



# LITTLE LABS LOST

## AN INVISIBLE SUCCESS STORY

*David Roe*

VOTERS IN SOME STATES enact laws that their legislature would never pass and that they cannot possibly understand. A quarter-century ago in California it was Proposition 65, the clumsily named Safe Drinking Water and Toxic Enforcement Act,<sup>1</sup> advertised as a populist cure for government's chronic failures to control toxic chemicals. Its proponents (including myself) promised a revolution; its long list of opponents, including a former U.S. Surgeon General and nearly every newspaper in the state, warned of amateur meddling in complex terrain, with real risk to the economy.

Prop. 65 passed on the 1986 statewide ballot by a large majority, went into effect in 1988, and then weathered a dozen high-powered attempts to wipe it out back in Washington D.C. during three successive Administrations. The nominal argument was "national uniformity," and the preempt-or-bust campaign was led for two decades by the food industry lobby. What toxic chemicals there might be to worry about in food, of all things, was never made clear, but the vehemence of the opposition clearly spoke to an upset of the status quo. A *Washington Post* article in 1991 summed up the new law as "legal judo."<sup>2</sup>

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<sup>1</sup> See Appendix below for citations.

<sup>2</sup> Mathews, "California Uses 'Legal Judo' on Toxics," *Washington Post* July 30, 1991,

Still, apart from a few warning placards and a small (if well-to-do) defense and plaintiffs bar, Prop. 65 is invisible to most Californians. There has been only a handful of reported cases in 25 years, and a mere \$10 to \$15 million changes hands every year in settlements of enforcement actions. The ballot initiative with the stormy past seems to be causing only a microscopic ripple on the surface of the pond in California's trillion-dollar economy, and no national disturbance at all.

Under the surface, though, the story is completely different. Proposition 65 has quietly driven cancer- and birth defect-causing chemicals out of thousands of everyday consumer products; created and enforced new safety standards for hundreds of such chemicals; sliced through a Gordian knot of complex science that multiple federal agencies have been struggling to untie since the 1970s; and found and filled gaping holes in the federal safety net.

Even more surprising, to lawyers, is how few of Prop. 65's hundreds of new chemical safety standards have gone to court. Taking the regulatory agency to court over any significant new safety standard is almost *de rigueur* at the federal level. But on the 282 separate standards that were issued very quickly under Prop. 65, no legal challenges were filed at all.

If ever there were an example of Brandeis's "little laboratories" coming up with a useful result, this would seem to be it. Yet the law and its judo leverage are almost completely unknown to policy experts. No federal agency charged with toxic chemical control has tried to build on its success, much less has any such bill been introduced in Congress.

Why the Brandeisian dynamic has not worked in this case is worth asking, and several reasons for ignoring any one state's experiment come quickly to mind. Too small a sample size, or too short a test period? One-eighth of the U.S. economy, for a quarter-century. Special support from the state's government? The Governor had to be enjoined twice from gutting Prop. 65 soon after it passed, and the budget for all that regulatory science was a tiny fraction of U.S.

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p. A3; available online at [apps.edf.org/documents/3403\\_Legal\\_Judo.pdf](https://apps.edf.org/documents/3403_Legal_Judo.pdf).

EPA's for the same tasks. High costs from reformulating all those products, passed on in higher prices that only Californians would pay? Consumers in all fifty states are already buying the same detoxified products as Californians, at the same unchanged prices.

A more likely answer lies in the kind of strategy that Proposition 65 has been test-driving. Its approach to a technically complex, many-sided regulatory task has been to reward success with silence, and have only failure draw public attention. If a silence-based strategy does work well, then by definition it will be hard to see. And if it was born in a loud, populist process, observers will be looking for loud results, not quiet shifts in the gravity fields of commerce and regulation. As an author and sponsor of the law when it was on the ballot, I can hardly be objective in analyzing its policy strategy, but I can offer an insider's perspective.

## I. SURFACE SIMPLICITY

The law that passed on the ballot in 1986 was put together out of familiar legal components. The two core sections were one sentence apiece, and the entire statute ran about two pages. The first section said to businesses, in effect, "Don't put chemicals that are known to cause cancer or birth defects into water bodies that people may eventually drink from"; and the second said, in effect, "And don't expose people to those same chemicals on purpose, anywhere, without warning them first."

