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## *Consumer Protection*

# Protecting the Medical Patient's Right to Privacy

*Victoria K. Lin*

*Code Sections Affected*
Civil Code §§ 56.104 (new), 56.35 (amended).
AB 416 (Machado); 1999 STAT. Ch. 527
Civil Code § 56.31 (new); Labor Code § 3762 (amended).
AB 435 (Corbett); 1999 STAT. Ch. 766

## I. INTRODUCTION

Article I, section 1 of the California Constitution expressly guarantees to individuals a right to privacy.[1] Since the enactment of the privacy amendment, the California Supreme Court has held that this provision protects people from the improper use of information which has been properly obtained for a specific purpose.[2]

However, "[p]rivacy concerns are not absolute; they must be balanced against other important interests."[3] "[N]ot every act which has some impact on personal privacy invokes the protections of the [state] Constitution."[4] Accordingly, invasion of a private interest is not a violation of the California constitution if the invasion is justified, as may be the case for a legally authorized or socially beneficial activity of the government or private entities.[5] Indeed, the relative importance of the interest is determined by its proximity to the functions of a particular public or private enterprise.[6]

Legislators have struck a balance between the medical privacy rights of citizens and the rights of interested parties through the enactment of Chapter 766,[7] which

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1. CAL. CONST. art. I, § 1; see *id.* (stating that "[a]ll people by nature are free and independent and have inalienable rights. Among these are enjoying and defending life, liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy").

2. *See* White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975) (determining that one of the principal objectives of the privacy amendment is to recognize principal "mischiefs" such as "government snooping" or misuse of properly obtained information).

3. Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 37, 865 P.2d 633, 655, 26 Cal. Rptr. 2d 834, 857 (1994).

4. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1046, 264 Cal. Rptr. 194, 202 (1989).

5. *Hill*, 7 Cal. 4th at 38, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857.

6. *Id.*, 865 P.2d at 655, 26 Cal. Rptr. 2d at 857.

7. *See* CAL. CIV. CODE § 56.31 (enacted by Chapter 766) (permitting the disclosure or use of medical information regarding a patient's HIV-positive status only with "the prior authorization from the patient").

regulates disclosure of medical information records subject to the Confidentiality of Medical Information Act. Moreover, the newly passed Chapter 527 returns some control of medical information to the individual by prohibiting providers of health care, health care services, or health care contractors from releasing medical information relating to a patient's outpatient psychotherapy treatment unless the provider strictly adheres to specific requirements, such as providing a written request explaining the length of time the information will be kept before being destroyed.[8]

Until the passage of Chapters 766 and 527, an individual's right to medical privacy had been at odds with the interest of employers or the government in gaining access to a person's information contained in medical records.[9] This Legislative Note traces the developments of privacy law in the field of workers' compensation, documenting the need for changes in the Confidentiality of Medical Information Act, and exploring Chapters 766 and 527 as they impact existing medical privacy laws.

## II. LEGAL BACKGROUND

### A. *Confidentiality of Medical Information Act*

California Civil Code section 56 and its companion parts codified the Confidentiality of Medical Information Act (CMIA).[10] The purpose of the CMIA is to protect the confidentiality of individually identifiable medical information obtained by health care providers.[11] Despite this purpose, the Act does establish limited circumstances under which the release of such information to specified entities or individuals is permissible.[12]

As defined by CMIA, medical information is any individually identifiable information in possession of or derived from a health care provider or health care service plan regarding a patient's medical history, mental or physical condition, or treatment.[13] CMIA requires a health care provider to hold confidential a patient's medical information unless the information falls under one of several exceptions

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8. *See* CAL. CIV. CODE § 56.104(a)(2) (enacted by Chapter 527) (providing the guidelines for requesting information specifically relating to an individual's outpatient treatment with a psychotherapist); *infra* notes 50-54 and accompanying text (discussing this aspect of the new law).

9. *See* James G. Hodge, Jr., *The Intersection of Federal Health Information Privacy and State Administrative Law: The Protection of Individual Health Data and Workers' Compensation*, 51 ADMIN. L. REV. 117, 121 (1999) (stating that workers' compensation is in conflict with modern notions of health information privacy because "[t]he privacy of health information cannot fully be preserved in a government-controlled, mandatory system" that adjudicates medical injuries).

10. CAL. CIV. CODE § 56 (West 1982).

11. *See id.* § 56.10(a) (West Supp. 2000) (setting the guidelines for authorization of release of medical information).

12. *Id.*

13. *Id.* § 56.05(f) (West Supp. 2000).

to the Act.[14] For instance, a provider must release information pursuant to a court order or a search warrant lawfully issued.[15]

Nothing in CMIA prevents a health care provider from supplying, upon specific request, "the patient's name, address, age, sex, general description of the reason for treatment, general condition of the patient, and any information that is not medical information as defined in CMIA."[16] For the most part, no health care provider may disclose medical information regarding a patient without first obtaining an authorization.[17] However, a health care provider is relieved from liability if it "can show that the disclosure is excepted either by the mandatory[18] or permissive[19] provisions of the Act, which allow disclosure of medical information without prior authorization under specified circumstances."[20] These circumstances include disclosure compelled "by a court pursuant to an order of that court"[21] or in an emergency situation "for purposes of diagnosis or treatment of the patient."[22]

The narrowly defined requirements found in Civil Code section 56.10 reflect the Legislature's interest in assuring that medical information is disclosed only for a specific purpose, to an identified party, for a limited period of time.[23] In California, employers and insurance companies, for example, have a strong interest in obtaining full access to the results of medical examinations for employees seeking workers' compensation benefits.[24] At times, this interest conflicts with the individual's highly-valued right to privacy.[25] Nonetheless, the existing mandatory and permissive exceptions do recognize the need to strike a balance between a legitimate interest for access to medical information and an individual's preference for keeping that information confidential.[26]

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14. *See id.* § 56.10(b)(1)-(8), (c)(1)-(17) (West Supp. 2000) (listing the mandatory and permissive instances when medical information may be disclosed without the patient's authorization).

