

# The Prop 65 Annual Conference: Notes from the Front 2021

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(Virtually - once again) Live from San Francisco, Kelley Green Law Blog is reporting today from the Prop 65 Clearinghouse 2021 Conference ... the largest annual gathering of stakeholders from the full spectrum of actors involved with California's "Proposition 65," including state regulators and legislators, plaintiff enforcers, defense and corporate counsel, tox and risk assessment consultants, product manufacturers, trade associations, and environmental and public health NGOs. The popularity of the conference, with over 250 participants, continues to demonstrate the extensive reach of Prop 65, touching businesses well-beyond the borders of California, particularly with the exponential growth over the last several years in product sales over the internet. As I have remarked in prior commentaries ([2018](#) and [2020](#)), the conference is valuable not only to gain insights into the latest trends, current developments, and future direction of the program, but also as a helpful reminder, for this defense counsel, of the role and motivations of the other stakeholders in the Prop 65 universe.

Following are some of those "insights," observations and other musings from the front lines of Prop 65:



*I started my career as a pre-school teacher - which proved to be good preparation for dealing with [Prop 65] stakeholders!*

- Carol Monahan Cummings, Chief Counsel of OEHHA and Conference Chair

- Conference Chair, Carol Monahan Cummings, Chief Counsel of the Office of Environmental Health Hazard Assessment (OEHHA) for the past 18 years, provided the "view from the lead agency" and highlighted OEHHA's work over the last two decades to make warnings more meaningful to consumers and less vague, as well as OEHHA's attempts to reduce the "over-warning" phenomenon. I would argue that the effort on the first issue has proven relatively

successful (e.g., adding chemical names to the warnings and establishing webpages to provide more detail on potential exposures), but that OEHHA has been spectacularly *unsuccessful* in addressing "over-warning."

- **Over-warning** was a common theme running through many of the panel discussions. For years, OEHHA and private plaintiff enforcers have bemoaned the proliferation of Prop 65 warnings on products for which a warning technically may not be required (due to no or minimal exposure, for instance) but is provided "prophylactically" to avoid the risk of a lawsuit. As summarized by Eric Somers with Lexington Law Group, which represents the Center for Environmental Health, a prominent Prop 65 enforcement organization: "Over-warning diminishes the impact of warnings over time ... consumers become less risk averse about those warnings and less inclined to take steps to avoid the exposure ... and companies will be less inclined to [do something to] reduce exposures to the chemical."
- However, "prophylactic" warnings are entirely reasonable from a business perspective. As one defense counsel panelist summed it up: "it is simple cost-benefit analysis ... if the chemical is there, unless your science [showing no exposure] is undisputed" -- something that is very rare -- "then the business is looking to mitigate risks."

*If the chemical is there, then I'd be hard-pressed to say that there is not a risk [of being sued].*

- In discussing the future of the current "**short-form warning**," panelists were in agreement that OEHHA's contention that proposed amendments are needed in part because the short-form warning contributes to over-warning was a "red herring." The over-warning phenomenon long-preceded adoption of the short-form option in 2016. Eric Somers, with the plaintiff-side Lexington Law Group, summarized: "Over-warning is caused by aggressive enforcement and the business desire to mitigate risk."
- Over-warning is not the result of specific regulatory safe-harbor warning text or mechanisms of delivery; rather, it is directly related to the practical reality that to avoid being forced into a settlement the only other option for a business is to go to trial, with all its related uncertainties and costs. [As I wrote at the time the 2016 amendments were adopted](#): "By focusing exclusively on the question of *how* to provide 'clear and reasonable' warnings, ... the amendments fail to address perhaps the most important question facing businesses confronted with Proposition 65 compliance: the issue of *when* warnings are required is not addressed at all. Hence, businesses will remain challenged by the paramount issue of whether a warning is required, particularly for a product that may contain a listed chemical but for which the company believes, based on its own due diligence and proper science, that exposure is below a safety threshold.... While a business rightfully should develop data on potential exposures to a listed chemical in a product, and assess the safety of that exposure, plaintiffs remain free to challenge such exposure/safety assessments and drag businesses into the expensive and time-consuming Proposition 65 enforcement process."
- OEHHA earlier this year [proposed to limit the use of "short-form" warnings](#) to situations where space is constrained (products with 5 square inches of label space or less); to eliminate their use for internet and catalog warnings; and to require identification of a chemical for which the warning is being provided.
- Objections from the business community are focused more on the process than the content/details of the short-form warning: after going through a multi-year regulatory process that resulted in the current "short form" option in 2016, and having now implemented those

label changes, it is frustrating to have to "go through this again" only a few years later. "Changing a label on a product is expensive."

