PROPOSITION 65'S EFFECT ON SMALL BUSINESS

THURSDAY, OCTOBER 28, 1999

COMMITTEE ON SMALL BUSINESS,
HOUSE OF REPRESENTATIVES,
Washington, DC.

The Committee met, pursuant to call, at 11:14 a.m., in room 2360, Rayburn House Office Building, Hon. Jim Talent [chairman of the Committee] presiding.

Chairman TALENT. Good morning. Today the Committee will examine how Proposition 65, the California Safe Drinking Water and Toxic Enforcement Act of 1986, effects small businesses.

Everyone here agrees that consumers have a right to know if a product might harm them. As I have repeatedly stressed, conscientious small businesses should manufacture safe products that make life more pleasurable for all consumers.

Furthermore we all agree that states have a right to protect their citizens. Indeed, courts routinely hold that states traditionally have had great latitude to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons. But that power should not be used by the state or by private parties to extort payments out of small business people who have done nothing wrong.

In 1986, California passed Proposition 65. That proposition generally requires warnings for environmental, consumer, and occupational exposure to particular chemicals the State of California has determined may cause cancer or reproductive toxicity. If a manufacturer, either in-state or out-of-state, fails to display the required warnings, Proposition 65 empowers private attorneys to enforce the statement in place of the California Attorney General.

In 1960, Congress passed the Federal Hazardous Substances Act to provide for national uniform requirements for adequate cautionary labeling of consumer products containing hazardous substances which are sold in interstate commerce.

In passing the FHSA, Congress recognized uniform labeling benefits the public. For example, "such a labeling program would facilitate the education of the public in the cautionary use of these products. Informative, uniform labeling would enable physicians to administer antidotes immediately rather than waste precious time in determining the active ingredients of the products." That is from the legislative history.

Absent federal legislation, Congress feared states would enact their own labeling statutes "leading to a multiplicity of requirements and creating unnecessary confusion in labeling to the detriment of the public." Indeed, Congress feared requiring multiple

warnings would cause consumers "to disregard label warnings, thus inviting indifference to cautionary statements on packages of substances presenting a real hazard of substantial injury or illness."

To facilitate the national uniform labeling requirements, Congress expressly provided that the FHSA preempt state cautionary labeling requirements. Congress empowered the Consumer Product Safety Commission to enforce the statute, including the preemption clause. The CPSC could use its authority to work with California to insure that lawsuits are not used to force settlements out of small businesses from around the country who have not violated the law.

And that abuse is occurring. I expect testimony today that approximately 20 percent of all intent to sue notices filed with the California Attorney General are frivolous. Furthermore, witnesses will testify that Proposition 65 private enforcers target small businesses which must settle because they cannot afford to fight frivolous lawsuits and still meet their payrolls. Witnesses will also testify that Proposition 65 private enforcers often fail to inform small businesses that Proposition 65 exempts businesses with less than ten employees. Finally, I expect testimony that large businesses refuse to distribute small business products without the required warnings notwithstanding the fewer than ten employees exemption.

Between 1996 and 1997, this Committee worked with the Occupational Safety and Health Administration to utilize OSHA's preemptive authority to preempt Proposition 65's occupational application and limit it to the California work place. This limited the private enforcer's ability to sue out of state manufacturers.

The Committee would like to work with the CPSC to determine if similar action might be taken in the consumer product area to protect against abusive lawsuits against small business people.

We have two panels of witnesses who have agreed to appear before the Committee today. The second panel includes Ann Brown, who is the Chair of the Consumer Product Safety Commission.

Before we turn to the first panel of witnesses, I want to recognize the distinguished Ranking Member from New York for any statement she may wish to make.

[Mr. Talent's statement may be found in the appendix.]

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

We are here to explore the enforcement of California's Proposition 65, an innovative initiative passed by the voters of California in 1986. Proposition 65 was designed to protect the public from possible carcinogens, and in many concrete ways it has worked.

There are numerous examples of certain chemicals that have been phased out of the production of certain products. Most correction fluids have seen potentially dangerous ingredients removed. Ceramic tableware now contains a lower concentration of lead, and the full caps on wine bottles no longer contain lead at all thanks to Proposition 65.

These are real changes that impact real people, and I strongly agree with the motives that lead to Proposition 65. Other states could benefit from similar initiatives, and I am committed to seek-

ing innovative ways to address concerns regarding exposure to these materials.

I have a personal concern. My district in Brooklyn-Manhattan in New York has one of the highest cancer rates of any congressional district in the country.

Today we will be exploring one aspect of Proposition 65. Specifically there are several questions regarding the third party enforcement provisions, which have raised several concerns.

Have they been implemented in an intelligent way? Have they had an undue effect on small businesses? If so, what can we do to make sure that Proposition 65 does the good work it was intended to do without unfortunate consequences?

The Committee has received some disturbing anecdotal evidence that some individuals are targeting small business through the third party provision. I am even more disturbed when I hear that some individuals have threatened legal action against businesses with fewer than ten employees. This is not covered by Proposition 65. This was never the intent of Proposition 65, and hopefully today's hearing will help find solutions to these types of problems.

These are the sorts of questions I am eager to begin to answer today. I welcome all of the members of our panel who have come here today, and I thank them for their time. I look forward to hearing what we can learn from them.

As I have mentioned in the past, one of the benefits that we have on the Small Business Committee is that our members have such diverse background and experience. Today once again we are in a position to receive the benefit not only of the witnesses before us today, but also from the members of the Committee.

I would like to yield to Congresswoman Grace Napolitano, who has worked on this issue for some time.

[Ms. Velazquez statement may be found in the appendix.]

Mrs. NAPOLITANO. Thank you, Ms. Velazquez.

I do appreciate the time to briefly address, Mr. Chair, if I may.

Chairman TALENT. Sure.

Mrs. NAPOLITANO. The Committee on the issue that is, of course, extremely important to California, the health and welfare of the people of California.

In the 13 years since the passage of Proposition 65 we have seen dramatic evidence that fundamental changes in product safety can be affected by ordinary people with the power of the vote. This important statute puts California in the forefront of efforts to protect its men, women, especially pregnant women, and its children, all Californians, from exposure to chemicals that are known to the State of California to cause cancer, birth defects, or reproductive toxicity.

The law allows Californians to make informed choices about products they use and to take legal actions to protect themselves against exposure through a variety of public and private enforcement measures.

One of the most laudable outcomes of Proposition 65 is the warning label now displayed on alcoholic beverages which warns pregnant women about effects alcohol may have on the developing fetus.

In other instances products have been reformulated to complete eliminate known carcinogens and other agents. The other two cases forcibly demonstrating the benefits of Proposition 65 were the case initiated against Price Fiester and American Standard against the use of high lead contact brass in faucet fixtures. As a result of the settlement, upheld by the California Supreme Court, there was the phaseout of lead containing brass.

That effort today continues with a targeted program to bring all manufacturers and retailers in California into compliance with California's strictest in the nation's standards for lead in drinking water.

On behalf of Latino and Asian workers in a manufacturing plant with high levels of reproductive toxins, workers prevailed in their case and gained cessation of toxins in favor of safer alternatives.

With regards to concerns by the industry about any onerous burden that it may impose, I believe there have been numerous attempts to quantify the extent of that burden and to balance it with the public good. Some of the facts are in 1988, at the industry's request, the Council of Economic Advisors under President Ronald Reagan found that the industry claim on 65's burden and cost to business were vastly overstated and recommended against federal preemption.

Subsequent preemption requests, both during Presidents Reagan and Bush administrations, have also been rejected.

In 1992, the administration of Governor Wilson found that by any federal standard Proposition 65 has resulted in 100 years of progress in the areas of hazard identification, risk assessment, and exposure assessment.

A series of Proposition 65 preemption challenges have all been rejected by California courts in the Ninth District Court. In 1992, both the food and non-prescription drug industry conceded at a state hearing that not one single product of thousands sold in California supermarkets would require a label or warning signs under Proposition 65, nor is any fresh produce, brand name food product, or brand name cosmetic sold in California required to have a label or warning on it.

Just this month the State Attorney General sued over 13 key manufacturers and distributors for failing to warn their products exposed consumers to lead at levels that substantially exceed Proposition 65 level.

I believe consumers need to know this information so that they can protect themselves and, most importantly, their small children or their unborn children. Let's keep in mind today that this is a hearing process, and there may well be some unintended consequences on small business as a result of Proposition 65. However, I very sincerely doubt that the law was intended to punish small business, the backbone of our vibrant economy, especially in California, and force them into lengthy and costly legal battles against the Proposition 65 compliance.

We must today hear from small business, both public and private, enforcers and others about how we may address these concerns fairly. At the same time, preemption of California's Proposition 65 is not the focus of the hearing. That law has been tested in the courts.

I believe I personally am committed to working with small business in the state and out of state, especially here, to insure that we can meet the standards imposed by 65 and still do business without undue legal and regulatory constraints or being hounded by the bounty hunting attorneys.

This Committee, more than any other, knows the value of small business and its needs. We want to and we must work honestly and directly and address their concerns.

Thank you very much, Mr. Chair and Madame.

[Mrs. Napolitano's statement may be found in the appendix.]

Chairman TALENT. Well, I thank the gentle lady, and I want to join my friend from New York in complimenting the gentle lady from California for her work and her advocacy in this field, and also thank her for her work in helping us prepare this hearing and her input.

Mrs. NAPOLITANO. Thank you.

Chairman TALENT. It is appreciated, as always.

All right. Our first panel begins with Ms. Marianne LaMura.

The gentle lady from New York had a statement, but normally we do not have extra opening statements, but if members feel strongly, I am always inclined to bend the rules a little bit.

I will recognize the gentle lady from New York.

Mrs. KELLY. Thank you, Mr. Chairman.

I think the important thing here is when a state issue becomes a federal issue and when a state requirement has an impact on interstate commerce, it is important that the federal government have a look at it.

And because this is really kind of a complicated factor, I was thinking about this the other day, and you know, in that children's story about the three billy goats Gruff where a troll is guarding the bridge, and the first billy goat is a little billy goat, and the billy goat has to pay a toll to get across the bridge.

And of course, the troll says, "Who's tripping over my bridge?" and threatens to eat the goat if they do not pay the toll.

Well, the second billy goat is a little bit bigger, and that same troll comes out and says, "Who's tripping over my bridge?" and the second billy goat has to pay a toll.

But when the third billy goat, that is a big billy goat, crosses that bridge and the troll threatens to eat the big billy goat, the big billy goat jumps off the bridge and eats the troll.

And I think it is really important that people understand that that is kind of the thing that is happening here. And I really feel that the effect of Proposition 65, we have to make sure that a private enforcer does not wait. I mean that we do not have the private enforcer out there being the troll, making sure that the billy goats have to pay the toll.

So here we bring in the federal government, and maybe the federal government needs to take a look at what the troll is doing, and that is what I hope this hearing will bring out today.

Thank you very much.

Chairman TALENT. I thank the gentle lady.

I have a three year old, and if it is not Barney or Winnie the Pooh, she is not into it, but maybe. [Laughter.]

I thank the gentle lady.

And we will start with our first panel now. Ms. Marianne LaMura of East Hanover, New Jersey, who is from Chemcoat Labs, Inc.

And I want to thank all of the members of both panels for being here.

Ms. LaMura, please give us your statement.

STATEMENT OF MARIANNE LAMURA, EAST HANOVER, NEW JERSEY

Ms. LAMURA. Good morning, ladies and gentlemen.

My name is Marianne LaMura, and I am the co-owner of a small, privately held family business located in East Hanover, New Jersey. The name of the company is Chemcoat Labs, and we deal primarily in the manufacture of nail polish.

I have been invited here today to tell of my experiences relating to California Proposition 65 and the adverse effect it has had on small business.

To do so, I would first like to offer some background information about our company. Chemcoat Labs was founded in 1971 by my father, the late Salvatore LaMura. Sam, as he was known, began working in the paint industry at age 14 in Newark, New Jersey. He eventually learned color matching of paints and lacquers and began to color match opaque nail polish during the 1930s when it was first invented by Ms. Helen Neushaefer.

During the 1940s, he went to work directly for Neushaefer at Lacquerite Company using the formula she had created. He manufactured nail polish from the mid-1940s through 1969, running Lacquerite for the family of Neushaefer, who passed away in 1959.

In 1971, he started his own company, Chemcoat Labs, again using the same formulation. My partner and brother, Frank, started working at Chemcoat in 1973, while I came on board in 1981.

During the early years of my employ, there were not many state or federal inspections at our facility because many of the regulatory agencies which were created during the 1970s were first busy with larger companies. It was not until the mid-1980s that we became inundated with inspections from different state and federal agencies.

As each inspection would take place, I would work to see that all requirements were met to bring our company into complete compliance with all laws.

In 1991, we were alerted by our nitrocellulose solution supplier, AKZO Nobel Coatings that warnings were to be required for products containing certain ingredients if they were sold in California. Proposition 65 would take effect beginning January 1, 1992.

I immediately sent out a letter advising approximately 80 of our accounts to alert them of this new law which was about to take effect. As a professional courtesy, AKZO provided our company with updated custom produced material safety data sheets which contained all necessary warnings and requirements for local state and federal laws.

Unfortunately, no one really knew exactly how to comply with the new labeling requirements for California, and there was no agency to contact for instruction for compliance.

Due to the fact that the CTFA had already done testing on exposure levels of toluene in nail polish with negative results, everyone, including myself, believed there was no need for labeling because the product was not considered harmful, and the warning went unheeded. We labeled anyway.

In early 1993, one of my customers, American Manicure, called to tell me that he had been contacted by a lawyer, Clifford Chanler, representing a nonprofit organization called As You Sow, which was headed by Thomas Van Dyck. He was given a 60-day notice of violation which cited that his product, which contained toluene, was being sold in California without a warning label and, therefore, was not in compliance with Proposition 65.

American Manicure was named in the first wave of the lawsuit and was eventually given the opportunity to settle the matter for $1,500.

Several other of my accounts also received warning notices, along with many national brands of cosmetics. All were eventually named in the litigation by Mr. Chanler. As time went on, the settlement fees being demanded were growing larger and larger.

Over the next few weeks, the first wave of companies named in the litigation had either settled with Mr. Chanler or were in the process of doing so. Some had opted to place a warning label on the products, with Mr. Chanler specifying the prescribed wording of the warnings, while others opted to reformulate their product removing toluene altogether.

It was quite burdensome for our company for the following reasons. Being the manufacturer of the product in question, we were receiving numerous calls every day for information about the litigation to find out if nail polish was really harmful or was it just harmful in California. Who was this Clifford Chanler and did he have a right to do this? Who can we call for labeling requirements, et cetera, et cetera?

I fielded many questions and tried to stay informed so that I could help my accounts in any way possible, but at the same time our phone was ringing off the hook, we were also being asked to immediately submit samples without toluene, and at that time we did not even have a working formula for a new product.

Once we did create a new product, it would require testing, new labeling, new material safety data sheets, new ingredient lists, and we had to start from scratch, and we needed it yesterday. And all of this was very time consuming to do it right.

It was a heavy burden for a small company of only seven or eight employees, and the newly created product would not be as good as the original formula, but at a cost of approximately $3.00 more per gallon.

By early summer of 1993, Mr. Chanler and AYS sent out the second wave of notices, and whoever he missed in his initial roundup was now being named in the second wave. By then the entire industry knew about this litigation that was spreading like wildfire, and many, fearing the high cost of litigation and also knowing that there was a lack of proof that nail polish did not cause harm, everyone just buckled under and paid a settlement fee.

I do know of one company that tried to fight, but after spending $100,000 in legal fees, gave up and settled.

In late August 1993, our company was finally named. We were part of the third and final wave of the lawsuit. Included with the cosmetic companies that were being named were suppliers of raw materials which are utilized in the manufacture of nail polish and also filling companies, private label manufacturers like Chemcoat, and just about anyone who ever touched the product. And still the settlement fees being demanded were always growing larger as time went on.

I had been in contact with the CTFA on a number of occasions. Although I was not a member of the CTFA, they were extremely helpful to me and offered as much information as they could to help small business. For that I would like to take this opportunity to personally thank that organization.

I believe they have the public interest in mind first and foremost.

In early September 1993, I received a letter from CTFA's Thomas Donegan, Vice President and General Counsel, advising of the latest information about the litigation. The letter also made me aware that companies with less than ten employees were exempt from the penalty phase of Proposition 65.

I immediately started to make all of my customers aware of this fact, as many were small companies within this category. One such customer was American Manicure with only one employee. When I told him of this, his attorney sent a letter to Mr. Chanler complaining about the $1,500 settlement fee he had paid, despite the fact he was exempt. He asked for the return of the fee.

He also sent a complaint letter to the Office of the Attorney General, explaining what had transpired, but to the best of my knowledge, the fee was never returned, and both letters were left unanswered.

On September 22nd, 1993, after receiving what was called a courtesy call from Mr. Todres who worked for Mr. Chanler, I responded to my notice of violation. I sent a letter to Mr. Chanler advising that I was exempt from the penalty phase of Proposition 65 due to the fact that we have never employed more than eight employees. To prove this, I sent him a copy of my payroll journal, along with our health care invoice which names all of our employees, and in addition to this information, I advised him that we had been using a warning label for our bulk product since 1991, along with a warning contained in our material safety data sheets which was newly revised in April of 1991, at least seven months before Proposition 65 took effect. In other words, we were in compliance.

I also questioned as to why Mr. Todres was concerned with my annual sales figures at Chemcoat. I felt that he should be focusing his concerns as to whether or not I was in compliance. My sales figures were none of his business.

I then sent a complaint letter to the Attorney General in California. I also sent a form letter to all of my accounts with a cover letter asking them to Xerox the form letter onto their own letterhead and send it to the Attorney General, along with a map which painted off California and labeled it "the Shakedown State."

Basically everyone wanted to know where all of this settlement money was going. As of today that question has never been answered, and I have never heard of even one case where someone

or anyone has sued for birth defects or getting cancer from the use of nail polish.

When the Attorney General's office did answer my letter about one month later, I was told there was nothing they could do because it was a civil matter, and that AYS and Mr. Chanler were within the law.

This Proposition 65 law is plagued with flaws, and all are at the expense of innocent businesses, both large and small. As You Sow (AYS) used exaggerated usage data to claim that exposure levels of toluene contained in nail polish were harmful.

The CTFA ran independent tests before this law ever took effect and claimed that the product was not harmful. I will offer the following information as further proof.

Our company uses toluene in our formula, the formula which originated in the 1930s. Our factory has been checked by OSHA to insure that the air quality is within permissible exposure limits for our employees. The levels of exposure for a manufacturing plant are within the requirements for OSHA, while AYS will have you believe that the vapors escaping from the quarter of an inch opening of a bottle of nail polish are harmful and require a warning label.

This is clearly a misuse of the law, and I do not believe that the law was intended for this purpose. An entire industry has been penalized unfairly to the tune of $993,000 in settlements. Proposition 65 is a paradise for lawyers that want to file frivolous lawsuits and, worse yet, it is a revolving door that never closes, allowing numerous lawsuits against the same company for the same violation from multiple parties.

This has recently happened with a hair color manufacturer, Combe Incorporated and American International Industries. Two suits were filed for the same violation, but the second suit was eventually dismissed by appeal. Now the consumer groups are asking the Supreme Court to de-publish the opinion so that it could not be cited in subsequent Court cases.

To me this appears to be more about money than compliance. Earlier this year one of my accounts with less than ten employees was forced to pay into a settlement or risk losing the business of a large chain store who was cited with violation for selling the product.

Mr. Van Dyck claims that AYS takes the more difficult cases that the Attorney General passes on. In truth, the cases that the Attorney General passes on are the ones that are without merit and that they feel do not pose a risk to the public.

The nail polish industry is again being targeted for round two of litigation by AYS. Clifford Chanler has been replaced as counsel by Larry Fahn, a newly elected board member of the Sierra Club. Some time last year a second ingredient has been named, and a number of companies have already faced citations. One such account that paid a settlement for the toluene suit has just paid a second settlement.

Strangely, while this ingredient was present in nail polish at the time of the first wave of lawsuits, it was never named along with the toluene. I refer to tosylamide-formaldehyde resin. I have a sample of it here so that we can put a face on it.

Several companies have been forced to reformulate their product despite already providing warning labels. The resin contains a by-product of less than .3 of one percent of formaldehyde. The resin content in nail polish is seven percent, which would mean that it is a trace amount. Yet I am sure that many companies will be forced to pay thousands of dollars just because of this small by-product content.

The law is about to be stretched again for the purpose of extracting settlement money from innocent companies just trying to earn a living. This law is out of control, and I do not know what would happen if more states were to pass laws similar to Proposition 65. It would certainly kill interstate commerce.

What we need to do is close this loophole in the law once and for all, to put an end to these frivolous lawsuits.

We also need national uniformity for interstate commerce so that all consumers are provided with the same relevant safety standards.

Since Proposition 65 has passed in California, it has cost small business thousands of dollars defending itself against false allegations. Lawyers, not consumers, have benefited. Please help.

Thank you.

[Ms. LaMura's statement may be found in the appendix.]

Chairman TALENT. Thank you, Ms. LaMura.

Our next witness is Frank Strauss from Marshall, Texas with Activa Products, Inc.

Mr. Strauss.

STATEMENT OF FRANK STRAUSS, MARSHALL, TX

Mr. STRAUSS. Thank you, sir,.

Chairman TALENT. And those who wish to and can summarize statements, that would be helpful. I know you all have come a long way, and the Committee wants to hear you, but we also want to have time for the members to ask questions.

Go ahead, Mr. Strauss.

Mr. STRAUSS. My name is Frank Strauss. I am the President of Activa Products, Incorporated. It is a woman owned, family run company with 22 employees. We manufacture and sell art and craft materials to distributors, retailers, schools, and others since 1959.

As your Chairman has informed you, we are headquartered in Marshall, Texas. The majority of our employees are minorities, with full medical and retirement benefits.

And let me state that my company is not against Proposition 65. We do not think, however, that Congress intended when LHAMA was passed that the art material companies would be forced to adhere to chronic health hazard labeling requirements.

Recently a bounty hunter sued my company under Proposition 65 regarding a product called Scenic Sand. Now, this is the first lawsuit against any of our products in the 20 years that I have been with the company.

Scenic Sand is just what the name implies: sand that is coated and baked with various colors for uses and designs in sand sculptures that I am sure all of the mothers and fathers in this room have bought for their children. Scenic Sand has received the ACMI

AP seal, which indicates that the product is the safest, least toxic category in the ACMI certification program.

Now, this sand is essentially no different than the sand you would find on any beach, including the beaches in California. Another name for sand, however, is crystalline silica. Proposition 65 requires a warning for crystalline silica.

In response to the lawsuit, we requested our toxicologist to conduct a Proposition 65 exposure assessment of our product. The toxicologist concluded that the potential exposure for the respirable fraction of crystalline silica in Scenic Sand is one percent of the amount that would require a Proposition 65 label.

Chairman TALENT. Mr. Strauss, let me interrupt. I feel responsible here because I asked you to summarize, and you omitted a part that I think would help members understand your testimony.

People who belong to your association, the people who sell art products like this, the association has toxicologists, and you submit the products to them before you market them.

Mr. STRAUSS. We submit every product that we sell to the toxicologist, who is the leading toxicologist in the country, if not the world, that I know of from Duke University, and none of the 300 manufacturers that belong to this association may sell a product that is not approved by the toxicologist.

Chairman TALENT. I want members to understand that when you refer to an AP seal on your product, that is the seal that people in your association put on the products after they have submitted it to the toxicologist.

Mr. STRAUSS. That is correct, sir.

Chairman TALENT. Okay. I just wanted the people to understand.

Go ahead now.

Mr. STRAUSS. As I said, this sand is essentially no different from the sand you would find in any beach, including the beaches in California, but this is also called crystalline silica, and Proposition 65 requires that approval.

I would return again that the toxicologist concluded that the potential exposure to the respirable fraction of crystalline silica in Scenic Sand is .01 of the amount that would require a Proposition 65 warning, and that assumes that the user made sand designs in a poorly ventilated room every day for 21 years. That is one percent to the required level for 21 years every day.

The manner in which these proposition bounty hunters enforce Proposition 65 acts as a sledgehammer against small businesses. We requested that the plaintiff's attorney did not file the lawsuit until the toxicologist could finish his exposure testing that demonstrated that Proposition 65 warning was not needed. The plaintiff's attorney refused and filed suit anyway.

It concerns me that bounty hunters can file these suits so easily against small companies like mine without any proof that the products at issue are unsafe or any proof that the AP certification is wrong.

Equally frustrating is the fact that we have had to hire a toxicologist just to sell our products, while a citizen enforcer need only to determine that the product contains a Proposition 65 chemical.

A company like Activa faces substantial costs in attorney fees and expert fees to defend itself fully. My company, along with other

small businesses face potential penalties of up to $2,500 per day of violation for each product used by any California consumer, these penalties for failure to provide a warning on the product that our toxicologist has told us would be misleading and inaccurate.

My choices are few. I can settle the lawsuit as best I can so that the business and my employees do not suffer, or I can fight the lawsuit at considerable cost and at risk to my company and my employees.

Even if we settle, we will still lose because our customers become the next target, and we must indemnify our customers in order to stay in business. The domino effect of a successive payment to resolve Proposition 65 enforcement lawsuits could eventually put our company out of business.

In conclusion, before we were sued we believed that by complying with the federal laws and requirements, we effectively would be complying with state laws requiring the same kind of health warnings. We are now concerned that we will be forced to comply with different requirements not only in California, but for each state in which our products are sold.

In the light of the burden that Proposition 65 is placing on Activa, we are evaluating whether we should continue to sell our products in California. This may be the only way to insure that we will not be subject to repetitious health hazard warning requirements and to the potential for successive and unfounded lawsuits.

However, even if we stop sales to California, there is still a likelihood that our products could be distributed in California without our knowledge, for example, a shipment from a distributor in Arizona into California and under those circumstances we will again face the policy of the impossibility of enforcement lawsuits against us and our distributors and retail customers.

Thank you for providing me with this opportunity to speak before the Committee, and I would just like in passing to mention to Madame Chairman from New York that we are aware of only one bounty hunter lawsuit that has gone to trial of the many thousands that have been filed in over 12 years.

Thank you, Madame Chairman.

[Mr. Strauss' statement may be found in the appendix.]

Mrs. KELLY. [presiding]. Thank you very much, Mr. Strauss.

Next we move to Mr. Klein.

STATEMENT OF ROBERT KLEIN, BALTIMORE, MD

Mr. KLEIN. Mr. Chairman or Madame Assistant Chairman, I accept the invitation not to read my three pages verbatim. I believe you have all gotten copies of it, and you will be proud that I had Spell Check on my word processor so that there are no spelling mistakes, and I think it speaks for itself.

I would like to, since I came all the way over from Baltimore where we are in the paint business, and I consider our company a small company, I would just like to verbalize some thoughts here.

I bought this company called Lenmar. It was called Lenmar Lacquers. We make industrial coatings or specialty paints. It is unlikely that anybody in this room would ever buy, use our paints or ever hear of us. We make about four different product lines. One of them is aerosol paint concentrate that we sell to the manufactur-

ers of aerosol paint. If you are familiar with Krylon, it is the stuff that you push the button, and it gets sprayed out of the can. We supply a concentrate. The packager will package it, add solvents, propellant, and so on, and that is sort of considered a raw material.

We do make floor finishes that are used by professional floor finishing contractors, and I doubt whether any of you would go out and rent a sanding machine and apply our floor finishes.

We also make cabinet finishes that are used by professional cabinet shops, and the item which we first heard about from the bounty hunters in California were military specification coatings which are used to paint airplanes and tanks and weaponry, and so forth. These military specification coatings, in fact, the formulas were developed by government agencies, and you have to comply with the governmental requirements.

We received a letter from Mr. Chanler at the middle of December 1994 actually, but it is dated the beginning of December 1994, and this was about a month or so after I had attended the annual convention of the National Paint and Coatings Association, of which we are members. At that meeting there was a seminar specifically on Proposition 65, which had very large attendance, and I suspect that they had a spy there checking who was there so they could come after them post meeting and send them these threatening letters and sue them or threaten to sue them.

Anyway, I am not accusing NPCA of selling membership lists because it is a great industry association. They are very helpful in all environmental compliance, the labeling acts, and so on.

My company has always been most assiduous in following the HMIS. We supply material safety data sheets to our customers. We revise them, send them out. I think you still have to send them out every year to existing customers.

And after this meeting in November 1994 of the NPCA, one thing I did when I got back to the office because to the best of my knowledge we did no business in the State of California, and before I got Chanler's letter, I said, "Let's check into the law," and we got their list of 600 different chemicals, including aspirin, that have to be labeled.

There are two products in this list used in paints. One is a product called toluene, which was mentioned here, which is a common hydrocarbon solvent, and the other is DOP, which is a plasticizer, which I have never heard of being on any hazardous products list, but California had it.

What we did immediately upon getting this letter, the product that they (Chanler, as you saw) claimed they found was a military specification item, and we track all the products by the product code numbers of where we ship them. We had never shipped, since 1986, any of that product outside the States of New York, Pennsylvania, and one other state. Nowhere near California.

Plus the fact that since I had a couple of business courses in law when I was in college, I felt pretty smug by the fact that we had no distributors; we had no salesmen; we had no warehouses, and by federal standards we did not do business in the State of California anyway. So I was sure nobody was going to contact us.

When I got the letter from Chanler and it named this product, we had shipped none of it into that area, and of course, they had the add on "or possible other products."

So I answered them on January 17th, but what I had done immediately, we do have a way of determining what raw materials are used in our products. We made up a list of all products we manufactured containing toluol. We told our shipping department, and this was effective January 1st, 1995 which was within a month after getting this letter, to label anything that goes into California per the requirements of Proposition 65 DOP, will cause birth defects or the toluol could cause cancer according to the State of California.

At the same time, when I first heard of this I called up the California Paint Council, which was a group representing the paint makers in the State of California, and was affiliated in some respect to the National Paint and Coatings Association. I called Matt Duston, who was the man who was running this office.

I said, "What do these guys want?"

He said, "They want a little bit of money."

I said, "What is a little bit of money?"

He said, "Ten thousand, $20,000, maybe a little more."

And I said, "Well, maybe to you that is a little bit of money, but I own this company, and it is out of my pocket. I don't consider that a little bit of money."

I wish I had given them a little bit of money up front. My initial investment in Lenmar, my capital investment was roughly $100,000. Just in direct costs, this Proposition 65 action has cost me $50,000, and you can read all of the details in between.

I ended up hiring a California law firm Haight, Brown & Bonesteel, Jeff Margulies who is here, who are expert in Proposition 65, to represent us, and I was just stubborn enough that I was not going to give into a bounty hunter until it got to the point that if I continued, whether I am a little goat or a big goat or whatever the animals are, I think I was a big goat that got swallowed up by the troll, anyway.

But it gets to the point that you say how much money are you going to throw after it. I really detested the idea of giving into a bounty hunter. Our company, every company I have ever been connected with has complied with the laws assiduously. We follow the labeling laws, the air toxicity laws, etc.

I can understand where local jurisdiction, and I know in the air tox. laws—I do not know about Washington, but the Baltimore area is a non-attainment area. So their laws have to be more strict than when you are out in the Midwest where the air is nice and pure.

In California, the South Coast Air Quality Management District came out with their own laws concerning air toxicity and labeling. There is quite a bit of reasoning for local laws, although CARB, the California Air Resources Board, tried to make every part of California at least be uniform.

My plea to you is from whatever I know of laws, if I were to say that there has to be a change, the number one change, is if somebody is going to go after you, I think they should warn you first. If I were driving down a dark road without a speed sign and I got

stopped for speeding, I would expect to get a warning, and then next time I would not speed.

I do not think it is possible for us to know every law in every jurisdiction and comply 100 percent, particularly in our case. We did not think we were shipping anything to the State of California. This was government purchases, and what I did when this first happened, I called up every customer that I could find who bought the MIL spec. paints from us located in the State of California. Of the government ones, most of our purchases or our sales or shipments went to a place that was the U.S. government, Rough and Ready Island, where they exported overseas.

There were other military installations. We tried to find out who was usually the transportation officer. I called up eight companies that were not government installations. "The materials that you bought from us, where did they go?"

