

Prop 65: Notes from the Front

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Live from San Francisco, Kelley Green Law Blog is reporting today from the Prop 65 Clearinghouse 2018 Conference the largest annual assemblage dedicated to the cottage industry that is California's "Proposition 65." Uniquely, the Clearinghouse conference brings together the full spectrum: California regulators, the plaintiff's bar, defense and corporate in-house counsel, and assorted other ne'er-do-wells. It's a great opportunity to be reminded, from my usual defense counsel perch, of what motivates "the other side" and to gain insights into the latest trends, current developments, and future direction of the program. Forthwith are some of those "insights," observations and other musings from the front lines of Prop 65:

- There are a lot of people here ... more than ever before (a good sized ballroom's worth) and the first year it is "sold out." And not just folks from California. Testament to the broad interest of the newly in force amendments and, generally, the long reach Prop 65 has for companies from all over and anyone whose products may be sold in the state (meaning: almost everyone).
- The best and most enlightened of the plaintiff's bar do have a good story to tell, highlighting true successes of the program over the last three decades (perhaps the greatest of which is focusing attention, and more thoughtful analysis, on the chemicals in the products we use and encounter every day) ... even if it is just part of the story and comes at a significant cost in not only economic terms, but in undermining ACCURATE risk communication and management.
- Quote of the Day 1: "Keep the blood pressure under control."
- Prop 65 is entering a new phase with the advent of the amended warning requirements and emerging judicial challenges ... some of the chief questions: How will "private enforcers" react to departures from the new "safe harbor" warning text and mechanisms? Will defense counsel launch a wave of preemptive challenges in the wake of the glyphosate "compelled false speech" First Amendment case?
- Internet warnings very much warrant an entire panel session ... for good reason as e-commerce expands exponentially. Private enforcers are active web surfers!
- Quote of the Day 2: "how will the bounty hunt- errrr.... private enforcers react?"
- What's next from OEHHHA? Expanding warning website chemical "fact sheets." Increased use of "information request" authority to obtain from companies details on the source, concentration, route, etc. of the exposure for which a warning is being provided. Guidance or amended regs on the duty to pass information through along the supply chain.
- The "safe use determination" process is seeing a significant uptick in interest.
- Overwarning is still a major issue despite the goal of the new amendments to reduce "prophylactic

warnings.” Of course it is - the amendments did nothing to address the main issue with Prop 65 (the determination as to WHEN a warning is required) or change the incentives to provide a warning out of an abundance of caution.

- The retailer/manufacturer provisions on “clarification” of responsibilities throughout the supply chain is riddled with ambiguities and questions with which the market is struggling. Who is an “authorized agent” for retailer notifications? What and how many warning materials must the manufacturer provide? How are distributor instructions/notifications to be handled? How should retailers respond when they receive a 60 day notice? How can private enforcers certify that a retailer may or may not be held liable under the new standards?
- More pointedly, the retailer provisions, by allowing independent agreements on liability allocations, may have the perverse result of sticking responsibilities on the smaller actors with less market power. Which leads to Quote of the Day 3: “Leave me alone or the little guy gets it!”
- There is no foolproof compliance solution ... it is a matter of risk tolerance and minimization. One important component: testing! Some is better than none. For example, testing showing “non-detect” levels can provide an affirmative defense if done within the past 12 months but make sure you meet the requirements of section 25900(a), such as use of a proper test method and a certified laboratory. Also, how many samples are enough? There is no set answer but look to do enough for statistical power (maybe three at least?!) given inherent variability.



And that’s a wrap from the City by the Bay! All signs suggest that next year’s conference will be at least as well attended. As always, for the latest on Prop 65 stay tuned to Kelley Green Law Blog.