The two commands of Prop. 65 were easy to understand, although the second one, the one that turned out to have all the effects,<sup>3</sup> did sound a bit faint-hearted: "you don't have to stop doing anything that exposes people to even the worst chemicals, as long as you let them know about it." Advocates for tough controls wondered, understandably, why it was worth their collecting some 500,000 signatures and then mounting a statewide political cam-

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<sup>3</sup> Prop. 65's provision on drinking water contamination has gone virtually unused (except by opponents claiming that it misled voters into approving the warning provision). The simplest explanation is ease of enforcement, which is very different in practice for the two provisions.

paign against evil polluters, if a victory on the ballot was not going to shut the bad guys down, but just force a few warnings that the public would probably ignore. If they had known that the goal was no warnings at all – in other words, that the incentive to *avoid* having to give warnings would be strong enough to cause “quiet compliance”<sup>4</sup> without anyone noticing – they would have thought it plain cowardice.

The devil was in the details, of course, but even there, the ballot initiative looked unreasonably reasonable. Like all modern laws meant to regulate toxic chemicals, Prop. 65 conceded that it shouldn’t have to apply to amounts of a chemical that were too small to matter, in terms of health risk. A *de minimis* exemption was explicitly written in. This fit the standard design of many federal toxic chemical control laws: first, pick which chemicals to aim at; and then second, figure out scientifically where to draw the line between a significant and an insignificant amount of each.

## II. CITIZEN ENFORCEMENT

Another piece of Prop. 65 was less innocuous, but still conventional. It included a standard citizen enforcement provision, closely tracking several federal environmental laws. The concept was so familiar that not everyone noticed an important difference from federal law. Federal court jurisdiction requires citizen enforcers to have a particularized interest in order to have standing. State law does not.<sup>5</sup> Prop. 65’s citizen enforcement provision therefore created universal standing. Businesses that might not take this faint-hearted new law seriously were going to have to worry about 33 million potential amateur sheriffs.

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<sup>4</sup> Totten, ‘Controversial Proposition 65 Provokes Industry Outrage, ‘Quiet Compliance’ As It Marks Second Anniversary as Law,’ *Chemical Regulation Reporter* pp. 169-174 (May 5, 1989).

<sup>5</sup> Hence, Prop. 65 citizen enforcement actions may not be brought in federal court, or removed there. *Toxic Injuries Corp. v. Safety-Kleen Corp.* (C.D. Calif. 1999) 57 F.Supp.2d 947.



### III.

#### A MODEST SHIFT IN BURDEN OF PROOF

The one design difference that has made Prop. 65 so effective, and so unsettling to industries comfortably adjusted to federal controls, is not any unusual new restriction or any tougher new standard. It has to do with the escape clause. Prop. 65's *de minimis* exemption, instead of being placed in the definition of an *offense*, occurs in a section that defines a *defense*. In other words, instead of saying as usual that "this law applies to quantities of certain toxic chemicals *above* a *de minimis* level," Prop. 65 says, "this law applies to those toxic chemicals in any amount, unless the amount is *below* a *de minimis* level." Placement in the statute made it clear that *de minimis* was an affirmative defense, which it would be a defendant's burden of proof to show in any future enforcement action. Where the line would be drawn was unsurprising, but who would have to draw it was new.

Only lawyers would grasp the difference, and while Proposition 65 was being debated during the 1986 election season, few did. Burden of proof is an esoteric subject for a political campaign, and the many industries that opposed Proposition 65 on the ballot could hardly tell voters that the sky was going to fall because of a burden shift. If they had tried, the response might have been, "if your businesses are going to expose me to a little bit of a chemical that you know causes cancer, why shouldn't you be the ones to know how much is too much?"

Reasonable-sounding as that question might seem, the standard answer for toxic chemicals is that government regulators must decide. And the unspoken truth is that the how-much-is-too-much debate tends to drag on forever, all the while with no effective regulation of the chemical in question. Even when it is absolutely certain that a chemical like benzene causes cancer, stalling tactics over the "just how much is too much" question can postpone an enforceable standard for decades.<sup>6</sup> Any economist understands the dynamic: if

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<sup>6</sup> Benzene is a famous example. See generally Feitshans, "Law and Regulation of Benzene," 82 *Environmental Health Perspectives* 299 (1989).

delay equals non-enforcement, then the regulated community has an incentive to delay for as long as possible. Even better, it can tell the public all the while that it is “complying with the law,” since the law hasn’t yet drawn the line that would define non-compliance.