And all but one said they were all export. The other one "was not sure". Now, what kind of laws are they that somebody comes after you and extorts money from you without any full knowledge. We finally found that Chanler got this information under the rights of information act. All of these sales are to the GSA, the Government Services Administration office in Auburn, Washington State, and they have probably got ten lists of everything we had bid in military specification coatings.

The first one they grabbed we had never shipped into the State of California, but they kept coming back and coming back.

After consulting with Jeff Margulies of Haight, Brown & Bonesteel, and feeling that it was a bottomless hole, he said, "Let's settle." And we had sort of mentioned settling with Chanler, and whatever you said was not enough, and if you said $20,000, they would talk more. Jeff finally went to them and said, "Well, we are interested in talking settlement." I think the number from Chanler was $70,000 or $80,000.

And to me this is not the way to do business between nations, let alone between states.

Thank you.

[Mr. Klein's statement may be found in the appendix.]

Mrs. KELLY. Thank you very much, Mr. Klein.

Mr. Golden.

STATEMENT OF MARK GOLDEN, NEW BERLIN, NY

Mr. GOLDEN. Thank you.

Good morning, Madame Chairwoman and members of the Committee. Can you hear me?

Mrs. KELLY. It would be helpful if you pulled the microphone a little closer. Thank you.

Mr. GOLDEN. I have summarized way too much information, and I would appreciate if it is possible if that testimony can be incorporated into this hearing.

Thank you for the opportunity to talk about my company's experience with private enforcement of California's Proposition 65.

My name is Mark Golden. I am President of Golden Artists Colors, Incorporated, a family owned business with about 100 employees.

We manufacture acrylic water-based paints primarily for professional artists, serious painters and students. We are located in the town of Columbus, a community of about 600 families in upstate New York.

I must admit I am a bit anxious about this process here today, but I am most anxious about properly summarizing the impact that private enforcement of Proposition 65 is and will continue to have on our small business and others like ours, and anxious actually that anything will be done about it.

If you think Proposition 65 is just a California issue, obviously it is not. If you think it is just an insignificant labeling issue and why don't we just label the product, it is not. If you think it is the best way of serving the public health in the current form, it is not.

My company, along with most other small businesses, does not have the financial resources to fight these lawsuits, and we find ourselves reaching settlements on products that have otherwise been deemed safe under stringent federal standards and laws.

My sense of right and wrong tells me we should fight these suits. Our costs if we win are estimated in the hundreds of thousands of dollars, plus all the energies of my staff.

Should we lose, the cost is potentially the entire business. My sense of protecting our business and the many families that depend on Golden Artists Colors to provide employment and full benefits leaves no choice but to settle.

Even after reaching a settlement agreement for a Proposition 65 lawsuit, we soon received a new Proposition 65 notice of intent to sue over the same products covered in the first settlement. We truly fear this costly cycle of litigation has no end for us.

My company complies with the federal labeling requirements through participating in the ACMI certification program, which covers even broader health requirements than the federal law.

We have included packets by your desk, those red packets, which include the information from ACMI.

Our expectations of the Federal Hazardous Substances Act, as amended by the Labeling of Hazardous Art Materials Act, or LHAMA, was that it was to protect public health first, and also to protect us from states creating duplicate and contradictory guidelines.

To meet the requirement of LHAMA, my company submits the formulas of our products to a board certified toxicologist, who reviews the formulations and advises us of the appropriate health labeling for each product. In fact, the guidelines used have included California's no significant risk levels requirements.

With very few exceptions, our products have been deemed safe for use by people of all ages.

The results of the toxicological review are relayed to consumers by the Art and Creative Material Institutes AP seal, which is recognized internationally as assuring safe products. In fact, many school organizations strongly recommend purchases of only ACMI AP approved products.

The Proposition 65 labeling requirements provide inaccurate information to our customers. The Proposition 65 warning labels will be viewed by all our customers throughout the country, promoting confusion and concern.

Before our customers were purchasing products that they considered to be safe. Now they'll be seeing the same products with warnings of health hazards. The only effect is to diminish our credibility with our customers that we hold dearly, without providing any additional benefit to consumers.

Before this process is through, if nothing is changed, it will cost us hundreds of thousands of dollars with the potential of millions and the jeopardy of our business and the jobs my small company has provided.

In summary, we thought Congress in 1988 indicated through the passage of LHAMA that our small industry would not be faced with conflicting state laws. LHAMA has addressed the identical health issues that Proposition 65 addresses, and we do more than any other industry in the United States to comply with the FHSA requirements as amended by LHAMA.

The issues of Proposition 65 enforcement have nothing to do with protecting public health, especially within our industry. We have worked too hard and too conscientiously to maintain public confidence in our product, in our integrity, in our desire to protect our customers, to be framed by Proposition 65 advocates as being against the concerns of public well-being.

We are simply easy targets by a flawed system that Congress recognized years ago we need protection from. I strongly urge this Committee and Congress to take action to protect small businesses like mine from the economic jeopardy of Proposition 65.

And I thank you, again, for this opportunity to be heard.

Thank you.

[Mr. Golden's statement may be found in the appendix.]

Mrs. KELLY. Thank you very much, Mr. Golden.

Ms. Skommesa.

STATEMENT OF SANDRA SKOMMESA, LOS ANGELES, CA

Ms. SKOMMESA. Good afternoon.

Mrs. KELLY. Sorry. I pronounced that wrong, didn't I? It is Ms. Skommesa.

Ms. SKOMMESA. Yes it is. Thank you very much, Madame Chairwoman.

My name is Sandy Skommesa, and I am President and CEO of Ellis Paint Company. We are in Los Angeles, California.

Ellis Paint Company was founded in 1887, and by the Ellis family and sold to my family in 1969. Today we remain a small, family owned specialty paint manufacturer, and we have about $18 million in sales, and we employ about 85 people.

My testimony, like my fellow panelists, is not about a small company that cannot comply with over complicated and over burdensome regulation because of our size. Quite the contrary, we are a proactive, pro solution oriented company.

Early in the regulatory process we took a strong position to be a leader in environmentally responsible products. We manufacture products that comply with the South Coast Air Quality Management District's rules and regulations, and we have done that since 1985.

We are also a hazardous waste facility site, and we recycle paint related waste streams. We have recycled over half a million gallons

a year for the last 20 years. We took that action in 1980 to recycle solvents, to be a solution for our customers that utilize our products.

With a company who is so proactive in their commitment to environmental responsibility and being a manufacturer in California, unlike the other testimony you have heard, how could a company like mine have gotten at odds with the bounty hunter groups?

Well, I would like to explain to you today that I got at odds with them over a comma. I put Proposition 65 warning on my product from the very beginning. I have a chart to show to you today the warning that I have on my product.

Here we see the safe harbor warning. In the case of a dual risk, we combined both the cancer and the birth defect and reproductive harm into one warning, and we separated it by a comma. We were sued by As You Sow and Mr. Chanler for that comma.

I, like Mr. Klein, felt that they had met their match because there was not a company that was more concerned about the environment, our community, and our employees than Ellis Paint Company, and we were going to stand firm.

But I thought that this was about fairness. I thought it was about warning the consumer, and I was mistaken about that. The bounty hunter requirements are about money, and against the advice of my attorney I did not settle.

Mr. Chanler offered to settle with me for $5,000, and I did not accept that. He did file a suit, and as I was preparing my testimony today I had forgotten how angry I had gotten. When I got the lawsuit, it did not even have my name on it. This lawsuit is made out to Star Finishes Products, Inc. and Does 1 through 1,000. I am one of those Does 1 through 1,000.

Mr. Chanler does not even take the time to see who he is suing. He just opens up the SIC code and finds the address and sends out these lawsuits.

We did settle this case. The discovery is incredible. The wear and tear on my company was also incredible. It was during the time in the 1990s, if you remember, was during the California recession. It was a very hard time for business. Our total cash outlay, as outlined in my testimony, was $54,000. The amounts shown on the chart of $68,000 includes the one administrative person from my company that also spent time on this lawsuit.

To put the cost in perspective, in 1995, my company lost $178,000. There were no raises for my employees, but I had the money to give to Cliff Chanler over a comma.

I do not think anybody at this table has expressed that we are against Proposition 65. We are not, and we would agree with you that better products have come as a result of Proposition 65

I am a California resident. I am a California voter. I have children and grandchildren in that state, and I believe in better products and certainly safer products.

But I can tell you I would fight with all of my being against this bounty hunter that robs us of resources that should be used in our state.

Thank you very much.

[Ms. Skommesa's statement may be found in the appendix.]

Mrs. KELLY. Thank you very much, Ms. Skommesa.

We invited Mr. Chanler. This panel may be interested to know we invited him to come and testify, and I have in my hand a letter from him which we will insert in the record. He declined our invitation, and I will insert this letter into the record, with no objection.

[The information may be found in the appendix.]

Mrs. KELLY. I have a few questions.

Yes?

Mr. STRAUSS. Would you read us that letter?

Mrs. KELLY. I would be glad to read you that letter if you would all like to hear that letter. It was written to Roger Keller, our General Counsel here at the Small Business Committee. "Dear Mr. Keller: 'Thank you for your recent telephone call in which your Committee invited me to join a panel relating to a discussion concerning California's Safe Drinking and Toxic Enforcement Act of 1986. While I intend to submit written comments on one or more of the issues before the Committee and/or the CPSC, I respectfully decline to appear as a participant on the panel. If you would like the names of other potential participants, please feel free to contact me.'"

"Very truly yours, 'Clifford A. Chanler.'"

Mrs. NAPOLITANO. We have identified the troll. [Laughter.]

Mrs. KELLY. I have a couple of questions.

Since, Ms. Skommesa, you were the last person to speak, I just want to ask you a question. It seems that Mr. Chanler and nobody in California really cared about whether they were being grammatically correct with your warning.

Ms. SKOMMESA. No, and we did point that out to them, and you are right. They did not care.

We have now made a decision to put two sentences on our label. So on our products that do represent both a carcinogen and a birth defect warning, we repeat the sentence twice.

Mrs. KELLY. Which costs a little bit more money and enlarges the label; is that correct?

Ms. SKOMMESA. Well, unfortunately on a paint can, you only have a limited space. This is the size of a gallon paint can warning. This is the back; this is the front.

When you make quarts, which we also make quarts, the quart paint label is smaller than the yellow, and we have to put all of the product information on that space, and we do.

It was the only way I could assure that I would not be re-sued, as you have also heard testimony on this panel.

Mrs. KELLY. You spoke about the warehouse people requiring a sticker, the current inventory as well as the new materials. I would like to know how many people that involved and what that really did entail.

Ms. SKOMMESA. Once California voters passed Proposition 65, rather than grandfather in our current inventory, we made a decision to sticker it, and that way to the best of our knowledge, everything that was for sale would be in compliance, and this involved five people in our warehouse. We went out and had stickers with the warning printed on it, and we went through and stickered our entire inventory, which is about $750,000 worth of inventory. The units would probably be around 2,500 units.

But not only that; we sell thorough independent paint dealers. We also sent the stickers and a letter out by product, which stickers went on which product. Our sales people when they made their sales calls, went out and checked our inventory.

Mrs. KELLY. And have you any estimate on not the product cost itself, but how much it cost you for those five employees and the cost of the stickers and the time and so forth to get out there to do that?

Ms. SKOMMESA. I really do not, Madame Chairwoman. I think that it is hard sometimes when you try to put all of the soft cost together, and what happens is then we overestimate or we underestimate.

We are very proactive in our approach to the consumer, and so we did not consider it to be too costly. We would not have said you should not label because it would cost us too much money, but what incenses us is that we do not get credit for the work that we do, and then we end up spending an exorbitant amount of time defending ourselves. Maybe because of our pride.

Maybe I should have just paid the $5,000 and been on my way, but I did not. It is those costs, Madame Chairwoman, on the bounty hunter side that is to me just so unreasonable.

Mrs. KELLY. You heard Mr. Golden's testimony. How does this warning—I am just interested in how the warning differs, your warning label would differ from Mr. Golden's.

Ms. SKOMMESA. His warning label would not differ from mine at all. My industry being in the industrial paint does use hazardous materials, and the warning would apply to my industry. Where in Mr. Golden's industry, he actually participates with a group of toxicologists that state that his product does not need the warning.

That is the other part of Proposition 65 that is so difficult. There are no guidelines that give somebody like Mr. Golden an opportunity to say, "This does not apply to me. I not only paid the toxicologist, but I have the information to prove the product does not require a warning." So you have nowhere to turn.

I agree that my product should be labeled. I do not have a problem with that, but some of our other panelist members, clearly their products should not have been labeled, and they should not have to be subject to bounty hunter where they have no opportunity to bring closure to it.

That is the loopholes. If we could close that loophole within Proposition 65 we would get the best of both worlds, the proper labeling for the consumer, and companies in compliance. Just let us know what you want us to do. We will do it.

Mrs. KELLY. I just would like to ask a question of you, Mr. Golden. If you continue to have these suits brought against you, you have stated in your testimony that you provide your employees with subsidized child care, educational allowances, 401(k) plans, profit sharing, and full health benefits. Would any of these be affected if ultimately you continue to be sued with this type of suit?

Mr. GOLDEN. I believe all of those things will be affected even without the continuation. We are going to have to go through a process of relabeling product, and that is going to immediately affect our income. We will be losing sales. We will be losing school

sales. So even without continued suits, yes, absolutely, those things will be affected.

We will potentially lose jobs, potentially lose benefits for employees.

Mrs. KELLY. Ms. LaMura, why do you think that Mr. Todres was interested in your annual sales figures?

Ms. LAMURA. I think that he was trying to, because I was claiming that I was already in compliance, that I had been labeling, and that I had less than ten employees, and he was disputing that. He did not believe me, and I believe that he was sizing up his losses. He was trying to size up his losses because he could not get at me because at the end, when there were opt in, in the third wave of the lawsuit, the third wave of people that were named, there was what was called an opt in settlement which was handled by the Nail Manufacturing Council, and all of the people that were named were given the opportunity to settle, but the settlement was based upon what their sales figures.

And because I was part of the third wave, that is what they were trying to figure out, but you know, I was stating that I was exempt, and they were annoyed that I knew that.

And when my other customer who paid the settlement, you know, was notified by me that he really should not have had to pay it, he did not get his money back. He never got his money back. He never got any kind of a response from Mr. Chanler or AYS or the Attorney General.

Mrs. KELLY. How do you think Mr. Chanler got the additional names? Where do you think he got those names?

Ms. LAMURA. I know where he was getting them. He was going through our trade magazines. He was relying upon people that he was naming. He was asking them to provide who their suppliers were.

Mrs. KELLY. Was he making a settlement, do you think; was he making some kind of a settlement with them as a tradeoff for them giving him names?

Ms. LAMURA. No, I do not think so. I do not think he did that, no. But he got the names through perhaps like getting his hands on one of our insurance booklets because we all belong to a group, the ICMAD, and all he needs to do is get his hands on one of the booklets. It has everybody's name and address in it, or he can get it from the "Drug and Cosmetic Industry Magazine where they have a yearly catalog that comes out that lists everybody in the industry.

And he just went through it, just like the lawsuit that one of these gentlemen had where he just had one name and then John Does 1 through 1,000, and that is how he did it.

Mrs. KELLY. Do you know if any of this has caused any business to go out of business?

Ms. LAMURA. To the best of my knowledge, no, but I know that companies were penalized up to $50,000. I know that Revlon had reformulated long before the law took effect, and they were charged $20,000. They were named in the first wave.

I am sure it did not help anybody.

Mrs. KELLY. Ms. Skommesa, do you want to add to that?

Ms. SKOMMESA. Yes. In my settlement, what was paramount to Mr. Chanler was a copy of every MSDS sheet that I had at my facility, and that was over 1,000 records. We had to copy every raw material's MSDS sheet, and they would be able to put those into a computer and just randomly select depending on which chemical that they wanted to go after.

Mrs. KELLY. I have more questions of all of you, but in the interest of allowing some of my fellow members here to ask questions, I am going to turn this panel over to the Ranking Member.

Ms. VELAZQUEZ. Thank you.

I would like to ask each of the panelists if you have complied with Proposition 65 by labeling your product, and how many made changes to the products that you offer, and also what has been the cost involved.

Ms. LAMURA. We were labeling. At the time we were notified, we were labeling before the law took effect. We did have it included in our material safety data sheet.

We did have to reformulate very quickly. We made an alternate product which we aptly named P 65. [Laughter.]

We created a suspension based lacquer. We removed the toluene and added more of the more expensive solvents, and we removed the tosylamide-formaldehyde resin and replaced it with polyester resin so that they would have a toluene and formaldehyde free product if they wanted to not have to label, and it would be acceptable for California.

Ms. VELAZQUEZ. Can you tell me what was the cost involved?

Ms. LAMURA. That, because we are a small company and it was just a lot of hours for me, a lot of hours for production, testing, a lot of office clerk hours typing up all new sheets and having to go through all of the red tape sampling all of the customers. It was a lot of money. It was a lot of money, but to put a dollar figure on it, I could not do it.

Ms. VELAZQUEZ. Mr. Strauss?

Mr. STRAUSS. Ms. Velazquez, number one, we would not change our formula because what we are selling is sand, and God created that sand, and I have not been able to get to him yet. [Laughter.]

I have not changed my labeling because my toxicologist has sworn to me that our products are not a safety hazard, and if we did it, as I stated in my notes to you, it would be hard to say that this is a chronic problem when we have no problem. We are not right now required by the LHAMA to label our products as having any toxic problem.

So we, frankly, are in firm belief that we do not have a problem.

Ms. VELAZQUEZ. Mr. Klein.

Mr. KLEIN. It has made absolutely no change to us. We have made no changes at all. First of all, the military specification coatings are approved, what are called—I forget the name, but the qualified products list—QPL, and we could not change them from those ingredients without getting it retested by the government.

And for many years now the government agencies involved have not had the money to do any retesting, and they would not retest it. We would be out of business.

Also, it would have been easier for us to just stop shipping anything into the State of California and just turning down any gov-

ernment bids that involved California shipments. It was the easier way out for us to just label the items. When the shipping department got something we were shipping to California or we thought it might end up in California, we would put a label on it. It was not a great number of our products.

So we did not make any changes for those reasons. It was not economically feasible.

Ms. VELAZQUEZ. Mr. Golden.

Mr. GOLDEN. We have not made the changes yet, but the estimate in terms of the first round, there are potentially 1,100 items in the first group. It is going to be well over $150,000 to do the second round, whatever that may be. It could be close to a quarter of a million dollars in changes in labeling.

I am not afraid of making changes in labeling. We have done that in the past as we need to. We have a pretty fluid procedure to be able to change labeling. Every year we spend at least 20, $25,000 in updating our standards and making sure we do regular toxicological review so that we do not sit on our laurels or past successes of labeling. We make sure that it is up to the latest standards of labeling.

So we are not afraid of spending the money to adequately protect the public health.

Ms. VELAZQUEZ. Ms. Skommesa?

Ms. SKOMMESA. Thank you.

We have about 600 products that we carry on a regular basis, and with the labeling and the man-hours, it costs us about $175,000, but like Mr. Golden, we do not have a problem relabeling. We get new information, more updated information. We check our MSDS sheets against our labels on a regular basis, and so we have a system in place to do that, and we do consider that to be a regular part of our business and a regular part of our responsibility.

Ms. VELAZQUEZ. Thank you.

Mr. Strauss, you state in your testimony that your product passes the most stringent labeling and warning requirements than those included in Proposition 65.

Mr. STRAUSS. Yes, ma'am.

Ms. VELAZQUEZ. And you also state that although you paid for the private toxicology study, the party suing you has not agreed to sit down and compare their study and yours.

And if there is some type of standard on who can make these studies in order for them to be accepted under the Proposition 65?

Mr. STRAUSS. I believe what little I know, and I am not a toxicologist, he used some of the standards from the State of California when he did the study, and I might say to Mrs. Napolitano I also have a child in California, and I have grandchildren in California. So it is very important to me also.

Have I answered your question? Yes, there are standards. There are standards the CPSC has. There are standards that LHAMA has. There are some of the standards in California, and all of these standards were looked at in the test that we came up with that's only .01 of the threshold that California is talking about.

And that is what bothers us, and the bounty hunter thought nothing of that and went after us anyway and will not check our tests about what tests he has.

I do not frankly think he has ever tested.

Ms. VELAZQUEZ. Could you tell me why in your opinion there is enough difference between both studies that you are still in compliance?

Mr. STRAUSS. In my opinion, they are just trying to get money out of us, quite frankly. I do not think they have any tests whatsoever that shows that we meet any closer to that threshold.

Quite frankly, our toxicologist is chairman of the ASTM D–4236 committee that is accepted nationally, if not accepted internationally, on the type of testing that they do, and even conservatively .01 of the threshold limit is this compared to this.

Ms. VELAZQUEZ. Mr. Golden, you know, we are here today to look at potential problems with the third party enforcement, and I have to tell you, sir, that there is one statement in your testimony that really troubles me.

You stated that placement of Proposition 65 warning labels diminishes your credibility with your customer without any accompanying benefit to them. Can you please explain that to me because I believe that if what you are saying is that if knowing that a product may expose someone to health risk is not important, I need for you to clarify that to me?

Mr. GOLDEN. I am glad you asked the question. Thank you.

First of all, our products do require health labeling. They require and go through a very stringent review and toxicological review. The products are reviewed for the amount of potentially hazardous or toxic materials. They are reviewed for bioavailability of toxic materials. They are reviewed for use, and they are also even reviewed for misuse, potential misuse of the product.

It is a pretty stringent standard that our products are asked to pass. In doing so we have put together what we think is a very informative label for our customers, which we have worked with personally.

I mean that is how I started the business, actually making product, going down to customers in New York, and delivering. So I have a very personal relationship with these artists. Many professionals expect our integrity for their product to last, to be safe, to provide all of the properties that they are looking for.

But in our health and safety labeling we have Golden acrylics with the Arts and Crafts Material Institute seal, are certified in the program of toxicological evaluation by a medical expert to contain no material in sufficient quantities to be toxic or injurious to humans or to cause acute or chronic health problems.

All Golden products should be used in accordance with safe handling practices. These include avoid contact with eyes, wash hands after use; do not spray apply cadmium containing pigments.

We have felt that we have done a better job in terms of informing customers not on our own, but using the LHAMA legislation as the background for creating this label. So we do not feel at all that we have not done our due diligence; that we have; that Congress has; that our toxicologist has; that our industry has done that level of due diligence.

Ms. VELAZQUEZ. You do see some benefit for having in this label any hazardous chemicals or carcinogens to be included in those labels?

Mr. GOLDEN. If, again, it has to do with the level of toxicity, and we cannot discount that. It is not just that a material is a carcinogen. It has to do with what are the levels, and I think probably other people could better answer that kind of question who are toxicologists, but that has been reviewed by, as well, the CPSC in terms of how well we did our work as an independent group.

Not only that, the group that had done the work, we have been part of ASTM D–4236, and that started for us in the early 1980s, and that was a group of artists, art groups, material scientists, toxicologists, and health advocates, as well as material manufacturers.

I am very proud to be part of that group that developed the first standard for acute and chronic toxicity of materials. It was such a good not compromise, but a good coming together of people that it was actually incorporated almost in its entirety into the CPSC language, into the LHAMA language.

And I think that speaks for itself. We have done the work. We are very proud of that work that we have done.

Mrs. KELLY. Will the gentlewoman yield?

Ms. VELAZQUEZ. Sure.

Mrs. KELLY. It is my understanding, Mr. Golden, that you all and everyone at the table is covered by federal law that requires labeling anyway; isn't that correct?

Mr. KLEIN. That is correct.

Mrs. KELLY. Each of you has a little bit of different type of label, but you all have federal hazardous warning labels from one or another of the federal agencies; is that not correct?

Ms. SKOMMESA. Yes.

Mrs. KELLY. And the problem here is that Proposition 65 is actually adding to this problem and making you pray to the troll under the bridge.

Ms. SKOMMESA. It would be okay if it was consistent. I think the problem with what Mr. Golden was trying to say is that he has one label requirement as the result of all of his research and the toxicology reports. The Proposition 65 warning is absolutely in conflict. He would lose credibility using two opposite warnings with his customers. They would wonder if he was sane or not.

If you left off the original warning and put the Proposition 65, he would not be telling his customers the truth, and that is the problem.

Ms. VELAZQUEZ. The issue is that if the label that they are putting in their product lists any carcinogens that are covered under Proposition 65.

Ms. SKOMMESA. And we are very willing to label for those things.

Mr. STRAUSS. I would just like to mention here that it is very hard to be found completely free of any toxicity in 49 states plus six continents in the world, except California, and I do not see how one could label safe and free in California and six—excuse me—not safe in California, but safe everywhere else in the world. That is my problem.

Mrs. KELLY. We have been called for a vote, and I want to give Mrs. Napolitano and my colleagues here a chance to have a full time of questioning. So I am going to adjourn for the time of the vote. We will be back. I beg your indulgence in staying with us for a bit.

Thank you.

[Recess.]

Chairman TALENT. If the witnesses would take their seats, I recognize it is Mrs. Napolitano's time, and I will recognize her. In the interest of time though I think I will go ahead with some of my questions.

And I apologize to the panel for having to leave. I had a speaking engagement over noon that I could not get out of, but I am back now to stay.

And let me as a question just to clarify some points, and I thought your testimony was excellent. I read it all, even that that I was not here for.

Just a factual question here, Mr. Strauss. The sand, the Scenic Sand, now, you mentioned that it had crystalline silica in it, and that that is sand, right?

Mr. STRAUSS. Sand is crystalline silica, sir. It is the sand that is on every beach in the world.

Chairman TALENT. See, I had assumed when I read your testimony that it was the coloring that you did that was the carcinogen.

Mr. STRAUSS. No, sir. The coloring is completely safe. It is a baked on process where we take a granule of sand and coat it with the color, and the color is completely safe. It is no problem.

Chairman TALENT. So that is not an issue.

Mr. STRAUSS. No, the color is no issue whatsoever.

Chairman TALENT. If you were just sending sand into California, you would have to label it.

Mr. STRAUSS. Then it would be an issue, and we gratefully accept that. Yes, sir.

Chairman TALENT. How does sand cause cancer?

Mr. STRAUSS. Sand, if you beat it up enough, it causes dust.

Chairman TALENT. Oh, and the dust.

Mr. STRAUSS. The dust gets in your lungs, and it is a carcinogen. We have never said anything against that. The fact that it is completely coated and the fact that it is minuscule amounts, as I said, to do what we are doing, it is once a day for 21 years would give you one percent of the threshold that California says is the amount of sand that you can use and which has tested out innumerable times by very conservative toxicologists.

Chairman TALENT. Yes, and I'm asking this to satisfy my curiosity because, I mean, the point of the hearing is the abuse of the remedial aspects of Proposition 65, although it does point out an interesting thing. I mean, if you're labeling sand the same way you would label something that really is toxic with the same kind of label, then the issue is how is the consumer to know whether it is as hazardous as sand, which I do not think the average person would be very concerned about, or as hazardous as something that really is toxic, and yet you would use the same label, wouldn't you?

Mr. STRAUSS. I do not have to label my sand as toxic, sir. That is——

Chairman TALENT. "Toxic" is the wrong word. You don't have to have a Proposition 65 label in it?

Mr. STRAUSS. No, I do not have a Proposition 65 label on it. All it says is that it is a nontoxic product that meets ASTM 4236 and meets all the LHAMA requirements, and that there is no toxicity whatsoever with the product that I sell.

Chairman TALENT. I am sorry. You been sued by somebody claiming that you should have labeled it.

Mr. STRAUSS. That is correct, sir.

Chairman TALENT. I understand.

Mr. STRAUSS. And we will not accept that.

Chairman TALENT. Now, let me just bring out another issue here. The Proposition 65 exempts manufacturers or, I guess, businesses with under ten employees; is that correct?

Mr. STRAUSS. That is what we have been told.

Chairman TALENT. You have been told that. I think that is correct.

Mr. STRAUSS. That is what we have read. We have not been told.

Chairman TALENT. But if the business with under ten employees sells to a distributor, let's say, that has more than ten employees, the distributor could still be liable; is that right?

Mr. STRAUSS. Absolutely.

Chairman TALENT. Okay.

Ms. LAMURA. No, it does not exempt you from the law, from the labeling. It exempts you only from the penalty phase. So if you are selling the product, you still have to do the labeling requirements, but if you are caught not doing it, they cannot give you a penalty.

Chairman TALENT. They cannot give you the penalty.

Ms. LAMURA. Right.

Chairman TALENT. They can order you to change though.

Ms. LAMURA. But you still are supposed to follow the labeling requirements, as far as I know, yes.

Mr. STRAUSS. Well, if I had less than ten people, sir, and I sold to a Wal-Mart, Wal-Mart would be liable for any penalty they might have, and Wal-Mart would immediately assess us the money that they give up, and it would immediately put us out of business.

Chairman TALENT. Right. That is the point I was making, that the people who would be liable go back against you.

Mr. STRAUSS. Very definitely. To stay in business we would have to do it.

Chairman TALENT. Mr. Golden, do you think, is there any way to avoid this by not marketing in California? I mean, you lose the market if you do not market in California, but is that an option for you?

Mr. GOLDEN. To tell you the truth, we have had to look at the possibility of not marketing the product in California, going through routes of distribution. It is unlikely that we are going to come up with that kind of solution just because of the risk of product still entering into the market.

Chairman TALENT. Yes, but if it still gets into the California market, something you sell to somebody in New Jersey or something gets into California, you are still liable?

Mr. GOLDEN. We are still liable and still at risk, yes.

Chairman TALENT. Well, I will ask the experts about that, too, later on.

I appreciate your testimony. I am trying to keep this open for Mrs. Napolitano if she gets here. Is there anything any of you would like to add before we go—yes.

Ms. SKOMMESA. As a resident of California, you asked a very good question about the confusion to consumers. There are Proposition 65 warnings all over the place. They are at the gas stations. They are at the grocery stores. They are in every restaurant, and the consumers are becoming very anaesthetized to the warnings because when they look at one thing that they do not believe to be toxic, then they just assume all of the rest of them are inaccurate. It is an over warning situation.

We have even been threatened to be sued for over warning, and so one of the big issues is we just have to have harmony between the federal requirement and the states. What would you like us to do?

If we could get some definition as to determining the toxicity level so that manufacturers can be on the same page.

Chairman TALENT. Right. You know, one of the reasons I called this hearing focusing on the process by which this law is enforced is that my experience here, certainly since I began chairing the Committee, is that if we are careful in how you enforce something and you have clear standards, it does away with a lot of the other problems that you might have.

In other words, even if the standard is a little too strong or whatever, if it is clear and people know what it is, they can usually find some way to adjust around it, and if you have a penalty that is reasonably proportionate to the offense and a reasonably inexpensive way of determining whether you have done something wrong, then you can deal with this sort of thing a lot better.

And then you could have your standards without having injustice as you all have been subjected to.

Well, let me ask you another question. Several of you have fought these lawsuits even though it cost you a lot more money than it would to just pay it. Why?

Ms. SKOMMESA. Well, I think it goes back to what America stands for. I mean, America stands for fighting injustices, and here you have companies up here represented that spend management time and have visions and values for the consumer, and you have a few, a handful of people that have found opportunity in extorting money out of industry.

Out of a sense of fairness and this has got to stop, we are sure that our specific case has the merits to be able to be the vehicle to stop it from now going forward.

Chairman TALENT. Mr. Klein, do you want to add anything? You raised your hand. Nobody has ever done that before, by the way, raised their hand.

Mr. KLEIN. I guess there is a Biblical statement of "if not me, who?" And I agreed with her. It just seems that when you think something is wrong, you ought to stand up for it.

And of course, it gets to the point when you become a coward and throw in the towel like I did, but you know, there are certain eco-

nomic considerations. You just get to the point where you feel like you are fighting city hall.

Chairman TALENT. Yes.

Mr. KLEIN. But if the citizens do not fight what they consider injustices, who is going to do it?

Chairman TALENT. Mr. Strauss?

Mr. STRAUSS. I have not gotten to the point where I have made the decision yet that it is too expensive, putting too much of my employees and my family in jeopardy and losing employees, but perhaps I am one of the last angry men.