15. CAL. CIV. CODE § 56.10(b)(1), (6) (West Supp. 2000).

16. ASSEMBLY COMMITTEE ON JUDICIARY, ANALYSIS OF AB 62, at 2 (Apr. 20, 1999).

17. *See* CAL. CIV. CODE § 56.10(a) (West Supp. 2000) (providing that medical information cannot be disclosed without the patient's authorization except as otherwise provided).

18. *See id.* § 56.10(b)(1)-(8) (West Supp. 2000) (providing guidelines for required disclosure of medical information); *supra* note 15 and accompanying text (explaining mandatory disclosure provisions).

19. *See id.* § 56.10(c)(1)-(17)(West Supp. 2000) (explaining situations in which medical information may be disclosed); *see also supra* note 15 and accompanying text (delineating the permissive disclosure provisions).

20. Pettus v. Cole, 49 Cal. App. 4th 402, 426, 57 Cal. Rptr. 2d 46, 62 (1996); *see* CAL. CIV. CODE § 56.10(b)-(c) (West Supp. 2000) (containing the provisions to which the *Pettus* court is referring in the quoted passage).

21. CAL. CIV. CODE § 56.10(b)(1) (West Supp. 2000).

22. *Id.* § 56.10(c)(1) (West Supp. 2000).

23. *Pettus*, 49 Cal. App. 4th at 426, 57 Cal. Rptr. 2d at 62.

24. *See* David G. Scalise & Kevin P. Farmer, *Disclosure of a Patient's Medical Information to Third Parties: How Much Is Too Much?*, 22 LAW & PSYCHOL. REV. 199, 199 (1998) (suggesting that employers are responsible for paying for medical exams, which entitles employers to the doctor's diagnosis).

25. Hodge, Jr., *supra* note 9, at 121.

26. *Pettus*, 49 Cal. App. 4th at 427, 57 Cal. Rptr. 2d at 62.

### B. Confidentiality of Medical Information in Workers' Compensation Claims

From its inception, the workers' compensation program "sacrificed individual control over the uses of health information concerning work-related injuries in the interests of providing uniformity and consistency in mediating claims."[27] The compensation process was intended to be government-controlled; thus, employees hurt at work were required to report their injuries to their employers and subsequently to government authorities.[28] The workers' compensation model explicitly rejected an individual's interest in insulating information about work-related injuries from employers or the government.[29]

On occasion, this broad disclosure policy regarding medical information has resulted in exposure of medical information that is not associated with the work-related injury. For instance, AIDS Legal Services in San Jose, California, assisted a client who was treated for back pain from an industrial injury.[30] Although his HIV-positive status had nothing to do with his injury, the patient disclosed his medical condition solely to avoid medication interaction complications.[31] Doctors put the unredacted HIV status information in the emergency room treatment records and sent the unredacted HIV information "to the client's employer's workers' compensation insurer."[32] "The insurer included those emergency room records in a report that [was] sent to a workers' compensation doctor to calculate a rating of the client's permanent disability" in order to determine compensation.[33] The insurer also sent copies of the entire report, including the unredacted HIV information, to the client, his employer, and his private chiropractor.[34]

Additionally, CMIA provides that a health care professional may disclose medical information without a patient's authorization to the extent necessary to determine responsibility for payment and to ensure that payment is made.[35] Furthermore, information and records acquired, maintained, or disclosed pursuant to a workers' compensation claim are not subject to the confidentiality requirement of CMIA in a payment dispute.[36] Thus, in the situation regarding the HIV-positive client,[37] the patient's HIV-positive condition could be disclosed to his employer as well as to his employer's insurer without his consent because this information was

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27. Hodge, Jr., *supra* note 9, at 124.
28. *Id.*
29. *Id.*
30. ASSEMBLY FLOOR, ANALYSIS OF AB 435, at 2 (May 19, 1999).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 2-3
35. CAL. CIV. CODE § 56.10(c)(2) (West Supp. 2000).
36. *Id.* § 56.30(f) (West Supp. 2000).
37. *See supra* notes 30-34 and accompanying text (explaining an incident in which a patient's HIV status was disclosed when that HIV status had no relation to the individual's workers' compensation claim).

communicated during an examination intended to be reported for purposes of a workers' compensation claim.[38] Therefore, according to these laws, employers and employers' insurers may access any information communicated during a medical check-up without first obtaining authorization from the patient, as long as the information was exchanged during an exam relating to recovery under workers' compensation insurance.

