

American Sportfishing Association

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PROPOSITION 65 SETTLEMENT FOR FISHING LURES AND OPT-IN OPPORTUNITY

- A Consent Judgment was recently approved by the Superior Court of California to settle a Proposition 65 lawsuit regarding soft plastic lures containing certain phthalates (DINP, DIDP, DEHP, and BBP).
- **PLEASE NOTE:** ASA strongly recommends that you label everything. This opt-in settlement is only for soft plastic fishing lures containing BBP, DEHP, DIDP, and DINP. This Opt-in Settlement does not apply to other products or other phthalates.
- According to the Memorandum of Understanding between the American Sportfishing Association (ASA) and Kingpun Cheng (Cheng), Fishing Lures means the category of bait composed in whole or part of soft plastic substrate and intended for fishing.
- The proposed Consent Judgment submitted to the Court had provided for an Opt-In opportunity for other companies to be covered by the settlement. This was made possible, in part, by the efforts of ASA.
- The court did not approve the proposed opt-in procedure, but ASA has reached an agreement with the plaintiff bringing the original case to make the terms of the Consent Judgment available to other manufacturers, distributors, and retailers of fishing lures. Companies will have until April 17, 2019 to submit their Opt-In stipulations and settlement payments.
- The proposed Consent Judgment stipulates that, for Opt-In companies, if Fishing Lure soft plastic substrate does not exceed 50% DINP, DIDP, DEHP or BBP by weight, a Prop 65 warning is not required.
- Compliance may be demonstrated by either a) manufacturing batch records for plastic substrate; b) a content test performed by a commercial laboratory; and c) for companies that are not the manufacturer, a certification by the soft plastic substrate manufacturer supported by either batch records or the total content test.

As an alternative, companies can have their Fishing Lure product tested pursuant to the NIOSH 9100 Wipe Test. For this alternative, the Judgment specifies acceptable levels by phthalate.

- If products fail these conditions/test levels, then a safe harbor warning on products, catalogues and the internet is still required for Opt-In company products.
- Once the new consent judgment is approved, participating companies will have a year in which to label non-compliant products with Prop 65 warnings and will be protected from bounty-hunter lawsuits over these phthalates in fishing lures.
- For companies that choose to Opt-In, payments (see below) are based on California sales, which are defined as average annual retail sales of Fishing Lures in California in 2016 through 2018.
- For Settling Defendants that do not sell Fishing Lures at retail in California, "California Sales" means six percent of the Opt-In Settling Defendant's average annual wholesale sales of Fishing

Lures in the United States in 2016 through 2018. ASA believes that this percentage may be higher than appropriate, but plaintiff's counsel will not accept a lower percentage.

The agreement with plaintiff's counsel requires the following payments to participate in the proposed consent judgment, based on California Sales. The settlement payment is the subtotal of the payment to ASA, civil penalties, and the plaintiff's attorney fees. Additionally, the total amount includes the settlement payment plus the filing fee.

California Sales	Payment to ASA	Civil Penalties	Plaintiff's Attorney Fees	Settlement Payment¹	Filing Fee	Total²
≤ \$25,000	\$752.50	\$430.00	\$967.50	\$2,150.00	\$850.00	\$3,000.00
≤ \$50,000	\$1,802.50	\$1,030.00	\$2,317.50	\$5,150.00	\$850.00	\$6,000.00
≤ \$100,000	\$3,902.50	\$2,230.00	\$5,017.50	\$11,150.00	\$850.00	\$12,000.00
≤ \$250,000	\$10,202.50	\$5,830.00	\$13,117.50	\$29,150.00	\$850.00	\$30,000.00
≤ \$500,000	\$15,452.50	\$8,830.00	\$19,867.50	\$44,150.00	\$850.00	\$45,000.00
> \$500,000	\$20,702.50	\$11,830.00	\$26,617.50	\$59,150.00	\$850.00	\$60,000.00

¹ The Settlement Payment column is the subtotal of the 1) Payment to ASA; 2) Civil Penalties; and 3) the Plaintiff's Attorney Fees.
² The Total includes the Settlement Payment plus the Filing Fee.

ASA, through the Norton Rose Fulbright law firm, will collect the payments of Opt-In companies, and distribute the funds to the plaintiffs and the State of California.

The law firm on behalf of ASA also will provide Proposition 65 compliance training and supporting uniform State and Federal regulations concerning the four phthalates and other Prop 65 chemicals in fishing tackle.

The payment to ASA is to offset costs incurred to develop the exposure assessment that supports the reformulation/warning levels in the settlement, as well as significant attorney's fees in negotiating the original settlement and the opt-in settlement. A portion of the payment will cover ASA's attorney's fees in implementing and obtaining approval of the opt-in settlement.

Where can I get more information or a copy of the opt-in form?

You can get the opt-in stipulation form along with the FAQs and the Prop 65 Opt-in process description at [here](#).