But I do feel that it is our right as a citizen and our responsibility as a citizen to stand up and see how people are taking advantage of other people and to fight it. You know, it is patently what is wrong what is happening out there.

We are not against Proposition 65. I am definitely aware of the problems with toxicity, having been active in the chemical business since 1955, but when someone is doing something wrong, you have to stand up and shout, and if we have to put your money with the shouting, that is what we are going to do right now.

Chairman TALENT. Well, I thank you all. I wanted you to say that, in part, because I am trying to get across to people here and people in agencies and people in charge of enforcing these laws that the small business people generally, in particular, take as much pride in what they do and in their enterprises as the government people do in the sense of mission they have in enforcing their laws.

And people do not like to be accused of doing something wrong when they do not feel they have done something wrong, and that happens a lot. It is kind of demoralizing when you feel like you have not done anything wrong, and yet your own government is out to get you, and I have encountered that a lot in small business people.

And I appreciate your coming by. I really hate to keep the second panel waiting. They have been very, very patient, and they are very distinguished people. So I will just thank you all for coming and excuse you, and then ask the second panel to come up.

Ms. SKOMMESA. Thank you very much.

Chairman TALENT. Thank you.

We will hold the record open without objection for ten days after the hearing so that members who wish to submit written questions to any of these or the other witnesses can do so.

And I will ask the second panel to come forward.

I thank all of you for your patience, and some of you for coming a very long way for this. In particular, Ann Brown, our first witness, who is the Chair of the Consumer Product Safety Commission, I want to thank you, very distinguished Chairwoman, for your patience.

Ms. Brown has been on the Consumer Product Safety Commission since March of 1994. How long have you been the Chairman?

Ms. BROWN. Five years.

Chairman TALENT. Five years, and you were chairman ever since you were nominated.

Ms. BROWN. Yes, sir.

Chairman TALENT. Well, thank you, ma'am. I appreciate you for being here.

STATEMENT OF ANN BROWN, CHAIRWOMAN, CONSUMER PRODUCT SAFETY COMMISSION ACCOMPANIED BY JEFFREY S. BROMME, ESQ., GENERAL COUNSEL, CONSUMER PRODUCT SAFETY COMMISSION

Ms. BROWN. Thank you. I am glad to be here.

Chairman TALENT. We will be glad to hear your statement.

Ms. BROWN. Mr. Chairman and members of the Committee, as you know, I am Ann Brown, and I am Chairman of the U.S. Consumer Product Safety Commission.

Since this is my first appearance before your Committee, I want to begin with a brief summary of who we are, what we do, and how we work with small business.

The Commission was created in 1972, as a five, now three member independent agency with a mission to protect the public against unreasonable risk of injury or death from consumer products.

We enforce five federal statutes: the Consumer Product Safety Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, the Hazardous Substances Act, and the Refrigerator Safety Act.

All told, we have jurisdiction over 15,000 different types of consumer products which are found in and around the house. Our task is to prevent unintentional injuries and death to your family and damage to your homes.

Our mission is strictly nonpartisan. Our job is to help you safeguard your children, families and possessions to make your home a safe haven.

From my first day at the Commission, I have been especially sensitive to the interests and needs of small business for I am the daughter of a small businessman in Washington, D.C. My father owned a ladies clothing store, and I did my homework after school in the back fitting rooms. So you see, I am familiar with the problems of small business, having been raised as the daughter of a small businessman.

My views of the business and the consumer were shaped at that store. My father, in fact, both my father and my mother who worked at the store, taught me that respect for the consumer is the basis of a good business relationship.

With this background, I have directed our staff to recognize and respond to small business in all of our activities. For example, implementing the Small Business Regulatory Enforcement Fairness Act, I appointed a small business ombudsman and established a small business enforcement policy. At last count, our ombudsman had responded to almost 2,000 questions and comments from the small business community. Over 80 percent of the callers to the ombudsman received a personal response to their inquiry within three business days.

Our Web site provides a specific small business guide to the Commission. It describes the Commission, the laws we enforce, the ways we can help small business, and where a small business can obtain additional information concerning the CPSC.

I have made a special effort to reach out to the small business community. In June 1996, we had a small business conference in New York City to assist more than 130 small businesses in their efforts to comply with our laws and regulations.

Furthermore, in cooperation with the International Consumer Product Health and Safety Organization, we provide educational seminars on product safety issues to small business owners three times a year at various locations across the country.

I believe it is important to recognize advances in product safety by small businesses. I have presented special Chairmen's commendation award to three small businesses for their safety, successful safety innovations.

Our efforts on behalf of small business have been commended by the Fairness Boards and the national ombudsman of the Small Business Administration. Our Commission was cited in the 1999 national ombudsman report in its description of the best practices.

Thus, Mr. Chairman, and members of the Committee, as you can see, small business is a prime concern at the CPSC. We devote substantial energy and resources to this concern. We are proud of our record of helping small business.

The issue before you today, the possible preemption of California Proposition 65 by Section 18 of the Hazardous Substances Act, is a complex and technical legal issue. Its origins predate my coming to the Commission.

Accordingly, since I am not a lawyer, I have asked our General Counsel, Jeff Bromme, to prepare the Commission's written testimony on this subject and to respond to any questions that you may have on this particular topic.

For now, I will simply repeat what I wrote Chairman Talent on June 2nd, 1999. Since both the federal and California courts have rejected the view that the Hazardous Substances Act preempts Proposition 65, the Commission's position is that it is not prudent to spend more of our time and resources on this particular issue.

Furthermore, our staff has advised me that in the 13 years Proposition 65 has been in effect, the California law has not interfered with our enforcement of the Hazardous Substances Act.

Thus, it does not appear that there is either a legal or factual basis for the Commission to act to preempt the state law.

Finally, under our federal system, it is appropriate for the Commission to respect the health and safety laws of the states. I just will add that, of course, having heard the rather heart rending testimony, that it does appear that the State of California, its voters and legislators will have to do something to aid the very sad situations that we typically have heard about today.

This concludes my oral statement.

[Ms. Brown's statement may be found in the appendix.]

Chairman TALENT. Thank you, Ms. Brown.

Our next witness is Ed Weil, who is the Deputy Attorney General of California in charge of Proposition 65 enforcement, I understand.

Mr. Weil.

STATEMENT OF ED WEIL, ESQ., CALIFORNIA DEPUTY ATTORNEY GENERAL

Mr. WEIL. Thank you, Mr. Chairman and honorable members of the Committee.

My name is Edward Weil, and I am Deputy Attorney General for the State of California, and I have enforced and defended Proposition 65 since it took effect in 1988 under three different Attorneys General.

On behalf of California's chief law officer, Bill Lockyer, I appreciate the opportunity to testify before the Committee today.

For consumer products, the use of warnings rather than government set content standards has created a market incentive to reformulate products in order to reduce the use of toxic chemicals without driving needed products out of the market and without awaiting years long product-by-product standard setting.

In many instances, we have found that Proposition 65 has filled gaps in regulatory networks. It also has prodded the federal government into action on many occasions. Whether the issue is lead in plumbing products, trichloroethylene in typewriter correction fluids, or lead in ceramic dishes, Proposition 65 has enabled California to act on levels of toxic chemicals in consumer products that could not be defended as acceptable, safe products, but merely had fallen through gaps in the federal regulatory system.

Moreover, this has been accomplished without establishing a large bureaucracy or voluminous technical regulations. It not only is the right of states to enact such laws to protect the health and safety of their citizens, but any federal action to prevent states from doing so ultimately would reduce the level of protection provided to the consuming public.

Let me provide two short examples. One, typewriter correction fluids. These products, such as White-out and Liquid Paper, were found to result in exposures to average users of several hundred times the no significant risk limit of trichloroethylene, a known carcinogen. That product was subject to regulation by the Consumer Product Safety Commission, but in fact had not been so regulated.

After the state and the Environmental Defense Fund took action, the companies changed solvents to a less toxic material, and at that point actually began to advertise the product as new and improved.

And I would add that the product as made by many companies specifically said on it "nontoxic."

Another example would be mini-blinds. In 1996, the Arizona and North Carolina state health departments found that plastic mini-blinds made with lead as an intended constituent, not a trace contaminant, disintegrated over time forming a lead dust on the surface of the blind which could be spread throughout a household and ingested by children.

The health departments linked these blinds to numerous cases of acute lead poisoning in children. The Consumer Product Safety Commission negotiated a voluntary agreement with industry under which the blinds would be changed to eliminate added lead, and we applaud them for doing that.

However, under that agreement, the retailers and manufacturers were permitted to sell off all existing stock. In California, because of Proposition 65, we immediately demanded that warnings be posted at the point of sale in California only, advising consumers of this potential hazard.

That resulted either in the warnings being provided or the retailers thinking of their customer, deciding that they would not continue to sell the old blinds and selling only new, lead free blinds.

In the other states in the union, consumers unwittingly continued to purchase those products, where they hang in people's homes today and will continue to hang in people's homes for several years.

Unfortunately——

Chairman TALENT. Can I ask you a question to clarify for me?

Mr. WEIL. Certainly.

Chairman TALENT. Several examples you have in your statement. You mention that public or private actions were brought. Just to clarify it for me, public actions are brought by the Attorney General's Office? When you say "public actions," you mean actions you took?

Mr. WEIL. We mean the Attorney General's Office or our local District Attorney.

Chairman TALENT. They also have the authority. Do they bring many?

Mr. WEIL. They typically do not bring very many, but they do have the authority, and they tend to focus more on local issues, such as factory air emissions.

Chairman TALENT. So when we read about a public action being taken, it is probably the Attorney General's Office?

Mr. WEIL. Yes.

Chairman TALENT. Okay.

Mr. WEIL. However, we have taken a number of actions in concert with a number of very responsible and effective environmental groups, such as Environmental Defense Fund, Natural Resources Defense Council, who are not the people that were being spoken about earlier today.

Unfortunately, however, a few plaintiffs' law firms, one in particular that I seem to be hearing a lot about this morning, have used Proposition 65 to bring cases of questionable significance against small, out of state businesses that may not have been aware of Proposition 65 requirements.

Of course, the great benefits of Proposition 65 clearly outweigh these problems, but we nonetheless are addressing them in several ways. First, we heard about the ten employee exemption problem. All companies with less than ten employees are totally exempt, and since we heard of those examples, a regulation has now been in effect for at least two years that requires every private citizen that gives a notice of violation to a company to send out a state written summary of the law, which includes all the available exemptions, specifically including that any company with less than ten employees is exempt from the law, so that no——

Chairman TALENT. Clarify that. They are exempt entirely from the law or just from certain remedial actions?

Mr. WEIL. They are exempt entirely from the law. If they have an indemnity agreement with somebody, that is a matter of private contract which we can do nothing about.

Chairman TALENT. But it is not a situation where they are exempt from penalties, but not injunctive relief or anything like that?

Mr. WEIL. They are totally exempt.

Chairman TALENT. Okay.

Mr. WEIL. In addition, in a number of cases involving nail polish, lead wine bottle caps and crystalline silica, the Attorney General has effectively taken over particular matters to assure that they are handled properly.

In these instances, the Attorney General's action has resulted in a fair, uniform resolution of the legal and public health issues.

Chairman TALENT. And describe for the record. I am doing this to make sure the record contains no gaps on how this thing is enforced.

So when you say you take over, tell us how you do that.

Mr. WEIL. Well, if we sue within 60 days of receiving the notice, which is also served on the Attorney General, as well as the private company, then the private party is not permitted to sue under Proposition 65. They may file some sort of parallel unfair business practice action, but the courts have been very uniform in California about saying that once the Attorney General is involved, he basically will direct the litigation.

And, for example, on the crystalline silica in the products, we have taken over the crystalline silica lawsuits, and we are handling it in a way that will make sure that the products that are involved in generating large amounts of cement dust, which does indeed cause numerous cases of cancer, will have warnings, and the kiddy play sand will not.

And when the toxicological evidence bears out that it is .1 of one percent of the level requiring a warning, we will do our best to make sure that the product does not have a warning because we agree. Once everything has a warning, effectively nothing has a warning.

Second, by filing amicus curiae briefs in certain cases, the Attorney General has helped assure that the courts reach a result on important issues consistent with the requirements of the law. One example alluded to today, not mentioned in my written statement, is this issue about being sued twice for the same violations.

The Court of Appeals in California ruled that that was not permissible, and they did so largely in reliance on a brief filed by the Attorney General in that case.

Finally, a recent statutory amendment to Proposition 65, supported by Attorney General Lockyer, will require private parties to report to the Attorney General on the events of their cases, as well as the terms of the settlements.

In turn, the Attorney General will be required to make that information available to the public. We think this change in the law has great potential to further the purpose of the law by allowing responsible private enforcers to continue unimpeded, while providing information to the public and the attorney general needed to detect any abusive practices.

I would add that I think Mr. Chanler should be viewed as sui generis to some degree. His former client, As You Sow, has, indeed, ended up suing him over his practices conducted in their name. Most of the suits are against large companies, not against the small businesses, and I must add as much as I sympathize with much of what I heard today, and we are doing everything in our power to cut back on these abuses, if you are a consumer and a product is potentially dangerous, it is not less dangerous to you because it was made by a small company. We need to have a level playing field in that respect, and certainly we feel that at the state level the Attorney General and the California government will do everything we can and is open to anyone's suggestions on limiting the abusive practices and keeping the very many good things.

Thank you, Mr. Chairman.

[Mr. Weil's statement may be found in the appendix.]

Chairman TALENT. I appreciate your coming here.

I think you probably know the statute better than just about anybody, and the Committee really appreciates your expertise.

Mr. WEIL. Well, and I have not been called a troll so far today, too. [Laughter.]

Chairman TALENT. Of course, there is still time. [Laughter.]

Our next witness is—oh, I am sorry. The gentle lady from New York has to leave and wanted to ask some questions. So I will be happy to recognize her.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Ms. Brown, it appears from your testimony that the Consumer Product Safety Commission has gone out of its way to reach out to the small business community. With your broad responsibility of 15,000 types of consumer products and the almost 2,000 questions and comments from the small business community, have many individual business raised Proposition 65 as a specific issue?

Ms. BROWN. We have not been petitioned by any small businesses, and we have not had many communications by small businesses to the Consumer Product Safety Commission. I think the problem lies in the State of California. We do not have experience with Proposition 65.

Ms. VELAZQUEZ. Ms. Brown, there has been some discussion about changing FHSA to include in its labeling definition——

Ms. BROWN. Changing what?

Ms. VELAZQUEZ. FHSA.

Ms. BROWN. Oh, FHSA. FHSA, yes. We are full of initials in Washington. You know how it is.

Ms. VELAZQUEZ. To include in its labeling definition similar to those found in Proposition 65. Today has anyone petitioned you to do this?

Ms. BROWN. No.

Ms. VELAZQUEZ. Can you think of a time during your tenure when you believe it was necessary to interfere with state safety efforts? And could you tell us some of these state efforts?

Ms. BROWN. No, the Commission has had no reason to interfere with state safety efforts since I have been at the Commission, none that I know about before. In fact, we work closely with the states. They really are our eyes and ears.

We have a network of 54 state delegates in all of the states and Puerto Rico, Virgin Islands, D.C., and Guam who participated in our recall roundup campaign to get recalled products out of people's homes. We get some of our data from the states, especially from the coroners who give us our death data. State commissioned officials conduct investigations for us, and they distribute product safety information. They notify CPSC of potential hazards, and from time to time the CPSC drafts model legislation for states to consider enacting.

So actually we have a good, cooperative working relationship with the states in order to enhance health and safety.

Ms. VELAZQUEZ. Thank you, Ms. Brown.

Mr. Weil.

Mr. WEIL. Yes.

Ms. VELAZQUEZ. In enforcing Proposition 65, does your office hear a complaint that smaller, out of state businesses were unfairly surprised by Proposition 65?

Mr. WEIL. We do hear that complaint, and what we have tried to do to address is it I speak constantly to very good trade associations, such as the National Paint and Coatings Association, which in turn give information to their members about how to comply.

As I said, the 60-day notices now include a summary of the law.

We also make it clear that, as in many of the cases that were described to me, where we think companies have very little liability, and in the case of the missing comma and so forth, I do not know any California judge that is going to impose a substantial penalty for something like that.

The problem is more the generic problem we have in this country that litigation costs a lot, and it is not any different than when somebody shows up saying they slipped and fell in your company parking lot and they want a settlement.

Ms. VELAZQUEZ. Mr. Weil, we have heard allegations of frivolous lawsuits, and the person's name—and we heard the testimony of the small businesses that have been impacted by this type of lawsuits. How can we correct such a loophole in the law that prevents people like him to just bring about frivolous lawsuits?

Mr. WEIL. Well, it is a combination of things that we are trying. I think the new change in the law that will give us the ability to pinpoint what someone like Mr. Chanler would be doing and see when he is collecting small amounts of money from large numbers of small companies will help us identify practices like that and determine which cases would be appropriate for us to get involved in.

Also, I think just sunshine will help. It turned out after the fact it was discovered that Mr. Chanler was collecting most of this money simply as attorney's fees for his own office, not even for the State of California, and now under the law as changed, we will know that as it is happening and would be able to go into a court and explain that we think an abuse is taking place here.

So that is one of the things that I think we can do.

The other problem is the word "frivolous" is tossed around a lot, and frequently what happens is that the case is not frivolous per se. There is, in fact, a violation. It is a matter of the appropriate sanction and the cost of getting to the just result in the end.

Many of these companies did, in fact, have at least some kind of minor violation about which we might send them a letter saying, "You should correct this practice." But you do occasionally have a private plaintiff who does not look at it that way, but most of the private plaintiffs I do not believe are like that, and so we have to be careful not to do anything that damages the ability to enforce the law in the right cases.

Ms. VELAZQUEZ. My last question is when a case is settled out of court, how does the state benefit from that. In terms of the settlement, is there any participation by the state?

Mr. WEIL. Well, under the law as previously written, we would not know that such a settlement took place. Now, when civil penalties are collected, the state gets 75 percent of those penalties, and now under the law as changed, any settlement will be reported to the state.

So if someone is out there entering into settlements that do not benefit the state because they are just collecting attorney's fees for themselves, that will be brought to our attention and to the public's attention so that we can act on it.

Chairman TALENT. Thank you.

And again, to clarify, the way that might be done, I suppose, is to attach a pendent claim to the Proposition 65 claim and then settle on the pendent claim, and then you could just keep it all, couldn't you? You would not have to do anything to the state.

Mr. WEIL. Well, I have found that there is a lot of creativity out there.

Chairman TALENT. Yes.

Mr. WEIL. But under the new law, we will get all of the settlements that raised Proposition 65 claims, and so we will be able, hopefully to be able to keep up with the creative forces out there.

Chairman TALENT. Now, what remedy do you have if, you know, through this new law you hear a report that something like this is happening? What can you do?

Mr. WEIL. Well, we have always felt that under existing law we could go to any court and ask that any settlement that it had entered be vacated as inconsistent with public policy.

Now, I have to tell you, Mr. Chairman, that the Attorney General is primarily a prosecutor.

Chairman TALENT. Sure.

Mr. WEIL. And we try to spend most of our time prosecuting meritorious cases, and I have, indeed, been contacted quite personally by some of the people who have been here today, and it is just not always possible for us to intervene in their individual matter.

Chairman TALENT. I hear you.

All right. Our next witness is Mr. Shawn Khorrami of Van Nuys, California, an attorney who specializes, among other things, in Proposition 65 cases.

Mr. Khorrami.

STATEMENT OF SHAWN KHORRAMI, ESQ., VAN NUYS, CA

Mr. KHORRAMI. Thank you, Mr. Chairman.

Actually Mr. Weil went over many of the comments I wanted to make, but one thing that I noticed that came up——

Chairman TALENT. Well, that was rude of him, but it happens here, Mr. Khorrami, you know. You can feel free to drive the points home again if you want to. I mean, I think they are important points. So you have come a long way. So be certain and say what you want to say.

Mr. KHORRAMI. Well, one thing that came up with the first panel, and it seems to be the biggest concern that is raised, is the cost that the defendants incur once one of these lawsuits is brought.

To begin with, I think that Proposition 65 is much kinder to the small businesses than other statutes. One of the reasons is that it basically exempts a very large percentage of small businesses, and with the implementation of this new regulation, which is where we could address problems that could come up, with the implementation of the new notice regulations, we have essentially taken care of many of the horror stories you hear from small businesses.

Another thing that I have noticed in my experience and with my clients, and I have a pretty diverse group of clients, is that, almost always, from the outset my clients have on the table an offer to reformulate the product in exchange for a waiver of either all or a significant portion of the cost and the penalties.

That is something that I have noticed pretty much across the board in these cases with private enforcers. That is not to say that there are not exceptions to this, but from what I know in my experience, that is what I have seen.

And invariably in almost every case, what you hear from the defendants is that reformulation as a way of compliance is either financially infeasible, technologically infeasible, or unduly burdensome. And equally often you will see defendants, as you go on in the lawsuit, come to you and settle with a reformulation clause in the settlement agreement and actually reformulate the product within a reasonable time.

Now, to the extent that this offer is open, the low cost offer is open to the defendant from the very outset. The refusal to take that offer is what drives the cost of these lawsuits because the defendant has to then expend money doing discovery; the defendant has to expend money getting experts, and the plaintiff has to do the same. It is just as costly for the plaintiff if the plaintiff is actually litigating these cases.

So the cost is essentially driven by the refusal to take a settlement and reformulate a product that they can do from the beginning, in my experience, from the beginning anyway. And so to the extent that they complain about having to pay attorney's fees and/or penalties, it really is something that could be avoided by taking the easier route out at the beginning and going into the reformulation settlement.

One thing that was brought up by the lady that was sitting over here testifying earlier on the panel was that, against the advice of her attorney, she turned down a $5,000 offer and the case turned out to be a $68,000 case.

I am not talking as to the merits of that case, but in cases that I feel are meritorious, what I see is that exact attitude. That, no, I am just not going to settle this case for any cost, and we will just go on litigating the case.

That happens quite often, and the defendants will take any action they need to take in order to move the lawsuit forward.

Now, another——

Chairman TALENT. Let me ask you a question.

You know, Grace, you and I are the only ones left here, and if you have something you would like to jump in and ask, go ahead and do it, although I'm not going to go on at great length, but just to clarify.

The point usually at issue in these cases is whether the amount of the carcinogen is adequate to create some real risk under the statute, isn't it? Because the easy thing is to determine whether it contains the chemical that is on the list. I am clarifying. The hard thing is determining whether it is present or the exposure is enough to make it a health hazard. That is the hard thing, isn't it, in most of these cases?

Mr. KHORRAMI. In most of these cases, I would not necessarily say it is the hard thing. It is what is at issue.

Chairman TALENT. It is what is at issue, right.

Mr. KHORRAMI. There is not a dispute as to the existence of the chemical.

Chairman TALENT. Right. Okay. Go ahead.

Mrs. NAPOLITANO. Could it be the labeling issue rather than a content issue?

Mr. KHORRAMI. I would need a little bit of clarification.

Mrs. NAPOLITANO. Well, in the cases that you might want to take on, is it a matter of the actual content violation or is it a matter of the label violation, Proposition 65?

Mr. KHORRAMI. As I understand your question, in general I do not recall a case where—well, actually in general what I would say is that we do not take on cases where there is actually a warning being given and we have a problem with the content. There are situations where we have taken on a case such as that.

Mr. WEIL. If I may, I think it might help answer the Congresswoman's question that there are situations in which there is a lot of dispute about whether the chemical is present at a level that requires a warning.

Mrs. NAPOLITANO. Right.

Mr. WEIL. And it is resolved simply by placing the appropriate labeling on the product, and that is done when it is within reason. I think it makes a lot of sense because in toxicology I can tell you you have cases where you can bring in the battling toxicologists for years to argue about it, and at some point our philosophy, as expressed by the voters in California, is if you know the chemical is there and you know that it causes cancer and it cannot be proven that it is at the safe level, then tell me before I spend my money on that product and bring it into my home.

Mrs. NAPOLITANO. Thank you.

Chairman TALENT. Go ahead.

Mr. KHORRAMI. Essentially, what happens is that usually when you get a company that comes in and reformulates, other companies will follow. That necessarily is one of the advantages that Proposition 65 brings.

By providing the incentive for reformulation, Proposition 65 essentially creates a market for better, safer products. It has been

much more effective than many of the federal statutes and other state statutes that are out there in actually bringing about change in the products.

We would rather have safer products than just warnings on these products. Where we cannot get the safer products, then we would rather know.

But Proposition 65 has been very effective at creating this market. I have said it in my written testimony. I have given multiple examples of creating a market for the better, safer product. To a certain extent what you get from smaller companies is that they cannot keep up with the market.

I would suggest that that is not so much a problem with Proposition 65 as it is with the marketplace. That's an unfortunate consequence of how our system works.

In terms of the abuses that may go on, I find, generally, that whenever we send out a 60-day notice, the Attorney General's Office is extremely active in investigating it. I do not recall any of the notices that we have sent, and we have sent individual notices, but whenever we have sent notices, I do not recall any situation where I have not received a call or I have not felt like the Attorney General has actually looked at my case. They may not take the case. But I believe that that is more a consequence of not having the resources for handling absolutely every meritorious case.

But they do investigate. They do keep in touch with the plaintiff; they do keep in touch with us as we are progressing through our case. And I think in this statute, in particular, there is much less of a potential for abuse because of the Attorney General's presence, particularly with this new amendment where the Attorney General is going to be kept informed as to most of the actions taken in the cases.

Mrs. NAPOLITANO. Has that new law been chaptered?

Mr. WEIL. That law has been chaptered and signed. It passed, I believe, with only one negative vote in each house of the legislature, and it will take effect January 1st.

Mr. KHORRAMI. And what we have essentially heard about today is a single enforcer and some practices that may be questionable. I think to the extent that those are abusive practices, states have the power. We have professional codes of conduct; we have the state Bar; and we have the courts that would sanction those types of conduct, those types of behavior in handling cases.

Mrs. NAPOLITANO. The only problem, small business does not have the adequate manpower or the wherewithal to find out who does it and how they can join forces in being able to take care of this kind of a problem, and that to me is onerous on the part of the attorneys who are, in essence, the ambulance chasers.

Mr. KHORRAMI. I agree with you on that point. However, in my experience, small businesses are not typically singled out in these cases. Most of the cases I have handled where small businesses have been involved are cases that involve large companies, and they may be in a group. The small companies are also included in the group.

In those situations, usually the larger companies take the lead role. They have the resources. The costs that dwindle down to the

smaller companies are minuscule because it is the large corporations that are driving the entire litigation.

Chairman TALENT. Anything further, Mr. Khorrami, that you have to add? We will have some more questions later.

Mr. KHORRAMI. No.

[Mr. Khorrami's statement may be found in the appendix.]

Chairman TALENT. Okay. Our next witness, Mr. Jeffrey Margulies of Santa Monica, California, an attorney with—how do you pronounce your firm? Haight, Brown?

Mr. MARGULIES. Haight, Brown & Bonesteel.

Chairman TALENT. Okay. Who will explain why the preceding two experts were wrong.

Mr. Margulies.

STATEMENT OF JEFFREY MARGULIES, ESQ., SANTA MONICA, CA

Mr. MARGULIES. Well, thank you, Mr. Chairman.

I am not sure that I find myself in a whole lot of disagreement with a lot of what has been said today.

I work with businesses, small and larger, in helping them deal with Proposition 65 issues on both the compliance and the enforcement end. I have been doing so for about the last ten years.

I am going to talk about three points today. First of all, we have a conflict between a nationally uniform warning system for consumer products and a different or a nonidentical state regulatory scheme that Congress sought to avoid.

Second, you have a burden on business, and especially on small business, which is caused by the lack of certainty that we have heard about from so many witnesses today, and the lack of control over private enforcement, and this burden is ultimately shouldered by each and every one of us. We all pay for the costs incurred by small business.

And what I think this hearing can do is lead to harmonization of the state and federal standard, much like this Committee prodded with the OSHA work place requirements in 1997.

I am going to agree with everybody who has spoken so far today. I have no problem with requiring warnings for toxic exposures. I live in California. I have two young children. I do not want them exposed to chemicals that are going to harm them, and I do not want to be exposed to them either.

That is the goal of Proposition 65, informing consumers about risks, reducing exposures to toxins.

I would like to commend Mr. Weil for the efforts his office has done in bringing about a change in California. I have a lot of respect for him. We have been on the same side of some issues and opposite sides of others.

FHSA has the same goal though. It adds important elements that are missing in Proposition 65 because it is addressed to how likely the risk is to actually occur, and it also tells consumers how to avoid the risk.

One issue I want to respond to very briefly is this fewer than ten employee exemption, and it is true that small businesses with fewer than ten employees are exempt. I got a call three weeks ago from such a business. It had gotten a letter from one of its distribu-

tors saying, "Are you in compliance with Proposition 65? And indemnify us and send us all of your labels."

And they called me and said, "What do we do?"

And one of the things I found out quickly was they had three employees, and I said, "Well, send them a letter saying you are exempt and you do not have to label."

And they said, "Well, wait a minute. They are not going to do business with me anymore. If I do not agree to put a label on this product, this large distributor that does business throughout the United States will not buy my product. I will not be able to sell in California and many other states as well."

So there is a practical problem that goes along. The exemption keeps them out of litigation, but if their distributor gets sued, they are going to turn around and put the cost on the small business, and again, eventually on all of us.

And I think the other point that probably most people would agree with is that litigation is not the forum to be answering these questions. Mr. Weil, Mr. Khorrami, all of the private enforcers, they all have a different view on what we should be doing here, and ultimately the reason we are having this problem is that businesses do not have any certainty. They do not have an agency with a track record. Each of these cases is filed as an enforcement action, and you will have a judge and jury deciding these very important and very complex technical questions.

In the FHSA, Congress set out a nationally uniform plan for communicating information and has said states cannot conflict with this by imposing nonidentical requirements unless they comply with the FHSA's framework for harmonizing the conflict, the exemption process.

And the conflict is there, and Ms. Skommesa showed the Committee her label before. In order to win the Proposition 65 case, the plaintiff had to show this label was inadequate under state law, that the judge or jury said this warning and all of this, except for this very small, little bit in the yellow here, is FHSA labeling, and the answer is not good enough for us in California, and as a matter of law, it is inadequate.

That is the conflict. That is the problem we have got here. That is what is undermining FHSA, and that is exactly what the courts have held, that the FHSA labeling is no good in California.

We have uncertainty that is exploited by private enforcers. Unlike the FHSA, Proposition 65 does not tell a business how to warn. It says, well, you can do this or you can do that. FHSA says put it on the label; say this; put it here and make it that size. Proposition 65 does not say any of that.

And in a point of sale sign, as Mr. Weil talked about, put a warning at a store, and I do not mean to suggest by any means that the case that he and I were involved in was frivolous; it was a very important case with important issues. But when we asked the Attorney General's Office on this board here, "Tell us what we did not do right in putting the signs up," we got an objection that it was burdensome and harassing for the State of California to imagine the hundreds or thousands of ways that my client could have complied with Proposition 65, and then went on to say, "You could

have done this. You could have done that, and you could have done A, B, and C," and none of that is in the regs.

My clients tell me they want certainty. They want to know what they have to do to comply, and we will not be in these lawsuits.

There is uncertainty in the risk assessment proceedings. We have heard about the risk assessment. Show that your warning is not required because you are below the level.

Well, how do you prove that? You have to wait until somebody sues you and you go to court. Businesses cannot take that uncertainty, and what happens? They put warnings on. They do not get sued.

If they are lucky enough not to get sued, they put warnings on. They do not have the resources to fight lawsuits, whether they are frivolous or whether they are mere technicalities that an agency or, as Mr. Weil noted, I will send you a letter. Please fix it up and go on.

Those things turn into big lawsuit. So we have warnings everywhere. Ms. Skommesa told you you see them in the grocery stores, the hardware stores, the hotels, the bars, the restaurants, everywhere.

And what happens? Consumers are confused. They do not know what the real risks are. They do not know what the unreal risks are, and I would invite any member of the Committee to come to California and see these signs all over the place and realize what is going on out there.

Chairman TALENT. These are signs on the products? These are not warning signs in the retail establishments, are they?

