



Proposition 65

*Evaluating Effectiveness
and a Call for Reform*

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Executive Summary

California's Proposition 65 was intended to protect consumers via warning labels from chemicals that might cause cancer, birth defects, or reproductive harm. It has instead become a money-making industry for a handful of organizations that claim to act in the public interest but instead line their pockets with millions of dollars in settlement funds and attorney fees. Civil penalties are being deferred to these private organizations to the detriment of state coffers—which means the public ultimately bears the cost of Prop 65.

These lawsuits have also rendered the benefits of Prop 65 labels almost entirely moot. In order to avoid predatory and frivolous lawsuits, businesses have put warning labels on nearly everything, regardless of truly harmful effects. The warnings have become so pervasive and vague that consumers pay them little heed; indeed, there is no statistical evidence of health benefits from Proposition 65.

The time has come to stop the opportunistic lawyers and phony “public interest” groups who file lawsuit after lawsuit and garner millions of dollars for personal gain. Penalties for violating Prop 65 should go to the state to further the intent of the law. In order to stem the tide of exploitation and secure true enforcement via litigation, action must be taken to reform Prop 65.

As the thirtieth anniversary of Prop 65's passage approaches, it's also time for California's Office of Environmental Health Hazard Assessment to reevaluate the warning system. There are close to 900 chemicals on the list with varying levels of toxicity and presence, yet all carry the same generalized warning statement. Consumers need more specific information to make knowledgeable choices. Establishing levels of risk and conveying those to consumers is a daunting task that will require bright minds and commitment of state resources. The citizens of California should get what they voted for—a self-funded and informative warning system.

Prop 65 Background

In 1986, California voters passed the Safe Drinking Water and Toxic Enforcement Act of 1986, generally referred to as Proposition 65, or “Prop 65.” The law stemmed from the growing concern that many chemicals may cause cancer, birth defects, or other reproductive harm. Under Prop 65, chemicals identified by the state as having even a one-in-100,000 chance of causing such harm may not be discharged into drinking water or onto land where they could contaminate sources of drinking water. In addition, manufacturers are required to post clear and reasonable warnings on any products that could “knowingly and intentionally” expose consumers to any of these listed chemicals. The state—specifically, the Office of Environmental Health Hazard Assessment (OEHHA)—is required to update the list of harmful chemicals annually. As of 2015, the list is almost 900 items long.¹

Regulations are usually enforced by an appropriate state agency, but in the case of Prop 65, the law is enforced through litigation. A lawsuit may be filed by the California attorney general, any district attorney, or by city attorneys from cities with populations exceeding 750,000. Private parties “acting in the public interest” may also file suit, provided they send a sixty-day notice of the proposed violation to the attorney general, appropriate district and/or city attorney, and the defendant. If any of the governmental officials decides to pursue legal action, the private party’s action must be dropped.

Almost thirty years have passed since the establishment of Prop 65, and many citizens question whether any benefits have been achieved. How effective has this law been in giving consumers the information they need to protect their own health? Has enforcement through private lawsuits worked in the interest of both the state and its citizens? This paper explores these questions, and offers reforms to Prop 65 to improve both the efficacy of the warnings and the enforcement of the law.

Warning Labels

Required language

Prop 65 requires businesses to place a “clear or reasonable” warning on products if potentially harmful chemicals are present above a certain “safe harbor” limit. The language of the warning labels is suggested as follows:

¹ At the end of 2013 there were 862 chemicals listed (Marlow, 2014).

- **For a carcinogen:** “WARNING: This product contains a chemical known to the State of California to cause cancer.”
- **For a reproductive toxin:** “WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.”
- **For chemicals which are both carcinogenic and toxic to reproduction:** “WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.”

These very general warning statements do not name the hazardous chemical contained, nor do they give any indication of the level of toxicity present. An herbal supplement might contain naturally occurring levels of lead just above the safe harbor limit, while a stain-removing laundry detergent containing large amounts of formaldehyde might carry the exact same warning label.