If, on the other hand, the law on a particular chemical can be violated *unless* a de minimis standard is set (and complied with), then the incentive shifts dramatically. Once Prop. 65 survived the first attempts to cripple it, state regulators were astonished to find industry after industry begging them to set clear standards for the chemicals each industry was most concerned about.<sup>7</sup> Compared to the usual stalling and threats to litigate over any loose thread in the regulatory garment, it was night and day. In less than two years, the assigned agency in California managed to produce precise numerical standards for 282 listed chemicals<sup>8</sup> – a feat that the five-year review conducted by the state environmental agency described as “100 years of progress [by federal standards] in the areas of hazard identification, risk assessment, and exposure assessment” based on “the application of internally consistent scientific criteria.”<sup>9</sup>

#### IV. REAL-WORLD EFFECTS

Scientists and regulatory insiders might admire Prop. 65’s lubricating effect on the process of turning laboratory science into enforceable law. What should matter to the general public, however, is whether Prop. 65 has actually delivered the better protection against risks from dangerous chemicals that it promised.

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A more generic example is Clean Air Act § 112, which in 1970 handed U.S. EPA a list of 189 airborne hazardous chemicals to set risk-based standards for. After twenty years, only 6 standards were in place.

<sup>7</sup> What this article calls Prop. 65 “standards” are actually one-way “safe harbor” levels, which have served as functional standards in nearly all cases because to rely on any more lenient standard, a defendant must carry the burden of scientific proof in court.

<sup>8</sup> See Appendix below.

<sup>9</sup> California EPA, Proposition 65 Review Panel, “Accomplishments” p.1 [unpublished], available online at [apps.edf.org/documents/3394\\_EPA\\_5year.pdf](http://apps.edf.org/documents/3394_EPA_5year.pdf).

The public evidence, based on enforcement actions filed and settled, is impressive. Among products reformulated to remove toxic chemicals after being challenged to warn, a 2005 survey listed brass faucets, ceramic tableware (i.e., china dishes), calcium supplements, water meters, water filters, galvanized pipe, crystal decanters, foil caps on wine bottles, brass keys, hand tools, exercise weights, raincoats and other plastic clothing, electrical tape, electrical cords and wires, bicycle cable locks, CD wallets, baby rash powders and creams, anti-diarrheal medicines, hair dyes, hemorrhoidal medicines, nasal sprays, correction fluid, spot remover, paint strippers, shoe waterproofing spray, nail polish and nail polish remover, dandruff shampoos, bottled water, wooden playground structures, and portable classrooms.<sup>10</sup> Local sources of industrial air emissions have been similarly affected, including brass foundries, lead smelters, battery manufacturers, hospitals, and diesel truck depots.<sup>11</sup> The known examples are as eye-opening in range – from baby bottles to brass foundries, from playground structures to Preparation H – as they are in number. In all these cases, defendants opted to eliminate or minimize the toxic chemical risk, in preference to giving warnings. With consumer products, the defendants' competitors have then typically followed suit,<sup>12</sup> with all versions of the product on the market reformulating together.

Non-litigation evidence of Prop. 65's effects is harder to come by, for obvious reasons. Companies that review their products or waste streams on advice of counsel and come into compliance early, instead of waiting to be sued, see no reason to draw attention to themselves. "We used to be exposing you to a chemical that causes