### *C. Mental Health Records*

Another area in which an individual's privacy interests are implicated involves the release of mental health records. Often, treatment "involves divulgence of embarrassing, sometimes shameful information about a patient's thoughts, desires, family members and associates, and past history."[39] Under previous practices, managed care companies did not acknowledge the sensitive nature of such documents.[40] For example, a therapist could fax a complete patient file to another party or permit a visitor to read an entire patient file while having the option to photocopy material merely by making a request for a specific file.[41] These parties did not have to state a reason for such use of the patient's record.[42]

The Lanterman-Petris-Short Act[43] provides some protection against the release of mental health records, but only for inpatient care and institutions that provide it, not for outpatient assistance and private providers.[44] Consequently, prior to the enactment of Chapters 766 and 527, California legislators had expressed concerns that personal mental health information would not be kept confidential.[45]

## III. CHAPTER 766

Chapter 766 limits disclosure of medical information to data related to an employee's claim for workers' compensation by prohibiting the disclosure of a person's HIV status when the patient has not made a prior authorization, unless the injured worker claims to be infected with or exposed to HIV through an incident arising out of his or her employment.[46] Accordingly, if the patient reveals his or her

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38. *See supra* notes 35-36 and accompanying text (providing circumstances in which organizations and individuals are entitled to receive information disclosed during an examination).

39. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 416, at 3 (May 11, 1999).

40. *Id.*

41. *Id.*

42. *Id.*

43. CAL. WELF. & INST. CODE § 5000 (West 1998).

44. *See* ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 416, at 2 (May 11, 1999) (implying that the Lanterman-Petris-Short Act is applied primarily to inpatient care and institutions).

45. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 416, at 1 (May 26, 1999) (outlining the concerns of legislators to this effect).

46. CAL. CIV. CODE § 56.31 (enacted by Chapter 766).

HIV-positive status to a nurse in order to insure that examination materials will be sterilized, and the person's HIV status does not pertain directly to the recovery the patient is seeking under workers' compensation benefits, then the information cannot be reported to the employer or the employer's insurer without the patient's permission.

Moreover, the amended law specifies that medical information and records may not be disclosed to an employer unless the diagnosis of the injury would affect the employer's premium[47] or the information is necessary for the employer to have in order to modify the employee's duties as a result of the injury.[48] Nevertheless, by its express language, Chapter 766 does not "prohibit a redaction decision by a workers' compensation judge from being appealed to the Workers' Compensation Appeals Board."[49]

## IV. CHAPTER 527

Chapter 527 restricts access to mental health medical information. "[N]o provider of health care, health care service plan, or contractor may release medical information" if the data specifically relates to an individual's "outpatient treatment with a psychotherapist."[50] The information request should specifically identify the information sought relating to a patient's outpatient treatment with a psychotherapist and the specific intended use to which the information will be put,[51] as well as the length of time the information will be kept before being disposed of or destroyed.[52] In addition, the request must be accompanied by two statements: one which will state that "the information will not be used for anything other than its intended use"[53] and another that will provide assurances that the information will be destroyed.[54] The new law prohibits contractors from releasing mental health records, and also prohibits such release by health care service plan providers.[55] A violation of California Civil Code section 56.104 could result in compensatory damages, punitive damages, payment of attorney's fees, and payment of costs of litigation if the patient sustains economic loss or personal injury as a result of the exposure of the medical record.[56]

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47. CAL. LAB. CODE § 3762(c)(1) (amended by Chapter 766).
48. *Id.* § 3762(c)(2) (amended by Chapter 766).
49. 1999 Cal. Legis. Serv. ch. 766, sec. 3, at 4445, 4446 (West).
50. CAL. CIV. CODE § 56.104(a) (enacted by Chapter 527).
51. *Id.* § 56.104(a)(1) (enacted by Chapter 527).
52. *Id.* § 56.104(a)(2) (enacted by Chapter 527).
53. *Id.* § 56.104(a)(3) (enacted by Chapter 527).
54. *Id.* § 56.104(a)(4) (enacted by Chapter 527).
55. *Id.* § 56.104(a) (enacted by Chapter 527).
56. *Id.* § 56.35 (amended by Chapter 527).

## V. ANALYSIS OF THE NEW LAWS

### A. *Chapter 766*

Opponents of Chapter 766 urged that the new law would make an occupational injury unnecessarily complicated by requiring the injured worker to consent to the reporting of medical information to the employer.[57] Under prior law, employers were allowed to order a broad discovery that "properly [afforded them] the opportunity to determine for [themselves] whether the injuries, which plaintiffs assert[ed] were caused by [on-the-job] operations, actually arose from other medical conditions," such as HIV.[58]

In this respect, the new guidelines fail to provide adequate protections for employers. Rather than allowing employers to find relevant information, Chapter 766 requires employers to evaluate medical facts that the plaintiff deems significant.[59] Consequently, Chapter 766 permits an employee to hide important medical history by claiming that the information may be related to his or her HIV status.

Further difficulties arise when medical examinations lead to increased costs on premiums for employers because, in such cases, insurers may disclose the patient's diagnosis if the medical records are considered "documents that affect the premium."[60] Consequently, the insurance company may have to disclose symptoms related to the employee's HIV-positive status if HIV status affects the employer's premium. This contradicts the purpose of the enactment of Civil Code section 56.31[61] because the goal of Chapter 766 is to prohibit the disclosure of medical information relative to a patient's HIV-positive status.[62]

In one respect, Chapter 766 may not be necessary because if a problem arises with regard to broad discovery, a workers' compensation judge (WCJ) has the "authority to hear discovery disputes and make orders respecting [them]."[63] In exercising discretion in this area, a WCJ tries "to achieve an appropriate balance between the public policy favoring liberality of pre-trial discovery and the specific policy applicable to workers' compensation cases [so] that [such situations] shall

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57. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 435, at 4 (July 13, 1999).