Exemptions—Stated vs. Actual

There are exemptions from the labeling law. However, these loopholes are either temporary or largely inaccessible. The difficulty in qualifying for the exemptions further contributes to the prevalence of the warning labels. If a product poses a health threat, consumers have a right to know, but when there is no real danger, the label should not be applied. Consider the exemptions:

- **Small business exemption:** Businesses with fewer than ten employees need not provide a label. While helpful to small companies, if the enterprise is successful and grows, which is the aim of most businesses, then it will have to address the Prop 65 requirement. Labeling products is perfectly fine if there is indeed a health risk, but given the current climate of opportunistic lawsuits, small companies may rush to apply a label for fear of extortion by litigation, even if the product is innocuous.
- **Federal preemption:** A product is exempt if an existing federal law preempts the Prop 65 requirement. So far only one challenge has been upheld in court.² In all other instances, both federal and state courts have

² ANH-USA, *A Guide to California's Proposition 65 for the Nutritional Supplement Industry*, p. 12.

ruled that federal labeling laws do not preempt Prop 65 requirements because the latter is a “consumer protection” law rather than a “labeling” law.³

- **Limited grace period:** When a new chemical is added to the list, companies are allowed a twelve-month grace period to provide the warning. This is a short-term exemption and requires businesses to continually monitor updates from OEHHA so they can stay in compliance with the law.
- **“Naturally occurring” exemption:** If a chemical occurs naturally in food (including dietary supplements), the manufacturer, retailer, and/or distributor are not liable for consumer exposure, though this level may be difficult or expensive to prove. This exemption was designed to promote the inclusion of natural foods in consumers’ diets. The “naturally occurring” exemption applies only to the level of chemicals that are not a result of any manmade actions. Pollution and manufacturing over the years have resulted in chemical contamination of the natural world. In order to prove the “naturally occurring” level in a food or product, a company must show that the area from which the product is obtained has not been polluted. If there are pollutants present, the company must then produce scientific studies showing what percent of the chemical in the final product is naturally occurring as opposed to the result of previous pollutants—a difficult and expensive endeavor.

If a hazardous chemical exists in harmful amounts, the manufacturer is liable for a Prop 65 warning even if that chemical was not added by the manufacturer. If granted the “naturally occurring” exemption, the company further must reduce the chemical to “lowest level currently feasible,”⁴ given current good manufacturing practices. The naturally occurring exemption has succeeded in only a handful of cases, such as methylmercury in tuna.⁵ Recently in *Environmental Law Foundation V. Beech-Nut Nutrition Corp. et al.*, the Alameda County Superior Court held that “food and beverage companies can average exposures over time when determining whether

³ McGaw, p.4.

⁴ California Dept. of Justice, <https://oag.ca.gov/prop65/faq>

⁵ In *The People ex rel. Brown v. Tri-Union Seafoods, LLC*. 171 Cal. App. 4th 1549 (Cal. Ct. App. 2009), a California appeals court upheld a ruling by a trial court that the tuna companies are exempt from Prop 65 warnings because the methylmercury in tuna is “naturally occurring.”

warnings are necessary on those products.”⁶ In effect, this ruling allows companies to average exposure to a chemical over time as opposed to a single day exposure when calculating the naturally occurring exemption.

“Safe Harbor” Limits

If the level of exposure to hazardous chemical falls beneath the “safe harbor limit” established for said chemical, no label is needed.

Safe harbor limits may be either “No Significant Risk Level” (NSRL) or “Maximum Allowable Dose Level” (MADL). OEHHA has established safe harbor limits for just over 300 of the nearly 900 listed chemicals; for the remainder, the onus of proof falls on the manufacturer or retailer, who must employ a laboratory specializing in Prop 65 services to conduct a rigorous scientific risk assessment.

Both the NSRL and the MADL are preposterously low. For reproductive harm, the standard is “1,000 times lower than the lowest level at which animal studies reported no adverse reproductive health effect.”⁷ For carcinogens, the NSRL is defined as not causing “one excess case of cancer in a population of 100,000 exposed daily for a 70-year lifetime.”⁸ As both of these limits are very low and very difficult to prove, some companies choose to apply the label rather than risk a costly lawsuit *even if the risk of exposure at the levels to cause cancer or reproductive harm is negligible to zero.*⁹ Applying warnings to innocuous products leads to label proliferation and decreases the value of information to consumers.

Some of the chemicals on the list have been disputed. Caramel coloring, used abundantly in foods, has been deemed safe by both the FDA and the European Food Safety Authority—yet several types of it are listed as carcinogens by OEHHA. Granted, such additives do not contribute to health and nutrition, but in the amounts present they are not carcinogenic. Acrylamide appears in several foods after cooking—such as coffee, potato chips, and baked goods—and is carcinogenic at very high amounts. A person would need to consume gross amounts of these items to reach cancer-causing levels of acrylamide.¹⁰ People are being warned where no real danger exists.