Mr. MARGULIES. They are both. They are both.

Ultimately, the burden has been estimated by one of the commentators in California having been over $325 million through the first ten years of Proposition 65, and that is the burden of everything from the litigation. I do not know if it includes the state's cost of enforcing, and the cost of relabeling, and ultimately everybody in this room is paying for that, and the question is: is it necessary?

Two years ago this Committee prodded harmonization of the OSHA work place standards and Proposition 65 and required the state to make sure that enforcement actions and private enforcement actions were consistent with what the OSHA standard was.

What has happened? Has it dramatically reduced uncertainty? Yes. Has it eliminated frivolous lawsuits? To the best of my knowledge, it has. Has it effectuated the goals of Proposition 65 and OSHA? Absolutely.

And the Committee has the opportunity to harmonize FHSA and Proposition 65.

Before I forget I actually did bring a quote from Cliff Chanler for everybody to read. It was in a court in the same case as the other board we have put up, and Mr. Chanler on the record in a hearing told the judge, "No one who knows anything about business would go into this public interest field. If there is no economic incentive, people like me would not be doing this."

Well, it is not just Cliff Chanler. The opportunity is there for anybody to take advantage of the uncertainty and the risks that business face, and as good a job as Mr. Weil is doing, he cannot

stop people from doing this, and I urge this Committee to take the chance to direct CPSC to start the process to end the abuse.

Thank you.

[Mr. Margulies' statement may be found in the appendix.]

Chairman TALENT. Yes, we invited Mr. Chanler, by the way. He did not want to come.

Ms. Brown, let me ask you a couple of questions because as I understand the substance of your testimony, it is basically that the courts have held that the federal law does not preempt this and that, therefore, you just do not really have any authority to get involved. Is that basically it?

And if you want to defer to Mr. Bromme, that is fine, your counsel.

Do you want to state your name for the record?

Mr. BROMME. My name is Jeff Bromme, Mr. Chairman. I am the General Counsel at the Commission.

Chairman TALENT. Okay.

Mr. BROMME. And I think you have accurately summarized the written testimony of the Commission.

Chairman TALENT. Now, let me explore a way that you might do this if you wanted to do it, and I guess the point I am driving at here—I do not usually conceal the points I am driving at from witnesses, particularly smart lawyers, because they figure it out anyway—is that I think you maybe do have the authority if you want to use.

I can understand why you would not want to get involved in this thicket, but you do have the authority by regulation to define what labeling is, don't you, under the FHSA?

Mr. BROMME. Mr. Chairman, Section 10 of the FHSA does give the Commission authority to promulgate regulations important for the efficient enforcement of the act. So in theory the Commission could define label.

On that particular point, of course, the act itself, Congress in 1960 provided a definition for us already.

Chairman TALENT. Right, and you could—is there a difference between defining label and labeling? You would have the authority to define labeling regulation.

Mr. BROMME. Yes, yes.

Chairman TALENT. Okay. And if you did that, you could define it in a way that brought Proposition 65 within it. I mean, as I understand what the courts have said is that Proposition 65 does not constitute cautionary labeling because cautionary labeling only applies to a label in connection with "direction's for use." So if it is not in connection with "direction's for use," it is not a cautionary labeling within the meaning of the federal law, and therefore, the preemption provisions in FHSA do not apply.

If you were to define it differently by regulation, there would at least be a question of whether the courts would respect your definition of it under, what is it, the Chevron doctrine where they defer to your discretion in interpreting statutes?

What I am getting at is then there is a savings clause in the FHSA which permits you to allow state regulatory models even under the preemption rules if you think the public interest requires it. So what you could do is if you defined labeling in the fashion

I have indicated, you could then invite the state to work with you about how it might enforce Proposition 65 in a way that did not have these abuses.

Now, wouldn't that be worth an effort in trying to eliminate some of these abuses and maybe create a little bit more uniformity?

Mr. BROMME. Mr. Chairman, you have isolated the very difficult legal question in all of this. The correspondence that you and I have had and that you have had with our Chairman and the conversations that I have had with Mr. Keller have at some length elucidated these issues.

The OSHA parallel, which Mr. Margulies mentioned, does not work for our situation in the same way that it worked with OSHA for this reason. In 1992, the Supreme Court had joined a long line of cases going all the way back to the 1970s in the whole federal courts and in the state courts which had held that OSHA hazard communication plans in the work place preempted state plans unless the state came forward and got permission from OSHA to put its own plan in place.

So when California came forward with its Proposition 65 amendments to its plan which had been approved in 1973, OSHA had leverage to impose conditions on the approval of the state plan.

Now, interestingly enough it did not impose any restrictions on the bounty hunter provision. OSHA specifically found that the private enforcement was something that the people of California had the right to select, and it pointed out that a number of states have private enforcement for their work place plans.

But OSHA had that leverage because of the Supreme Court case. Now, the Commission is in exactly the opposite situation. We have an opinion from the Ninth Circuit that says and uses the phrase "cautionary labeling" in saying so, that cautionary labeling does not preempt Proposition 65 signs.

And then the Court of Appeals of California entered exactly the same judgment. So whereas OSHA states are required to come forward to OSHA and get permission, under our statute the exemption provision that you referred to never comes into play because California is not required to come and get permission from us for Proposition 65.

Chairman TALENT. Yes. I guess what I am getting at is, and I acknowledge a legitimate legal difficulty, but it also sounds a little bit to me like a rationalization for not wanting to do something when we do have a substantive interest here at stake that does look an awful lot like what Congress was trying to protect against when it provided for the preemption statute.

In other words, we have real concerns with an absence of uniformity, conflict in labeling type of requirements, a lack of certainty, and in an area where, yes, I know that the Ninth Circuit said, but, boy, I will tell you what. What Proposition 65 requires sure seems like labeling to me. Now, judges can jump through hoops and say it is not, but I mean if it is not a label, I do not know what a label is, and that is what you require under the FHSA.

Mr. BROMME. And we had told the court in our advisory opinion that in our view, the General Counsel's view, and the Commission did not object at that time to the definition, that a Proposition 65

sign was a label because it did constitute directions for us, and the court called that view nonsensical, not comporting with common sense, contrary to the intent of Congress, and plainly erroneous.

Chairman TALENT. Yes, you did try. That is true. You have done a regulation, but you did do an advisory opinion which the court rejected. It is not clear what the Supreme Court would do if they ever took the case.

Mr. Margulies, did you have a point you wanted to make in connection with this?

Mr. MARGULIES. Yes, Mr. Chairman. Thank you.

I think that you isolated the point there, and that was that it was not a regulation defining cautionary labeling. It was an advisory opinion, and I think the court missed the point, as well, on what I was trying to make, and that is you have to prove this FHSA label is inadequate, and if Congress said, you know, CPSC set the standard and we do not want nonidentical laws, it seems to me that if a regulation comes out and says any requirement for a warning that is not required here is cautionary labeling, the courts are really not going to have wiggle room to get out of that.

Chairman TALENT. Yes.

Mr. Weil, did you want to comment on that?

Mr. WEIL. Yes, I would like to comment on that, and I feel relatively certain that the Committee does not want to hear a rehash of the cases that Mr. Margulies and I have been arguing about for about the last ten years, but let me say a couple of things.

First of all, we agree that the Consumer Product Safety Commission would not have authority to adopt a regulation that expanded the scope of preemption, and if we are looking at solutions to the problem, adopting one that simply results in another round of litigation ultimately ending up, we think, in our favor, Mr. Margulies thinks in his favor, may not be the way to go about it, especially as I sit before this body.

Because I am accustomed to going into a court and saying, "Your Honor, it is not for you to decide whether preemption is a good idea. It is for Congress to decide."

And if the majority of Congress were to decide that this should be preempted, they know how to do it, but as the courts have looked at the existing law, they have all concluded that Congress has not done that, and we think with good reason.

I would add one final point, which is we have already worked with federal agencies on other occasions to harmonize Proposition 65 and federal labeling.

Chairman TALENT. Mr. Weil, let me interrupt you because you are right. If at the end of this I may conclude that the only thing we can do is to try and fix this through legislation.

But I argue with you that we tried. I mean, look. I am a Congressman, and if somebody read this language to me, "No state or political subdivision of a state may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under Section 2(b) or 3(b)," I would read that as saying we just preempted it.

Now, the way around it because the Ninth Circuit has defined a label, a cautionary labeling to require in addition to just the existence of a label the attachment of the label to directions for use, which of course courts do this, and whoever argued it came up with a really ingenious interpretation.

But it seems to me Congress tried, didn't they? I mean wouldn't you read that language and——

Mr. WEIL. No, I would not read it that way, with all due respect, Mr. Chairman. A sign in a store——

Chairman TALENT. I am not a judge, and you do not have to be particularly respectful to me. [Laughter.]

I understand.

Mr. WEIL. Well, you deserve as much respect as the judges do, I think.

But a sign in a store is not a label. That is not a technical bit of gymnastics. What the court was getting at and what we found in the legislative history is that marketing a single nationwide label was the idea, and where the state gives you the option of complying in a way that still enables you to market that single nationwide label, then you have complied.

The reason we get into this directions for use is what the Commission tried to do and what Congress tried to do is say, "Look. If we are telling you to put a warning in your labeling, we also want to make sure you include it in any pamphlets that have directions for use because those tend to go with the product and be seen."

But it is quite another thing to say anything that accompanies a product at any time is labeling because if that is labeling, the price sticker in the store is labeling; a sign that advertises the product is labeling, and clearly it cannot be the case—we do not think it is the case—that Congress intended to say, "Look. If you want to tell people to post signs in stores in California only," as we did for the mini-blinds, so that people did not continue to purchase those products, yet they continued to buy them in other states, that did not prevent those companies from marketing their single nationwide labeling, and we think it is a good thing that Congress chose not to do that.

Chairman TALENT. Mr. Margulies, and then Mrs. Napolitano had another questions, but go ahead.

Mr. MARGULIES. Thank you, Mr. Chairman.

I think if you look at Congress' intent, as Mr. Chairman has expressed, if you look at labeling, it is defined in a whole number of statutes. There is a label, and then there is labeling.

And I would disagree with Mr. Weil that in all of these statutes labeling is defined as something that accompanies the product, and a price tag could be labeling. I think Congress has intended in the preempting scope of a number of statutes or just simply in the definition of what labeling is to say it is not just what is on the label.

And I would ask if a manufacturer put a point of sale sign up in California that said, "Ignore the warning," would the Commission think it had no jurisdiction to call that product misbranded?

If the answer to that is that it does not have jurisdiction, I suspect that is an improper interpretation of the law, and if they do have jurisdiction, then it is labeling.

Chairman TALENT. Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

And I have sat here and listened to the attorneys go at it, and I say bless you.

Chairman TALENT. This is what is known as a fine point of the law.

Mrs. NAPOLITANO. They make a lot of money, and I am not one, thank God. It is just one of those things that makes me shiver sometimes because the taxpayer ends up paying in the end.

And the unfortunate part is that it is the small business that is going to be hurting more than the larger business, and the consumer is the one that ends up paying for it because somebody has got to pay for it, and that cost is passed on down.

Now, I have listened to the different scenarios or different comments about how we might be able to deal with it. I would totally prefer, Mr. Chair, to have the business get with the different agencies, with the Attorney General, and with everybody else and begin to look at how you can come to the table and say, "This is the label that is going to protect the consumer," bottom line, and quit messing around with trying to add labels or add words that are not going to mean anything except to the attorneys.

You know, that to me is one of the most frustrating things.

California has already begun, apparently, and I have read about it, but I have not read the proposed law, that they are already beginning to work on that. Now, one of the questions that I might have, and we have 15 minutes, is this law going to close the loophole for the 60-day time frame that is allowed for you to take action before an attorney comes in and does their thing?

Mr. WEIL. Well, we still have the 60 days which we have always had, and if we come in and take over a case in that time period, then the private party is not permitted to pursue a Proposition 65 action.

Mrs. NAPOLITANO. Right, but it is still 60 days, and sometimes that may not be enough time for that individual business to be able to take corrective action or to develop the whole scheme of things that are going to address the labeling, if you will.

Mr. WEIL. That is correct, but the Committee should understand that the law also has a one year grace period built into it.

Once a chemical is placed on the Proposition 65 list, it is not actually subject to the law for 12 months, and so that time period is there and available to do that initial type of compliance work.

Mrs. NAPOLITANO. Okay. Well, also, one of the comments that was made was that Mr. Chanler had supposedly gone through the SIC code and just sent lawsuits out literally en masse.

Is there any possibility that you may go after him personally?

Mr. WEIL. Well, I know the Attorney General does not like me to talk about who he might think about suing at some time in the future.

Mrs. NAPOLITANO. Oh, okay. I will talk to Bill.

Mr. WEIL. If I could respectfully not go into that, I would appreciate it.

Mrs. NAPOLITANO. I will talk to Bill. Okay.

Mr. WEIL. Yes.

Mrs. NAPOLITANO. That to me would be a great satisfier to know that somebody who is perpetrating fraud upon the general public is being pursued for his dastardly deeds, if you will.

One of the interesting statements that I heard just now is that, Mr. Margulies, you said that you—well, Ms. Brown said that there were no cases that she had known on 65. She does not have the expertise.

You were looking at possibly asking for something to be looked at. My understanding is that you can petition and have them develop that expertise.

Mr. MARGULIES. Yes. That is correct, and in fact, you will see, I believe, in some of the written testimony, we were back with CPSC back in, I think, 1990 originally when some of the early enforcement actions were going on, talking to the General Counsel's office about the advisory committee opinion that had been issued in the Allenby case, which had said Proposition 65 point of sale signs are cautionary labeling.

Until the Cotter decision came down, and that was the California Court of Appeals decision on preemption, it was my feeling that that letter clearly expressed the Commission's position on point of sale signs, and I frankly thought that the Court of Appeals in California was going to give deference. Mr. Weil had a differing view of that and ultimately convinced the court not to give it deference.

So we have been working with CPSC for some time, and indeed, I do understand that communication has been continuing between the Chairman and Mr. Bromme and also Chairperson Brown on this very issue, and I think a petition is something that very likely will be seen in the near future.

Mr. BROMME. May I say one thing, Mr. Chairman, in response to something you observed? You read the preemption language and expressed surprise that the courts could come to the result they have, and I just want to respond to that.

I think very reasonable, intelligent people can reach exactly the same conclusion that you did. However, the point that I want to emphasize, and that the Commission's testimony emphasizes, is that the courts have now ruled. There is in our judgment nothing that the Commission can do at this point to affect the outcome of future litigation.

Now, I understand, and I have had long conversations with your staff and with industry where they have expressed the view that if the Commission were to promulgate a rule, this would make a difference.

I do not share those views for reasons that I will not take time to go into. We have gone into them before. We are not here defending one way or the other what the courts did, but we are an agency that is a creature of Congress, and the courts have now interpreted the statute, and our very strongly held view is that if there is to be a change in the law in this area, it would have to come through an amendment to our legislation.

Mrs. NAPOLITANO. But would that necessitate a change in law if maybe California comes up with some language that will help?

And that was my next question to you, Mr. Weil, is whether or not, and you mentioned that this new law will only help in a certain way; I mean, in other words, it will close some of the loophole,

but as you are hearing, it may not close all of the loophole. Is there something that you might be able to suggest that might further clarify the intent, the law, and the ability for small business to not get litigated?

Mr. WEIL. Let me address that, but first Mr. Bromme asked to respond.

Mr. BROMME. I just wanted to clarify that my remarks to Mr. Talent were not saying that we were advocating a change to the legislation. It is just simply that there was nothing we could do.

Mrs. NAPOLITANO. Right. I understand.

Mr. WEIL. I think, you know, in preemption lingo they talk about the states as laboratories for experimentation, and this has been a live and learn process with us, and the regulations I have talked about, the changes to the statute I have talked about are things we have developed based on our experience over time, and as we learn more and see how much the new legislation works, then maybe we would be looking at other things if it turns out that the new legislation does not do as much.

Let me point out one good story I can tell you about people getting guidance, and it relates to this crystalline silica issue. Crystalline silica is a known carcinogen, and there is a procedure under the state law to get a nonbinding, safe use determination from the state government about a product.

Thinking ahead, the people who make all of the kitty litter products went to the state and said, "This product has crystalline silica. It kicks up dust, but we think it is below the safe level. Can you give us a determination?"

And they received the determination saying you are substantially below the safe level. You do not have to give a warning. No one has sued them, and I do not expect anybody will, and if somebody does, although it would not be binding, I cannot imagine a court ending up disagreeing with that.

So there are some mechanisms for the groups to go in and use them to get this kind of guidance. It is a procedure that has not been used much, but it could be used more under all of the existing authorities.

Mrs. NAPOLITANO. Is there an ombudsman in the Attorney General's office that can speak to the small business when they have questions they have already gone through and now they are being sued or have some question about whether or not they are in compliance?

Mr. WEIL. Well, I seem to be about as close to it as there is, based on the phone calls I receive, and I actually do appreciate them because it keeps me in contact with what's really going on out there.

Mr. KHORRAMI. Mrs. Napolitano, if I may speak for a moment, I think you bring up a good point. From what I understand, the issue is the abuse that is allegedly going on with respect to small businesses. An exemption or getting essentially rid of enforcement of the law is not necessarily an answer to a few isolated cases that have been brought up.

We have mentioned one individual and one organization as potential abusers. Those issues are being addressed by the Attorney

General and through regulation, one of them being the notice regulation.

Mrs. NAPOLITANO. That is why I asked them if they were going after Mr. Chanler.

Mr. KHORRAMI. Yes, I understand. I just think that a wholesale change in the law or essentially taking away a big part of the law in order to address a few isolated cases of abuse really does not address——

Mrs. NAPOLITANO. That is not my intent. My intent is to try to make it easier for business to be able to move forward and the consumer to know what they are actually dealing with.

Mr. KHORRAMI. Absolutely.

Chairman TALENT. Okay. What I am going to do now before we go, because Ms. Brown has been around, and the Chairwoman has been here probably longer than she anticipated. I have got a couple more questions for you, and then I will go ahead and excuse you, and if the other witnesses could remain, I have a few more after this vote, and then we will be done.

What is it you would need to see in a petition before you would consider a rulemaking? People are considering giving a petition to you, and I do not want to go back and, you know, the petition does not have enough in it, and then they have to add some more, and then enough.

I understand that no matter what is in it you may not undertake a rulemaking, but what would you like to see in a petition before you would consider this?

Ms. BROWN. Well, of course, the outcome of a petition would depend on the vote of the Commissioners.

Chairman TALENT. Right.

Ms. BROWN. And, you know, as our Commission testimony states, there are problems with Proposition 65 in the state itself, but Proposition 65 has not interfered at all with our safety mission, which is the conclusion that we have to come to.

And since the courts have already rejected the statutory interpretation that any such position would seek, it would be extremely difficult to think that there would be any more success with a petition.

But we would, of course, consider that petition the way we would consider any petition, the petitioning process is actually quite simple, and it is supposed to be written in English. It has to contain the name and the address of the petitioner. It has to indicate the type of rule involved. It has to include facts establishing claim that the rule is needed, and it has to contain explicit requests for rulemaking and a brief description of the rule.

And anybody who wants to petition us can get advice from our agency about petitioning.

I do just caution about the somewhat hopeless nature of a petition, but we would very seriously consider it. I just do not think that a court would uphold it.

Chairman TALENT. What I hear you telling me is that until Mr. Bromme or somebody tells you that there is a better legal chance that some regulation you issue is going to have an impact on the court's determination, that you are not inclined to move forward.

Ms. BROWN. Well, we would consider it, but it is not Mr. Bromme who is in the courts. We have had both federal and state rulings. I did not know that he has been appointed to the court yet. He is still the General Counsel, but it is the courts who have the ultimate decision

Chairman TALENT. Oh, I understand, but until your counsel or somebody. I did not mean to be smart-alecky with that.

Ms. BROWN. Oh, no, no, no.

Chairman TALENT. But until your counsel advised you or somebody advises you that there is a greater room for the Commission to operate here, it does not sound like you are inclined.

Ms. BROWN. Well, we would certainly have to consider it, and we could grant a petition, you know, and go along with it. It is just that the chances of doing what you are trying to do are very small because of the opinions both of the state and federal court.

Chairman TALENT. All right. Well, the record is open in case we have more questions for you along those lines, and I will excuse you, Ms. Brown.

Ms. BROWN. Thank you very much.

Chairman TALENT. Thank you for coming.

If the other witnesses could wait, I will vote and get right back, and we can wrap this up.

[Recess.]

Chairman TALENT. Okay. We will reconvene the hearing.

Let me go to an issue that developed because people have been talking about this is one gentleman, and let's say his name, Mr. Chanler, abusing the situation. We, of course, do not know how many of these frivolous or strike suits are being filed, but I think we have some evidence that it is more than just him.

Mr. Weil, you complained, didn't you, in 1995 to a newspaper that you thought about 20 percent of the cases that had been filed were frivolous?

Mr. WEIL. I think what I said was not frivolous, but either frivolous or what we would call trivial or de minimis, which would be something like was mentioned where there may have been a minor wording violation, but in our opinion it justified sending a letter saying, "Change it," and not a lawsuit.

Chairman TALENT. Right.

Mr. WEIL. But we are not designing this on the assumption that if Mr. Chanler went out of the business then we could assume all of these problems would go away.

Chairman TALENT. Right, and you also at that time, I think, sought legislation which would permit you to actually intervene in these lawsuits, didn't you, at the time, in like 1995 and 1996?

Mr. WEIL. We sought legislation that would actually enable us to make a finding that a suit would be trivial or frivolous and thereby make it extremely difficult for a private party to go forward with the suit, but that legislation was not passed.

Chairman TALENT. You were concerned enough about it to want a legislative change at the time.

Mr. WEIL. That is correct, Mr. Chairman.

Chairman TALENT. And you have, and I agree with you; I am not trying to downgrade this legislation that you have gotten. I think it probably will help, particularly if somebody like you is actively

using this information that now comes to light. I did not mean to suggest that it was not useful, but it is not everything that you wanted several years ago, is it?

Mr. WEIL. It is not everything that was asked for several years ago, correct.

Chairman TALENT. Now, another point I want to make, and it is not strictly related to the abuse problem that I really called the hearing to go into, but in discussing the benefits of Proposition 65, you and Mr. Khorrami talked about products that have been reformulated in response to actions either by the Attorney General's office or the Attorney General's office and private litigants.

And, for example, the nail policy, toluene that is no longer——

Mr. WEIL. Correction fluids had trichloroethylene, is the one I referred to.

Chairman TALENT. Now, I think it is owing to the manufacturers involved in that to make the point that the way the Proposition 65 statute is set up, it is the burden on the business to prove that the carcinogen or the substance that might have a negative effect on reproductive systems is not present in an amount that may cause a health hazard; isn't that right? The burden is on the business to prove that?

Mr. WEIL. That is right. Once the plaintiff has shown that there is an exposure, and we should keep this in mind. It is not enough to show the chemical is present in the product. There has to be an exposure. It has to be an exposure known to the manufacturer and intentionally by the manufacturer.

And keeping in mind that we are starting with a list of chemicals found by established scientists and scientific agencies to be known to cause cancer or reproductive toxicity, at that point, once all of those showings have been made, the burden shifts to the manufacturer to say, "All right. We can show by a preponderance of the evidence that the level here would not pose a significant risk."

Chairman TALENT. But known to cause cancer if exposure is adequate. I mean there are carcinogens all throughout the environment that occur naturally, aren't there?

Mr. WEIL. Yes, there are.

Chairman TALENT. So, I mean, really, yes, that triggers sort of a shifting of the burden of proof, but the fact that a product contains a carcinogen tells us really next to nothing about it, and we have to know how much of that carcinogen is present and how much people are going to be exposed to it; isn't that right?

Mr. WEIL. That is correct, but we have to remember that, for example, foods which often have very small trace amounts do not end up having labels and warnings under Proposition 65.

Chairman TALENT. Right.

Mr. WEIL. Because we have found that for the most part, even where the chemicals are present, they are at a level that clearly is not of significance, but there is somewhat of a philosophical difference here that I want to be quite plain about, which is that the federal approach tends to be there will be no requirement whatsoever until we have absolutely determined what the proper level of this chemical is, and the California approach is if we know the chemical is hazardous, then at least disclose to the customer that it is there unless you can show that it is at a safe level.

And we think that kind of approach is an appropriate one, given how much uncertainty there is in this area of science, and given that really consumers should get to make their own choice.

Some people are not worried about this kind of thing. Some people are very worried about it. Everyone gets their own option under this approach.

Chairman TALENT. Sure, and I understand that.

The point I am getting at is the fact that a manufacturer reformulated a product in response to a lawsuit or the threat of a lawsuit really tells us nothing about whether that product was hazardous in the first place. What it tells us is that they did not want to go through the hassle of litigating it.

Now, maybe had they litigated it and had there been a finding, it would have been found to have been present in sufficient amounts to cause a health hazard, but all it tells us is that they decided to reformulate it rather than pay whatever they would have had to pay to litigate it.

And that may be a public health gain, and it may not be a public health gain.

Mr. WEIL. I think that is quite correct, Mr. Chairman, but I would add that those circumstances by definition are circumstances where the product easily could be reformulated and still be an effective product.

And we would submit that if a lot of industries do that, overall that is beneficial. I know one gentleman who works in this area who spoke before a group of maybe 100 people from the chemical industry, and he said to them, "If you have ever, without ever being sued or received a notice, changed a product to take a chemical out of it because that chemical was subject to regulation under Proposition 65, raise your hand."

And he said 90 percent of them raised their hands, and I would submit that without going through product by product, chemical by chemical and ascertaining whether each one of those individually eliminated a significant health risk, that in the long run, that kind of reformulation is probably very good for all of us.

Chairman TALENT. Well, we have this disagreement. We are a couple of lawyers talking about this, and another point I wanted to make about the Proposition 65 method of regulation, and you have put as good a face on it as you can, and I think a rather persuasive one, and it is pretty clear that this is what the people of California wanted, and I think as long as it—except insofar as it may unduly burden interstate commerce, they are entitled to it. I mean, you know, that is the way the system works.

But we have not had a finding. I mean, we are talking about these things. We have had no regulatory process to determine what the proper level of exposure is, no statutory process with hearing, and in most cases not even a trial. I mean how many of these cases have even come to trial? Two?

Mr. WEIL. Two cases have come to trial.

Chairman TALENT. So all we have had is an assertion that it might, and then in this huge veil of uncertainty manufacturers take actions which cost them and, therefore, the consumers money, and to reformulate products that for all we know were completely safe.

Mr. WEIL. Well, I do not think that is necessarily the case, Mr. Chairman, because, for example, taking the correction fluids, we sued. We had the data. We laid it on the table. The level of significant risk was under California regulation, which is not particularly strict on cancer, which is a one in 100,000 risk level with 60 micrograms per day of exposure.

We tested the products, and the exposure to somebody who wrote one word per hour with liquid paper was 30,000 micrograms per day, and why did that happen when theoretically it should never happen? Because the Consumer Product Safety Commission was only going to go product by product, standard by standard.

And so a lot of these cases that settle in reformulation are, in fact, high risks. I would not dispute, Mr. Chairman, your conclusion that sometimes they may not have been and they did it to avoid litigation, but we certainly cannot assume that they all are because in my experience frequently they are cases where they reformulated because, one, they knew they would lose and, two, they knew it was a product that their customers would not buy with a warning label on it.

Chairman TALENT. I just think that there is some value in having a legal mechanism here whereby we know, I mean, and to the extent that California, which can choose what it wants for its own people, is effecting products that are manufactured and delivered all over the country because manufacturers do not want to have two different products with all of these different labels, you see how we have California basically making a decision for the rest of the country in terms of how it is going to enforce these things.

I mean, I do not see why we have to have such uncertainty. I do not see why we cannot have a situation where we have federal agencies or some federal process, and, by heaven, they work hard enough and fast enough and figure out what is safe and what is not and tell people.

I mean, this is what the Consumer Product Safety Commission is supposed to do, and one question that rises here is so they were missing it all this time in terms of White-out. I mean, if that is true, then what about the other 49 states?

Mr. BROMME. Well, it happens that——

Chairman TALENT. I figured that would get you going, Mr. Bromme.

Mr. WEIL. Well, let me just add, Mr. Chairman, I should say, and it is hard given the hyper regulation of so many products in this country, it is hard to believe sometimes, but things fall through the gaps. It just happens because they are outdated.

Nobody at CPSC defended trichlorethylene in correction fluids. They just had not been able to get to it.

When we did lead in ceramic tableware, the FDA itself had proposed tightening the standard and had backed off in the fact of industry opposition.

And let me add you can warn in California. There are products with California only labels. General Motors makes cars just for California, and we have found when we have gotten into this in detail that a lot of companies, in fact, already have different types of labels and different formulas for different states where it suits their marketing needs.

What we have found more frequently happens is the company says, "Look. Okay. Only California is prohibiting this or saying give a warning. Why wait for the other 49 states to get to it. If it is a problem, it is more convenient."

And so we think sometimes it does benefit consumers in other states, but we make no bones about it. We have our little province, and we are not trying to tell anybody in the other 49 of them what to do.

Chairman TALENT. Well, and I understand this. A lot of times you focus on what you have got right in front of you and very zealously and understandably, and I have not seen many witnesses as credible as you or Mr. Khorrami, for that matter. So I am really not doubting at all your sincerity in this.

But when you drive to the extent you are driving on behalf of the interest you are trying to protect and you cause a whole lot of attention and money and effort to be spent by manufacturers or business people on that, you have to ask yourself what other things are they not paying attention to.

Some of it is just economic. Well, just economic; how many jobs are they not creating? You know, how many people are not being able to save for a better education for their kids?

And then maybe what other risks? What research are they not investing in to find the cure for cancer? I mean, we're debating on a philosophical level, and California has made a choice, and I am not talking about disturbing more than really a fraction of the remedial scheme. That is really all I would like to see come out of it, but I do mean to make the point.

Grace, I am going to recognize you in just a minute, but let me ask another question here, and it goes to the heart of this because our job here is to some extent anyway to represent the perspective of small business people that get lost. Now, let me put this to you guys this way.

What I hear you telling me is that you think we need to have this pretty comprehensive regulatory scheme where the burden is shifted to small business people and where you do have a pretty strong enforcement mechanism involving private litigants because the problem is that there are a lot of business people, big and small, out there and they are decent enough people, but they are in the business of making money, and unless we have these comprehensive and detailed legal sanctions available, okay, they might let their desire to make money get the better of them and put products on the market and expose people in California to products that are unhealthy.

I mean that is really what this comes down to. You obviously cannot trust them to do it on their own so you have to have this pretty comprehensive scheme to control them, right?

Mr. WEIL. Well, Mr. Chairman, I do not believe in criticizing people for trying to make money. A lot of good things come out of that in our society, but I think it is the government's job to either impose limitations or at least try to create incentives to do the safe thing, to assure that the good thinking, forward thinking companies do not lose their business to the few companies who would, in fact, put the dollar over the safety of their customer.

Chairman TALENT. In other words, the government needs to be there as a watchdog to make sure that in the name of trying to make money they do not hurt people or do something that is unjust.

Mr. WEIL. Exactly.

Chairman TALENT. All right. Now, look at it from the small business person's point of view. All right?

Are lawyers any less subject to greed than small business people?

Mr. WEIL. Not that I have ever known.

Chairman TALENT. Exactly, and I am a lawyer.

In an attempt to control the small business people, because you are concerned that in this desire to make money, they might put something on the market that would hurt people, you have unleashed the private Bar against them.

Aren't you a little bit concerned that some of those attorneys in the desire to make money might do something that has an unjust result?

Mr. WEIL. I am more than a little bit concerned about it.

Chairman TALENT. And I know you have been, but, I mean, Mr. Khorrami, shouldn't we really pay a little more attention? I mean, it is fine to say it is just a few people out there, but shouldn't we pay a little bit more attention on behalf of these people who have been harassed?

Mr. KHORRAMI. Mr. Chairman, with all due respect, the law goes after people who knowingly and intentionally expose. There is no surprise there. What ends up being the dispute is the policy decision that Proposition 65 makes. And that is that once a company knowingly and intentionally exposes, then we expect it to also look at the amounts, know the amounts, and see whether those present a risk so that they require a warning, or whether they qualify under an exemption.