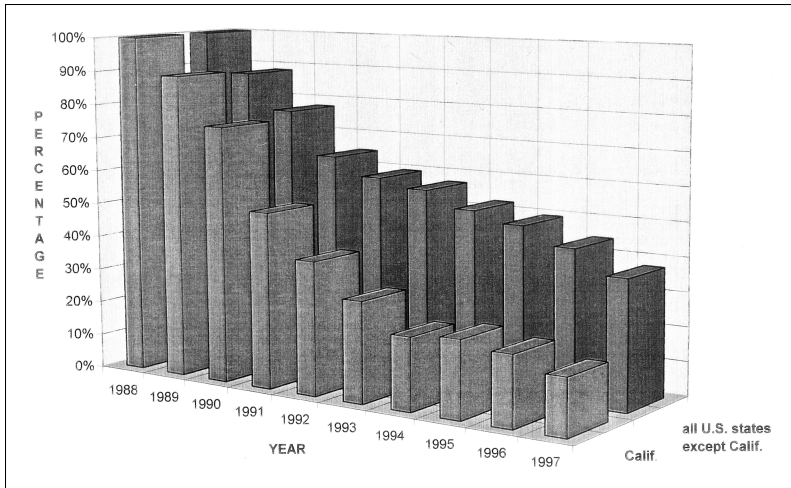
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<sup>10</sup> Rechtschaffen and Williams, "The Continued Success of Proposition in Reducing Toxic Exposures," 35 *Environmental Law Reporter* 10850 (December 2005), at 10850.

<sup>11</sup> See Freund, "The History of Reducing Toxic Air Emissions and Exposures in California Through Proposition 65 Enforcement," 21 *Environmental Law News* 18 (Winter 2012).

<sup>12</sup> Either by joining in master settlements through their trade associations, or by opting in to an initial settlement on a company-by-company basis (and paying the original defendant something for its attorney fees).

# TEN-YEAR AIR EMISSIONS OF PROP 65 CHEMICALS (AS PERCENTAGES OF 1988 BASE YEAR)



cancer, but we just stopped” is not an attractive press release. The public evidence of toxic exposures being stopped or shrunk to safety, visible through enforcement actions, is only the tip of an iceberg.

One way to quantify Prop. 65’s effects would be to compare experience in California to other states. For emissions of toxic chemicals into the air, large-scale evidence can easily be pulled from the Toxics Release Inventory (TRI) data that U.S. EPA started collecting at the same time Prop. 65 was going into effect. In TRI’s and Prop. 65’s first decade, measured air emissions of Prop. 65-listed chemicals dropped twice as fast in California as they did nationally.<sup>13</sup> The dramatic difference was for the Prop. 65 chemicals only; California emissions of the other toxic chemicals tracked by TRI dropped only at the national average rate.

In the realm of consumer products, however, where Prop. 65 has had its widest impact, comparisons with other states are futile. The reason is that nearly all of the product reformulations spurred

<sup>13</sup> See chart above; references available at [apps.edf.org/article.cfm?contentID=3429](http://apps.edf.org/article.cfm?contentID=3429).

by Prop. 65 have already spread nationwide. Again, avoiding public attention is the reason. It would be legally safe to sell a reformulated product in California without a warning (say, a hemorrhoid cream with its mercury compound removed) and the old-formula product in every other state. But to be caught selling a “clean” and a “dirty” version of the same brand-name product to consumers in different states? When a “clean” version is obviously available? Marketplace risk, not legal risk, has spread Prop. 65’s effects on consumer products nationwide, and industry lawyers are by now comfortable saying in public what they have long said in private, that Prop. 65 has significantly influenced the manufacture of consumer products nationally and internationally.

## V. FEDERAL CONTRAST

One chemical by itself highlights Prop. 65’s improvements over federal regulation, the chemical with the longest history of known harm to humans and the widest manmade distribution throughout our environment. That chemical is lead (Pb), which took 60 years to be banned from gasoline and is still the most serious environmental health hazard in the U.S. for young children. Proposition 65’s effect on reducing actual exposures to lead, in hundreds of unexpected contexts as well as familiar ones, has been dramatic and thoroughly documented.<sup>14</sup>

As a demonstration of gaps in the federal safety net, one source of lead exposure had been particularly blatant: the presence of lead in brass plumbing fixtures like faucets, water meters, well pumps, etc. The brass alloys used to make them had been up to eight percent (8%) lead, and the fixtures were leaching lead into water (especially hot water) in millions of people’s kitchens and bathrooms. Brass plumbing fixtures were immune from federal regulation,

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<sup>14</sup> See Rechtschaffen, “How to Reduce Lead Exposures with One Simple Statute: the Experience of Proposition 65,” 29 *Environmental Law Reporter* 10581 (October 1999); see also Rechtschaffen and Williams, note 10 above. Another long litany of examples can be found in the cited sources.