58. Britt v. Superior Court, 20 Cal. 3d 844, 862, 574 P.2d 766, 778, 143 Cal. Rptr. 695, 707 (1978).

59. *See* CAL. CIV. CODE § 56.31 (enacted by Chapter 766) (allowing disclosure of a patient's HIV-positive status if an employee authorizes such disclosure, or if the employee claims that the infection occurred due to employment activities).

60. CAL. LAB. CODE § 3762(c)(1) (amended by Chapter 766); *see also id.* § 3762(a) (amended by Chapter 766) (stating that insurers shall discuss all elements that affect the employer's premium, and that copies of the documents that affect the premium shall be supplied).

61. *See* CAL. CIV. CODE § 56.31 (enacted by Chapter 766) (attempting to protect the medical records of patients infected with HIV).

62. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 435, at 2 (Sept. 5, 1999) (describing the reasons behind Chapter 766's promulgation).

63. Allison v. Workers' Comp. Appeals Bd., 72 Cal. App. 4th 654, 664, 84 Cal. Rptr. 2d 915, 921 (1999).

be adjudicated expeditiously, inexpensively and without encumbrance of any character."[64] Resolution of the dispute by a WCJ may be more beneficial to parties because the WCJ can determine a procedure that fulfills due process concerns while ensuring timely completion of discovery proceedings.[65]

However, to its credit, Chapter 766 protects patients from unwanted medical information disclosures, situations where in a patient divulges his or her HIV-positive status to the healthcare practitioner merely to avoid medical complications.[66]

### *B. Chapter 527*

Speaking with healthcare practitioners is not always easy. Often, "matters disclosed to the physician arise in most sensitive areas often difficult to reveal even to the doctor."[67] This concern is heightened when the "doctor" involved is a psychotherapist, as matters discussed during such sessions are highly personal.[68] Chapter 527 therefore provides solutions to the mental healthcare patient wishing to fully inform his or her psychotherapist, but fearing that the information might be divulged to third parties.

By restricting employers to discovering information that is directly related to the recovery the employee seeks under workers' compensation statutes,[69] Chapter 527 avoids divulgence of unrelated medical histories. Chapter 527 staves off the possibility that medical administrators might inadvertently give medical records or information to a health care service plan billing agent by forcing the administrators to delve deeper into the request.[70] Essentially, the health care provider will do this by examining the statements concerning the purpose of the request, the length of time during which the file will be used, and the assurance that the information will be used only for its permissible purpose and will be destroyed soon thereafter.[71] This is a positive change, as the sensitivity surrounding mental health information requires that steps be taken to ensure the patient's privacy to the extent possible in the workers' compensation setting, where divulgences of some sort must occur so that healthcare plans may evaluate the patient's claim.[72]

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64. *Id.*, 84 Cal. Rptr. 2d at 921.

65. *Id.*, 84 Cal. Rptr. 2d at 921.

66. *See supra* notes 30-34 and accompanying text (highlighting the necessity for Chapter 766).

67. Palay v. Superior Court, 18 Cal. App. 4th 919, 932, 22 Cal. Rptr. 2d 839, 847 (1993).

68. *See supra* note 39 and accompanying text (acknowledging that the information divulged in mental healthcare sessions often is embarrassing).

69. *See supra* note 59 (explaining the provisions of California Civil Code section 56.31).

70. *See supra* notes 50-55 and accompanying text (opining that Chapter 527 will reduce the chances of unnecessary medical record releases).

71. *Supra* text accompanying notes 50-54 (explaining the provisions of Chapter 527).

72. *See supra* note 35 and accompanying text (listing the purposes for which healthcare administrators may divulge information in the workers' compensation setting).

## VI. CONCLUSION

Theoretically, allowing workers to control the disclosure of health information is inconsistent with the goals of workers' compensation from the perspective of employers who need to be able to gauge the extent of their liability in the workers' compensation context. However, given the previous opportunities for disclosure of needless and serious medical information on releases, California legislators have enacted Chapters 527 and 766 in an effort to achieve a balance between employees' privacy interests and employers' economic interests.[73] By enacting these provisions, legislators have developed a strict system to protect the mental and physical health of employees, and to maintain the confidentiality of private health information.

73. *See, e.g., supra* notes 30-34 and accompanying text (documenting the egregious, if accidental, release of one patient's HIV status information in the workers' compensation setting).

# Is It Necessary?: Increase in Stogie Smoking Triggers "New and Improved" Warning Labels

*Jason M. Miller*

*Code Sections Affected*
Health and Safety Code §§ 104550, 104551, 104552 (new).
AB 1595 (Migden); 1999 STAT. Ch. 693

## I. INTRODUCTION

Smoking cigars has become prevalent among society's youth.[1] The Center for Disease Control and Prevention conducted a study in 1996 that indicated that one-quarter of the nation's teenagers had smoked at least one cigar over the course of the preceding year.[2] In part, the cigar-smoking trend among athletes and movie stars, and of course the traditional stogie-lighting at celebrated events, has perpetuated cigar sales nationwide; sales increased fifty percent between 1993 and 1998.[3] The significant increase in cigar smoking has re-ignited public concern over its adverse effects, and recent studies indicate that this concern is well-founded.[4] A 1999 Kaiser Permanente study of 18,000 men suggests that those who smoke cigars are "twice as likely as nonsmokers to develop cancers of the throat, mouth, esophagus, and lung, and are at significantly greater risk [of] chronic lung disease and coronary disease."[5]