Like I said in my written testimony, if the companies were actually looking at those issues, I think many of the problems with litigation would go away.

Chairman TALENT. Well, that is because you are showing a greater trust in our brothers and sisters in the Bar than I do. Okay? And just because it is human nature.

See, what Proposition 65 does is it empowers private enforcers almost without risk to drive up the costs, to impose transaction costs an economist would say, on business people, and then with a view towards getting them in order to avoid that cost to pay them off. Okay?

And there's really no incentive for them not to do that. Human nature being the very human nature that makes Proposition 65 necessary, because if everybody loved their neighbors and that is why they did everything, all we would need to do is to make sure these small business people just knew about these carcinogens and then they would naturally do the right thing.

But we recognize we have to have a little more than that, and see, from the small business person's perspective, they are always the one that the government has got to guard against, and from that perspective, well, who guards against the government? Who guards against the private enforcers out there who are sending them hundreds of these notices to sue? And we just were so vig-

orous in trying to protect against them and very lax in trying to protect them.

Mr. KHORRAMI. I agree with protection of the small business. That is not at all the issue. However, this law essentially exempts the majority of them because of the ten employee exemption.

And, again——

Chairman TALENT. In theory it does. In practice, we have heard.

Let me just suggest, and I do not want to put words in Grace's mouth, but her frustration before about the lawyers and why don't you just get together, you know, if those of you who are in that part of the Bar that is privately enforcing this, who are responsible—and I have not even asked you whether you have ever filed an harassing lawsuit because I do not think you would do that—if you would get together with people like Mr. Weil, I bet you could come up with changes, and if you got behind it, the legislature would pass it.

Maybe give him a little more authority, a few things to try and make certain that this sort of thing did not happen, so that if there was no violation, you know, you could not go after people. If there was a technical violation, you could just make sure that they fixed the notice or whatever, and then you reserve the enforcement authority for the situations that you all really want to go after, the serious ones.

I bet if you led your brothers and sisters in the Bar in doing that, you could put together a piece of legislation.

Mr. WEIL. Well, I should add, Mr. Chairman, that you need to keep in mind that this citizen suit provision is not born of a distrust of businesses. It is born of a distrust of people like me. The public wants enforcement, and they do not trust the government to be left alone to do it all by themselves because then it will be left to someone like me, and I will decide not to do it.

And you need people at the very least watchdogging the government to make sure they do their job. So it is an important part of the statute.

Chairman TALENT. A lot of what this Committee is about is trying to make certain because there is a consensus on this Committee on behalf of the following proposition: we do not want to hurt small business people if it accomplishes nothing.

Now, we may disagree about how much of a burden we want to put on them in behalf of an environmental interest or a social justice, but we do not want to hurt them and accomplish nothing.

And we have had a lot of testimony about people who have been hurt, and I think we all agree it has accomplished nothing. So if California is saying the federal government has no authority here, I do not want to introduce a bill on this, and it just seems to me you need to keep moving in the direction you are moving in with this one piece of legislation.

And guys like you, Mr. Khorrami, are in the key position because if you come forward and say, "Look. We have got a bill here. It will protect against abuse, but will still allow us to enforce the spirit of Proposition 65," then I think the legislature will say, "Oh, well, okay. We are not concerned about it."

Mr. KHORRAMI. Well, Mr. Chairman, we try to be as active as possible, and certainly I do not advocate any sort of abuse of the

law, and you know, we would support anything that would protect against it.

Chairman TALENT. Grace, I am sorry. I went on too long. Do you have something?

Mrs. NAPOLITANO. Well, yes. I wanted to jump in, but I wanted you to get your frustrations out because I had mine.

Actually I would be glad to find you a senator or assembly person to carry the legislation in California. That would not be a problem.

Secondly, I can understand California, and I just about two months ago met with the California Chemical Manufacturers Association. We were dealing with other issues that they find important. Not once, not one of them mentioned any problems with Proposition 65. It never even came into the conversation.

So California business is very well in tune with the need and abide by it. They find that this, as was stated before and was stated by one of the members of your panel, that, Mr. Margulies, that he has children that he wants to keep healthy and he wants to be healthy.

Well, I have 13 grandchildren, all in California, that I am very, very concerned about their safety. So to me business is very in tune in California to it.

Somehow we have got to find the way to be able to do away with the loopholes that allow the ambulance chasers to go in and do what they are doing to some of the other businesses in the other states, and that to me seems to be the more salient thing that I am finding at this hearing.

But I have a question for the General Counsel of the Consumer Product Safety Commission, and that has to do with the Commission's previous counsel opinion. Do you support that, that the Proposition 65 warning signs were labels?

Mr. BROMME. Mrs. Napolitano, in view of the court decisions, the Commission no longer adheres to that opinion.

Mrs. NAPOLITANO. Okay. That was something that was kind of in the back.

Mr. BROMME. May I add one thing?

Mrs. NAPOLITANO. Sure.

Mr. BROMME. About our statute, in general, too, that responds to something about the White-out example that was used. The Chairman was correct to see me pull the microphone towards me when he expressed shock that the agency that I work for would not have been on the job.

I want to just point out that our statute, the FHSA, does not require manufacturers to wait for the agency to act. It is a self-executing labeling statute that imposes the conditions under which the manufacturer must then label.

So if any manufacturer is waiting for us to come to them, they already have shown an ignorance of our statute, and so we think our statute—although I certainly agree with Mr. Weil's point; there may be manufacturers who do not comply with it, and we cannot catch everybody—I think our statute actually does impose a fairly heavy burden on manufacturers to produce safe products.

Mrs. NAPOLITANO. Yes, and that makes sense.

In essence, if a state has more stringent laws, then the federal does not over encompass themselves onto that state, do they?

Mr. BROMME. Well, the Chairman pointed out in his opening remarks an acknowledgement that historically state health and safety laws have been a province that the courts and the Congress have been very respectful of.

And there is a role to play, an important role to play, for states in the protection of the state's health. The only way in which a state cannot go forward is if Congress has specifically said they cannot.

Mrs. NAPOLITANO. Right, and I understand that it may have the unintended consequence to other businesses outside the state, and that is where we need to maybe begin to focus on how do we address it and how do we help deal with it so that the Attorney General's office does not get complaint from frivolous lawsuits or other minor issues that crop up.

But we do need to protect the small business.

Mr. BROMME. As my Chairman said in her comments, and I applaud what Chairman Talent was just dialoguing with the gentleman from California about, it is our view that the problems and abuses of Proposition 65 are properly dealt with in the State of California with the legislative processes that exist there.

Mrs. NAPOLITANO. Right. Thank you.

Chairman TALENT. Well, all right. I will allow your long ordeal to end.

Mr. WEIL. If I might before it ends, Mr. Chairman.

Chairman TALENT. Sure.

Mr. WEIL. I noticed this very interesting correspondence between the Committee and the Commission about preemption and the various actions that could be taken, and in the spirit of working together on these issues, we would appreciate it if we could receive copies of that correspondence in the future.

Chairman TALENT. Oh, absolutely. We are working on the model that we had with OSHA, which I think has been a pretty good result, and you know, speaking for myself, and that is where we get four or five states doing this with some real problems.

I do not know that federal legislation is warranted, especially since you are making progress in California towards correcting these abuses.

I mean, you are right. I mean, the states are a laboratory in a federal system and need to be given some leeway in trying to shape these sorts of things. I am hopeful that this new statute will make a difference.

Did you have another comment, Mr. Margulies?

Mr. MARGULIES. Yes. Thank you, Mr. Chairman.

We have heard this is a California problem. Well, it is an interstate commerce problem. There are small businesses throughout the country, and what if four or five other states come up with a law similar? Then we have a label that says this product contains chemicals known to the States of California, Texas and Illinois to cause cancer, but in Iowa, Ohio, and Michigan it does not, and that is a real problem, and that is not just a California problem.

Second of all, I would offer some encouragement to Mr. Bromme and his Chairperson. In the ITA v. Henry case, the district court held Proposition 65 was not preempted by OSHA rulemaking or by

the federal work place standards. OSHA came up with an approval, and in an appeal the Ninth Circuit held it was preempted.

And I think what we are talking about here is a regulation which defines cautionary labeling and does not do what the letter or the advisory opinion said, which was that warning signs are a label, but one that defines cautionary labeling, that CPSC is empowered to do I think will be upheld by the courts.

Chairman TALENT. Mr. Bromme, since none of you seem to want to leave, respond to that point. [Laughter.]

I mean, there is a good point here, isn't there? If the agency responsible for enforcing the relevant federal statute weighs in through formal rulemaking to define cautionary labeling, wouldn't you at least have an argument before the Ninth Circuit that that changed the landscape and that they ought to maybe reconsider in light of the exercise of the discretion Congress has given you?

I take it that is basically what you are saying, right, Mr. Margulies?

Mr. MARGULIES. Yes.

Mr. BROMME. Mr. Chairman, if I left you with the impression that I was not eager to leave, I sincerely apologize. [Laughter.]

Chairman TALENT. Nothing like candor on behalf of one's witnesses. Well, you do not have anything else to do this afternoon, do you?

Mr. BROMME. The day is well nigh along, I agree.

The suggestion that we define cautionary labeling is a creative suggestion that I think came to fruition after the other arguments failed twice in the federal and state courts. It had never been suggested prior to that litigation, to my knowledge, that the Proposition 65 was not defined with reference to the statute's definition of label, which includes the direction of use requirement.

Once the courts rejected that argument pretty soundly, then the thought has come along that perhaps we could define the phrase cautionary labeling differently than the definition of label in the FHSA on the theory that label is recognized in other federal statutes and defined somewhat separately from the word "labeling."

My view is that a regulation at this point by the Commission, in view of the history of the litigation, to define labeling more broadly than label, that is, to effectively drop the directions for use requirement from the definition of labeling, would be seen by the courts as not entitled to deference because it wouldn't comport with the definition that Congress gave us of label.

And in the very statute where cautionary labeling is used, it is used in two ways, first with reference to federal labeling requirements, and second with reference to states.

And so the rule that has been proposed or suggested would require us to define cautionary labeling differently for state law than the statute defines it for federal law, and there is just no basis in the legislative history or in the language of the statute to suggest that is what Congress intended.

Chairman TALENT. Well, I am going to let you have the last word.

Thank you all for coming. I do appreciate your patience. I hope something good comes out of this.

And the hearing will be adjourned.

[Whereupon, at 3:02 p.m., the Committee was adjourned, subject to the call of the chair.]

Member Statements House Small Business Committee

HEARING
House Small Business Committee

"Prop. 65's Effects on Small Businesses"

October 28, 1999

Statement of Chairman James M. Talent
Committee on Small Business
Prop. 65's Effects on Small Businesses

Good Morning. Today the Committee will examine how Prop. 65 - the California Safe Drinking Water and Toxic Enforcement Act of 1986 - effects small businesses. Everyone here agrees that consumers have a right to know if a product might harm them. As I have repeatedly stressed, conscientious small businesses manufacture safe products that make life more pleasurable for all consumers. Furthermore, we all agree that States have a right to protect their citizens. Indeed, courts routinely hold that "[s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." But that power should not be used, by the State or by private parties, to extort payment out of small business people who have done nothing wrong.

In 1986, California passed Prop. 65. Prop. 65 generally requires warnings for environmental, consumer and occupational exposure to particular chemicals the State of California has determined may cause cancer or reproductive toxicity. If a manufacturer, either in-State or out-of-state, fails to display the requisite warnings, Prop. 65 empowers private attorneys to enforce the statute in place of the California Attorney General.

In 1960, Congress passed the Federal Hazardous Substances Act (FHSA) to provide for nationally uniform requirements for adequate cautionary labeling of consumer products containing hazardous substances which are sold in interstate commerce. In passing the FHSA, Congress recognized uniform labeling benefits the public. For example, "[s]uch a labeling program would facilitate the education of the public in the cautionary use of these products. Informative, uniform labeling would enable physicians to administer antidotes immediately rather than waste precious time in determining the active ingredients of the products." Absent federal legislation, Congress feared states would enact their own labeling statutes "leading to a multiplicity of requirements and creating unnecessary confusion in labeling, to the detriment of the public." Indeed, Congress feared requiring multiple warnings would cause consumers "to disregard label warnings, thus inviting indifference to cautionary statements on packages of substances presenting a real hazard of substantial injury or illness."

To facilitate the national uniform labeling requirements, Congress expressly provided that the FHSA preempts State cautionary labeling requirements. Congress empowered the Consumer Product Safety Commission to enforce the statute, including its preemption clause. The

Member Statements House Small Business Committee

CPSC could use this authority to work with California to ensure that lawsuits are not used to force settlements out of small businesses from around the country who have not violated the law.

And that abuse is occurring. I expect testimony today that approximately 20% of all intent to sue notices filed with the California Attorney General are frivolous. Furthermore, witnesses will testify that Prop. 65 private enforcers target small businesses that must settle because they cannot afford to fight frivolous lawsuits and meet their payrolls. Witnesses will also testify that Prop. 65 private enforcers fail to inform small businesses that Prop. 65 exempts businesses with less than 10 employees. Finally, I expect testimony that large businesses refuse to distribute small businesses' products without the requisite warnings notwithstanding the fewer than 10 employees exemption.

Between 1996 and 1997, this Committee worked with the Occupational Safety and Health Administration (OSHA) to utilize OSHA's preemptive authority to preempt Prop. 65's occupational application and limit it to the California workplace. This limited the private enforcer's ability to sue out-of-state manufacturers in their workplaces. The Committee would like to work with the Consumer Product Safety Commission to determine if similar action might be taken in the consumer product area.

We have two panels of witnesses who have agreed to appear before the Committee today. These second panel includes Chairwoman Ann Brown, Chairwoman of the Consumer Product Safety Commission. Before we turn to the first panel of witnesses, I will recognize the distinguished ranking member for any statement she may wish to make.

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Return to Home Page of House Small Business Committee

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Committee on Small Business
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Statement by Congresswoman Nydia M. Velázquez
at the
Hearing on Proposition 65 Enforcement

October 28, 1999

1 Thank you. We are here to explore the enforcement of California's
2 Proposition 65, an innovative initiative passed by the voters of
3 California in 1986. Proposition 65 was designed to protecting the public
4 from possible carcinogens, and in many concrete ways, it has worked.
5 There are numerous examples of certain chemicals that have been
6 phased out of the production of certain products. Most correction fluids
7 have seen potentially dangerous ingredients removed. Ceramic
8 tableware now contains a lower concentration of lead, and the foil caps
9 on wine bottles no longer contain lead at all – thanks to Proposition 65.

10 These are real changes, that impact real people, and I strongly
11 agree with the motives that led to Proposition 65. Other states could
12 benefit from similar initiatives, and I am committed to seeking
13 innovative ways to address concerns regarding exposure to these
14 materials. I have a personal concern. My district – in Brooklyn,
15 Manhattan, and Queens – has one of the highest cancer rates of any
16 congressional district in the country.

17 Today we will be exploring one aspect of Proposition 65.
18 Specifically, there are several questions regarding the third-party
19 enforcement provisions, which have raised several concerns. Have they
20 been implemented in an intelligent way? Have they had an undue effect
21 on small businesses? If so, what can we do to make sure that
22 Proposition 65 does the good work it was intended to do – without
23 unfortunate consequences?

24 The committee has received some disturbing anecdotal evidence:
25 that some individuals are targeting small business through the third party
26 provision. I am even more disturbed when I hear that some individuals
27 have threatened legal action against businesses with fewer than 10
28 employees – businesses not covered by Proposition 65. This was never
29 the intent of Proposition 65, and hopefully today's hearing will help find
30 solutions to these types of problems.

31 These are the sorts of questions I am eager to begin to answer
32 today. I welcome all the members of our panel who have come here
33 today, and I thank them for their time. I look forward to hearing what
34 we can learn from them.

35 As I have mentioned in the past, one of the benefits that we have
36 on the Small Business Committee is that our members have such diverse
37 backgrounds and experience. Today, once again, we are in a position to
38 receive the benefit not only of the witnesses before us today, but also
39 from the members of the committee. I would like to yield to
40 Congresswoman Grace Napolitano, who has worked on this issue for
41 some time.

October 27, 1999

Good Morning, Ladies & Gentlemen:

My name is Marianne LaMura, and I am the co-owner of a small, privately held family business located in East Hanover, New Jersey. The name of the company is Chemcoat Labs, inc. and we deal primarily in the manufacture of nailpolish. I have been invited here today to tell of my experiences relating to California Proposition 65, and the adverse effect it has on small business. To do so, I would first like to offer some background information about our company. Chemcoat Labs was founded in 1971 by my late father, Salvatore LaMura. "Sam" as he was known, began working in the paint industry at age 14 in Newark, NJ. He eventually learned color matching of paints and lacquers, and began to color match opaque nailpolish during the 1930's when it was first invented by Mrs. Helen Neushaefer. During the 1940's he went to work directly for Neushaefer at Lacquerite Company using the formula she had created. He manufactured nailpolish from the mid 1940's through 1969, running Lacquerite for the family of Neushaefer, who passed away in 1959. In 1971 he started his own company, Chemcoat Labs, again using the same formulation. My partner/brother Frank started working at Chemcoat in 1973, while I came on board in 1981. During the early years of my employ, there weren't many State or Federal inspections at our facility because many of the regulatory agencies which were created during the 1970's were first busy with larger companies. It wasn't until the mid-1980's that we became inundated with inspections from different State and Federal Agencies. As each inspection would take place, I would work to see that all requirements were met to bring our company into complete compliance with all laws. In 1991, we were alerted by our

nitrocellulose solution supplier, Akzo Nobel Coatings, that warnings were to be required for products containing certain ingredients if they were sold in California. Proposition 65 would take effect beginning January 1, 1992. I immediately sent out a letter advising approximately 80 of our accounts to alert them of this new law which was about to take effect. As a professional courtesy, AKZO provided our company with updated, custom produced Material Safety Data Sheets which contained all necessary warnings and requirements for Local, State and Federal laws. Unfortunately, no one really knew exactly how to comply with the new labeling requirements for California, and there was no agency to contact for instructions for compliance. Due to the fact that the C.T.F.A. had already done testing on exposure levels of toluene in nailpolish with negative results, everyone including myself believed that there was no need for labeling because the product was not considered harmful, and the warning went unheeded. In early 1993 one of my customers, American Manicure, called to tell me that he had been contacted by a lawyer, Clifford Chanler representing a non-profit organization "AS YOU SOW", which was headed by Thomas Van Dyck. He was given a 60 day notice of violation which cited that his product which contained toluene was being sold in California without a warning label, and therefore was not in compliance with Proposition 65. American Manicure was named in the first wave of the lawsuit and was eventually given the opportunity to settle the matter for $1500. Several other of my accounts also received warning notices, along with many national brands of cosmetics; all were eventually named in the litigation by Mr. Chanler. As time went on, the settlement fees being demanded were growing larger and larger. Over the next few weeks, the

first "wave" of companies named in the litigation had either settled with Mr. Chanler, or were in the process of doing so. Some had opted to place a warning label on their products, with Mr. Chanler specifying the prescribed wording of the warnings, while others opted to reformulate their product removing toluene altogether. It was quite burdensome for our company for the following reasons. Being the manufacturer of the product in question, we were receiving numerous calls every day for information about the litigation, to find out if nailpolish was really harmful, or was it just harmful in California, who was this Clifford Chanler and did he have a right to do this, who can we call for labeling requirements, etc., etc., etc. I fielded many questions and tried to stay informed so that I could help my accounts in any way possible. But at the same time our phone was ringing off the hook, we were also being asked to immediately submit samples without toluene, and at the time, we didn't even have a working formula for a new product. And once we did create a new formula, it would require testing, new labeling, new MSDS, new ingredient lists, and we had to start from scratch and we needed it "yesterday" - all of this is very time consuming to do it right. It was a heavy burden for a small company of only 7 - 8 employees. And the newly created product would not be as good as the original formula, but at a cost of approximately $3.00 more per gallon. By early summer of 1993, Mr. Chanler and AYS sent out the second "wave" of notices, and whoever he had missed in his initial roundup was now being named in the second wave. By then, the entire industry knew about this litigation that was spreading like wildfire, and many, fearing the high cost of litigation and also knowing that there was a lack of proof that nailpolish did not cause harm, everyone just buckled under and paid a settlement fee. I do know of one company that tried

to fight, but after spending $100,000 in legal fees, gave up and settled. In late August, 1993, our company was finally named. We were part of the third and final "wave" of the lawsuit. Included with the cosmetic companies that were being named were suppliers of raw materials which are utilized in the manufacture of nailpolish, and also the filling companies, private label manufactures (like Chemcoat Labs) and just about anyone who ever touched the product. And still, the settlement fees being demanded were always growing larger as time went on. I had been in contact with the C.T.F.A. on a number of occasions. Although I was not a member of the C.T.F.A., they were extremely helpful to me, and offered as much information as they could to help small business. For that, I would like to take this opportunity to personally thank that organization. I believe they have the public interest in mind first and foremost. In early September, 1993, I received a letter from (C.T.F.A.) Thomas Donegan, Vice-President and General Counsel advising of the latest information about the litigation. The letter also made me aware that companies with less than 10 employees were exempt from the penalty phase of Proposition 65. I immediately started to make all of my customers aware of this fact, as many were small companies within this category. One such customer was American Manicure, with only <u>one</u> employee. When I told him of this, his attorney sent a letter to Mr. Chanler complaining about the $1500 settlement fee he had paid, despite the fact that he was exempt. He asked for the return of the fee. He also sent a complaint letter to the Office of the Attorney General explaining what had transpired, but to the best of my knowledge, the fee was never returned, and both letters were left unanswered. On September 22, 1993 after receiving what was called a "courtesy call" from Mr. Todres who worked for

Mr. Chanler, I responded to my notice of violation. I sent a letter to Mr. Chanler advising that I was exempt from the penalty phase of Proposition 65 due to the fact that we have never employed more than eight employees. To prove this, I sent him a copy of my payroll journal, along with our healthcare invoice which names all of our employees, and in addition to this information I advised him that we had been using a warning label for our bulk product since 1991, along with a warning contained in our MSDS which was newly revised in April, 1991 (at least 7 months before Proposition 65 took effect). In other words, we were already in compliance. I also questioned as to why Mr. Todres was concerned with my annual sales figures at Chemcoat. I felt that he should have been focusing his concerns as to whether or not I was in compliance. My sales figures were none of his busniess. I then sent a complaint letter to the Attorney General in California. I also sent a form letter to all of my accounts with a cover letter asking them to xerox the form letter onto their own letterhead and send it to the Attorney General, along with a map which painted off California and labeled it "the Shake-Down State". Basically, everyone wanted to know where all of this settlement money was going. As of today, that question has never been answered. And I have never heard of even one case where someone, anyone has sued for birth defects or getting cancer from the use of nailpolish. When the Attorney General's office did answer my letter about one month later, I was told that there was nothing they could do because it was a civil matter and that AYS and Mr. Chanler were within the law. This Proposition 65 law is plagued with flaws, and all are at the expense of innocent businesses, both large and small. As You Sow used exaggerated usage data to claim that exposure levels of toluene contained in nailpolish were harmful.

The C.T.F.A. ran independent tests before this law ever took effect and claimed that the product was not harmful. I will offer the following information as further proof. Our company uses toluene in our formula (the formula which originated in the 1930's). Our factory has been checked by OSHA to ensure that the air quality is within permissible exposure limits for our employees. The levels of exposure for our manufacturing plant are within the requirements for OSHA, while AYS will have you believe that the vapors escaping from the 1/4" opening of a bottle of nailpolish are harmful and require a warning label. This is clearly a misuse of the law, and I don't believe that the law was intended for this purpose. An entire industry has been penalized unfairly to the tune of $993,000 in settlements. Proposition 65 is a paradise for lawyers that want to file frivilous lawsuits. And worse yet, it is a revolving door that never closes, allowing numerous lawsuits against the same company for the same violation from multiple parties. This has recently happened with a haircolor manufacturer, Combe Inc., and American International Industries. Two suits were filed for the same violation, but the second suit was eventually dismissed by appeal. Now, the consumer groups are asking the Supreme Court to depublish the opinion so that it could not be cited in subsequent court cases. To me, this appears to be more about money than compliance. Earlier this year, one of my accounts with less than ten employees was forced to pay into a settlement or risk losing the business of a large chain store, who was cited with violation for selling the product. Mr. Van Dyck claims that AYS takes the more difficult that the Attorney General passes on. In truth, the cases that the Attorney General "passes on" are the ones that are without merit, and that they feel do not pose a risk to the public.

The nailpolish industry is again being targeted for Round two of litigation from AYS. Clifford Chanler has been replaced as counsel by Larry Fahn, a newly elected board member of the Sierra Club. Sometime last year, a second ingredient has been named and a number of companies have already faced citations. One such account that paid a settlement for the toluene suit has just paid a second settlement. Strangely, while this ingredient was present in nail-polish at the time of the first wave of lawsuits, it was never named along with the toluene. I refer to tosylamide-formaldehyde resin. Several companies have been forced to reformulate their product, despite already providing warning labels. This resin contains a by-product of less than 3/10 of 1% of formaldehyde. The resin content in nailpolish is 7%, which would mean that it is a trace amount. Yet I am sure that many companies will be forced to pay thousands of dollars just because of this small by-product content. The law is about to be stretched again for the purpose of extracting settlement money from innocent companies just trying to earn a living. This law is out of control, and I don't know what would happen if more states were to pass laws similar to Proposition 65. It would certainly kill interstate commerce. What we need to do is close this loophole in the law once and for all to put an end to these frivilous lawsuits. We also need National Uniformity for interstate commerce so that all consumers are provided with the same relevant safety standards. Since Proposition 65 has passed in California it has cost small business thousands of dollars defending itself against false allegations. Lawyers, not consumers have benefitted.
Please help. Thank you.

Activa Products, Inc.

TRADEMARK

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STATEMENT OF FRANK STRAUSS
United States House of Representatives Committee on Small Business
The Effect of California's Proposition 65 on Small Business
October 28, 1999

Chairman Talent and Members of the Committee:

My name is Frank Strauss. I am President of Activa Products, Inc., a small company headquartered in Marshall, Texas that sells art, school, crafts and hobby materials. We have sold these products to arts and crafts distributors and retailers and schools since 1959.

Thank you for inviting me to testify. I appreciate having this opportunity to tell the Committee about Activa's experience with California's Proposition 65. I would like to share this experience so that the Committee may understand the burdens that Proposition 65 lawsuits create for small businesses like ours.

Activa is a progressive, socially responsible small business. We are a woman-owned and family-run company. Our twenty-two employees are overwhelmingly female, and fifty percent are minorities. We provide our employees with full benefits, including health insurance and retirement. We believe that providing these benefits to our employees is part of our responsibility to take care of the people that make our company a success. We are proud to say that twenty-five percent of our employees have been with us since the 1970s. We believe that their continued work at our company speaks volumes about the kind of work environment we strive to foster.

We at Activa are strong advocates for product safety, for the benefit of both our customers and our employees. Activa has been a member of the Art and Creative Materials Institute ("ACMI") for nine years. Through ACMI's certification program, which addresses both acute and chronic health effects, Activa complies with the health labeling requirements of the Federal Hazardous Substances Act ("FSHA"), as amended by the Labeling of Hazardous Art

Materials Act ("LHAMA"). We submit our product formulations to a board-certified toxicologist at Duke University, who reviews the product formulations and determines the appropriate health hazard labeling for each product. The toxicologist evaluates the specific product formulations based on, among other things, the levels of potentially hazardous components of the product, the bioavailability of those components and the product's intended use, including foreseeable misuse of the product. (Because of the expansive nature of this toxicological review, the ACMI certification program ultimately is more comprehensive than the Proposition 65 scheme.) Based on that toxicological review, all of Activa's products bear the "AP" Seal, which signifies that the product is non-toxic within the meaning of the FSHA and LHAMA. Products bearing this seal are the safest under the LHAMA scheme. Activa will not sell a product that does not bear the "AP" Seal.

Recently, a private bounty-hunter sued my company under Proposition 65. This is the first lawsuit against any of our products since I began running the company twenty years ago. The lawsuit claims that Activa has violated Proposition 65 because we do not have Proposition 65 warnings on a product called Scenic Sand. Scenic Sand is just what its name implies: sand that is coated with various colors for use in designs and sand sculptures. This sand essentially is no different than the sand one would find at a beach. Another name for sand, however, is crystalline silica. In California, crystalline silica requires a warning under Proposition 65. Our Scenic Sand product has been reviewed under the ACMI certification program, which, while incorporating the LHAMA requirements, contains even stricter warning criteria. Based on that review, Scenic Sand has received the ACMI "AP" Seal, which is the safest, least toxic category in the ACMI certification program. (Attached as Exhibit A is a copy of one of the labels we use for this product.)

This lawsuit is completely frivolous. If we have to defend it, we will. But it will cost our small company a considerable amount of money to fight it.

The scientists tell us that no Proposition 65 warning should be required on our Scenic Sand product. In response to the lawsuit, we requested our Duke University toxicologist to conduct a Proposition 65 exposure assessment of our Scenic Sand product, which cost several thousand dollars. The toxicologist concluded that the potential exposure to the respirable

fraction of crystalline silica in Scenic Sand is ***1/100th*** of the amount that would require a Proposition 65 warning***, assuming that the user made sand designs in a poorly ventilated room every day for 21 years***, the most conservative of "worst-case" assumptions. Assuming a "normal," expected use of Scenic Sand, the potential average exposure is further reduced by a factor of ***1500***.

The plaintiff's lawyers only tell us they want to bring a lawsuit. After we received notice from the plaintiff that he intended to file suit, we tried to get the matter resolved. Through our attorney, we requested the plaintiff's attorneys not to file the suit until our toxicologist could finish his exposure testing, to demonstrate that a Proposition 65 warning is not appropriate. The plaintiff's attorneys refused, and filed suit anyway. Now that we have this exposure information, we have proposed that the parties exchange their respective toxicological reports relating to Scenic Sand for in-depth review. So far, however, plaintiff's attorneys have not agreed to this informal exchange.

We can only wonder whether the plaintiff or his attorneys have made any investigation into the safety of Scenic Sand. We believe there has been no such investigation. We think they brought this suit simply because our product contains sand. We understand that we bear the burden of proof to win this lawsuit, and that it will be expensive for us to win. The plaintiff seems to hope we will pay some money just to settle. It seems most unfair that bounty-hunters can file these suits so easily against small companies like ours without any proof that the products at issue are unsafe or even any proof that the ACMI "AP" certification is wrong. It is also frustrating to realize that, to sell our products, we have a toxicologist conduct a thorough evaluation of our products' safety, whereas it seems that to file a Proposition 65 lawsuit, a citizen enforcer needs to determine only that the product contains a Proposition 65 chemical.

Activa favors effective product safety warnings. We are not against Proposition 65, or its expressed goal to provide consumers with health warnings. But, we do not think that Congress in 1988 believed that art material companies should be forced to adhere to two chronic health hazard requirements. We believe that the conflict between FSHA/LHAMA and Proposition 65 is inevitable.

The manner in which these bounty-hunter lawyers "enforce" Proposition 65 acts as a sledgehammer against small businesses, which cannot afford to defend against them. A company like Activa faces substantial costs in attorneys' fees and expert fees to defend itself fully. We face potential penalties of up to $2500 per day of violation for each product used by any California consumer. A Proposition 65 warning for our products would be misleading and inaccurate in light of what our toxicologist at Duke University has told us. If we put a Proposition 65 warning on our Scenic Sand product, simply to avoid suit, we would risk losing our school customers, who represent a significant portion of our sales. We also face potential negative publicity, which may result in decreased sales. I believe that Activa has already suffered decreased sales because time that I otherwise would be devoting to marketing and getting sales has been diverted to dealing with this lawsuit. This redirection of resources and risk to sales only hurts our employees, whose livelihood depends on continued orders for our products. The choice is simple: settle the lawsuit as best we can so that the business can continue to meet payroll and provide critical health and other benefits to our employees, or fight the lawsuit at considerable cost and risk being unable to pay for those benefits – or even go out of business altogether. ***And, even if we settle, we still lose because our customers become the next targets, and we would indemnify them in order to stay in business.*** This "domino effect" of successive payments to resolve these Proposition 65 enforcement lawsuits could eventually put our company out of business.