however, because federal law officially defined plumbing brass with a lead content of up to 8% as “lead-free.” A Prop. 65 lawsuit brought by two environmental organizations in 1992 led first to a voluntary nationwide industry standard in 1994, then to a settlement in 1995 accepting tight lead limits (or warnings) for all new faucets sold in California, and then to an amendment to the Safe Drinking Water Act in 1996 that closed the federal loophole and turned the voluntary standard into national law.<sup>15</sup>

Finding and filling holes in the federal safety net has been a familiar Prop. 65 story. More commonly a hole comes not from a naked exemption like “lead-free” plumbing fixtures, but from neglect: a widespread chemical exposure that a federal agency knows about and has authority to control, but is not acting on. Inertia, budget constraints, political pressure, and lack of headlines all contribute. Examples documented elsewhere at length<sup>16</sup> include the transparent lead glazes on china dishes (a billion-plus pieces sold annually in the U.S., with FDA testing only a few hundred samples) and lead in costume jewelry (the Consumer Product Safety Commission failing to catch 166,000 parts per million [*sic*] of lead in children’s bracelets sold by Walt Disney Co.). In the case of dishes, Prop. 65 settlements established a massive industry testing program in the U.S., Europe, and Japan, covering 2,000 manufacturers and overseen by the state Attorney General’s office. With children’s costume jewelry, 150 million items were voluntarily recalled. Lead in calcium supplements (taken in a third of American households, especially by pregnant women; U.S. FDA jurisdiction) and arsenic in playground structures made of treated wood (U.S. EPA territory) tell similar stories.<sup>17</sup>

Ironically, the most radical feature of Proposition 65 compared to federal law is that it applies the same rules to a toxic chemical no

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<sup>15</sup> The lead-in-brass saga is described at length in Rechtschaffen, *id.*, 29 ELR 10583-85.

<sup>16</sup> See Rechtschaffen and Williams, note 10 above.

<sup>17</sup> *Id.* at 10853 (playground equipment); Rechtschaffen, note 14 above, at 10587 (calcium supplements).

matter what the context. Under federal law, the same chemical can be subject to very different enforcement mechanisms and standards (and exemptions), depending on whether it shows up in a consumer product or a pesticide or a food, whether it emits from a smoke-stack or a tail pipe or a hazardous waste pond, whether it is breathed outdoors or in the home or in a workplace, and so forth. Prop. 65 enforcement actions have caused consternation at the prospect of, for example, holding lead exposures to the same limit in cheap jewelry or calcium supplements as in drinking water.

Perhaps even more radically, Prop. 65 applies the same level of calculated health risk from one chemical to the next. An exposure to a known carcinogen needs a warning if the calculated cancer risk is more than 1-in-100,000,<sup>18</sup> no matter which carcinogen it is. Although equal protection against equal cancer (and other) risks is the professed federal norm, nearly every successful Prop. 65 enforcement action shows a departure from that norm in practice.

## VI. POLICY PERSPECTIVE

All God's dangers are not toxic chemicals, to say the least. Proposition 65's ability to unstick tar babies in government, and force technology changes in commerce, would have interest for only a very limited audience if its approach could be applied only to known nasty chemicals in unnecessary places. With the little-laboratory experiment limited to that one context, anything more is speculation.

Still, after such well-established success, some extrapolation is tempting. The sunshine-based strategy for keeping government effective and honest – Brandeis's most famous prescription – works less and less well as the activities to be illuminated stretch out over decades, their subject matter gets more esoteric, and the issues turn

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<sup>18</sup> The statutory standard is simply "no significant risk assuming lifetime exposure at the level in question." Regulators then interpreted that as a 1-in-100,000 risk (rather than the oft-professed federal goal of 1-in-a-million risk). 22 *California Code of Regulations* § 12703(b) *et seq.*

into debates among incomprehensible experts with equal credentials (if not equal economic motivation). In other words, the way to hide a needle in sunlight is to build up a haystack around it. This process of complexification is partly unavoidable in a complex world, but it is also an automatic reflex of large institutions, and of course so much the lifeblood of lawyers that we tend to take its inevitability for granted.