For further information on the settlement, including the proposed Consent Judgment and directions on how to participate, please contact:

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PROP 65 FISHING LURE OPT-IN SETTLEMENT AGREEMENT FAQs

What does the proposed settlement cover?

The proposed settlement addresses four Prop 65-listed phthalates in soft plastic fishing lures: BBP, DEHP, DIDP, and DINP ("Listed Chemicals"). It was negotiated by the American Sportfishing Association (ASA) and Kingpun Cheng (Cheng), the plaintiff in a previous settlement between a Prop 65 enforcer and several companies that sold fishing lures titled *Cheng v. Zoom Bait*.

According to the Memorandum of Understanding between ASA and Cheng, Fishing Lures means the category of bait composed in whole or part of soft plastic substrate and intended for fishing.

PLEASE NOTE: ASA strongly recommends that you label everything. This opt-in settlement is only for soft plastic fishing lures containing BBP, DEHP, DIDP, and DINP. This Opt-in Settlement does not apply to other products or other phthalates.

Who can participate in the settlement?

Businesses that manufacture, distribute, or sell Fishing Lures ("bait composed in whole or part of soft plastic substrate and intended for use in fishing") can agree to opt-in to this industry-wide settlement. Businesses are ineligible if (i) they have received a Prop 65 60-day notice over alleged exposure to the Listed Chemicals in Fishing Lures within the prior year or (ii) if they are currently a defendant in a Prop 65 enforcement action alleging exposure to Listed Chemicals in Fishing Lures.

What does the settlement do?

Participating companies that meet defined standards for the listed chemicals in Fishing Lures will not need to provide Prop 65 warnings. The standards are set by either content (50 percent by weight) or a standardized wipe test. The settlement defines how warnings must be provided for Fishing Lures that do not meet the reformulation standards, starting one year after the settlement is approved by the court.

Businesses that comply with the settlement will be deemed to comply with Prop 65 and protected from lawsuits by other private enforcers over the same chemicals in Fishing Lures that they sell or distribute before the reformulation date. The settlement will also release claims against downstream retailers and distributors for Fishing Lures supplied by participating companies.

How does this settlement impact recent changes to Prop 65's warning regulations?

Companies that participate in this settlement will have a court order stating that if they comply with the terms of this settlement, they will comply with Prop 65 over the listed chemicals in Fishing Lures, even if the terms of the settlement differ from the regulations. Under the new regulations, a court-approved settlement is deemed clear and reasonable under Proposition 65.

How does this settlement impact the earlier settlement over lead in fishing tackle?

Companies that participated in that settlement are provided with the ability to comply with the phthalate chemicals in this settlement by providing the same warnings they are already providing.

How much does the settlement cost?

Settlement costs depend on a business's average annual retail sales of Fishing Lures in California in 2016 through 2018. For businesses that do not sell Fishing Lures at retail in California, California sales are defined as six percent of the business's average annual wholesale sales of Fishing Lures in the United States in 2016 through 2018. Settlement costs include defined amounts of civil penalties, plaintiff's attorney's fees, court and filing fees, and costs incurred by ASA in negotiating and implementing the settlement.

The agreement with plaintiff's counsel requires the following payments to participate in the proposed consent judgment, based on California Sales. The settlement payment is the subtotal of the payment to ASA, civil penalties and the plaintiff's attorney fees. Additionally, the total amount includes the settlement payment plus the filing fee.

The payment to ASA is to offset costs incurred to develop the exposure assessment that supports the reformulation/warning levels in the settlement, as well as significant attorney's fees in negotiating the original settlement and the opt-in settlement. A portion of the payment will cover ASA's attorney's fees in implementing and obtaining approval of the opt-in settlement.

California Sales	Payment to ASA	Civil Penalties	Plaintiff's Attorney Fees	Settlement Payment ¹	Filing Fee	Total ²
≤ \$25,000	\$752.50	\$430.00	\$967.50	\$2,150.00	\$850.00	\$3,000.00
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² The Total includes the Settlement Payment plus the Filing Fee.

Companies that only sold Fishing Lures in California (i.e., did not manufacture) are required to pay ½ of the amount otherwise required under the agreement, except for the \$850 filing fee.

How do I participate?

To participate, a business must fill out an opt-in stipulation containing basic information and submit the stipulation along with its payments by April 17, 2019. The business will then receive a Prop 65 60-day notice and will be included in the settlement when it is submitted to the court for approval.

What happens once the opt-in period expires?

Cheng will file a motion to seek approval of the proposed settlement. The court will need to approve (i) the Prop 65 warnings required by the settlement, (ii) the civil penalties, and (iii) the plaintiff's attorney's fees, and find that the settlement is in the public interest.

What happens if the settlement is not approved?

Cheng and ASA have agreed to attempt to negotiate a revised settlement that resolves any concerns raised by the court should it not approve the settlement.

Where can I get more information or a copy of the opt-in form?

You can get the opt-in stipulation form along with the FAQs and the Prop 65 Opt-in process description at [here](#).

You may also contact ASA's attorney for Prop 65 issues *only* at:

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