This lawsuit is unfair because we have complied fully with LHAMA's labeling requirements. Before we were sued, we believed that by complying with this federal law we effectively would be complying with state laws requiring the same kind of health warnings. We now are concerned that we will be forced to comply with different requirements not only for California, but also for each state in which our products are sold. We simply cannot afford to do that because of the huge impact on our costs of production, which, in turn, would undermine our ability to keep our employees and to provide for them in the way we believe we ought to provide for them.

Proposition 65 may force us to stop selling products in California. In light of the burdens that Proposition 65 places on Activa, we are evaluating whether we can continue to sell our products in California at all. That may be the only way can we ensure that we will not be

subject to duplicative health hazard warning requirements and to the potential for successive and unfounded Proposition 65 enforcement suits that may be brought against us. It is ironic that, while we export our products to six continents and have not encountered any product safety-related obstacles to such exports, we may be forced to stop selling in an American state because of Proposition 65. Even so, there is still the likelihood that our products will be distributed in California by our customers without our knowledge. In those circumstances, we will face again the possibility of enforcement lawsuits against us and against our distributor customers, ***whom we will indemnify in order to keep their business***.

Thank you again for providing this opportunity to provide testimony.

FRANK STRAUSS

CURRICULUM VITAE

Education: University of Virginia, 1953
B.A. (Biology)

Military Experience:

1953-1955: United States Army Signal Corps.

Business Experience:

1955-1962: *Salesman,* ***Allied Chemical.*** Sold plastics and organic chemicals to chemical manufacturers in Ohio and the Southeast region of the United States.

1962-1972: *Salesman, Regional Sales Manager, Field Sales Manager, General Sales Manager,* ***W.R. Grace Co.*** Supervised sales of organic chemicals to the chemical and construction industries.

1972-1975: *Director of Marketing,* ***Hamblett & Hayes.*** Supervised and directed the marketing of chemicals (including water treatment chemicals, alum and leather treatment chemicals) to chemical manufacturers, paper manufacturers, paint manufacturers and laundry and dry cleaning businesses in the New England area.

1975-1979: *President,* ***Ambroid.*** Responsible for the overall management of the manufacture and sales in the U.S., Canada and Europe of this hobby adhesive business.

1979-present: *President,* ***Activa Products, Inc.*** Responsible for the overall management, operation, manufacture and sales of this art, school, crafts and hobby business.

Other Industry Leadership Experience:

1986-1988: *President,* ***Hobby Industries of America.***

1980-1989: *Member, Board of Directors,* ***Hobby Industries of America.***

1996-present: *Member, Board of Directors,* ***Art and Creative Materials Institute.***

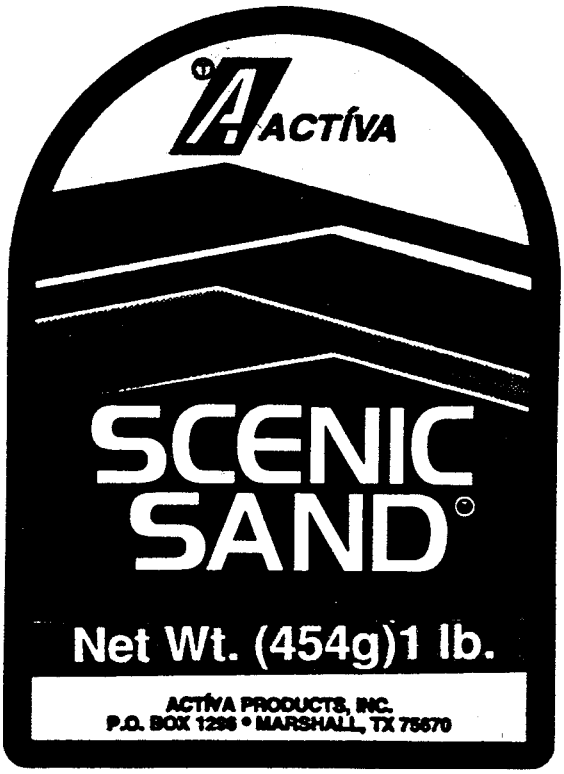
1999 (current): *Member, Board of Directors,* ***National School and School Equipment Association.***

DISCLOSURE

Pursuant to Rule XI, clause 2(g)(4) of the Rules of the House of Representatives, I, Frank Strauss, make this disclosure as on behalf of Activa Products, Inc.:

Neither I nor Activa Products has received any federal grant, contract or subcontract in the current year or in the preceding two years.

EXHIBIT A



CE

AP

CONFORMS TO ASTM D-4236

LENMAR

October 25, 1999

Honorable James M. Talent, Chairman
House Committee on Small Business
2361 Rayburn House Office Building
Congress of the United States
Washington, DC 20515-6315 FAX No, (202) - 225-2934

RE: Hearing of 10/28/99 California Prop 65's effect on small business

Mr. Chairman:

I was the owner and Chief Operating Officer of Lenmar, Inc. from July 1985 until April 30, 1997. I was contacted by a California Law Firm in December 1994 concerning Proposition 65 and was threatened with "...a citizens suit following the expiration of the 60-day period unless a resolution can be reached." Lenmar had labels printed according to the law and its shipping department was instructed to affix them to any shipment going to (or near) California, effective January 1st 1995. These labels were prepared according to the laws of California with the guidance of the National Paint and Coatings Association, (NPCA) Labeling Guide, and the California Paint Council.

THE COMPANY: Lenmar was founded in 1954 in Baltimore, Md. as "Lenmar Lacquer Co." Its manufacturing facilities, warehouses and offices were all located in Baltimore, and it was considered a "local company". Sales were restricted to the East Coast with perhaps a few minor exceptions. When I acquired the company in 1985 the name "Lacquer" had been dropped and there were only three independent sales reps, two in Baltimore and one in Philadelphia. There was essentially no data sheets, advertising matter nor effort to solicit business outside of the immediate area. During the entire period covered by my ownership there were less than 100 employees and we never solicited business, advertised, or had sales personnel, except for Government purchases or where an "Eastern Customer" would refer a facility or customer to us. We had no distribution, warehousing, or personal contact (other than telephone calls to us) west of the Mississippi River.

PRODUCTS: Lenmar is/was in the "specialty coatings business" designing and producing products for "professional" users such as manufacturers, contractors, and professional applicators. You would not normally find our products on the shelf of a store catering to the general public. There were four general product areas: **(1) AEROSOL PAINT CONCENTRATES** constituted about 63% of total sales upon my acquisition of Lenmar and increased to about 74% at the time of the Prop 65 notification. These products were shipped in either tank truck quantities or in 55 gallon drums and would be considered a raw material to the Aerosol Paint Packer or Manufacturer. They would typically pump our concentrate from the tanker or drums into a mixing tank where they would add solvents and propellents to manufacture the finished products. If you are familiar with the name "Krylon" Aerosol Paint, we helped develop and supply the concentrate for these product;.

MANUFACTURER OF INDUSTRIAL COATINGS • 150 S. CALVERTON RD., BALTIMORE, MD 21223 • 410 947-2300 • FAX 410 566-4817

Oct.25. 1999 9:28AM LENMAR INC NO. 225 P. 2/2

(2)MILITARY SPECIFICATION COATINGS is a product line of coatings designed to comply with specifications (and to a certain degree 'formulations') developed and approved by U.S Government agencies. The purchaser was usually a government agency or a contractor doing work under government contracts or supervision. The products we produced were referred to as Q P L (standing for "Qualified Products List") products. Usually the plans and or specifications for requirements as stated above, would list Lenmar as a QPL producer of certain products so we could get requests to quote or orders without actually soliciting the business, and without personal contact with the purchaser or user, The materials could be shipped anywhere in the country or the world. Most overseas shipments would come from export agents in the U.S. but the largest purchaser would be the G S A (General Services Administration) of the U.S. Government who would solicit quotations (generally out of Auburn, Wash.) for the annual needs of various U.S. governmental agencies or facilities. When bidding we would not know the ultimate destinations (in most cases) until the releases to ship came in;

(3) FLOOR FINISHES as generally manufactured, including those by Lenmar, are not that unique that they would be purchased from a company without local manufacturing or distribution which Lenmar did not have anywhere near California;

(4) LACQUERS AND MISCELLANEOUS WOOD FINISHES would not normally be purchased from other than local manufactures/distributors

In November of 1994 the NPCA had its annual meeting in San Francisco, California. During those meetings they had a special forum having to do with Prop 65. This session attracted a greater attendance than was common to other specific sessions. The speakers included persons from the California State Attorney General's office, and an attorney representing paint companies, Jeffrey Margulies, and other speakers. I immediately began to investigate Prop 65 and ordered copies of all relevant information including Calif. E P A "The Implementation of Proposition 65: A Progress Report" dated 1/1/94 and a Calif. E P A list of 500 to 600 " Chemicals Known to the State of California to Cause Cancer or Reproductive Toxicity" which list included Oral Contraceptives and Aspirin. After examination of this list by our technical people we saw two raw materials that might be used in paints: toluene (a common hydrocarbon solvent) and D.O.P (a plasticiser).

Effective January 1, 1995 (see Exhibit I-D) Lenmar's shipping department was given a list of all our manufactured products containing these ingredients and instructed if they were being shipped to California or anywhere nearby to make sure they were labeled.

ATTACHED EXHIBITS might be helpful in further explaining the dilemma created by proposition 65 and the "Bounty Hunters" it spawned, not only to small remote businesses such as mine, but to everyone across the nation (and elsewhere) who 'might' have done business in California. I-A and I-B are the letter from Chanler & Assoc. and "As You Sow" claiming that a specific product of ours was shipped into Calififfornia. We have very complete and accurate records and upon investigation found that the product named had been shipped only to Phila.,Pa, New York and Texas from 1986 (as far back as our records went) until 1994. See my response Ex I-D.

Upon receiving the first letter I immediately contacted N P C A, The California Paint Council and some fellow paint manufacturers in California and all gave similar responses when I asked, "What do these guys want?" "They are 'Bounty Hunters' and want you to pay them off with "..a little bit of money!" When I asked them how much they were talking about the answer was "..$10,000 or $20,000..or more" My response was "To me that is not a 'little bit of money'" and I hired the law firm of Haight, Brown and Bonesteel (Jeff Margulies) to defend my rights as a citizen of the United States. I was doing my best to comply with all laws and regulations, protect the health of its citizens, protect the environment and be a good corporate citizen.

Exhibit II-A is a letter of 1/31/95 from another person at the Chanler office whom I told we had started to label anything being shipped anywhere near California, and III-A1 & 2 is a letter from a third person at that office. I got the distinct impression that each one only wanted to know how much I wanted to "settle for". I am not an advocate of extortion! With Jeff Margulies' experience and ability I decided to fight the 'Bounty Hunters' until it got the point that it began to look like a bottomless pit. When Jeff finally went to Chanler to talk settlement they asked for something like $80,000 which would have made my total cost for this Quixotic battle of mine cost me more than the $100,000.00 I put up to purchase Lenmar 10 years earlier! But they finally lowered there asking price to a point that was lower than my continuing battle was expected to cost.

I will bring to the hearing, if you wish, more back-up documents. If I were to effectivel convey how much time, aggrevation, and other unmeasurable expense this created for me and my company, I think you would find ways, without jeoprodizing the constitutional concept of 'States Rights' to protect business and the citizens from a maze of regional laws making it next to impossible to do business in some or all jurisdictions. Suppose every State in the Union wrote its own "Proposition 65" permitting 'Bounty Hunter' enforcement?

Please also read the last Exhibit, a letter from a professor of the California State University, and my scribbled commentary. I think that if I were speeding in my car on any road in America, and particulary if the speed was not clearly posted, that I would get a warning first, before being fined.

I hope my commentary has aided you in your future work. Thank you for your kind interest in this important, unfair situation.

Sincerely your;

Robert S. Klein

FACTURER OF INDUSTRIAL COATINGS • 150 S. CALVERTON RD., BALTIMORE, MD 21223 • 410 947-2300 • FAX 410 560-4817

Oct.26. 1999 9:29AM LENMAR INC. No.322 P. 4/7

I-A

CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, THIRD FLOOR
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122

FAX: (415) 391-1157

December 9, 1994

General Counsel's Office
LENMAR, INC.
150 S. Calverton Road
Baltimore, MD 21223

Re: 60-Day Notice of Proposition 65 Violation

Dear Counsel:

This firm has been retained as counsel for As You Sow ("AYS") in the above-referenced matter.

Enclosed is a 60-Day Notice of Proposition 65 violation which was sent to the appropriate public enforcement agencies as required by California's Health & Safety Code §25249.6 et seq. This notice is to inform you that AYS intends to initiate a citizen's suit following the expiration of the 60-day period unless a resolution can be reached.

If you would like to discuss this matter with AYS, please feel free to contact me at the address or telephone number provided above.

Very Truly Yours,

Patrick Wilson

cc: Thomas Van Dyck, Chairman As You Sow

printed on recycled paper

I-B

105 Clifford Terrace
San Francisco, CA 94117
Tel. (415) 512-5711

. . . a foundation planting seeds for social change

December 9, 1994

Dear Public Enforcement Agencies:

As You Sow ("AYS") is a non-profit foundation organized under the California Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among other things, the protection of the environment and the improvement of consumer rights.

AYS has become aware of violations of Health & Safety Code §25249.6 et seq ("Proposition 65"). This letter serves to notify you of these violations. As required, notice is also being provided to the violator. AYS plans to bring an enforcement action sixty days from now if diligent prosecution against the violations has not occurred.

The violations consist of exposures to certain Proposition 65-listed chemicals, including but not limited to toluene and 4 dioctyl phthalate, from various aerosol, paint, adhesive and/or automotive products. "Product Number P-820 TT-L-32A" is an example of such a product sold without clear and reasonable warning. The violations may have been occurring since February 27, 1988. The violator covered by this notice is as follows:

LENMAR, INC., Baltimore, MD 21223

Please direct all questions concerning the above-referenced Proposition 65 violations to counsel for AYS, at Chanler & Associates, 1700 Montgomery Street, Third Floor, San Francisco, CA 94111, (415) 391-1122.

Very Truly Yours,

Sarah Fiona Pillar

for Thomas Van Dyck
Chairman, As You Sow

Oct.25. 1999 9:30AM LENMAR INC - recycled pap
No.3267 P. 2/2

I - D

LENMAR

January 27, 1995

LABELS BEING USED AS OF 1/1/95

WARNING:
This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.
Consult MSDS.

Mr. Patrick Wilson
Chanler & Associates
Attorneys At Law
1700 Montgomery Street, Third Floor
San Francisco, CA 94111

Re: 60-Day Notice of Proposition 65 Violation

Gentlemen:

This letter is in response to a letter from Chanler & Associates, dated, December 9, 1994. Your letter states that Lenmar is in violation of Proposition 65 the State of California's Health & Safety Code. The accompanying letter from As You Sow, states that the material in violation is "Product Number P-820, TT-L-32A". It also states that the violations may have been occurring since February 27, 1988.

The product named in this complaint is manufactured by Lenmar, Inc. in accordance to Federal Specification, TT-L-32A, dated, April 30, 1969. The title of this Federal Specification is, " Lacquer, Cellulose Nitrate, Gloss for Aircraft use. Most of this product that we manufacture is sold to the Federal Supply Service of the General Services Administration for the use of various federal agencies.

Since March of 1992, the only purchaser of this material has been the General Services Administration. Going back to 1986, including some purchases other than General Services Administration purchases, none of this material has been shipped by us into the State of California. This can be proven and documented, and we have very careful records concerning the shipments of our products. We have never knowingly, nor intentionally, either directly or indirectly, exposed the State of California to this product. We have no specific knowledge, either directly or indirectly, of any shipment of this product going into the State of California.

Lenmar, does not: solicit business in the State of California; have a salesman, sales representative, warehouse, nor distributor in the State of California.

I am afraid, we cannot be of any help to you, as to how this material found its way into the State of California.

Very truly yours,

Lenmar, Inc.

Robert S. Klein
Chairman

RSK/wcd

cc: Thomas Van Dyck, Chairman As You Sow

II - A

CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, SUITE 110
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122 FAX: (415) 391-1157

Rec'd 2/3/95

January 31, 1995

General Counsel's Office
LENMAR, INC.
150 S. Calverton Road
Baltimore, MD 21223

Re: 60-Day Notice of Proposition 65 Violation

Dear Counsel:

This firm has been retained as counsel for As You Sow ("AYS") in the above-referenced matter.

On December 9, 1994 a "60-Day Notice" was mailed to your office at the above address which alleged violations of California's Proposition 65 and which notified you of AYS' intent to initiate an enforcement action in 60 days against LENMAR, INC. This notice was also sent to the appropriate public enforcement agencies as required by California's Health & Safety Code §25249.6.

The purpose of this letter is to inform you that AYS' primary goal in this matter is to secure prompt compliance with the warning requirements of Proposition 65 from companies found to be in violation of the law. AYS would also like to avoid litigation where possible. For these reasons we are interested in discussing this matter with you.

Please feel free to contact me by mail or phone, if you have any questions regarding this matter.

Very Truly Yours,

Christopher Bricca

cc: Thomas Van Dyck, Chairman, As You Sow

JAN-26-1995 3:30AM LENMAR INC NO.0281 P. 3/1

III - A - 1(a-1)

CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, SUITE 110
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122

FAX: (415) 391-1157

March 15, 1995

Via Facsimile and U.S. Mail

Robert S. Klein
Lenmar, Inc.
150 S. Calverton Rd.
Baltimore, MD 21223

Re: Lenmar, Inc.'s Proposition 65 Violations

Dear Mr. Klein:

Your letter of January 27, 1995, regarding As You Sow's ("AYS") 60-day notice of Proposition 65 violation, has been referred to me. I appreciate your attentiveness to this matter.

In your letter, you state that Lenmar, Inc. ("Lenmar") has not shipped any of the products, listed in AYS' notice by way of example, into California. Section 25249.6 of the California Health & Safety Code ("Proposition 65") states: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual...."

AYS' investigation of your company indicates that Lenmar's products are being used in California with inadequate Proposition 65 warnings. An appropriate Proposition 65 warning is required for all products that expose users to chemicals known to the state of California in this state to cause cancer and birth defects, or other reproductive harm. Lenmar knows or should have reasonably known that by supplying the General Services Administration ("GSA"), which has substantial operations in California, exposures to certain Proposition 65-listed chemicals would occur in California.

Furthermore, Lenmar remains liable if the end users of its products are government employees. Proposition 65 does not provide any exemption for a company that exposes government workers to chemicals listed pursuant to Proposition 65.

Oct.26. 1999 9:31AM LENMAR INC No.3237 P. 3/3 paper

III - A-2/of 2

CHANLER & ASSOCIATES

Robert S. Klein
March 15, 1995

page 2

I should also point out that the product indicated in AYS' notice letter dated December 9, 1994 (Product Number P-820 TT-L-32A), was offered by way of example. AYS' investigation includes all of Lenmar's products sold or used in California that contain Proposition 65 chemicals.

AYS' primary goal is to achieve complete Proposition 65 compliance with respect to Lenmar's products sold and used in California. To this end, AYS would prefer a quick and amicable settlement of this matter to expensive and time consuming litigation. Please contact me by March 24, 1995, in order to discuss this matter further.

Thank you.

Very truly yours,

Jill H. Jacobson

cc: Clifford A. Chanler
Eric Somers

Oct 26 1999 9:31AM LENMAR INC No.3281 P. 13/13

DEAR PROFESSOR; I BELIEVE THAT YOU HAVE DONE A GREAT SERVICE FOR YOUR STATE – CALIFORNIA!! MY COMPANY, TECHNICALLY, DOES NOT DO BUSINESS IN THE STATE OF CALIFORNIA (EXCEPT EXPORTERS) AND HAVE NO WISH OR DESIRE TO DO BUSINESS IN YOUR STATE! COMPANIES I KNOW OF IN OUR INDUSTRY ARE LEAVING CALIFORNIA WHEREVER POSSIBLE – TO NEVADA, ARIZ, HW, ETC.

SPECIFICALLY, WHY DON'T YOU INVESTIGATE PROP 65, LABELLING LAWS – "AS YOU SOW" WHICH IS SUPPOSED TO BE A PUBLIC INTEREST ENVIRONMENTAL GROUP, BUT WHOSE INTERESTS SEEMS TO BE TO MAKE A MULTI MILLIONAIRE OUT OF ONE LAWYER

California State University, Sacramento

SACRAMENTO, CALIFORNIA 95819-6088

SCHOOL OF BUSINESS ADMINISTRATION
DEPARTMENT OF MANAGEMENT
FAX (916) 278-5437

Feb 9, 1996

Dear Mr. Klein:

There is growing evidence that innovative environmental management can result in improved competitiveness. The alternative of opposition to environmental regulations has drained resources away from productive solutions.

I am studying the relationships among environmental regulations, innovative responses, and business performance. Given the importance of environmental issues and regulations in your industry, the results of my study may be of interest to you. If you wish to receive a summary of the results when it is completed, please fill out the enclosed questionnaire and return it in the enclosed postage-paid envelope by March 10, 1996. Of course, your responses will be kept strictly confidential.

Thank you in advance for your cooperation.

PLEASE SEE ENCLOSED COPY OF PART OF NATIONAL PAINT & COATINGS ASSOCIATION (NPCA) ANNUAL REPORT!!

Sincerely,

Necmi Karagozoglu
Professor of Strategic Management

ME AND MY COMPANY ARE ALL FOR THE HIGHEST LEVELS OF CLEAN AIR, WORKER SAFETY & ENVIRONMENTAL MANAGEMENT!

BUT EXTORTION, BLACKMAIL, SUBVERSION OF THE INTENT OF THE LAW ..... BAH-HUMBUG!

CALL ME IF YOU WISH
410-947-2300

Golden Artist Colors, Inc.
188 Bel Road
New Berlin, NY 13411-9527 USA
Phone: 607-847-6154
Fax: 607-847-6767
E-Mail: goldnart@goldenpaints.com
www.goldenpaints.com

STATEMENT OF MARK GOLDEN
United States House of Representatives Committee on Small Business
The Effect of Proposition 65 on Small Business
October 28, 1999

Chairman Talent and Members of the Committee:

My name is Mark Golden. I am President of Golden Artists Colors, Inc., a family-owned company that manufactures acrylic water-based paints primarily for professional artists, art colleges and high schools. We are headquartered in Columbus, New York and have annual sales of about ten million dollars.

First, I would like to thank you for this opportunity to tell the Committee about my company's experience with private enforcement of California's Proposition 65. I hope that this information will help the Committee to solve the problems that Proposition 65 causes for small companies like mine. We invest substantial time and money in product safety. The money we spent and will have to spend to defend lawsuits under Proposition 65 takes critical resources away from our company and from job growth. In fact, it potentially will cost jobs and employee benefits, and could jeopardize the very existence of my company.

Golden Artist Colors is a family business. My father and I founded the company in 1980, beginning with just two employees, namely my wife and my mother. We currently employ over 100 people in a rural area of New York. We pride ourselves in our "employee friendly" policies. We provide our employees with subsidized child care, education allowances, 401K plans, profit sharing and full health benefits.

Golden Artist Colors is recognized as a good corporate citizen. In 1996, the Small Business Administration selected me as Small Business Person of the Year for New York State.

Also in 1996, at President Clinton and Vice President Gore's invitation, I participated in the Forum on Corporate Citizenship held at the White House. In 1997, NBC Nightly News highlighted Golden Artist Colors as a successful small business. Last year, Fortune Magazine selected me to appear in a video series on small business. I have attached as Exhibit A a short summary of some of our company's accomplishments.

Golden Artist is a strong advocate for product safety. In the early 1980s we accepted the responsibility of working in concert with material scientists, artists, consumers, other artist paint manufacturers and the Art and Creative Materials Institute ("ACMI"), to develop a voluntary standard for product labeling. The result was the development of ASTM D-4236, a uniform standard for the evaluation and labeling of art materials for acute and chronic health hazards. Subsequently, we began providing our customers with appropriate information regarding our products' safe use long before federal law required it through the incorporation of ASTM D-4236 into the Federal Hazardous Substances Act ("FSHA"), as amended by the Labeling of Hazardous Art Materials Act ("LHAMA"). We continue to actively participate in the ASTM committee that oversees ASTM D-4236, assuring that it remains current with the developing scientific body of toxicological information.

Golden Artist complies with the LHAMA requirements through participation in the ACMI certification program, which covers even broader health requirements than LHAMA. We submit the formulas of our products to a board-certified toxicologist, who reviews the formulations and advises us of the appropriate health labeling for each product. We implement the toxicologist's directives through our Director of Safety and Compliance and our Label Group, whose duties include ensuring that the appropriate language is placed on the product labels. With very few exceptions, our products have been deemed safe for use by people of all ages. This information is relayed to consumers by the ACMI "AP" Seal, which is recognized internationally as assuring safe products. The required health labeling is the result of a toxicological review of, among other criteria, the amounts of any potentially toxic substances in the products, the bioavailability of those substances and the products' intended use, including foreseeable misuse. (Because of the expansive nature of this toxicological review, the ACMI certification program ultimately is more comprehensive than the Proposition 65 scheme.) In

fact, many school organizations, including the Self-Insured Schools of California, strongly recommend that school districts purchase only ACMI "AP" certified products.

Despite providing warnings required under LHAMA through the ACMI certification program, we nevertheless became the target of a threatened Proposition 65 private enforcement action. It came as a great shock to learn that fellow art materials manufacturers were being sued in a California Proposition 65 lawsuit alleging that they had provided improper health warnings. We contacted our toxicologist to discuss the potential health impacts of our company's products that were in the same category as the defendants' products at issue in the lawsuit, including our cadmium-containing paints. (We sell our cadmium-containing paints at the insistence of our professional painter customers, who tell us they have no other way of achieving the proper shades of color for their work.) These products, which already have been reviewed under LHAMA through the ACMI certification program, have received the "AP" Seal and are labeled with instructions for proper use. (Attached as Exhibit B are copies of representative labels.) The toxicologist assured us that any potential exposures to the Proposition 65 chemicals in these products were below the levels of significant risk as defined by Proposition 65, and therefore should be exempt from Proposition 65 labeling.

We had a choice: to face a similar lawsuit and fight it on the merits or to join the other manufacturer defendants in settling the pending lawsuit. We decided to opt into a settlement of the lawsuit pending against the other manufacturers, and to be protected by the settlement those parties were negotiating. We made this decision because of the great burden of proof that Proposition 65 places on defendants to show that any exposures are below the applicable Proposition 65 levels of significant risk, and the costs of meeting that burden of proof. And, although we had thought that compliance with LHAMA and participation in the ACMI certification program would protect our industry from Proposition 65 enforcement actions, it became clear that proving this in court also would be too costly for us.

Rather than jeopardizing our business and the responsibility we have to our employees, we agreed to settle the lawsuit. The substantial amount of money it would take to fight the lawsuit on the merits – even if we won – would be money that otherwise would be directed to business development, creating new jobs, meeting our payroll, paying health insurance

premiums, and providing all the other benefits we give our employees. Paying to fight the lawsuit would not be a good use of those funds. And, if we lost the lawsuit, our company would be subject to penalties of up to $2500 ***per day*** of violation for ***each*** product used by ***any*** California user. All told, this sum represents such a substantial amount of money that, even if we were able to stay in business, we likely would have to reduce jobs or even the benefits – including health insurance – we provide our employees.

Even though we have settled the original lawsuit, we have received a new Proposition 65 Sixty-Day Notice of Intent to Sue from yet another "citizen enforcer," who is threatening to sue us regarding the <u>same</u> products that are covered by the settlement. Unfortunately, the settlement agreement, which was incorporated into a court-approved Consent Judgment, has not automatically put a halt to the second, duplicative action. This second citizen enforcer still may cause us to spend more money and more resources on litigation, despite the clear language of the Consent Judgment which incorporates our settlement. (I have attached as Exhibit C a copy of the Consent Judgment.) We fear that this cycle of costly litigation might never end, even though we continue to expend substantial time and resources in complying with FSHA/LHAMA.

The warnings required under our settlement are unnecessary and inappropriate, and will critically hurt our sales. Under the terms of the Consent Judgment that was entered as part of the settlement in the original case, we are required to provide certain Proposition 65 warnings on our products. These new warning requirements could cost our company about $240,000 to implement. (Attached as Exhibit D is a worksheet that breaks down this cost.) At best, these warnings potentially are unnecessary and confusing. At worst, these warnings could create a false, inappropriate concern about a chronic health hazard. Additionally, we anticipate that these warnings will cause us to lose about $400,000 a year in sales to our school customers alone, even though we have sold these customers the ***same*** products in the past. Yet, our products meet the Consumer Product Safety Commission-approved toxicological criteria, which assures us that the products pose no threat to the health of the people who use them. Still, as a small business, we had no choice other than to settle. Our costs now are real and not just potential. These conflicting health warning regulations puts our company in real jeopardy.

Proposition 65 has affected us in other negative ways. Since it may be impossible to control which of our products are distributed to specific states, we must place Proposition 65 warnings on each product, even those that never enter California. As a result, consumers all over the nation will see these potentially confusing or even inaccurate labeling on our products. Moreover, the placement of Proposition 65 warnings on the same products that previously did not bear such warnings diminishes our credibility with our customers, without any accompanying benefit accruing to them. It is clear that our small business will suffer.

Proposition 65 may force us to stop selling our products in California. Because of these burdens that Proposition 65 places on us, we are reviewing ways to avoid selling any products in California, a market representing almost one million dollars per year in sales. This may be the only way we can maintain any school sales and avoid conflict regarding products we sell elsewhere. It would certainly be the only way we can avoid being sued over and over again in California for the same alleged violations.

Proposition 65 lawsuits against companies complying with LHAMA are not enhancing public health. Ours is the ***only*** consumer product industry that requires toxicological review of products ***before*** sale. We have always believed that by complying with the ACMI certification program and LHAMA, and having our products reviewed by board-certified toxicologists who advise us of appropriate health warnings, we would be doing our best to ensure that our products are used safely, no matter where in the world our products are used. We strongly believe in the need to hold industry, large and small, accountable for the protection of public health. We believe as an industry that the United States Congress validated our approach with the LHAMA amendment of FSHA, and we comply with that federal law's requirements. In exchange, we ask that we be protected from the economic jeopardy made possible by Proposition 65.

Thank you again for providing me with this opportunity to give you one small company's perspective on Proposition 65.

GOLDEN
ARTIST COLORS

Golden Artist Colors, Inc.
188 Bell Road
New Berlin, NY 13411-9527 USA
Phone 607 847 6154
Fax 607 847 6767
E-Mail: golden@goldenpaints.com
www.goldenpaints.com

October, 1999

CURRICULUM VITAE
Mark Golden

Biography

Education: University of Rochester
Graduated Bachelor of Arts, 1976
Major: Neural Sciences

Personal: Married, wife Barbara, (principle in Golden Artist Colors)
Children, Callen 14, Emma 12
Address:Earlville, NY ("Small Town USA")

Golden Artist Colors History

Mark Golden, President and original founder of Golden Artist Colors, Inc. has been creating products by working directly with artists for over 19 years. Mr. Golden's company started with four people, in a cow barn on his parents retirement home in rural Upstate New York. Presently, Golden Artist Colors employs over 100 people, making and distributing products for professional artists worldwide.

The company started by making and delivering custom products for Artists in Manhattan, Mr. Golden started by visiting the clients with whom his father worked during his 50 years career as a paint maker and partner with Leonard Bocour. The original customers included; Jules Olitski, Larry Poons, Helen Frankenthaller, Frank Stella, Ken Noland and others.

Golden continues to produce Custom Products for Artists, Conservators, Museums in a one of a kind custom production facility. Golden Artist Colors produces 5 lines of acrylic products and hundreds of unique mediums and products for the industry.

Professional Accomplishments:

Mr. Golden has been a guest lecturer at the Smithsonian Institute in Washington D.C, the Tate Gallery in London, the College Arts Association convention, a keynote speaker at the symposium "Polymers in Museums" sponsored by the American Chemical Society as well as lecturing in colleges world wide on issues surrounding modern synthetic coatings. Mr. Golden presented the history of Golden Artist Colors and its influence on the arts at the National Museum of American History in Washington, DC, a symposium called "The Colors of Invention, An Exploration of Color, Technology and Culture". Mark Golden has co-authored several technical papers on issues dealing with conservation of acrylic paint and paintings.