Chapter 693 requires that new warning labels be placed on all cigars distributed within California.[6] The labels must prominently disclose the potential health risks related to cigar smoking.[7] In addition, the new labels must warn consumers that cigars contain many of the same carcinogens present in cigarettes.[8] According to the new law's author, one of the primary purposes of Chapter 693 is to "dispel the

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1. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 1595, at 3 (Apr. 19, 1999).
2. *Id.*
3. Philip Connors, *Cigar Smokers Face Increased Risks of Cancer, Study Shows*, WALL ST. J., June 10, 1999, at B2.
4. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1595, at 1 (May 19,1999).
5. Keay Davidson, *Stogie Smoking Found to Double Risk of Cancer: Migden Cites Kaiser Study in Calling for Cigar Warning Labels*, S.F. EXAMINER, June 9, 1999, at A1.
6. CAL. HEALTH & SAFETY CODE § 104550(a) (enacted by Chapter 693).
7. *Id.*
8. *Id.*

myth that cigar smoking is a safe alternative to smoking cigarettes."[9] Challengers, however, in vigorous opposition to the legislation, contend that the new warning labels are unnecessary because current warning labels adequately warn the public of the health concerns related to cigar smoking.[10] In an effort to air both sides of the debate, this Legislative Note traces tobacco legislation at the federal and state level,[11] and provides an overview of the positions taken by both the challengers and the advocates of Chapter 693.[12]

## II. LEGAL BACKGROUND

### *A. Federal Regulation of Tobacco Products*

The realization that cigarette smoking poses significant health risks prompted the United States Congress[13] to enact the Federal Cigarette Labeling and Advertising Act of 1965.[14] This Act mandates placement of the familiar "Surgeon General's Warning" on every package of cigarettes and on every advertisement promoting cigarette usage.[15] The warnings advise the consumer that smoking cigarettes causes cancer, complicates pregnancies, and poses other serious health risks.[16]

In addition, federal law requires that manufacturers of smokeless tobacco place a warning label on the product that warns consumers of the health risks involved with the usage of that product.[17] The warning must include one of three messages that indicates smokeless tobacco may cause mouth cancer, gum disease, and tooth loss, and that smokeless tobacco is not a safe alternative to cigarette smoking.[18]

Despite federal law that requires warning labels to be placed on cigarettes and smokeless tobacco, the federal government has yet to implement a similar requirement for cigars.[19]

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9. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1595, at 1 (May 19, 1999).
10. *Infra* note 59 and accompanying text.
11. *Infra* Part II.
12. *Infra* Part IV.
13. Francisco Hernandez, Jr. & Jordan M. Parker, *Federal Preemption of State Tort Actions Under the Federal Cigarette Labeling and Advertising Act*, 27 TORT & INS. L.J. 1, 1 (1991).
14. Pub. L. No. 89-92, 79 Stat. 445 (codified at 15 U.S.C.A. §§ 1331-1341 (1965)).
15. 15 U.S.C.A. § 1333 (West 1989).
16. *Id.*
17. *Id.* § 4402 (West 1998).
18. *Id.*
19. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1595, at 2 (May 19, 1999).

## B. State Regulation of Cigars

### 1. Massachusetts

While a number of states have considered adopting regulations that would require warning labels on cigars, aside from California, Massachusetts is the only state to take action.[20] Effective February 2000, manufacturers will commit a civil violation when they distribute in Massachusetts cigar packages that do not bear one of two labels: (1) "Warning: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug"; or (2) "Warning: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products."[21] In addition, retailers who sell individual cigars will be required to display on the cigar containers one of the two warning labels to ensure that the consumer is readily informed of the message.[22]

Tobacco companies responded to Massachusetts' successful effort to implement warning labels on cigars by filing a complaint in federal court alleging that the regulations violate the Commerce Clause of the United States Constitution.[23] They argue that the Massachusetts' cigar labeling requirements pose an undue burden on interstate commerce.[24] Tobacco companies contend that the likelihood of similar labeling requirements being enacted in other states will soon require cigar packages to carry numerous different labels and make compliance with the individual state mandates onerous for manufacturers.[25] In support of this contention, cigar manufacturers have alluded to the fact that manufacturers currently distribute throughout several states cigars bearing labels that conform with the labeling requirements imposed by California's Proposition 65—simply because of the inherent difficulty of tracking cigars that are to be distributed for solely one state.[26]

### 2. California

In 1986, California voters passed the Safe Drinking Water and Toxic Enforcement Act (Proposition 65).[27] Pursuant to this Act, businesses must adequately warn consumers before exposing them to chemicals that cause cancer

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20. Interview with Kyra Emanuels, Associate Consultant, Office of Assemblymember Migden, Sacramento, Cal. (Sept. 30, 1999) [hereinafter Emanuels Interview] (notes on file with the *McGeorge Law Review*).

21. MASS. REGS. CODE tit. 940, § 22.04(1) (1999).

22. *Id.* § 22.06(2)(e) (1999).

23. Complaint, at ¶ 56, Consolidated Cigar Corp. v. Reilly, No. 99CV11270WGY (copy on file with the *McGeorge Law Review*).

24. *Id.*

25. *Id.*, at ¶ 35.

26. *Id.*, at ¶ 28.