- **Factors that plaintiffs consider** in assessing whether to bring a case:
  - The potential for harm if nothing is done, particularly with respect to chemicals with adverse impacts at low exposure levels (such as lead)
  - Opportunities for reformulation to reduce or eliminate exposures to a listed chemical in a product
  - The potential for a broad industry-wide impact by provoking change in a manufacturing process or inputs
  - Whether a warning would be effective if reformulation is not viable
  - Environmental justice (EJ) impacts - seek to address marketing of certain products to EJ communities (based on input from those living in and actively working with EJ communities)
- Great discussion of the pending **First Amendment** case involving warnings related to acrylamide in foods (CalChamber vs Bonda, 9th Circuit): does compelling a "safe harbor" warning violate the First Amendment rights of a business? By way of legal background, such "compelled speech must be purely factual and non-controversial." How does this standard apply for a chemical, such as acrylamide (or, in a prior case, glyphosate) where there remains robust scientific debate about the risk of cancer or reproductive harm from exposure to a given chemical?
- Ideas for addressing the **explosion of food cases** that do not address realistic risks: reform the certificate of merit process to make the plaintiff's initial showing more robust for chemicals in food; adopt more "safe harbor" levels for acrylamide and other chemicals that form in specific foods to provide more certainty for industry; require a "meet and confer" process prior to litigation for the parties to determine what the appropriate level of the substance should be in food.
- As a lawyer that has represented many new and often smaller companies in navigating the waters of Prop 65, it was great to see a panel session dedicated to the **challenges "small businesses" face in complying with Prop 65**. Small companies typically lack the resources that larger businesses have to assess compliance with Prop 65 (testing, risk assessment), implement appropriate warning and labeling, or to defend a case when a plaintiff comes calling (or even to "call their bluff"). While there is a "small business" exemption (for companies with less than 10 employees), in practice, the exemption often is of little utility due to indemnity provisions commonly found in contracts between small business producers and downstream distributors and retailers. Panelists cited strong arm tactics by some plaintiffs to "buffalo" small businesses into a settlement. Others cited the impact of broader industry-wide settlements (put together by larger players in an industry or trade associations) that are onerous for small businesses to comply with.
- The good news is that (once again) reform legislation is being developed in the California Assembly ... however, amendments to a voter-adopted initiative require a two-thirds super-majority of both houses of the state legislature. Historically, Prop 65 reform legislation has struggled to pass due to the multiple stakeholders involved with diverging interests -- and, if

passed, been too watered-down to provide meaningful relief to businesses.

- The **proposed cannabis "safe harbor" warnings** will provide new and unique warnings for cannabis smoke and THC products (and different modes of consumption; ingestion, inhalation, topical). Question whether these products are truly sufficiently unique to warrant distinct warning language from other consumer products. The more specified warnings are consistent with OEHHA's goal of making warnings increasingly tailored to provide more detailed information to consumers.
- The conference concluded with a spirited discussion on the topic of the **"Divide Between Businesses and Environmentalists Over What Prop. 65 Has Accomplished."** From my own perspective, every day I see Prop 65 cases that are charitably described as frivolous, and the vast majority of cases seem to target chemicals that are present at trivial levels and simply do not pose any sort of meaningful risk. Hence, the "over-warning" phenomenon. But it is undeniably true that Prop 65 has been highly successful in focusing the attention of companies and the public on the chemicals that are in products manufactured, used, consumed and purchased every day. In this respect, Prop 65 remains perhaps the single most consequential state-level environmental/public health regulatory program in the US, with global reach.

The biggest accomplishment of Prop 65 is the extent of the law's general deterrence function ... reformulation that occurs behind the scenes, using the Prop 65 list as a check, outside of enforcement, and is completely invisible to the public."

- Claudia Polsky, Clinical Professor of Law and Director, Environmental Law Clinic, UC Berkeley

- Panel debate centered on the role of the private enforcement mechanism. Supporters cite the actions of private plaintiffs as the engine that drives companies to pay attention to Prop 65 and the list of chemicals. Without this mechanism, it would be similar to TSCA at the federal level, dealing only with a small subset of listed chemicals and providing minimal incentive to companies outside of that small group of chemicals. Critics maintain that the private enforcement mechanism is an incredibly inefficient means of achieving the same regulatory results, with little relationship between the penalty paid and the extent of the public benefit achieved. The system has resulted in widespread over-warning, due to the threat of relatively unrestrained private enforcement, and misallocation of public health resources towards minimal or non-existent risks.
- Would a program like "Safer Products" (under the California Department of Toxic Substances Control) be more appropriate? On one hand, government regulatory programs "move like molasses" and are not cost-effective ... though private enforcement focuses costs on one segment of society, businesses that may or may not be primarily responsible for an exposure risk. A government-directed regulatory program, however, would target meaningful risks and weed out the large majority of current cases that are trivial and not truly in the public interest.
- More active public enforcement, with the attorney general and/or district attorneys taking more Prop 65 cases, would be one possible solution ... though resources may not be available to do so.
- Ultimately, the future of Prop 65 relies on the ability to impose proper limits on private enforcement while preserving the core function of plaintiffs as putting teeth into Prop 65.

Thanks for joining us at the conference and we hope to be broadcasting live and in person next year

from the City by the Bay! As always, for the latest on Prop 65 stay tuned to Kelley Green Law Blog.