Personal Achievements

Mr. Golden was selected by the Small Business Administration as the 1996 Small Business Person of the Year for New York State. He was invited by President Clinton and Vice President Gore to participate along with 150 other businesses, to a Forum on Corporate Citizenship held at the White House, for his activities in creating a business that exemplifies the spirit of corporate citizenship in creating a work environment that values all employees. Mark Golden and his company were highlighted in 1997 on NBC Nightly News as a successful small business. In 1998 Mr. Golden was selected by Fortune Magazine to appear in a video series on small business.

University Guest Lectures:

Maryland Institute of Art, Corcoran School of Art, Washington, Queen's University, Ontario, London School of Art, San Francisco Art Institute, University of Miami, University of Buffalo, New York, University of Rochester, New York, University of Syracuse, New York, Hamilton College, New York, Colgate University, New York, Pratt Art Institute, New York, New York University, New York.

DISCLOSURE

Pursuant to Rule XI, clause 2(g)(4) of the Rules of the House of Representatives, I, Mark Golden, make this disclosure as on behalf of Golden Artist Colors, Inc.

Golden Artist has received the following federal grants:

Loan Source	Amount	Date
SBA Loan #GP 9223 773005	$300,000	3/24/97
SBA Loan #GP 134952 4005	$405,000	9/17/97
HUD Small Cities Loan	$208,000	2/18/97

EXHIBIT A

GOLDEN ARTIST COLORS, INC.

"From the beginning of this business, Golden Artist Colors, Inc. has been dedicated to the business ethic – if we produce the best product and provide the best service, we will win. We are committed to being a good employer, to being a good neighbor in our community, and being a valued asset to the artist community, worldwide."

Golden Artist's Working Philosophy

Every day, we at Golden Artist carry out our Working Philosophy. We strive to be the best employer and neighbor, and a valuable contributor to the artist community.

- Our company was the first to put on our product labels the chemical description of each pigment we manufacture. The MSDS's we have developed have been used as models for others in our industry, as well as a model for several colleges. Our labels have been also used as a model of excellence by some of the most active advocates for artist safety, namely Mike McCann, author of "Artist Beware" and Monona Rossol, Director of Arts, Crafts and Theatre Safety, also author of "The Artist's Complete Health and Safety Guide".

- We have an active paint reclamation program ("Seconds Program") throughout the facility through which we donate to art groups around the world any paint collected from the manufacture process which does not meet our quality specifications.

- We have developed a micro-scale water treatment process that allows individuals and entities to avoid disposing of paint solids down the drain. Last year we won a New York State grant for developing a new process to completely reuse our process wastewater.

- Our company has contributed to our county's hazardous waste program by screening latex paint for our residents, remixing and reconstituting those paints, and then donating the resulting paint to non-profit organizations throughout the county. This program has been so successful that we have been requested by neighboring counties to recycle their latex paint as well, which has meant literally thousands of gallons of leftover paint not going to the landfill.

- We have opened our business to support community forums on Y2K readiness, alternative agriculture, and we have acted as a satellite class room for our local community college. We have participated in Welfare to Work programs as well as in an active School to Work program.

Exhibit B

7 38797 11354 1

GOLDEN Heavy Body Acrylics are produced with 100% Acrylic Polymer Emulsion. This produces a film with excellent flexibility, and chemical, water and ultraviolet resistance. The milky emulsion dries transparent allowing the pigments to show their full color. Pigments are chosen for the greatest purity and permanency within each chemical class. Golden Acrylics dry quickly, and may be painted over immediately, yet complete drying will take longer. Avoid freezing. Minimum film formation temperature is 48° F / 9° C.

DIRECTIONS: To thin, use water or Golden Mediums. For slower drying, use Golden Retarder. Do not mix with oils. Paint on any non-oily surface. Nonabsorbent surfaces should be abraded for increased adhesion. Clean tools with soap and water. Keep tools wet during use.

GOLDEN
ACRYLICS®

C.P. Cadmium Yellow Primrose

Jaune primevère de cadmium
Amarillo cadmio primavera

Cadmium Zinc Sulfide (CC) / PY 35
Lightfastness I / Conforms to ASTM D 5098
Golden# 01135 / Series VII

Made in USA
NET 4 fl. oz. / 119 ml.

HEALTH & SAFETY: Golden Acrylics, with the Art & Craft Materials, Institute, Inc., AP Seal, are certified in a program of toxicological evaluation by a medical expert to contain no material in sufficient quantities to be toxic or injurious to humans, or to cause acute or chronic health problems. All Golden products should be used in accordance with safe handling practices. These include:

- Avoid contact with eyes.
- Wash hands after use.

DO NOT SPRAY APPLY
CONTAINS CADMIUM PIGMENT

CONFORMS TO ASTM D-4236

GOLDEN Artist Colors, Inc. • New Berlin, NY • 607-847-6154

GOLDEN Heavy Body Acrylics are produced with 100% Acrylic Polymer Emulsion. This produces a film with excellent flexibility, and chemical, water and ultraviolet resistance. The milky emulsion dries transparent allowing the pigments to show their full color. Pigments are chosen for the greatest purity and permanency within each chemical class. Golden Acrylics dry quickly, and may be painted over immediately, yet complete drying will take longer. Avoid freezing. Minimum film formation temperature is 48° F / 9° C.

DIRECTIONS: To thin, use water or Golden Mediums. For slower drying, use Golden Retarder. Do not mix with oils. Paint on any non-oily surface. Nonabsorbent surfaces should be abraded for increased adhesion. Clean tools with soap and water. Keep tools wet during use.

GOLDEN
ACRYLICS®

Cobalt Blue

Bleu de cobalt
Azul cobalto

Oxides of Cobalt and Aluminum / PB 28
Lightfastness 1 / Conforms to ASTM D 5098
Golden# 01140 / Series VIII

Made in USA
NET 4 fl. oz. / 119 ml.

HEALTH & SAFETY: Golden Acrylics, with the Art & Craft Materials, Institute, Inc., AP Seal, are certified in a program of toxicological evaluation by a medical expert to contain no material in sufficient quantities to be toxic or injurious to humans, or to cause acute or chronic health problems. All Golden products should be used in accordance with safe handling practices. These include:

- Avoid contact with eyes.
- Wash hands after use.
- When spraying or sanding use NIOSH-approved respirator.

AP™
CONFORMS TO ASTM D-4236

GOLDEN Artist Colors, Inc. • New Berlin, NY • 607-847-6154

EXHIBIT C

Robert C. Goodman (State Bar No. 111554)
Goodman/Kang LLP
177 Post Street, Suite 600
San Francisco, CA 94108
Telephone: (415) 777-2210

Attorneys for Plaintiff

ENDORSED
FILED
San Francisco County Superior Court

OCT - 7 1999

ALAN CARLSON, Clerk
BY: KEVIN R. DOUGHERTY
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PUBLIC MEDIA CENTER, Plaintiff, vs. UTRECHT MANUFACTURING CORP., et al., Defendants.	Case No. 306481 [PROPOSED] CONSENT JUDGMENT Date: October 7, 1999 Time: 11:00 a.m. Dept.: 301 Judge: Hon. David A. Garcia Action Filed: September 16, 1999 Trial Date: None Set

1. Introduction

1.1 On or about July 29, 1998, the Public Media Center ("PMC") served, via certified mail, a notification to the California Attorney General, various District and City Attorneys, and certain private businesses pursuant to Health and Safety Code section 25249.7(d) alleging that such businesses were in violation of California Health and Safety Code section 25249.6 because they, through marketing of certain paint products allegedly exposed residents of the State to chemicals listed under California Health and Safety Code section 25249.5 *et seq.* ("Proposition 65") without first providing those residents with clear and reasonable warnings ("Notice Letter"). PMC subsequently served several

1 additional and supplemental Notice Letters covering additional businesses and
2 additional allegations.
3 1.2 Utrecht Manufacturing Corporation, Utrecht Manufacturing
4 Corporation of California, Binney & Smith, Inc., Colart Americas, Inc. (aka
5 Winsor and Newton), Royal Talens, B.V., Canson-Talens, Inc., Koh-I-Noor, Inc.,
6 Jack Richeson & Co., Inc., Daler-Rowney Ltd., Golden Artist Colors, Creative Art
7 Products Co., Sennelier-Sauer, H. Schmincke & Co., HK Holbein Inc., Old
8 Holland Classic Colours, and Martin F. Weber Co., and certain of their respective
9 divisions and brands, are among the businesses that were named in and received
10 the Notice Letter, and are herein referred to as "Settling Defendants."
11 1.3 On September 16, 1999, PMC, acting in the public interest pursuant to
12 Health and Safety Code section 25249.7(d) and on behalf of the general public
13 pursuant to Business and Professions Code section 17204, filed a complaint in the
14 San Francisco County Superior Court containing Proposition 65 and Unfair
15 Competition Act claims against some of the Settling Defendants based on the
16 allegations contained in the Notice Letter. On October 4, 1999, the PMC amended
17 its complaint and named additional defendants who are Settling Defendants
18 hereunder.
19 1.4 For the purpose of avoiding protracted litigation, the parties have
20 exchanged information concerning the claims asserted and factual matters alleged
21 in the Notice Letters and the Complaint and now enter into this Consent Judgment
22 as a full and final settlement of all claims that were raised or which could have
23 been raised in the Complaint based on the facts alleged therein or in the Notice
24 Letters.
25 1.5 Nothing in this Consent Judgment shall be construed as an admission
26 by any party of any fact or issue of law; nor shall compliance with the Consent
27 Judgment constitute or be construed as an admission by any party of any fact or
28

issue of law. Nothing in the Consent Judgment shall prejudice, waive or impair any right, remedy or defense the Settling Defendants may have in any other or future legal proceedings. However, this Paragraph shall not diminish or otherwise affect the obligations, responsibilities and duties of the parties under this Consent Judgment.

2. Jurisdiction

2.1 For purposes of this Consent Judgment only, the Parties agree that:

2.2 The Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over each of the Settling Defendants.

2.3 The Court is the proper venue for resolution of this Action.

2.4 The Court has jurisdiction to enter this Consent Judgment as a full and final judgment, resolving the claims which were or could have been raised in the Complaint based on the facts alleged therein or in the Notice Letters.

3. Injunctive Relief: Clear and Reasonable Warnings

3.1 Settling Defendants shall provide Proposition 65 warnings in the manner set forth in Paragraphs 3.2 through 3.10 below in conjunction with the sale of any of "Covered Products" as defined herein. For purposes of this Agreement, the term "Covered Products" shall mean any and all paints (including, without limitation, acrylics, alkyds, gouaches, oils, and water colors) and pigments manufactured, sold, and/or distributed by a Settling Defendant for use in California which contain: 1) lead, 2) cadmium, 3) any other Proposition 65-listed chemicals, including, but not limited to certain forms of cobalt and nickel, where such are listed as ingredients on the product's Material Safety Data Sheet ("MSDS") and/or label, or 4) any other Proposition 65-listed chemicals which are otherwise known to be present in an amount requiring a health warning under the Labeling of Hazardous Art Materials Act ("LHAMA"), 15 U.S.C. §§ 1277 *et seq.*

3.2 Revisions to Permanent Labeling For Covered Products: By no later than one year after entry of this Consent Judgment, Settling Defendants shall revise the labeling for Covered Products manufactured for sale in the State of California to include the warning language specified in Paragraphs 3.3 through 3.9 below (as respectively applicable to a particular Covered Product's formulation). Settling Defendants shall not thereafter ship such Covered Products, or cause such Covered Products to be shipped, into California without such revised labeling. The applicable warning language shall be printed in a type size and style that is as conspicuous as, but not necessarily any more prominent than, other health effects information printed on the Covered Product's label. The type size requirements specified in 16 C.F.R. § 1500.121 shall be deemed to satisfy the type size requirements of the preceding sentence.

3.3 For Covered Products containing *cadmium* and which are paints, the warning shall state:

> **WARNING: DO NOT SPRAY APPLY** -- This product contains cadmium, a chemical known to the State of California to cause cancer by means of inhalation.

If space limitations on containers holding less than 7.5 mililiters preclude use of the warning language required by this Paragraph in the manner required by Paragraph 3.2 above, a Settling Defendant may omit the word "This."

3.4 For Covered Products containing *cadmium* and which are pigments, the warning shall state:

> **WARNING:** This product contains cadmium, a chemical known to the State of California to cause cancer.

3.5 For Covered Products containing *lead* and which are either paints or pigments, the warning shall state:

> **WARNING:** This product contains lead, a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

3.6 For Covered Products containing chemicals *other than cadmium or lead* which are listed under Proposition 65 as carcinogens (including, but not limited to certain forms of cobalt and nickel) and which are either paints or pigments, the warning shall state:

> **WARNING:** This product contains a chemical known to the State of California to cause cancer.

3.7 For Covered Products containing chemicals *other than cadmium or lead* which are listed under Proposition 65 as reproductive toxicants and which are either paints or pigments, the warning shall state:

> **WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

3.8 For Covered Products containing chemicals *other than cadmium or lead* which either singly or in combination are listed under Proposition 65 as *both* carcinogens and reproductive toxicants and which are either paints or pigments, the warning shall state:

> **WARNING:** This product contains chemicals known to the State of California to cause cancer, and birth defects or other reproductive harm.

3.9 Interim Signage for Covered Products in Inventory: To address Covered Products in, or that may placed in, inventory in California prior to the implementation of revisions to permanent labeling required by Paragraph 3.2, Settling Defendants, or an entity acting on their behalf, shall, by no later than sixty (60) days after receipt of notice of entry of this Consent Judgment, mail to the central purchasing office for retail stores with whom they transact business for sale of Covered Products in California: 1) at least five (5) copies of the sign contained in Exhibit A (hereinafter "Warning Sign"), printed on 65 pound cover stock and 2) a letter explaining the warning program and providing posting instructions. The Warning Sign shall be 8½" by 11" in size and shall have the

exact content, form, and print style as Exhibit A. The letter and posting instructions referred to in this paragraph shall contain the text shown in Exhibit B, and shall contain no further information or statements without the advance written approval of the California Attorney General's Office. A Settling Defendant that has complied with the terms of this paragraph in good faith, and which has not advised a retailer to the contrary, shall not be found to have violated this Consent Judgment where a retail store, distributor, or any other person required to post the warning signs required by this paragraph fails to properly post such warnings.

3.10 Warnings for Occupational Exposures: A Settling Defendant shall, in addition to complying with the warning provisions of Paragraphs 3.2 through 3.9 above, revise the Material Safety Data Sheet ("MSDS") pertaining to each Covered Product to include the applicable warning language specified in Paragraphs 3.3 through 3.8 above. Settling Defendants shall distribute final MSDSs incorporating applicable warning language in the normal course of business within one hundred and eighty (180) days after receipt of notice of entry of this Consent Judgment

3.11 Alternative Warning Requirements. If any other Proposition 65 warning language or method is permitted by the courts or Attorney General of the State of California with any person or entity which manufactures, distributes, or sells Covered Products addressed by this Consent Judgment, then a Settling Defendant, may at its sole option, give warnings on the same terms.

4. Duties Limited to California

The warning requirements contained in this Consent Judgment shall have no effect on Covered Products sold by Settling Defendants for use outside of the State of California.

5. Statutory Penalty Payment

5.1 Settling Defendants, or an entity acting on their behalf, shall, within thirty (30) days after receipt of notice of entry of this Consent Judgment,

collectively pay the sum of $12,500 in statutory penalties pursuant to Health and Safety Code Section 25249.7(b).

5.2 Seventy-Five (75) percent of the funds required by Paragraph 5.1 shall be paid to the California Attorney General pursuant to Health and Safety Code Sections 25192(a)(1) and (3).

5.3 The remaining twenty-five (25) percent of the funds required by Paragraph 5.1 shall be paid to PMC pursuant to Health and Safety Code Sections 25192(a)(2).

6. Restitutionary Relief/Cy Pres Remedy

6.1 Settling Defendants, or an entity acting on their behalf, shall, within thirty (30) days of receipt of notice of entry of this Consent Judgment, collectively pay the sum of $125,000 to be used for projects and programs designed to educate artists on safe use and handling practices for art materials containing lead, cadmium and/or other chemicals listed under Proposition 65. PMC shall design and implement such programs and projects and, in so doing, will use its best practicable efforts to obtain input from and consult with the Council For Art Education and other non-profit organizations with knowledge in the field. The PMC shall also, within two years of the date of entry of this Judgment by the Court, provide the California Attorney General's office and the Settling Defendants' counsel of record with a letter report briefly describing: 1) the programs and projects it has undertaken pursuant to this Paragraph, 2) a general evaluation of their effectiveness, and 3) an accounting of the funds it has expended pursuant to this Paragraph.

7. Attorneys' Fees

Within thirty (30) days after receipt of notice of entry of this Consent Judgment, Settling Defendants, or an entity acting on their behalf, shall collectively pay the sum of $36,250 to the law firm of Goodman/Kang LLP as

reimbursement for Plaintiff's investigative and experts' costs and attorneys' fees. Except as specifically provided in this Consent Judgment, each side shall bear its own costs and attorneys' fees.

8. Modification of Consent Judgment

This Consent Judgment may be modified by written stipulation of the Plaintiff and the Settling Defendant(s) to whom the modification applies and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of the Plaintiff, the Attorney General, or any Settling Defendant as provided by law and upon entry of a modified Consent Judgment by the Court. The California Attorney General's office shall be served with a copy of any stipulation or motion brought before the Court by the Plaintiff and/or a Settling Defendant pursuant to this paragraph.

9. Enforcement of Consent Judgment

The Plaintiff or the California Attorney General may, by motion or order to show cause before the Superior Court of San Francisco, enforce the terms and conditions contained in this Consent Judgment.

10. Application of Consent Judgment

10.1 The obligations of this Consent Judgment shall apply to and be binding upon plaintiffs, acting in the public interest pursuant to Health and Safety Code section 25249.7(d) and on behalf of the general public pursuant to Business and Professions Code section 17204, and the Settling Defendants and the successors or assigns of any of them. Pursuant to the recent decision in *American International Industries v. Superior Court (Urbach)*, 72 Cal.App.4th 1384 (1999), the terms of this Consent Judgment were submitted to and discussed with the California Attorney General's office by the Settling Defendants prior to the entry of this Consent Judgment by the Court. The final terms of this Consent Judgment reflect various modifications of prior drafts made to address comments provided to

the Settling Defendants by the Attorney General's office. A copy of this final version of the Consent Judgment has been served on the Attorney General's office together with advanced notice of the parties' intent to present it to the Court on Thursday, October 7, 1999 (*See* Exhibit D).

10.2 In the event that Proposition 65 is repealed, declared unconstitutional, or found to be preempted by federal law with respect to its application to the Settling Defendants' and/or their competitors' or either of their Covered Products, Settling Defendants shall have no further obligations pursuant to paragraphs 3.1 through 3.10 of this Consent Judgment.

11. Retention of Jurisdiction

This Court shall retain jurisdiction of this matter to implement the terms of this Consent Judgment.

12. Authority to Stipulate to Consent Judgment

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the party represented and legally to bind that party. Upon execution of this Consent Judgment by all parties, Plaintiff and/or the Settling Defendants shall serve a copy of it, together with all of its exhibits, on the California Attorney General.

13. Claims Covered

This Consent Judgment is a final and binding resolution between the Plaintiff, acting in the public interest pursuant to Health and Safety Code section 25249.7(d) and on behalf of the general public pursuant to Business and Professions Code section 17204, and each Settling Defendant and their respective parents, subsidiaries, affiliates, employees, agents, distributors, retailers, and/or customers, and the successors and assigns of any of them, of any violation that has or could have been asserted against any of them based on their alleged failure to

provide clear, reasonable, and lawful warnings pursuant to Proposition 65 of consumer, occupational, and/or environmental exposures to chemicals listed under Proposition 65 contained in Covered Products manufactured, distributed and/or sold by the Settling Defendants. Compliance with the terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance by any Settling Defendant, its parent, subsidiaries, affiliates, divisions, subdivisions, brands, employees, agents, distributors, retailers, and/or customers, and the successors and assigns of any of them, concerning the requirements of Proposition 65 and the Unfair Competition Act with respect to any consumer, occupational, or environmental exposures associated with chemicals listed under Proposition 65 contained in Covered Products manufactured, distributed, or sold by the Settling Defendants.

14. Entire Agreement

The agreement reflected in this Consent Judgment contains the entire understanding regarding the subject matter of this Consent Judgment and supercedes all prior understandings and agreements, whether oral or in writing, regarding the subject matter of this Consent Judgment.

15. Use of Documents

Unless otherwise required by subpoena or court order, the Plaintiff shall not use or disseminate any documents that any Settling Defendant has provided to it in the course of this Action or in the course of settlement discussions conducted prior to or during the course of this Action. Plaintiff shall advise a Settling Defendant of its receipt of any subpoena or court order requiring it to produce documents it has received from the Settling Defendant within a reasonable time in advance of their required production date so as to allow the Settling Defendant an opportunity to attempt to obtain a protective order concerning the production and/or further dissemination of such information.

16. Provision of Notice

16.1 When any party is entitled to receive any notice or report under this Consent Judgment, the notice or report shall be sent by U.S. mail or overnight courier service to all of the persons and addresses set forth in Exhibit C. Any party may modify the person and address to whom notice is to be sent by sending each other party notice in accordance with this paragraph.

17. Individual Obligations

Except as otherwise provided herein, the obligations of the Settling Defendants pursuant to this Consent Judgment are individual to each of them and are in no way collective or joint. No Settling Defendant shall be held responsible for the failure of any other Settling Defendant to comply with the terms hereof.

18. Choice of Law

This Consent Judgment shall be governed by and construed under the laws of the State of California.

19. Effective Date

This Consent Judgment shall become effective when it is entered as a final judgment by the Court and shall be of no force or effect if it is not so entered.

20. Court Approval

If this Consent Judgment is not approved by the Court, it shall, at the Settling Defendants' sole option, be of no force or effect and cannot be used in any proceeding for any purpose.

21. Execution by Facsimile and/or in Counterparts

The stipulations to this Consent Judgment may be executed together or in counterparts and/or by facsimile, which taken together shall be deemed to constitute one document.

1 IT IS SO STIPULATED:
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3 DATE: Oct. 5, 1999 By: Vice President
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5 For: Binney & Smith Inc.
(name of party)
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IT IS SO STIPULATED:

DATE: Oct 5/1999

By:

For: Plaintiff Public Media Center
(name of party)

1 IT IS SO STIPULATED:
2
3 DATE: 10/4/99 By: James V. Otis
4
5 For: Utrecht Mfg Co. *
6 (name of party)
7 * Includes Utrecht Manufacturing Corporation of California
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IT IS SO STIPULATED:

DATE: October 4TH 1999

By: [signature]

For: Colgate Americas Inc.
(name of party)

IT IS SO STIPULATED:

DATE: Oct 5 1999

By: HANS BAX

For: ROYAL ZALENS
(name of party)

IT IS SO STIPULATED:

DATE: October 4, 1999

By: Edwin F. Bush, II, Secretary

For: Canson Talens, Inc.
(name of party)

IT IS SO STIPULATED:

DATE: 10/1/99

By: PRES
D.T. RICHESON PRES.

For: JACK RICHESON & CO. INC.
(name of party)

IT IS SO STIPULATED:

DATE: 10/5/99

By: Jamie L. Paulin

For: Sanford/Grumbacher/Koh-I-Noor
(name of party)

IT IS SO STIPULATED:

DATE: 5th October 1999

By: (A.R. FRENCH)

For: Daler – Rowney Ltd.
(name of party)

IT IS SO STIPULATED:

DATE: 10-1-99

By: Mark Golden, President

For: Golden Artist Colors, Inc.
(name of party)

IT IS SO STIPULATED:

DATE: OCT 6, 1999

30 SEP. 1999

By: ERIC SAUER

For: SENNHELIER / SAUER
(name of party)

IT IS SO STIPULATED:

DATE: October 6, 1999

By: (Nils Knappe)

For: H.Schmincke & Co. - GmbH & Co.KG -
(name of party)

IT IS SO STIPULATED:

DATE: 10/4/99

By:

For: OLD HOLLAND CLASSIC COLOURS
(name of party)

IT IS SO STIPULATED:

DATE: 4 October 1999

By: E.J Flax, V.P.

For: Martin F. Weber Co.
(name of party)

IT IS SO STIPULATED:

DATE: OCTOBER 5, 1999

By: Douglas Hopper

For: HK HOBEN INC.
(name of party)

1 REVIEWED AND APPROVED AS A JUDGMENT OF THE SUPERIOR
2 COURT:
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4 DATE: OCT - 7 1999 DAVID A. GARCIA
5 By: Judge of the Superior Court
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Exhibit A

WARNING:

Some artists' paints and pigments contain lead and/or cadmium which are chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

Some artists' paints and pigments contain cobalt or nickel which are chemicals known to the State of California to cause cancer.

Check label to see if any of these are present.
Do not spray apply these products.

sf-696616

Exhibit B

RETAILER INSTRUCTIONS

RE: Court-Ordered Proposition 65 Warnings for Sale of Certain Art Materials in California

Dear Retailer:

This letter contains important information and materials concerning the need to provide court-ordered warnings for the sale of certain art materials in California containing chemicals listed under Proposition 65. **It is very important that you read and comply with the following instructions.**

Enclosed are signs for posting in your store if, and only if, you currently sell artists' paints or pigments in California. **If you do not post these signs as required, you risk further legal action by the Attorney General, District of City Attorneys, or other private prosecutors,** in which substantial monetary penalties and recovery of the prosecutor's attorneys' fees and expenses could be sought.

These signs are being provided by art material manufacturers and distributors as part of a court-approved settlement of a legal action brought under "Proposition 65." In this legal action, the plaintiff claimed that certain artists' prints and pigments containing chemicals listed by the State under Proposition 65 require a warning under Proposition 65 in certain circumstances, such as when these artists' paints or pigments are applied by artists contrary to their directions for use. The companies sued vigorously dispute the plaintiff's claims, but have agreed to take various actions to settle the case.

Under the settlement, artists' paints and pigments containing lead, cadmium, cobalt and/or nickel, or other chemicals listed under Proposition 65 may continue to be sold legally in California. Manufacturers of these art materials that are parties to the settlement will be revising their labeling over the next year to

1 include Proposition 65 warnings on the products in question. In the mean time,
2 they are asking you to post the enclosed warning signs in your California retail
3 stores as an interim measure. **If artists' paints or pigments are sold in your**
4 **California stores, then your must post these signs.** Please make sure the
5 warning sign is placed in a location that is visible to the consumer prior to
6 purchase, such as at the cash register or adjacent to the area in which these
7 products are displayed.
8 YOU WILL BE PROTECTED BY THE TERMS OF THE SETTLEMENT AS
9 LONG AS YOU POST THESE SIGNS IN YOUR CALIFORNIA STORES BY
10 JANUARY 31, 2000 AND ENSURE THAT THEY REMAIN IN PLACE FOR AT
11 LEAST A YEAR.
12 Not all suppliers are participating in this court-ordered warning program.
13 Suppliers that are not participating in this program may not be updating the labels
14 of their art materials with a Proposition 65 warning. Therefore, **before you**
15 **remove the enclosed warning sign from your California stores, you should**
16 **check your inventory to ensure that labels with Proposition 65 warnings are in**
17 **place** and/or contact your suppliers to determine if they are in compliance with
18 Proposition 65, since failure to comply could subject you to the legal actions
19 referred to above.
20 If you need additional signs for your store(s), please contact **[name of**
21 **person or entity distributing signs]** at **[telephone number and/or e-mail**
22 **address]** to request an additional supply.
23
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EXHIBIT C

(Notice Form)

Party Name:	Public Media Center
Attention:	Robert C. Goodman
Address:	Goodman Kang LLP ~~177 Post Street, Suite 600~~ San Francisco, CA 94108
Telephone:	415-777-2210
Fax:	415-777-2215

EXHIBIT C

(Notice Form)

Party Name: UTRECHT MANUFACTURING CO.*
Attention: JAMES PETERS
Address: 6 CORPORATE DRIVE
CRANBURY NJ 08512
Telephone: ~~(609)~~ (800) 276-2205
Fax: (609) 655-4367

*Includes Utrecht Manufacturing Corporation of California

EXHIBIT C

(Notice Form)

Party Name: BINNEY & SMITH, INC.
Attention: JOAN LILLEY
Address: 1100 CHURCH LANE P.O. BOX 431
EASTON, PA 18044
Telephone: (610) 253-6272 EXT 4820
Fax: (610) 250-5810

EXHIBIT C

(Notice Form)

Party Name: COLART AMERICAS, INC.
Attention: RICHARD GOODBAN
Address: 11 CONSTITUTION AVENUE
PISCATAWAY, NJ 08853
Telephone: (732) 562-2770
Fax: (732) 562-0941

EXHIBIT C

(Notice Form)

Party Name: ROYAL TALENS, B.V.
Attention: MR. RUDOLPH WILMER
Address: P.O. BOX 4, 7200 AA
APELDOORN, HOLLAND
Telephone: 011-31-55-52-784-700
Fax: 011-31-55-52-15-286

EXHIBIT C

(Notice Form)

Party Name: CANSON TALENS, INC.
Attention: KEVIN KELLEY
Address: 21 INDUSTRIAL DRIVE
SOUTH HADLEY, MA 01075
Telephone: (800) 628 9283
Fax: (413) 538-7301

EXHIBIT C

(Notice Form)

Party Name: KOH-I-NOOR, INC.
Attention: JAMIE L. PAULIN
Address: 2711 WASHINGTON BLVD.
BELLWOOD, IL 60104
Telephone: (800) 323-0749 EXT 3270
Fax: (708) 649-3434

EXHIBIT C

(Notice Form)

Party Name: JACK RICHESON & CO. INC.
Attention: D.T. RICHESON
Address: 557 MARCELLA DR
KIMBERLY, WI. 54136
Telephone: 920 738 0744
Fax: 920 738 9156

EXHIBIT C

(Notice Form)

Party Name: Daler-Rowney Ltd.
Attention: Alan R. Frank
Address: Peacock Lane, Southern Industrial Area, Bracknell, Berkshire, RG12 8ST, England.
Telephone: 011 44 1344 424621
Fax: 011 44 1344 486511

EXHIBIT C

(Notice Form)

Party Name: Golden Artist Colors, Inc.
Attention: Ben Gavett
Address: 188 Bell Rd
New Berlin NY 13460
Telephone: 607 847 6154
Fax: 607 847 8162

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EXHIBIT C

(Notice Form)

Party Name: Creative Art Products
Attention: Mike Karlovich
Address: 1558 S. Henderson St.
Galesburg, IL 61401
Telephone: 309-342-0179
Fax: 309-342-0170

30 SEP. 1999

EXHIBIT C

(Notice Form)

Party Name: SEHMELIER - SAUER
Attention: Eric SAUER
Address: 2, rue Lamarck
22000 - ST BRIEUC FRANCE
Telephone: 33-2-96-68-20-00
Fax: 33-2-96-61-77-19

EXHIBIT C

(Notice Form)

Party Name:	H. Schmincke & Co. - GmbH & Co.KG -
Attention:	Nils Knappe
Address:	Otto-Hahn-Str. 2
	D - 40699 Erkrath, Germany
Telephone:	0049 - 211 - 2509-467
Fax:	0049 - 211 - 2509-497

EXHIBIT C

(Notice Form)

Party Name: HK HOLBEIN INC.
Attention: DOUGLAS HOPPER
Address: P.O. BOX 555, 20 COMMERCE ST.
WILLISTON, VT 05495
Telephone: 800-682-6686
Fax: 802-658-5889

EXHIBIT C

(Notice Form)

Party Name: OLD HOLLAND CLASSIC COLOURS
Attention: STEPHEN LYNTON
Address: NIJENDAL 36
3972 KC DRIEBERGEN, HOLLAND
Telephone: +31 343 518224
Fax: +31 343 516342

EXHIBIT C

(Notice Form)

Party Name: Martin F. Weber Co.
Attention: Edward J. FLAX, Vice Pres.
Address: 2727 Southampton Rd.
Philadelphia PA 19154-1293
Telephone: 215-677-5600 x.304
Fax: 215-677-3336

EXHIBIT D

PROOF OF SERVICE BY MAIL

I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for hand delivery and/or for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be hand delivered and/or deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

NOTICE OF EX PARTE MOTION RE: ENTRY OF [PROPOSED] CONSENT JUDGMENT

[PROPOSED] CONSENT JUDGMENT

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and hand delivery by messenger (as specifically designated below) and/or for mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105, in accordance with Morrison & Foerster's ordinary business practices:

Edward G. Weil
Deputy Attorney General
State of California Department of Justice
1515 Clay Street
Oakland, CA 94612-1413

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 5th day of October, 1999.