27. Restrictions on Toxic Discharges into Drinking Water; Requirement of Notice of Persons' Exposure to Toxics, Initiative Statute, Prop. 65, §§ 1-8 (codified at CAL. HEALTH & SAFETY CODE §§ 25249.5-25259).

or reproductive toxicity.[28] On April 1, 1988, tobacco smoke and chewing tobacco were classified as known carcinogens.[29] Tobacco smoke was also listed as a chemical known to cause reproductive toxicity.[30] As a result, in August of 1988, environmental interest groups filed a complaint that alleged that manufacturers of cigars and other tobacco products were in violation of the labeling requirements imposed by the Safe Drinking Water and Toxic Enforcement Act.[31] Negotiations ensued, and the parties stipulated to a settlement agreement that required manufacturers of cigars to place warning labels on retail packages.[32] Display boxes that contain individual cigars must exhibit a warning label that can readily be observed by customers who remove the cigars.[33] The notice reads as follows: "Warning: This Product Contains/Produces Chemicals Known To The State Of California To Cause Cancer, And Birth Defects Or Other Reproductive Harm."[34] The settlement agreement, however, stated that federal, state, or local government warning label requirements enacted subsequent to the agreement could replace the agreed upon warning label, so long as the language comports with the Safe Drinking Water and Toxic Enforcement Act.[35]

## III. CHAPTER 693

Chapter 693 provides that, by 2000 September 1, retail cigar packages shipped for distribution in California must display one of three warning labels disclosing the pertinent health concerns related to cigar smoking, in addition to a new message indicating that cigars are not a healthy substitute for smoking cigarettes.[36] Subject only to printing abilities, each manufacturer is required to rotate its distribution of

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28. CAL. HEALTH & SAFETY CODE § 25249.6 (West 1999).

29. SENATE HEALTH AND HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 1595, at 1 (June 30, 1999).

30. *Id.* at 2.

31. California *ex rel.* John Van DeKamp v. Safeway Stores, Inc., No. 996780 (San Francisco Superior Court 1988).

32. Stipulated Agreement at 5, California *ex rel.* John Van Dekamp v. Safeway Stores, Inc., No. 897576 (San Francisco Superior Court 1988).

33. *Id.* at 6.

34. *Id.* at 5.

35. *Id.* at 5-6.

36. CAL. HEALTH & SAFETY CODE § 104550(a) (enacted by Chapter 693); *see id.* (setting forth three options for cigar manufacturers:

[1] Warning: Cigars contain many of the same carcinogens found in cigarettes, and cigars are not a safe substitute for smoking cigarettes. This product contains chemicals known to the State of California to cause cancer and birth defects and other reproductive harm.

[2] Warning: Smoking cigars regularly poses risks of cancer of the mouth, throat, larynx, and esophagus similar to smoking cigarettes. This product contains chemicals known to the State of California to cause cancer and birth defects and other reproductive harm.

[3] Warning: Smoking cigars causes lung cancer, heart disease, and emphysema, and may complicate pregnancy. This product contains chemicals known to the State of California to cause cancer and birth defects and other reproductive harm.).

retail packages of cigars so that a proportionate number of each label is displayed within a twelve-month period.[37] The labels must be placed in a reasonable manner so that the language is clear and readable, taking into consideration other printed material that may accompany the warning.[38] Display boxes used to sell individual cigars must contain a warning label that is apparent to a consumer who removes the cigars.[39]

As has been noted, prior to the enactment of Chapter 693, manufacturers were required to place warning labels on cigars as a result of a settlement agreement between environmental interest groups and tobacco manufacturers.[40] The specific language of that warning label, however, is to be replaced and effectively superseded by the language of the warning label requirements promulgated by Chapter 693.[41]

Each manufacturer or importer of cigars who distributes within California and fails to place the Chapter 693 warning labels on the cigars will be subject to a civil penalty of up to $2,500 per day for each violation.[42] A number of local and State officials are permitted to prosecute allegations that manufacturers are in violation of Chapter 693.[43] Any federal law enacted subsequent to Chapter 693 that requires cigar manufacturers to provide warning labels on cigars will supersede the provisions of Chapter 693 in the event of a conflict.[44]

By its express language, the implementation of Chapter 693 does not affect a number of lawsuits pending against cigar manufacturers.[45] These lawsuits were filed in an effort to compel cigar manufacturers to put warning labels on cigars to disclose prominently the dangers of exposure to environmental tobacco smoke, commonly known as second-hand smoke.[46] The Legislature was concerned that, absent express language that Chapter 693 does not affect the pending litigation,

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37. *Id.* § 104550(b) (enacted by Chapter 693).
38. *Id.* § 104550(d) (enacted by Chapter 693).
39. *Id.*
40. *Supra* notes 31-35 and accompanying text.
41. CAL. HEALTH & SAFETY CODE § 104550(f) (enacted by Chapter 693).
42. *Id.* § 104550(g) (enacted by Chapter 693).
43. *Id.* § 104550(h) (enacted by Chapter 693); *see id.* (providing that:
[a]ctions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California, by any district attorney, by any city attorney of a city having a population in excess of 750,000 people and with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor).
44. *Id.* § 104552 (enacted by Chapter 693).
45. *Id.* § 104550(f) (enacted by Chapter 693); *see id.* (providing specifically that the enactment of Chapter 693 will not affect the litigation in: *People v. General Cigar Co.*, San Francisco Superior Court No. 996780; *People v. Phillip Morris, Inc.*, Los Angeles Superior Court No. BC194217; and *People v. Tobacco Exporters International (USA), Ltd.*, San Francisco Superior Court No. 301631).
46. *Id.*; Emanuels Interview, *supra* note 20; *see* Letter from Mark N. Todzo, Lexington Law Group, to Assemblymember Carole Migden (June 28, 1999) (on file with the *McGeorge Law Review)* (suggesting that Chapter 693 should include a warning for environmental tobacco smoke, and explaining that lawsuits have been filed to require cigar manufacturers to warn non-smokers of the adverse effects of environmental tobacco smoke).

