

Daily Journal

www.dailyjournal.com

THURSDAY, AUGUST 25, 2016

PERSPECTIVE

Despite fears, condom law will not result in ‘bonanza’ of lawsuits

By Bradley W. Hertz

Proposition 60, the California safer sex in the adult film industry act, is shaping up to be one of the sexiest and most-watched measures on this November’s California ballot. This narrowly tailored public health and worker safety measure strengthens the state and federal laws that already require condoms to be worn during specified scenes in sexually explicit films. Because the industry refuses to obey the law as currently written, Proposition 60 is needed to add teeth to the current enforcement mechanisms.

Prop. 60 will be the antidote to the current malevolent practice in the adult film industry — whereby producers bully and blacklist onscreen talent who want condoms worn in their sex scenes. Why is the industry so adamant? Because it believes condoms don’t sell films and their use poses an existential threat to the industry.

Notwithstanding the “sky is falling” scare tactics being employed by Prop. 60’s opponents, it is a measured response to an epidemic of sexually transmitted infections (STIs) in the adult film industry that can be significantly mitigated by condom use. The measure starts with the premise that “all workers in the adult film industry deserve to go to work and not become ill.”

Among Prop. 60’s purposes are: (1) to protect adult film performers from the all-too-frequent spread of STIs by requiring condom use in selected sexual intercourse scenes in commercial films produced in California; (2) to encourage the state, namely Cal/OSHA, to fine adult film producers who violate the law, and to give performers and others the right to sue noncomplying producers and distributors; and (3) to require producers, rather than performers, to pay for performers’ medical testing.

Prop. 60’s opponents have created a number of deceitful myths about Prop. 60 and even tried to insert some of them in the official ballot arguments that are mailed to millions

of California voters. To protect the electorate from being misled, Prop. 60 attorneys filed *Burts v. Padilla* to challenge those misrepresentations. The outcome was favorable. Sacramento Superior Court Judge Timothy Frawley ordered the opponents to remove numerous “false and misleading” statements from their official ballot arguments.

Among the misrepresentations the Prop. 60 fear-mongers tried to foist on voters were that performers — as performers — could be sued under the measure.

In fact, Prop. 60 shields performers from liability, rather than exposing them to it. The measure could not be more clear. It states “Liability under this Act shall not apply to adult film performers” as long as the performers are not also playing a dual role as a producer/ investor, which is sometimes the case. If they are producers/investors, then those who also happen to be performers can be sued because they — as employers — have assumed the legal obligation to protect their employees. The opponents also falsely claimed that the measure could lead to “tens of millions” of dollars in lost government revenue. Frawley responded by requiring the reference to “tens” of millions to be deleted after finding that the state’s independent Legislative Analyst determined that the cost, if any, would be far less. What’s more; the measure is projected to lead to state and local government savings due to better health outcomes for adult film performers.

Other false claims made by the frenzied opponents of Prop. 60 are that the measure:

- Will result in a bonanza of lawsuits against the adult film industry. Wrong. Prop. 60 does enable private parties to sue to enforce Cal/OSHA’s condom-use rule (in effect since 1992). But such lawsuits can only be brought if Cal/ OSHA fails to act within a reasonable period of time to enforce violations. Far from being a “sue an adult film performer” measure, as the opponents would have you believe, the “private attorney



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general” provision serves only as a last resort. Nor, as opponents have mistakenly claimed, is this provision novel. In fact, many laws to protect the public contain “private attorney general” provisions, including the federal Clean Water Act and Americans with Disabilities Act, the state Political Reform Act, the Environmental Quality Act and the Unruh Civil Rights Act.

- Will cause a mass exodus of adult film production from California. Highly unlikely. There is no evidence of this, especially given that so much of the technical expertise is in the state and the only other state in which the making of adult films is legal is New Hampshire. Moreover, the condom use requirement is a federal rule — enforceable in all 50 states.

- Will require a condom to be present in every adult film scene. Wrong again. Condoms would be required only in acts of vaginal or anal penetration by a penis. In fact, a huge number of adult film scenes — including scenes of oral, solo and all-female sex and even the proverbial “money shot” — would not be affected by Prop. 60’s condom requirement.

- Will result in performers’ real names and home addresses being publicly disclosed in the event of private lawsuits being filed against them for violating the condom rule. Wrong. Numerous legal protections are in place to maintain the confidentiality and safety of those being sued.

- Will make the AIDS Healthcare Foundation (AHF), the proponent of Proposition 60, a “porn czar” because of the measure’s widely misunderstood Section 10. Still wrong. Section 10 allows AHF — as the proponent — to step into the shoes of the state’s attorney general solely for the purpose of defending the legality of the measure in court in the event that it passes, the losing side sues, and the attorney general refuses to defend the measure — and the will of the people.

We all remember the phrase “Lions and Tigers and Bears, oh my!” from the “Wizard of Oz.” The Prop. 60 opponents seem to have adopted a similar exaggerated sentiment: “Condoms and lawsuits and porn czars, oh my!” Just as Dorothy made it to Oz in one piece, so too will the adult film industry survive and thrive — even if Prop. 60 is approved. If and when Prop. 60 passes, the rampant sexually transmitted infections that plague performers due to producers’ greed and insensitivity will be substantially reduced — all by the simple required use of condoms in selected sex scenes.

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Derrick Burts in Burts v. Padilla.