⁶ Modaq, 2013.

⁷ Veneble, LLP, p. 3.

⁸ McGaw, p.4

⁹ McGaw, 2012.

¹⁰ <http://prop65scam.com/misleading-warnings/>

Enforcement of Prop 65

Manipulation of litigation

The California attorney general, state or city attorneys, or private parties “acting in the public interest” may all file lawsuits for failure to warn the public of the presence of Prop 65 listed chemicals. If filed by a private party, said party must give a sixty-day notice to the AG, appropriate city or state attorney, and the defendant. A government attorney may decide to pursue the case during the sixty-day period, but if not, the private party may proceed with the suit. Rather than serving as a valid and useful enforcement mechanism, the private right of action has been exploited by “bounty hunters” seeking attorneys’ fees and settlements rather than improving public safety.

These lawsuits have become a California industry:

- **Private parties** are guaranteed 25% of any civil penalties resulting from the suit and are reimbursed for attorneys’ fees. In essence, this creates a profit incentive for litigation. In fact, the term “bounty hunters” has been applied to private parties in California known for filing multiple Prop 65 suits.
- Settlements often establish **payments in lieu of penalties (PILPs)**. In these all-too-common settlements, private organizations designated by the plaintiff receive money that would otherwise have gone to the state. PILPs are supposed to further the intent of the law, however there is no accounting of how the funds are spent after the award. A May 2014 letter the California attorney general expressed concern that “PILP provisions are hard to enforce and render the settlement process opaque.”¹¹
- Suits can be filed not just against CA businesses, but **any business whose product might be available to a citizen of the State of California**. Manufacturers, distributors or retailers anywhere in the country are liable to Prop 65 enforcement actions if they market goods in California.¹²

¹¹ Grimaldi, 2014.

¹² McGaw, 2002.

Burden of proof is on the defendant

Lawsuits are easy to file, as the plaintiff need not produce any evidence that the level of a given chemical is above the safe harbor point. The original law was amended in 2001 to require the plaintiff to file a “certificate of merit” with the attorney general so the AG could ensure that the suit had substance. Another 2001 amendment gave the AG power to participate in the settlement of Prop 65 cases to insure that the settlement terms uphold the law. Despite these amendments, the bounty hunters continue their trade because the burden shifts to the defendant, who must prove scientifically that the exposure is *1000 times below the level of no observable effect*. Mounting such a defense is exorbitantly expensive and difficult, which is why the majority of companies settle, paying high attorney fees and private penalties.¹³ The bounty hunters reap profits and file more suits. From 2000–2010, businesses paid over \$142 million to settle Prop 65 suits rather than go to court.¹⁴

In 2013 there were 352 lawsuits filed to enforce Prop 65. The majority of these suits, 243, were filed by just five plaintiffs.¹⁵ After obtaining a settlement from a manufacturer, a plaintiff will file the exact same lawsuit against other manufacturers of that product. Bounty hunters make it their business to seek out products that lack labels. Arguably, they file these suits for the payoff, rather than doing so “in the public interest.”

Profits from lawsuits

Prop 65 stipulates that 25% of penalties may be awarded to the plaintiff. Penalties for failing to display a Prop 65 warning may be as much as \$2,500 per day, per violation. In addition, if the court finds in the plaintiff's favor, the defendant must reimburse the former's attorney fees, making it virtually cost-free to the bounty hunters. Settlements usually include payments for attorney costs. In 2013 Prop 65 settlements included over \$12 million in attorney fees. One would expect the state to be reaping 75% and plaintiffs 25% of fines, but in many cases the bounty hunters and/or their designated affiliates receive more.

¹³ Caso, 2012.

¹⁴ Center for Consumer Freedom, 2015.

¹⁵ Venable, 2014.

Questionable division of settlement fees

The AG has permitted penalty payments directly to private parties—the bounty hunters themselves, or another firm designated by them—in lieu of civil payments. The defendants keep 100% of those payments; no portion allotted to the state.