cigar manufacturers would argue that Chapter 693 effectively exempted them from those warning labels.[47] However, the Legislature has made clear that only health risks related to smoking cigars were contemplated as being within the ambit of Chapter 693's provisions, and that consideration of whether a warning label for environmental tobacco smoke is appropriate is outside the scope of the new law.[48] Thus, Chapter 693 does not exempt cigar manufacturers from such a requirement simply by passing legislation in which the requirement was not included.[49] Accordingly, for purposes of the current litigation, that Chapter 693 does not include a warning label for environmental tobacco smoke is inconsequential.[50]

## IV. ANALYSIS OF THE NEW LAW

### A. *The Assertions of Chapter 693's Advocates*

Proponents of Chapter 693, such as the American Cancer Society, the American Heart Association, and the American Lung Association, argue that the exclusion of warning labels on cigars at the federal level portrays a view that cigar smoking does not pose inherent health risks.[51] This is a principle concern because a considerable amount of toxins found in cigarettes, which cause cancer and other health-related problems such as birth defects, are also found in cigars.[52] Proponents contend that daily cigar smokers are twice as likely to get lung cancer, seven times more likely to get oral cancer, and ten times more likely to get larynx cancer than are non-smokers.[53]

Despite the endorsement of a federal requirement for cigar warnings by the Federal Trade Commission,[54] some California lawmakers dismissed that progress as a reason to delay immediate action, claiming that federal legislation requiring

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47. Emanuels Interview, *supra* note 20.

48. *Id.*

49. *Id.*

50. *Id.*

51. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 1595, at 3 (Apr. 19, 1999).

52. *Id*; *see* Regina McEnery, *Cigar Smokers Engaging in Deadly Hobby, Cancer Institute Says*, SALT LAKE TRIB., May 21, 1998, at C2 (stating that the National Cancer Institute recently released a study that found that cigar smoke "contains most of the same toxins found in second-hand cigarette smoke—ammonia, carbon monoxide and nitrosamines—and in higher quantities").

53. SENATE HEALTH & HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 1595, at 3 (June 30, 1999).

54. FEDERAL TRADE COMM., CIGAR SALES AND ADVERTISING AND PROMOTIONAL EXPENDITURES FOR CALENDAR YEARS 1996 AND 1997, 17 (1999); *see* Caroline E. Mayer & John Schwartz, *Trade Commission Proposes Health Warnings for Cigars; Labels Would Be Like Those on Cigarettes*, WASH. POST, July 22, 1999, at A1 (reporting that the Federal Trade Commission was "[a]larmed by a dramatic increase in cigar consumption, particularly among adolescents, . . . [and therefore] proposed placing the same advertising and labeling restrictions on cigars that are now on cigarettes and chewing tobacco").

warning labels on cigars is at least four, if not five, years away.[55] In addition, the State mandated Proposition 65 warning label for cigars are not specific to the health concerns related to cigar smoking.[56] The Proposition 65 warning label fails to adequately address the health risks associated with cigar smoking, and only makes a vague reference to the fact that cigars may cause cancer.[57] Supporters contend that Chapter 693 is a commendable and significant change if it deters from smoking cigars even one uninformed teenager who is unaware that "lighting up a stogie" is not a healthy alternative to smoking cigarettes.[58]

### B. *The Assertions of Chapter 693's Challengers*

Opponents of Chapter 693, which include the Cigar Association of America and the California Distributors Association, argue that Chapter 693 was unnecessary because the Proposition 65 warning sufficiently warned cigar smokers of the adverse health effects associated with smoking cigars.[59] The Proposition 65 warning label specifically states: "This product contains/produces chemicals known to the State of California to cause cancer, and birth defects or other reproductive harm."[60] In comparison, one of the Chapter 693 warning labels contains the precise Proposition 65 warning label language, only adding a clause specifying lung cancer, heart disease, and emphysema as potential health problems associated with cigar smoking.[61] Thus, opponents assert that the Proposition 65 warning label was adequate,[62] and that the "new and improved" Chapter 693 label will be a failed attempt to deter people from smoking cigars.[63] To further support this contention, challengers claim that there is no evidence that corroborates the supporters' position that a false perception that cigars are a risk-free alternative to cigarettes is a motivating factor for those who smoke cigars.[64]

In addition, action by the Federal Trade Commission proposing federal warning labels on cigars strengthens the argument that the implementation of Chapter 693

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55. *See* CAROLE MIGDEN, AB 1595 Q & A (1999) [hereinafter MIGDEN, AB 1595 Q & A] (copy on file with the *McGeorge Law Review*) (explaining that the Federal Trade Commission cannot implement legislation without the consent of Congress; thus, the hope of new regulation is, in realistic terms, four to five years away).

56. *Id.* at 1; *see supra* note 34 and accompanying text (explaining that the warning label required prior to Chapter 693 only informs the user that the product contains cancer-causing agents, without reference to cigar smoking in particular).

57. *Supra* note 34 and accompanying text.

58. Editorial, *A Closer Look at Stogies*, L.A. TIMES, Aug. 8, 1999, at M4.

59. SENATE HEALTH AND HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 1595, at 4 (June 30, 1999).

60. *Supra* note 34 and accompanying text.

61. *Supra* note 36.