Proposition 65 was meant to be an antidote to complexification. Instead of trying to reveal the complexities of toxicological risk assessment, its silence-based strategy let them stay in the dark, with sunlight reserved for failure. Silence meant success, with no need for the public to track the process or grasp the details. Failure needed no understanding of the intricacies, either, just a reminder that “That protection you expected to be in place, isn’t, and it’s affecting you personally right here.”<sup>19</sup> Who to blame was also clear: whoever was giving you the message.

Turning a complex regulatory process into a simple on-off message, with the only news being bad news, gave the regulated community a strong incentive to avoid drawing attention to the process at all. Instead of marveling at the intricacies of the Gordian knot and explaining how laborious and time-consuming it would be to untie it, businesses and their trade associations suddenly preferred the swordstroke.

Turning complexity into a simple negative message is only part of the antidote, however. It is just as important that the burden of responsibility be fair, and be seen as fair. Businesses couldn’t claim that Prop. 65 made them each other’s keepers, since its warning requirement applied only to exposures that each business itself was intentionally causing and could control.<sup>20</sup> Nor could they comforta-

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<sup>19</sup> An actual Prop. 65 warning: “This product exposes you to a chemical known to the State of California to cause cancer.”

<sup>20</sup> Retailers and suppliers are subject to Prop. 65 as well as manufacturers, even though they can’t directly control the contents of products they sell. The first major Prop. 65 enforcement action caused Safeway to instruct its 12,000 suppliers that it was handing compliance responsibility to them, and would not stock their products if they refused.



bly claim to be ignorant about the science. “We’re waiting for government to decide later how much is too much” is not a defensible excuse when coupled with “and we know we’re putting you at risk now.”

Finally, the consequences of failure should be non-fatal. Here Proposition 65’s weakness was its strength. The worst that could happen to a business was that it would have to give warnings, either to its customers or its neighbors. No one was going to be shut down or forced to change a product or plug a smokestack, since proper warnings would always constitute compliance. This also meant that, at least nominally, the cost of providing warnings was the upper bound of compliance costs.<sup>21</sup> Defendants in enforcement cases rarely seem to make that choice, given what they see as the intangible costs of attracting that kind of attention, but it is a choice driven by the marketplace, not the law.

Many other areas of regulation have the same complex, each-case-is-different character as chemical risk assessment. Could a silence-based strategy with a shift in burden of proof be as lubricating elsewhere as it has been in chemical regulation? And just why was it that the regulated community accepted the avalanche of science-based regulatory determinations under Prop. 65, instead of using arbitrary-and-capricious challenges (readily available in California) to slow it down?

Two factors made the regulated community want finality instead of delay. First was its unstoppable clock. “Go ahead and tie my hands,” Prop. 65’s chief regulator told the top food industry lobbyist in 1987 when he threatened to pull strings with the Governor. “I

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<sup>21</sup> Early on the food industry gave the Reagan Administration an analysis estimating its Prop. 65 compliance costs at \$200 million per year. On review, White House economists concluded that the estimate was “vastly overstate[d],” in part because producers would be more likely to “utilize better quality control measures” for their products than to put warnings on them. Executive Office of the President, Council of Economic Advisers, “Economic Analysis of Proposition 65,” December 5, 1988, available online at [apps.edf.org/documents/3409\\_Office\\_of\\_the\\_President\\_1988.pdf](http://apps.edf.org/documents/3409_Office_of_the_President_1988.pdf).

know you can do it. But this law will go into effect anyway.”<sup>22</sup> And by making regulation discretionary rather than mandatory, the law avoided any threat of a clock-stopping injunction due to regulatory failure.

The second factor, which kept businesses from trying to block new standards no matter how stringent they were, was simply self-interest. Since Prop. 65 liability attaches to the smallest detectable exposure unless the defendant proves a *de minimis* exemption, defendants need a reliable way of showing what the exemption level is. The only sure way is to point to an official determination.<sup>23</sup> Numbers fixed by the regulatory agency don’t create liability, in other words; they create shields against what would otherwise be wider liability. Good lawyers and expert witnesses in court could well have succeeded with challenges to some of those early numbers, which were calculated in haste – but their relief would have made their clients more vulnerable to liability instead of less. Self-interest lay in cooperation with regulators: the “legal judo.”