- In 2013, more than a third of all settlement cases involved PILP.¹⁶ There is no reporting requirement on the expenditure of those payments.
- From 2000–2010, businesses paid settlement fees of \$142 million in total, \$21 million of which was allocated to the attorney general, the rest to other plaintiffs.¹⁷ Over 85% of Prop 65 suits are filed by private parties.
- How these settlements are divided depends on who is filing the suit. The percentage paid to attorneys and PILPs is much higher in private party suits, as shown in the table below:¹⁸

Plaintiff	Attorney Fees	PILP	Civil Penalties	Total
All parties (352 suits)	\$12,700,000 (73%)	\$1,998,000 (23%)	\$2,680,000 (14%)	\$17,000,000
AG and DAs (2 suits)	\$300,000 (26%)	\$0 (0%)	\$300,000 (49%)	\$600,000
Center for Environmental Health (CFEH) (62 suits)	\$2,300,000 (68%)	\$600,000 (19%)	\$400,000 (13%)	\$3,400,000

Of the settlement payouts that year, 73% of the settlement money went for attorney fees. For CFEH settlements, the attorney fee portion was 68%, but for state cases it was only 26%—which means that for the remaining 288 cases (private cases), the attorney fees were outrageously high. Across the board, private party attorney fees are grossly exaggerated, while civil penalties—the money needed to fund the Prop 65 program—are

¹⁶ California Office of Attorney General,
http://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/Alpert_Report2013_summ.pdf

¹⁷ Caso, 2012.

¹⁸ Amounts and percentages from
http://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/Alpert_Report2013.pdf

suffering. Only 14% of the settlement payments went to the state. The “self-funding” Prop 65 measure set the cap on private payments to 25% of all penalties, yet that ceiling has been ignored by the current system, which diverts money to PILPs.

When Caso¹⁹ looked at some of the individual plaintiffs—for example, the Manteel Environmental Justice Foundation—he found the numbers even more skewed:

Year	Penalty	Other		Attorney Fees		Total
2000	\$ 46,000.00	\$ 509,750.00	8%	\$ 652,750.00	54%	\$ 1,208,500.00
2001	\$ 59,000.00	\$ 882,500.00	6%	\$ 1,203,000.00	56%	\$ 2,144,500.00
2002	\$ 121,500.00	\$ 1,192,000.00	9%	\$ 1,549,000.00	54%	\$ 2,862,500.00
2003	\$ 11,000.00	\$ 264,000.00	4%	\$ 366,500.00	57%	\$ 641,500.00
2004	\$ 10,500.00	\$ 580,250.00	2%	\$ 771,000.00	57%	\$ 1,361,750.00
2005	\$ -	\$ 538,500.00	0%	\$ 611,000.00	53%	\$ 1,149,500.00
2006	\$ -	\$ 438,750.00	0%	\$ 513,750.00	54%	\$ 952,500.00
2007	\$ 15,000.00	\$ 865,637.00	2%	\$ 1,190,000.00	57%	\$ 2,070,637.00
2008	\$ 95,450.00	\$ 619,850.00	13%	\$ 1,060,000.00	60%	\$ 1,775,300.00
2009	\$ 22,500.00	\$ 515,000.00	4%	\$ 945,000.00	64%	\$ 1,482,500.00
2010	\$ -	\$ 393,000.00	0%	\$ 601,000.00	61%	\$ 993,000.00
Totals	\$ 380,950.00	\$ 6,799,237.00	5%	\$ 9,463,000.00	57%	\$ 16,642,187.00

Table from <http://www.fed-soc.org/publications/detail/bounty-hunters-and-the-public-interest-a-study-of-california-proposition-65>

Only in one year, 2008, did the percentage of civil penalties break 10% of total settlements, and for three years (2005, 2006, and 2010) no civil penalties were paid. In other words, the Prop 65 law is not funding itself—it is lining the pockets of opportunistic lawyers (57% of settlement funds) and other organizations (38%). These payments do not further the intent of the law to reduce exposures to harmful chemicals. Not only are the attorney costs for Manteel a higher percentage, their rate is exorbitant. From 2000–2010:²⁰

¹⁹ Caso, 2012.

²⁰ Caso, 2012.

Plaintiff	Attorney Fees (% of total settlements)
Attorney General	26%
Mateel Environmental Justice Foundation	57%
Center for Environmental Health	58%

The attorney fees for the bounty hunters are artificially high because the burden of proof is on the defendant. The state of California is not reaping its fair share.