62. SENATE HEALTH AND HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 1595, at 4 (June 30, 1999).

63. McEnery, *supra* note 52, at C2.

64. Complaint, *supra* note 23, at ¶ 36.

was unnecessary.[65] Challengers of Chapter 693 maintain that one uniform warning label imposed at the federal level is a reasonable solution when compared with the unworkable possibility of fifty different state warning labels.[66]

### *C. Dormant Commerce Clause Challenges to Chapter 693*

Initiating warning label requirements for cigars at the state level will inevitably lead to a variety of warning labels in the several states—which will undoubtedly be a burden to cigar manufacturers.[67] As a result, Chapter 693 may face a challenge similar to the argument framed against the Massachusetts regulations[68] that the California law violates the dormant Commerce Clause.[69]

In an area unregulated by the federal government, the states are free to act provided they do so within the restraints of the Commerce Clause.[70] Thus, although the mandates of Chapter 693 apply to California cigar distributors, one might argue that requiring out-of-state cigar manufacturers to place warning labels on cigars overburdens interstate commerce.[71] However, as in the instant case, when implementing an evenhanded law in an effort to promote the safety and general welfare of its people, a state may place incidental burdens upon interstate commerce provided that those burdens are not clearly excessive.[72]

Cigar manufacturers have argued that they will "face regulatory chaos" if they are forced to comply with individual state warning labels, and that because of the difficulty of establishing a state-specific distribution scheme, the only economically viable alternative is to place the warning labels on all the cigars to be sold

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65. *See supra* note 54 and accompanying text (describing Federal Trade Commission proposals in this regard).

66. Letter from Carpenter, Snodgrass & Associates to Assemblymember Carole Migden (June 30, 1999) (on file with the *McGeorge Law Review*).

67. Complaint, *supra* note 23, at ¶ 35.

68. *See supra* notes 23-26 and accompanying text (describing the Massachusetts situation).

69. Complaint, *supra* note 23, at ¶ 56.

70. City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978); *see* U.S. CONST. art. I, § 8 (permitting Congress "to regulate Commerce . . . among the several States").

71. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-54 (1977) (holding that North Carolina's facially neutral statute that required all apples entering the State to display only United States grades violated the dormant Commerce Clause). Although the statute applied to North Carolina apples, the court held that, in its application, the legislation was discriminatory against Washington apples, which endured a more comprehensive inspection process than would have occurred under the United States apple grading system. *Id.* at 354.

72. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (stating that:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.")

throughout the United States.[73] On the other hand, distributing cigars in this fashion does not appear to be a threatening economic burden, as expenditures that would have to be made to accommodate jurisdictional distribution schemes will not be incurred.[74] More persuasive is the fact that for over a decade prior to the enactment of Chapter 693, cigar manufacturers have distributed "the overwhelming majority" of their cigars in the United States with the Proposition 65 warning labels affixed to them, thereby demonstrating that individual state mandates are not economically impractical and are less of an economic concern than cigar manufacturers suggest.[75] Accordingly, the labeling requirements imposed by Chapter 693 are not likely to be viewed as excessive burdens when weighed against the advancement of uncontested legitimate local concerns such as the desire to warn people of the life-threatening health risks associated with smoking cigars.[76] Thus, Chapter 693 will likely withstand a constitutional attack under the Commerce Clause.

## V. CONCLUSION

Irrespective of one's political ideology regarding whether governmental imposition of warning label requirements is good policy, one cannot overlook that Chapter 693 is an effort to forward a respectable objective.[77] Recent trends indicate that smoking cigars has become more common among teenagers, and has increased in the society as a whole.[78] Thus, the promulgation of this legislation is timely, especially considering the absence of federal regulation.[79] Nevertheless, challengers of Chapter 693 have voiced legitimate concerns that the new warning labels are unnecessary because the Proposition 65 warning label requirement, which was superseded by the adoption of Chapter 693, sufficiently warned consumers of the health risks associated with cigar smoking.[80]

Arguably, the most appropriate compromise and ultimate solution is for the federal government to respond to the Federal Trade Commission's request for a federal warning label, to be placed on all cigars, that sufficiently identifies the health risks related to cigar smoking.[81] Until such federal requirements are enacted,

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73. *E.g.*, Complaint, *supra* note 23, at ¶¶ 31-32.

74. *See id.*, at ¶ 28 (explaining that cigar manufacturers distribute most of their cigars throughout the United States with labels attached; therefore, only incidental costs will be added under the new scheme).

75. *Id.*

76. *See Pike*, 397 U.S. at 142 (explaining that unless the burdens placed on interstate commerce are substantial, legislation that promotes legitimate local interests will survive Constitutional scrutiny).

77. *See supra* note 9 and accompanying text (explaining that the purpose of Chapter 693 is to educate cigar smokers about the fact that stogie smoking is a health danger and not a safe substitute for cigarettes).

78. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 1595, at 3 (Apr. 19, 1999).

79. *Supra* note 51 and accompanying text.

80. *Supra* note 59 and accompanying text.

81. *See supra* text accompanying notes 65-66 (recapitulating the position of cigar manufacturers that Chapter 693 is unnecessary in view of the proposed federal warning label).

for better or worse, cigar manufacturers must be cognizant that California will continue to demand cigar warning labels that promote a clear and uncompromised message that cigar smoking has significant health repercussions.[82]

82. *See supra* text accompanying notes 56-57 (noting that the Proposition 65 warning label was not specific to cigars and did not adequately warn smokers of the inherent health concerns related to smoking cigars).