Not many examples of effective legal judo against complexification come to mind (at least mine), and one reason may be that any burden shift of consequence has to be authorized in the statute proper.<sup>24</sup> Trying to impose one through regulation alone would be *ultra vires* in most cases. Another reason is that the structure around a burden shift has to be airtight to work, and conventional regulatory regimes are not typically designed with that in mind.<sup>25</sup> For both reasons, most of the potential probably lies in new law.

How many useful applications there might be for a Prop. 65-type mechanism is hard to guess. In any specialized area, the most immersed practitioners are the ones who could tell best, since they most deeply understand the dynamics at work in their specialty and

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<sup>22</sup> Personal conversation with T. Warriner, 1987.

<sup>23</sup> Otherwise they bear the burden of proof to establish it in court, putting them on the flip side of the benzene experience; see note 6 above.

<sup>24</sup> One law that does, very effectively, is the 1968 Truth in Lending Act with its Regulation Z.

<sup>25</sup> Or if they are in original form, they don’t stay that way as they move through a typical legislative process.

the motivations and pressures actually felt in practice by key participants. There is no simple template for burden shifts; fine tuning to each different legal environment is key. My hope in laying out the Proposition 65 experience is to suggest the possibility, for those with deeper knowledge in different fields to consider.

## VII. CONCEPTUAL ELEMENTS OF THE PROPOSITION 65 MECHANISM

**P**rop. 65's main elements in concept are listed below. Only a combination of all of them together has been proven to work, but it seems likely that success could be had with only some, depending on the subject matter, the policy goals, and the adaptability of the pre-existing legal regime.

- a. *Complexity*: a complex subject matter to be resolved, in many iterations with varying facts, before a policy goal can be achieved;
- b. *Fairness*: expertise in the subject matter that is fair to expect from those whose behavior the law targets;
- c. *Shifted risk*: legal jeopardy for an unsuccessful resolution falling on the targeted parties;
- d. *Golden silence*: public communication that occurs only when timely resolution in a specific iteration has *not* occurred;
- e. *Simple pointed message*: a clear message, specific to each iteration, that might cause negative public reaction to important interests of the targeted parties;
- f. *Market*: a marketplace that could anticipate the public's reaction, and respond;
- g. *Fixed deadlines*: an unstoppable clock for each iteration; and
- h. *No way out*.

## APPENDIX

Proposition 65 was codified at *Health & Safety Code* § 25249.5 *et seq.*, available online at [www.oehha.ca.gov/prop65/law/P65law72003.html](http://www.oehha.ca.gov/prop65/law/P65law72003.html). See also the official “Proposition 65 in Plain Language,” available online at [www.oehha.ca.gov/prop65/background/p65plain.html](http://www.oehha.ca.gov/prop65/background/p65plain.html). The main provisions relating to the warning requirement:

- § 25249.6 – warning requirement
- § 25249.7 – enforcement
- § 25249.7(d) – citizen enforcement
- § 25249.8 – listing of chemicals
- § 25249.10 – exemptions from warning requirement
- § 25249.10(c) – de minimis exemption
- § 25249.12 – regulatory implementation

The Office of Environmental Health Hazard Assessment (OEHHA) maintains an extensive Prop. 65 website that includes the current official list of chemicals (891 as of 3/16/12) and all “safe harbor” standards adopted (295 as of 3/16/12) as well as the original 282 “Expedited Potency Levels” from 1992; regulations; and other administrative materials. See [oehha.ca.gov/prop65/law/P65law72003.html](http://oehha.ca.gov/prop65/law/P65law72003.html).

The California Attorney General’s office also maintains a Prop. 65 website that includes a searchable database of all 60-day notices filed by private citizens since 1988; annual summaries of every citizen-suit settlement from 2000 through 2010; enforcement regulations; Attorney General letters on specific Prop. 65 topics; etc. See [oag.ca.gov/prop65](http://oag.ca.gov/prop65). Under a 2001 amendment to the statute, the Attorney General receives advance notice of every private settlement and may object or comment in court, based on the original statutory requirement that private enforcement actions be “in the public interest.”