Where are these “other payments” going? The money can go directly to the organization that filed suit, ostensibly to pay for costs of studies used to file the suit, or to another private organization designated by the plaintiff. As stated above, PILP payments make the settlement process “opaque.” In effect, the money may even be used to file more Prop 65 lawsuits, thus turning the proposed regulatory system by lawsuit into a profitable industry for a few firms. In 2013, three firms²¹ filed 87% of all the Prop 65 settlements that resulted in PILPs, a combined total of \$1.8 million. There are no state reporting requirements for expenditure of these funds so no guarantee that this money furthers the “public interest.”

Prop 65—Is It Benefiting California’s Citizens?

Warning labels not altering consumer behavior

As the number of Prop 65 chemicals grows yearly and the exemptions are difficult or expensive to take, the use of warning labels on products and in environments has exploded. Not only are products with known risks labeled; many more sport labels merely as a precautionary measure to avoid potential lawsuits.²² Prop 65 warning labels are found everywhere—in restaurants, beaches, parking garages, and auto repair shops, as well as on marking pens, art supplies, faucets, gardening products, medical supplies, window treatments—and many more. The warnings are ubiquitous.

²¹ Center for Environmental Health, Consumer Advocacy Group, Inc., and Environmental Research Center, http://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/Alpert_Report2013_summ.pdf

²² Essential Living Foods. <http://media.essentiallivingfoods.com/blog/prop-65-warning/>

How do consumers respond to such generalized and plentiful warnings? According to Marlow, “‘Over-warning’ may reinforce consumer inattention to the information, making it more difficult for consumers to consider risk differentials between products.”²³ Consumers may become inured to the warnings, or conversely, they may overestimate the danger of the more innocuous products.

Prop 65 was intended to warn California consumers of the presence of chemicals that may cause cancer or reproductive harm. If the warnings were taken seriously at face value, health-conscious citizens of the state might find their shopping choices exceedingly narrow, their recreational activities constrained by fear of environmental toxins, and their everyday tasks performed with protective gloves, eyewear, and surgical masks!

Even more worrisome is the fact that truly harmful products and exposures appear to be innocuous in the sea of identical warning labels. The warnings do not give consumers adequate information. Studies have shown that hazardous chemical warnings “will not alter prior beliefs” about a product unless there is new information about the risk present.²⁴ When everything bears the same generalized label, all warnings may be ignored. Furthermore, if all similar products bear the same hazardous warning label, there is no risk-free alternative to which consumers can turn. Under the current system of Prop 65 enforcement, consumers are not given any meaningful information with which to make their purchasing and lifestyle decisions.

No statistical evidence of greater health

Prop 65 warnings should have improved public health in California from two perspectives. First, the labeling requirement should have induced manufacturers to reformulate products to remove hazardous chemicals to avoid the warning label and make their product more appealing to consumers. Some manufacturers have altered products to avoid Prop 65 challenges. For example, Liquid Paper dropped the use of trichloroethane in 1989 even though studies did not show the level to be carcinogenic.²⁵ Most manufacturers complied, adding a warning label even if their products did not contain hazardous levels of chemicals, because a suit can be filed even if the chemical “is present in amount 1,000 times below the ‘no observable effect’” level.²⁶

²³ Marlow, p.22.

