingly detailed Hot Spot reports on emissions and their possible impacts. More suits, by the government or private citizens, are expected, and prosecutors are already investigating a few dozen companies.

"We have identified more than 200 companies that, according to their own reports, create a cancer risk greater than Prop 65 limits," says Al Meyerhoff, a senior attorney with the Natural Resources Defense Fund in San Francisco. "Providing just a warning would be inadequate. An appropriate remedy will be providing both adequate warnings that not only reaches the affected population but provides penalties for past violations."

The AG is seeking penalties of up to \$2,500 per day of violation since 1988, according to the suits.

Unlike past Prop 65 suits — most of which have settled — some of the air toxics cases likely will go to trial, attorneys say. With the recession intensifying the environment-versus-the-economy debate, partisans on both sides expect fierce disputes over what constitutes a clear and reasonable warning to communities under Prop 65.

Moreover, the use of information supplied by potential defendants to satisfy the requirements of a different law will be a heavily debated issue. Even plaintiffs attorneys admit they face a trying task in extracting accurate information about specific risks from the data supplied under the Hot Spots act. And defense attorneys say prosecutors are misusing the information.

"I think the concept of their lawsuit is fatally flawed," says Roger Carrick, a partner in Heller, Ehrman, White & McAuliffe's Los Angeles office who specializes in Prop 65 cases. "It is deceptive to say that data under [the Hot Spots Act], is per se a violation of Prop 65. . . . There's no sense that this is an attempt to clean up the air — it's just another attractive target. I find it remarkably inept to



MERYL SCHENKER

DEPUTY AG CLIFFORD RECHTSCHAFFEN: He says McDonnell Douglas failed to provide specific enough warnings about emissions from four of its plants.

bring a lawsuit against a company that is already moving out of state." (McDonnell Douglas is moving manufacturing jobs out of the Southland, citing the high cost of doing business in California.)

Those on the other side of the aisle, however, say prosecutorial interest has prompted corporate backpedaling on the Hot Spots data.

"It's creating a lot of frustration and making a mockery of whole risk assessment process," says Michael Freund, a Berkeley attorney who has filed Prop 65 intent-to-sue notices against McDonnell Douglas and other companies on behalf of the Los Angeles-based California Earth Corps. "These companies are hiring consultants, spending large sums of money and coming up with conclusions [for the Hot Spots reports] that they now say are not true."

Los Angeles prosecutor Jan Chatten-Brown, who is investigating several air toxics cases, says companies contacted by her office have made radical reductions in their Hot Spots emissions information.

But Michele Corash, a Morrison & Foerster partner and Prop 65 defense expert, says revisions of Hot Spots data are necessary because the health risk assessments they offer often are based on old information and reflect worst-case, theoretical exposures.

"Those numbers do not translate for Prop 65," Corash says. "You plug numbers into a model and theorize a risk level. . . . it is not intended to be an accurate estimate of genuine risk."

"I gather. . . . the objective is going to be notification which is resident-specific. There's nothing wrong with that as long as you are notifying people of genuine risk,"

she added.

The attorney general's cases against McDonnell Douglas could turn on the warning issue. Although the company published Prop 65 notices in local newspapers that stated McDonnell Douglas used certain chemicals at its plants, Deputy AG Clifford Rechtschaffen says the advertisements did not warn residents living near four facilities that they were being exposed to toxins at levels ranging from nine to 190 times the Prop 65 limits.

The ads also failed to provide any warning or identify which plants emitted which chemicals, or even that there was any exposure, according to the suits.

McDonnell Douglas in-house attorney David Cohn referred questions to the company's public relations office. Spokeswoman Anne McCauley says the notices meet the legal requirements of Prop 65 but that company attorneys will try to resolve the issue with the AG's office.

Defense attorneys accuse the state of changing the rules of the game by altering its definition of "clear and reasonable" warnings.

"People feel tricked," says Charlotte Uram, a partner at Landels, Ripley & Diamond who handles clean air cases. "People who try to comply try to stick very close to what regulations say so they'll avoid these suits. The state has prescribed regulations that say you could use newspaper advertisements. Yet they sue and say they're in the wrong format."

But environmentalists and prosecutors say the mere publication of a generic statement does not meet Prop 65's requirements.

"Most companies don't want to be known as people who are poisoning their neighbors," says James Wheaton, an Oakland attorney and president of the Environmental Law Foundation. "They'll do everything to avoid giving their neighbors clear warning about poisons they're dumping."

Attorneys on both sides are awaiting a
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Defense Counsel Balk at AG Suit

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final decision in the only Prop 65 case to go to trial, *Citizens for a Better Environment v. Sawyer of Napa, Inc.*, 61687, an unsuccessful air toxics suit brought against a tannery.

The plaintiffs built their case partly on air pollution data filed on preliminary reports submitted by Sawyer Tannery of Napa Inc. under the Hot Spots Act. But a Napa County judge allowed the defendant to submit new, lower estimates at trial.

Deputy AG Rechtschaffen says the final risk assessment reports give companies much less wiggle room.

"This emissions information is considerably more reliable and trustworthy than data in Sawyer case," Rechtschaffen says. "The information generated by the Hot Spots Act has gone through several layers of review and is much more refined."



RECORDER FILE (1990)

MICHELE CORASH: Revisions of Hot Spots data are necessary because risk assessments often reflect worst-case exposures.

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