

CELLY SERVICES, INC.

Environmental, Health and Safety Services

Now They Got A Dentist

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A private enforcer of Proposition 65 brought a case against a dental office for failure to provide warnings of exposure to mercury that is present in minimal quantities in silver dental fillings. Proposition 65 is a unique California law in that it prohibits any person in the course of doing business from knowingly and intentionally exposing any individual to a chemical, known to the state of California to cause cancer or birth defects, without first giving clear and reasonable warning.

In the case at hand, the Los Angeles Superior Court granted summary judgment on grounds that the plaintiff failed to provide any evidence of the level of mercury exposure. The appellate court reversed. The appellate court stated that once the plaintiff alleges exposure to a Proposition 65 chemical at any level, the burden of proving that the exposure is below Proposition 65 thresholds lies on the defendant.

Now proving levels below Proposition 65 levels can be an uphill battle. For example, in the case of cancer causing chemicals, the "No Significant Risk" level is one in one hundred thousand excess cancer risk. As the state has set the levels for a few chemicals, many chemicals require the risk determination to be made. This can require literature search and even some clinical research.

So where does the dealership go from here? They routinely use chemicals that are on the Proposition 65 list or are known to cause cancer or birth defects. A *clear and reasonable warning* at appropriate locations would help avoid Proposition 65 litigation. The signs should be posted as follows:

Parts Front and Back Counter: The sign stating that "*Chemicals sold at this facility are known to the state of California to cause cancer, birth defects or other reproductive harm*" should be placed at conspicuous places.

Entrance to Service and Bodyshop Areas: The sign stating that "*Chemicals used at this facility are known to the state of California to cause cancer, birth defects or other reproductive harm*" should be placed at public and private entrances to these areas.

Documentation: Whenever autos are detailed or painted with Proposition 65 chemicals and residues may remain, the invoice should have a warning or a warning label placed inside the automobile. Warning should state "*Chemicals used to refinish and/or polish automobiles have utilized chemicals known to the state of California to cause cancer and birth defects or other reproductive harm.*" If sample paint or other chemical is given to the customer, make sure Proposition 65 and other warning labels are affixed to the containers.

Lastly the dealership should contact a qualified counsel to assess his risk to Proposition 65 requirements and seek guidance on protective measures.

For current information on Proposition 65 litigation, you may visit www.calprop65.com, a page maintained by Jeff Margulies of the law firm of Parker Milliken, Clark, O'Hara & Sameulian.

The article was authored by Sam Celly of Celly Services, Inc. Sam has been helping automobile dealers comply with EPA & OSHA regulations in California, Nevada, Arizona, Hawaii & Idaho since 1987. Sam received his BS & MS in Chemical Engineering followed by a JD from Southwestern University. Sam is a Certified Safety Professional & a Registered Environmental Assessor (CA). Your comments/questions are always welcome. Please send them to sam@cellyservices.com.