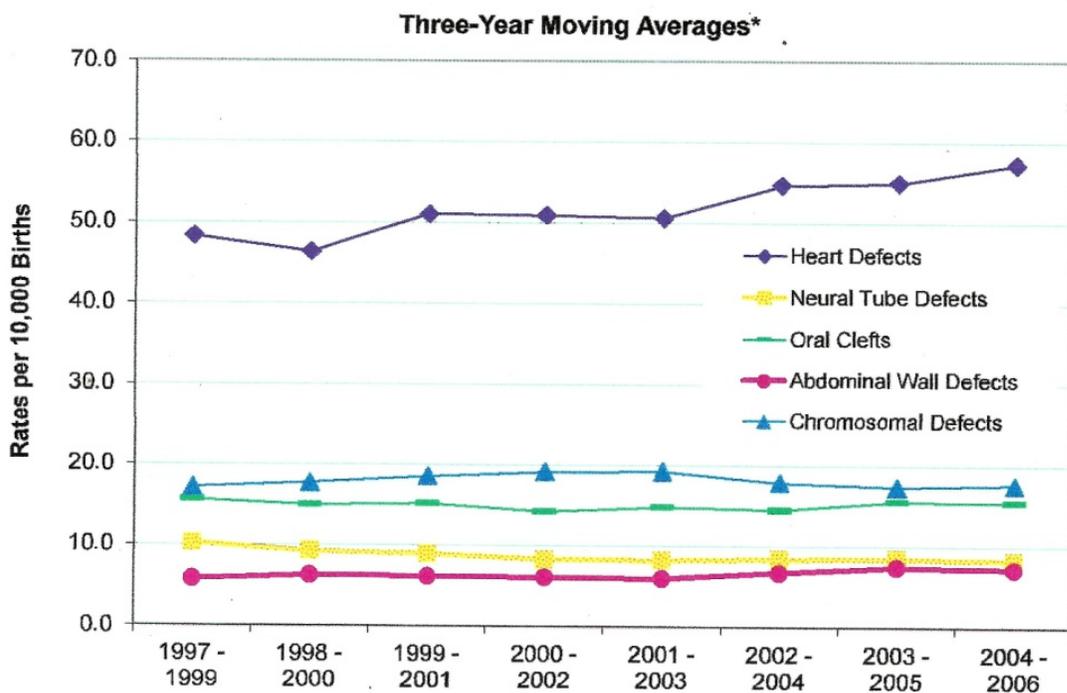
²⁴ Viscusi, p. 128.

²⁵ http://en.wikipedia.org/wiki/Liquid_Paper

²⁶ Borrell, quoting Lisa Halko, *Los Angeles Times*, Nov 2, 2009

Second, health-conscious consumers should have exercised the power of the purse and avoided those products carrying warning labels. The lower incidence and usage of the hazardous chemicals would translate into lower cancer incidence, as well as decreases in birth defects and reproductive harm. However, using cancer statistics from the National Cancer Institute from 1996–2009, Marlow compared cancer rates in California to similarly sized cities (Atlanta, Seattle, and Detroit) in states with no mandated warnings. Marlow found “very weak evidence...that Proposition 65 exerted a positive and statistically significant effect on cancer incidence.”²⁷

Comparison statistics of birth defects by state are not readily available. California is one of the few states that tracks incidence of birth defects. The California Birth Defects Monitoring Program (CBDMP) was established by the state legislature in 1982 to monitor and track birth defects. Currently the program collects data for approximately 30% of California’s births, covering a representative geographic and demographic sample. Looking at just one region, the Central Valley Counties, from 1997–2006, the three-year moving average of select birth defects shows no significant reductions in incidence:



Graph from <http://www.cdph.ca.gov/programs/CBDMP/Documents/MO-CBDMP-OverallRates-CV.pdf>

²⁷ Marlow, p. 26

While no comparative data is available, a superficial examination of trends within California does not indicate a significant reduction in rates of birth defects and is no indication that Prop 65 has had a positive impact on infant health.

Prop 65—Need for Reform

Curtailing the bounty hunters

As initially intended by the voters of the state, Proposition 65 should be enforced by either a government attorney or by a private citizen or group acting in the public interest. The current settlement structure has allowed the profit motive to overshadow the intent of the law. Reforms to rectify this situation and limit abuse by bounty hunters include:

- **Disallowing the diversion of civil penalties to private organizations via PILPs**—This action began through regulatory guidance from the AG,²⁸ and the AG has the power to repeal it.
- **Reducing exorbitant attorney fees**—The law gives the AG the power to participate in settlements to prevent excessive attorney fees; however given the sheer number of lawsuits filed, the AG’s office may not be able to scrutinize each settlement. In those cases, the court should set reasonable attorney fees.
- **Eliminating the bounty hunter incentive**—Reform the law and remove the 25% of civil penalties to the plaintiff. As a change to the law, this action would need to be passed by a supermajority vote of the legislature.
- **Greater judicial oversight of settlements**—All settlements are subject to court approval.²⁹ The courts have the opportunity to mitigate both the PILPs and the overcompensation of attorneys by scrutinizing the settlement to determine if awards are just.

²⁸ 11 Cal. Code of Regs. §3203, cited by Caso, 2012.

²⁹ Cal. Health & Safety Code §25249(f)(4).

Revamping warning labels

- Prop 65 warnings need to communicate **actual risk levels** in an effective manner. Safe harbor levels need to be established for all chemicals and should be adjusted to reflect actual levels of danger.
- A **graduated warning system** would transmit more effective information to the public. A system of levels of danger, whether color-coded like the fire danger risk or on a numerical or alphabetical system like a hurricane wind scale, would cause consumers to pay more attention and better assess their personal risk. If there are no determined levels, as is the case currently with more than half of the chemicals on the list, that should also be evident to the consumer. With close to 900 chemicals listed, devising a meaningful and accurate level would require the participation of specialists in chemistry and health sciences. Money is needed to fund the research required to formulate a better system.
- Instead of funneling settlements to bounty hunters, **penalties should be paid to the state** so that the current system can be improved. In tandem, the **safe harbor levels need to be recalibrated**. Currently they are absurdly low or nonexistent, making it extremely difficult for manufacturers to know if they are in compliance with the law.
- This year OEHAA is considering some amendments to the warning requirements.³⁰ One proposal would allow **supplementary information concerning the nature of the exposure to the chemical** and how that might be mitigated. The warning itself must not be compromised by the additional information.
- Also under consideration is requiring the warning to list **any or all of the following twelve chemicals** if they are present: acrylamide, arsenic benzene, cadmium, carbon monoxide, chlorinated tris, formaldehyde, hexavalent chromium, lead, mercury, methylene chloride, and phthalate. The reform measure calls for the establishment of a website for the collection and display of information on Prop 65 chemicals and exposures.

These reforms will give consumers more information, but they do not address the issue of ubiquity. Nor do they provide a system that would allow consumers to judge the severity of danger a particular product or area contains.

³⁰ http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/NPR_Article6.html

Conclusion: Time for Reform of Prop 65

Original intent

Prop 65 was meant to help consumers make educated purchasing and lifestyle choices. The goal was to create a warning label system to alert California citizens to potential hazards so that they can be avoided.

Costs outweigh the benefits

The costs of Prop 65 are many. Settlement payments, lawsuit defenses, research to determine levels of chemicals, even the printing of labels themselves, all increase business expenses—which are then passed on to consumers via price increases. As the bulk of settlement payments go to attorneys and private organizations rather than the state, citizens bear the brunt of uncompensated court costs. Information based on perceived rather than actual dangers lowers product sales, which in turn leads to lower tax revenues—and possibly higher unemployment, as companies respond to lowered profits with layoffs. Some companies, such as Dunkin Donuts and Wholesale Unlimited, have chosen to avoid doing business in California altogether,³¹ which means that Prop 65 is limiting access to consumer products and services.

Public health should be increased because of this measure; however, no statistical data indicates that Californians are less likely to suffer from cancer, reproductive harm, or birth defects. Manufacturers have removed some harmful chemicals from their products, but the ever-growing list of chemicals means an ever growing number of warning signs on products and in environments. Consumers do not have the benefit of meaningful information, because the warnings are too generalized.

Real benefits go to the lawyers

The lawyers and the bounty hunters are reaping the most benefits. Reform is needed now to reverse this trend. The state needs to take back its share of settlement money, adjust attorney payments to reasonable levels, and stem the tide of opportunistic bounty hunters.

³¹ <http://prop65scam.com/national-burden/>

Key areas of reform

In summary, Proposition 65 is not fulfilling its intent. Consumers (and even manufacturers, retailers, and distributors) don't really know if harmful levels of the listed chemicals are present. The measure is not self-funding as envisioned. Private parties become enriched at the expense of businesses and ultimately the citizens of the state. People need to be protected from carcinogens and chemicals that could cause reproductive harm or birth defects, but they must be able to evaluate the level of risk present in a given product or situation.

The time has come to address the shortcomings of the law. The following suggestions seek to improve this groundbreaking law to increase the benefits to the citizens and the state:

- Revamp the warning system to provide meaningful information.
- Adjust safe harbor levels upwards so innocuous products are not considered dangerous.
- Drastically reduce or completely eliminate PILPs.
- Adjust attorney reimbursement fees to reasonable amounts.
- Eliminate the bounty hunter incentive.
- Increase judicial scrutiny of settlements for more equitable distribution of payments to the state.

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Alliance for Natural Health USA

800.230.2762

membership@anh-usa.org

www.anh-usa.org

3535 Piedmont Road NE

Building 6, Suite 310

Atlanta, GA 30305