Millie Calvo
(typed)

Millie Calvo
(signature)

EXHIBIT D

Golden Artist Colors, Inc.
Estimated Costs for Relabeling GAC product

	Sep-99	Dec-98	Dec-97
Annual Label Purchases:	70,851		
Estimated 12/99	94,468	97,811	120,756
Production OH Rate	0.787	0.597	1.012
Cost + OH	168,814	156,204	242,961

Plate Charges for each label	25
Copy charges for each label	15
Total New Label Charge	40
# of Labels produced outside that would require change	1,925
Total Cost of label change	77,000
Overhead rate applied	60,599
	137,599

Carrying Cost of International Labels	**1998**	**1997**	
GAC US Sales (excluding OEM/Private Label)	4,563,071	3,961,277	
GAC Int'l Sales (excluding OEM/Private Label)	1,022,435	1,029,939	
Total	**5,585,506**	**4,991,216**	
			AVERAGE
International Sales as a percent of total GAC	18.3%	20.6%	19.5%
Finished Goods Inventory	783,719	697,814	740,767
Portion of FG's relating to International Labeling			144,228
Carrying Costs of Separate Labeling (Assume 20% add'l inventory)			28,846
Overhead associated with additional inventory			51,547
Carrying cost at 25%			**12,887**

SUMMARY:			
Cost of Outside Label Production	137,599		
Carrying Cost of International Inventory Label	12,887		
Additional Staff as follows:			
Proofer...person needed for all the label proofing	12,500	(6 Months full time)	
Label Painters to accommodate workflow	12,000	(two students 1000 hours each)	
Graphic Artist to change all labels	25,000	(6 Months full time)	
Overhead on all additional salaries	38,957		
GRAND TOTAL	238,942		

Statement of
Sandra Berg Skommesa
President/CEO Ellis Paint Company
Los Angeles, California
Before The
Committee of Small Business
U.S. House of Representatives
Thursday, October 28, 1999

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to speak before you today on the draining effects of the bounty hunter provision of California's Proposition 65. Theodore Roosevelt said, "The things that will destroy America are prosperity at any price, peace at any price, safety first instead of duty first, the love of soft living and the get rich quick theory of life." It is my hope that not only will you see what a mockery groups like As You Sow have made of what California voters meant for the betterment of their citizens, but you will take action to eliminate this abuse.

Ellis Paint Company Background:

Ellis Paint Company - founded in 1887 by the Ellis family, and sold to my family in 1969 - remains a small, family-owned speciality paint manufacturing company in Los Angeles, California. We have $18 million in annual sales, and we employ approximately 85 people.

My testimony is not about a company that cannot comply with complicated, over-burdensome rules and regulations because of our size. Quite the contrary, although Ellis Paint Company may be small and family-owned, we are a proactive and solution-oriented company. Early in the regulatory process, my father and I took a strong position on being a leader in environmentally responsible products, not only by developing products for the compliant marketplace, but also in taking an active part in assisting our customers in understanding and complying with the rules and regulations required as the result of using our product line.

What can a small company do to be part of the solution?

Ellis Paint Company is a leader in environmental solutions with the development, and customer assistance, in compliant products; hazardous material and hazardous waste management alternatives; plus health, safety and environmental training programs to ensure the correct use of our products.

In 1980, Ellis began a solvent recycling program for the autobody refinishing market. Over the last 19 years we have recycled over a half million gallons of solvent,

using the recycled solvents back in our manufacturing process, and fuel blending the paint waste into a supplemental fuel for cement kilns.

Today we offer a full range of hazardous waste management programs, including product recycling, waste minimization and health, safety and environmental training for our employees, our customers and the agencies we work with.

Additionally, our commitment to the development of compliant coatings has been just as aggressive. Beginning with the 1985 South Coast Air Quality Rules and Regulations, we developed products which not only met the regulation requirements but were technically usable in the field. Today we continue to manufacture coatings which meet the Architectural Rule 1113, Wood Furniture Rule 1136, and Automotive Rule 1151 in a manner which allows our customers to remain competitive and in compliance.

California's Proposition 65 - The Bounty Hunter Provision

With a company who is so proactive in their commitment to environmental responsibility, how could Ellis Paint have gotten at odds with the bounty hunters of Proposition 65? Did we not understand the obligation of product warning for cancer, birth defects and other reproductive harm? No, Ellis Paint, in fact, actively warned its customers. We became at odds with a bounty hunter group over a comma in our warning!

In November 1986, when the citizens passed the Safe Drinking Water and Toxic Enforcement Act, or Prop 65 as it is more commonly known, Ellis Paint Company did not think twice about our labeling responsibility. Even though the law grandfathered in all products manufactured prior to its implementation, we, however, wanted every possible gallon for sale to be labeled. We required our warehouse people to sticker our current inventory, as well as the new materials, until we could change our labels to include the Prop 65 warning. We also sent letters and stickers to our independent paint dealers, so they would label our existing product in their stores. As with many of the regulations, we exceeded what was required for us, and ahead of scheduled time requirements.

The wording for Prop 65 was fuzzy at best. The California Attorney General's office suggested a "safe harbor" warning language:

> *This product contains chemicals known to the State of California to cause cancer.*
>
> *This product contains chemicals known to the State of California to cause birth defects and other reproductive harm.*

Many of our products contained chemicals which would require both cancer and the birth defect warnings. To complicate matters, paint labels are so crowded with a multitude of information - from product use, product application, health and safety issues - all competing for a limited amount of label space. In order to accommodate all the regulatory and product labeling requirements, we made a decision to use the safe harbor warning with a single risk of either cancer or birth defects, and combined the two

warnings in the cases where a product represented both a cancer *and* birth defect risk. For those products which represented both risks, our warnings stated:

> *This product contains chemicals known to the State of California to cause cancer, birth defects and other reproductive harm.*

Ellis Paint Company was satisfied we had met all requirements of labeling for Proposition 65 in both the spirit and the letter of the law.

Unfortunately the environmental group of As You Sow did not think so. On January 9, 1995 they filed a "60 Day Notice" stating our warning was not clear and reasonable. Specifically the comma in our warning between cancer and birth defects made our warning unclear.

I had been aware of As You Sow and their attorney Cliff Chanler. This environmental group began as a Proposition 65 "start up". It had no existence prior to Proposition 65 and its entire reason for existence was to collect money from industry under threat of lawsuit. But I felt comfortable they had met their match, because I was not only in compliance, but proactive. What I failed to realize is the bounty hunter provision is not about protecting the consumer or the environment--it is about lawyers making money.

After As You Sow's initial investigation, they offered to settle the case for $5,000.00. Stubbornly I refused, deciding to stand on my company's principles, and knowing As You Sow would come to realize the bounty hunter provision was included as a mechanism for negligent companies, not companies who had worked hard to be in compliance. We offered to change our warning to suit their interpretation of clarity by dropping the comma and adding the word "and" - but I would not pay them a fine which was not warranted.

Against my attorney's advice, I stood firm. However, after many months of discovery , hundreds of employee hours and no end in sight, my attorney convinced me to settle with As You Sow. The settlement included a donation of $17,000 to As You Sow for the Sierra Club Legal Defense Fund; plus attorney fees of $14,500 to Cliff Chanler of Chanler and Associates. The total cash cost to my company was $54,000-- which included my attorney fees--plus the hundreds of employee hours. To put the dollars spent in perspective, Ellis Paint's net income before taxes in 1995 was a loss of $178,448 on sales of $13,351,000.

I am a California voter, as well as a business executive. I can assure this committee that as a voter, it was not my intention to pass into law an avenue for a few to extort hard earned income from businesses of any size. This practice robs resources from businesses, the communities in which we work, and the State, of vital revenues. I believe Henry Ford II when he said, "What's right about America is that although we have a mess of problems, we have a great capacity--intellect and resources--to do something about them." Please, we must remedy this blatant misuse of the bounty hunter provision of Prop 65.

TESTIMONY OF U.S. CONSUMER PRODUCT SAFETY COMMISSION

OCTOBER 28, 1999

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON SMALL BUSINESS

Mr. Chairman, and members of the Committee, I am Ann Brown, Chairman of the U.S. Consumer Product Safety Commission ("CPSC"). With me today is Jeff Bromme, the Commission's General Counsel. I am pleased to have the opportunity to present the Commission's testimony.

Congress enacted the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261 et seq., in 1960 and transferred responsibility for enforcing that act to the Commission in 1972, when the Commission was created. Section 18 of the FHSA describes when a federal labeling rule would preempt a state labeling rule. 15 U.S.C. § 1261 note. In pertinent part, that section provides:

> [I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and

> designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).

15 U.S.C. § 1261 note (b)(1)(A).

Subject to certain exceptions, this means that if a label is required under the FHSA, neither California nor any other state could require a label directed to the same risk of injury or illness unless that label were identical to the FHSA label.

In 1986, California voters approved Proposition 65. It imposes the following warning requirement: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . . ." Ca. Health & Safety Code § 25249.6. One may comply with Proposition 65 by providing the required warning on a label, a sign or in other ways. Id. § 25249.11(f). Proposition 65 warnings that are not identical to FHSA warnings arguably would be preempted if the Proposition 65 warnings are "cautionary labeling

requirements" under the FHSA, and if the FHSA requires labeling for the same risks.

In 1991, the Chemical Specialties Manufacturers Association sought an advisory opinion from the Commission regarding whether Proposition 65 signs are labels within the meaning of the FHSA. Letter from Stephen S. Kellner to Clement D. Erhardt, III (Sept. 14, 1990). The State of California had corresponded with the Commission's Office of General Counsel on the same issue. See, e.g., Letter from Clifford Rechtschaffen to Clement Earhardt (sic) (Oct. 18, 1990). On March 6, 1991, the Office of General Counsel ("OGC") responded.

OGC examined the FHSA's definition of "label," which is set forth at Section 2(n) of the statute, 15 U.S.C. § 1261(n). That section provides a two-part definition. First, a label is a "display of written, printed or graphic matter upon the immediate container of any substance" (or on the article itself or on something affixed to the article). Second, an FHSA "label" includes "accompanying literature where there are directions for use, written or otherwise." Referring to the Proposition 65 signs, the OGC Advisory Opinion concluded,

> A warning that a product can cause cancer or birth defects is not an express direction for use. Nevertheless, it conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure. Stated another way, the warning itself can also serve as a direction for use. . . .
>
> . . . .
>
> Therefore, . . . [the Proposition 65 warning] does convey information about how the product should be used (steps should be taken to reduce exposure). Accordingly, this office views the statement as a direction for use.

Letter from Clement D. Erhardt, III, to Stephen S. Kellner and Clifford Rechtschaffen (March 6, 1991).

Before its release, the Office of General Counsel shared this Advisory Opinion with the Commission on a "no objection" basis, and there was no Commission objection. Thus, the Advisory Opinion reflected the position of the Commission at that time. However, both federal and California courts have explicitly rejected the reasoning in this Advisory Opinion. In Chemical Specialties

Manufacturers Ass'n, Inc. v. Allenby, 958 F.2d 941 (9th Cir.), cert. denied, 113 S. Ct. 80 (1992), the Ninth Circuit held that FHSA does not preempt Proposition 65. The Ninth Circuit disagreed that Proposition 65 signs were "directions for use" and thus FHSA "labels." The court asserted that the argument was founded "upon the misconception that since this warning impliedly directs the consumer to handle the product so as to avoid or minimize direct exposure, the warning is a direction for use." 958 F.2d at 949. The court said, "We do not believe Congress intended such a broad reading of that term." Id. The court also described this argument as a "nonsensical reading" and added that the argument "simply does not comport with common sense." Id.

The court concluded with some observations on the policies underlying FHSA's preemption clause:

> Finally, we see no congressional purpose frustrated by Proposition 65. Congress apparently sought to balance its concern for a national safety standard with its desire for the states to promulgate their own sales and warning requirements. . . . On the one hand, a national safety standard would ease the burden of

> compliance for chemical product manufacturers by relieving them from the burden of complying with fifty-one separate regulatory schemes promulgated by each state and the federal government. On the other hand, such a standard would take police powers away from the states who best know how to serve the interests of their citizenry. The preemption clause in FHSA balances these competing concerns by leaving cautionary labeling requirements to the federal government while allowing states to regulate the sale and use of hazardous chemicals. Proposition 65 warnings do not constitute cautionary labeling preempted by FHSA.

Id. at 950.

Thereafter, the State of California brought an action in state court against a chain of hardware stores for failing to post Proposition 65 warnings with respect to paint, a product within the Commission's jurisdiction. Defendants' counsel wrote the Commission's General Counsel asking whether the 1991 Advisory Opinion remained the Commission's position. Letter from Jeffrey B. Margulies to

Eric A. Rubel (Sept. 26, 1995). On October 17, 1995, OGC replied that, notwithstanding Allenby, the Commission had not altered its position. Letter from Eric A. Rubel to Jeffrey B. Margulies (Oct. 17, 1995). Nevertheless, like their federal counterparts, the California state courts rejected the Advisory Opinion. People v. Cotter & Co., 53 Cal. App.4th 1373 (Cal. App.), rev. denied, (Cal. July 9, 1997), cert. denied, 118 S. Ct. 601 (1997). The Court of Appeals held that the opinion was "plainly erroneous" and "entitled to no deference." Id. at 1393. It concluded that "point of sale signs pursuant to Proposition 65 do not constitute 'directions for use' and are not preempted by the FHSA." Id. The California Supreme Court let this ruling stand, as did the U.S. Supreme Court.

In conclusion, the Commission's Office of General Counsel, without objection from the Commission, took what it considered to be a reasonable interpretation of the FHSA in 1991. However, the courts have decisively rejected that interpretation. Moreover, it has not been demonstrated to the Commission that Proposition 65 is undermining any FHSA cautionary label. Absent such demonstration, and in view of federalism concerns, which recognize the legitimate role that states play in ensuring the health and safety of their citizens, it would not be appropriate for the Commission to

support any effort to preempt or otherwise scale back a state health and safety statute.[1]

[1] During 1999, Chairman Brown and Commission staff have had extensive correspondence with Chairman Talent and committee staff on these issues. Letter from Hon. James M. Talent to Hon. Ann Brown (February 4, 1999); Letter from Jeffrey S. Bromme to Hon. James M. Talent (February 19, 1999); Letter from Hon. James M. Talent to Jeffrey S. Bromme (March 12, 1999); Letter from Jeffrey S. Bromme to Hon. James M. Talent (March 29, 1999); Letter from Hon. James M. Talent to Jeffrey S. Bromme (April 8, 1999); Letter from Jeffrey S. Bromme to Hon. James M. Talent (April 20, 1999); Letter from Hon. James M. Talent to Jeffrey S. Bromme (April 30, 1997); Letter from Jeffrey S. Bromme to Hon. James M. Talent (May 6, 1999); Letter from Hon. James M. Talent to Hon. Ann Brown (May 26, 1999); Letter from Hon. Ann Brown to Hon. James M. Talent (June 2, 1999). In addition, Commission staff met with Committee staff member Roger Keller on April 20, 1999 and have had various telephone conversations with Mr. Keller regarding these issues.

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 CLAY STREET, 20TH FLOOR
OAKLAND, CA 94612-1413

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(510) 622-2149

Congress of the United States

House of Representatives

Committee on Small Business

The Honorable James M. Talent, Chairman

Testimony on behalf of California Department of Justice
Bill Lockyer, Attorney General

Presented by Edward G. Weil, Deputy Attorney General

October 28, 1999

Mr. Chairman and Honorable Members of the Committee:

My name is Edward Weil, and I am a Deputy Attorney General for the State of California, and have both enforced and defended it since it took effect in 1988, under three Attorneys General. On behalf of California's Chief Law Officer, I appreciate the opportunity to testify before the committee on this important state law and its effect on small businesses. I respectfully present this testimony on behalf of the California Department of Justice.

For consumer products, the use of warnings–rather than government-set content standards–has created a market incentive to reformulate products in order to reduce the use of toxic chemicals, without driving needed products out of the market, and without awaiting years long product-by-product standard setting. In industrial facility air emissions, the requirement to warn neighbors of exposure has created an incentive for businesses to reduce use of toxic chemicals, or to install better technological control equipment.

In many instances, we have found that Proposition 65 has filled gaps in regulatory networks. It also has prodded federal government into action on many occasions. Whether the issue is lead in plumbing products, trichloroethylene in typewriter correction fluids, or lead in ceramic dishes, Proposition 65 has enabled California to act on levels of toxic chemicals in consumer products that could not be defended as acceptable, safe products, but merely had fallen through gaps in the federal regulatory system. Moreover, this has been accomplished without establishing a large bureaucracy, or voluminous technical regulations. It not only is the right of states to enact such laws to protect the health and safety of their citizens, but any federal action to prevent states from doing so ultimately would reduce the level of protection provided to the consuming public.

Unfortunately, a few unscrupulous private attorneys have made this law unduly burdensome for small business because of the manner in which they have sought to enforce it. We have made substantial efforts to address this problem, and, in particular, we think that recent amendments to Proposition 65, which

require full public disclosure of the litigation activities of private plaintiffs, will help to assure that any abuse is limited.

In order to best assist the committee, my testimony will first address the actual substantive requirements of Proposition 65, the history of its many successes in protecting the public from exposure to toxic chemicals, why any further federal preemption of Proposition 65 would be contrary to principles of federalism and lessen government's ability to protect public health and safety, and our efforts to curb abuses of some irresponsible plaintiffs' groups.

***Summary of Proposition 65*:**

California's Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known by its ballot designation "Proposition 65," is an initiative statute passed by a vote of the People of California in November, 1986, receiving 63% of the votes cast.

Proposition 65 creates a list of chemicals known to the state to cause cancer or reproductive toxicity. It does not include other forms of toxicity. Over six hundred chemicals are included on the list, the vast majority of which also have been identified as causing cancer or reproductive toxicity by other government agencies such as the U.S. Food and Drug Administration, the National Toxicology Program, the Environmental Protection Agency, or respected international groups such as the International Agency for Research on Cancer.

The "listed" chemicals are subject to two requirements:

- Warnings: Any business knowingly and intentionally exposing persons to the listed chemicals must first give "clear and reasonable warning."

- Discharge: Knowing discharges of listed chemicals into sources of drinking water are prohibited. "Sources of drinking water" includes everything from groundwater to the point of the tap.

Carcinogens are exempt where the exposure or discharge poses "no significant risk." This flexible term is defined by regulation as a 1 in 100,000 lifetime risk of cancer. This is *not* an especially strict standard. In fact, this standard is significantly less strict than standards applied by EPA and FDA for carcinogens in food additives and for pesticide residues.

Reproductive toxins are exempt where the exposure is less than one-thousandth of the No Observable Effect Level. This statutory standard is controversial, because while virtually all regulatory agencies apply an "uncertainty" or "safety" factor necessary to protect the public, many agencies vary the size of the factor to account for the degree of scientific uncertainty concerning particular chemicals.

The law is enforced by civil actions in superior court. They may be filed by the Attorney General, District Attorneys and some city attorneys. Private citizens may sue, if they give notice of the violation to the AG and DA's and none of the government enforcers sue within sixty days.

Lead Agency. A department within California's Environmental Protection Agency, the Office of Environmental Health Hazard Assessment, is designated by the Governor to implement the law. This Office has developed the list of chemicals subject to the law, in consultation with a distinguished panel of scientific experts, and has set "no significant risk" standards for over 200 chemicals on the Proposition 65 list, many of which are based on standards set by federal agencies.

***Critical features of the statute*:**

- **Once a chemical is listed, the law takes effect (after a grace period), regardless of whether the state set specific no significant risk levels.** This assures that health protection cannot be delayed by interminable regulatory processes, but also means that requirements take effect before specific guidance has been developed.

- **The standards are relatively general.** Even where "no significant risk levels" have been set by regulation, they are still not specific to particular products or emissions, which is typical in other health and environmental regulation. Thus, they do not provide the degree of specificity to which industry is accustomed.

- **Enforcement is not done administratively, but through litigation, the majority of which is brought by private parties.** Initially, sixty-day notices totaled a few dozen a year, but now over 1,000 per year are filed, and most enforcement litigation is filed by private parties. The Attorney General files major cases, but very few DA's bring them. Some private litigation is filed by "mainstream" environmental groups such as NRDC and EDF, but much of it is filed by small "on paper only" organizations through private law firms. The variety of firms and tactics has resulted in some cases that create substantial public benefit, and others that appear to be abusive.

Significant Areas of Enforcement:

- **Tableware:** The Attorney General–at the time, Dan Lungren, a former member of this House–and the Environmental Defense Fund sued makers of ceramic dishes because their products leached lead into food and drink. These products complied with outdated federal standards, but our action resulted in major reductions in lead exposure from these products. Indeed, this matter came to our attention largely because FDA had proposed substantially tightening its lead standards in 1989, after finding that under its then-existing standards, a child drinking orange juice that had been stored in a ceramic pitcher overnight that complied with all FDA standards nonetheless could be exposed to as much as 450 micrograms per day. This amount of exposure to lead is acutely hazardous, and cannot be justified by any contemporary analysis of lead toxicity. In the face of industry opposition–claiming that the proposed standards were technically infeasible--FDA completely dropped its proposal. After the state filed suit,

the industry members agreed to reduce lead in their products over a five year period and to provide clear warnings of lead content to consumers. Soon afterward, FDA adopted new informal lead guidelines at substantially lower levels. Due to this settlement, and the market incentives created by the provision of visible warnings in retail stores, all companies agreeing to the settlements in fact reduced lead in their product by more than required, and the public is exposed to significantly less lead from this source than in the past.

- **Drinking water faucets:** The Attorney General and the Natural Resources Defense Council brought actions against makers of drinking water faucets containing lead, permissible under existing exemptions from federal law. While Congress in the federal Safe Drinking Water Act grandly declared that all plumbing shall be "lead free," it then defined "lead free" to mean up to 8% lead, the maximum and commercial brass plumbing makers used in any event, and enough to create lead levels significantly above safe levels. The suits resulted in favorable court rulings and a major reduction of lead-leaching from faucets into drinking water.

- **Ambient air emissions:** Cases have been brought by public and private litigants against numerous industrial facilities for failing to warn surrounding communities of toxic air emissions. This has resulted in community warnings, and substantial pressure to reduce the emissions.

- **Calcium Supplements:** The Attorney General brought actions against companies that make calcium supplements that contain lead, resulting in reduction in lead levels in these products to levels that do not require a warning. This accomplished the important objective of lead reduction without alarming the public about calcium supplements generally, which continue to have important health benefits, particularly to women.

- **Typewriter correction fluids.** These products, such as Wite-Out and Liquid Paper, were found to result in exposures to average users of several

hundred times the no-significant risk limit of trichloroethylene, a carcinogen. After the State and the Environmental Defense Fund took action, the companies changed solvents to a less toxic material. At that point, they began advertising the product as "new and improved."

- **Mini-blinds**. In 1996, the Arizona and North Carolina Health Departments found that plastic mini-blinds, made with lead as an intended constituent, disintegrated over time, forming a "lead dust" on the surface of the blind, which could be spread throughout a household, and ingested be children. The health departments linked these blinds to numerous cases of acute lead poisoning in children. The U.S. Consumer Product Safety Commission negotiated a voluntary agreement with the industry, under which the blinds would be changed to eliminate added lead, but all old leaded blinds could continue to be sold, with no disclosure to consumers. In California, however, because of Proposition 65, an action was brought that resulted in retailers in California either immediately posting signs warning customers of the leaded blinds, or removing the blinds from the shelves. Ultimately, under the Attorney General's actions, the industry paid penalties, agreed to a lead reduction standard even stricter than the CPSC's, and adopted an extensive public education program concerning the old blinds, which included the opportunity for consumers to receive rebates on the purchase of new, unleaded blinds.

Proposition 65 and federal regulation

Proposition 65 has provided a useful supplement to federal regulation, by addressing issues that had not been addressed by federal agencies, where federal standards were outdated, or where federal action had been delayed. In the examples given above, federal agencies did not defend the existing product contents as being justified by an appropriate standard setting process, but simply had no existing standard, or had not revised existing standards in the light of currently available information.

The State has worked with federal agencies wherever possible in order to harmonize federal labeling requirements and Proposition 65. In one instance, the Consumer Product Safety Commission authorized the use of a warning for methylene chloride in paint strippers as in compliance with both the FHSA and Proposition 65. In another instance, U.S. EPA authorized the inclusion of a Proposition 65 warning on the label of a FIFRA-registered product, after California agreed to modifications in "safe harbor" Proposition 65 language in order to accommodate EPA's concerns.

Finally, as the courts have held uniformly, Proposition 65 allows warnings to be provided through point-of-sale signs, which may be provided in stores within California only, thereby allowing manufacturers to continue to market a product with a single nationwide label.

In the past, the California Attorney General, of either party, has opposed efforts to include language preempting Proposition 65 in the Food, Drug and Cosmetic Act, and we think the balance cast by Congress and the courts under the Federal Hazardous Substances Act as written is appropriate.

Small Business Concerns

Unfortunately, a few plaintiffs' law firms have used Proposition 65 to bring cases of questionable significance against small out-of-state businesses that may not have been aware of Proposition 65's requirements. Of course, the great benefits of Proposition 65 clearly outweigh these problems, but we nonetheless are addressing them in several ways.

First, in a number of cases, involving nail polish, lead wine bottle caps, and crystalline silica in building products, the Attorney General has effectively taken over particular matters to assure that they are handled appropriately. In these instances, the Attorney General's action has resulted in a fair, uniform resolution of the legal and public health issues.

Second, by filing *amicus curiae* briefs in certain cases, the Attorney General has helped assure that the courts reach a result on important issues that is consistent with the requirements of the law. For example, in recent litigation concerning the application of Proposition 65 to workplace chemicals, the Attorney General filed briefs explaining and following Federal OSHA's "approval conditions" placed on Proposition 65 in that context.

Finally, a recent statutory amendment to Proposition 65–the first substantive amendment to the statute since it was adopted–and one supported by Attorney General Bill Lockyer, will require private parties to report to the Attorney General on the events of their cases, as well as the terms of the settlements. In turn, the Attorney General will be required to make that information available to the public. We think this change in the law has great potential to further the purpose of the law by allowing responsible private enforcers to continue unimpeded, while providing information to the public and the Attorney General needed to detect any abusive practices.

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SUMMARY

I have a broad range of experience in issues involving environmental law, toxic torts, civil rights, consumer fraud, and municipal liability. I have handled a variety of environmental and discharge cases involving toxic chemicals such as di(2-ethylhexyl)phthalate, perchloroethylene, polychlorinated biphenyls, DDT, toluene, diesel, lindane, and mercury. I have litigated these cases in state and federal courts against chemical manufacturers, consumer item manufacturers and distributors, and mining and mineral-extraction interests. Notable successes of my law firm include the reformulation of various products, as well as an industry-wide change in the protocol and warning requirements of fluid administration; the first case to be brought addressing manufacturers' competitive injuries and unfair competition claims through environmental litigation; and the discontinuation of the sale of contaminated white croaker fish.

PROFESSIONAL EXPERIENCE

Attorney, **Law Offices of Shawn Khorrami**
1996 to Present

EDUCATION

Pepperdine School of Law
JD, *with honors*
1995

UCLA
BA, Mathematics, Economics
1991

PROFESSIONAL MEMBERSHIPS

- *Editorial Advisory Board Member*, ***Prop 65 News***
- *Executive Committee Member*, Litigation and Environmental Law Sections, **Beverly Hills Bar Association**
- *Executive Committee Member*, Litigation and Health Care Sections, **The State Bar of California**
- **American Bar Association**
- **Los Angeles County Bar Association**
- **Consumer Attorneys of Los Angeles**

PRESENTATIONS AND LECTURES

- February 20, 1998, Panel Member
  "Prop. 65's Focus on Consumer Products"
  Proposition 65's 12th Year Conference & Seminars, *Prop 65 News*
- March 4, 1998, Panel Member
  "Litigation Techniques: Attacking Pleadings"
  Anatomy of a Lawsuit, *Beverly Hills Bar Association*
- January 14, 1999, Lecture Series
  "Proposition 65: What's New?"
  Litigation Section and Environmental Law Section, Beverly Hills Bar Association
- March 17, 1999, Panel Member
  "Prop 65's Impact on Out-of-State Manufacturers"
  The 1999 Annual *Prop 65 News* Conference & Seminars
- September 27, 1999, Lecture Series
  "Prop 65 Defense: A Plaintiff's Perspective"
  A Day of Prop. 65, *McKenna & Cuneo, LLP*

BEFORE THE SMALL BUSINESS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

Testimony of Shawn Khorrami, Law Offices of Shawn Khorrami

RE: California's Proposition 65

October 28, 1999

Mr. Chairman and Members of the Committee:

I am pleased to appear before you to testify regarding Proposition 65 and its impact on small businesses. My name is Shawn Khorrami. I am an attorney in California. My practice covers a broad range of issues, including environmental law and toxic torts, civil rights, consumer fraud, and municipal liability. My firm employs five attorneys and seven full time support staff. I am active in Proposition 65, and have handled a variety of environmental and discharge cases involving toxic chemicals such as di(2-ethylhexyl)phthalate (DEHP), perchloroethylene, polychlorinated biphenyls (PCB's), DDT, toluene, diesel, lindane, lead and mercury.

Currently, we have a diverse clientele in environmental cases, ranging from non-profit environmental organizations to worker and citizen groups, to members of industry. Our environmental practice includes claims under Proposition 65, The Clean Water Act, The California Environmental Quality Act, The Endangered Species Act, and unfair competition claims predicated on various environmental statutes and regulations. I, personally, concentrate on cases involving toxic chemicals primarily brought under Proposition 65. I am also actively involved in employment law, and unfair competition claims.

I am on the Executive Committee of the Litigation of the Beverly Hills Bar Association, and also chair the Environmental Law section. I also serve on the Editorial Advisory Board of *Prop 65 News*, a biweekly publication which tracks events surrounding Proposition 65.

I graduated with honors from Pepperdine University School of Law in 1995, after earning my undergraduate degrees in mathematics, economics and computer programming at UCLA.

The purpose of my testimony today is to provide some insight for this Committee on Proposition 65. In so doing I will address Proposition 65's impact on small businesses. I will also provide a brief overview of the effects of citizen enforcement, the California Attorney General's involvement, along with possible preemption which has been visited by the Executive, Legislative, and Judicial branches of the Federal government at the request of one or more industry groups.

I. IMPACT OF PROPOSITION 65

A. Proposition 65 Enforcement Has Resulted in Substantial Benefits to Consumers Both inside and outside of California

As you may know, the California Attorney General has the primary enforcement authority under Proposition 65. Other public prosecutors, such as district attorneys, may also bring suit under the statute. In court, the Attorney General has stated that "Proposition 65 enforcement has culminat[ed] in the provision of appropriate warnings [and] the reformulation of products used by millions of Californians to replace toxic ingredients with safe alternatives . . ."[1]

As an example, Lead exposure has been eliminated or greatly reduced from products ranging from dishware, to brass plumbing fixtures, to dietary calcium supplements and antacids. A recent study concluded that "Proposition 65 has been able to quickly and efficiently fill in important gaps in the regulation of lead exposures left by federal law . . . These and other experiences over the past decade illustrate that a simple, multi-media, self-executing statute like Proposition 65 can be more powerful than a host of complex regulatory programs in achieving actual reductions of pollutants in our environment."[2]

The positive impacts of Proposition 65 has even been acknowledged by industry. For example, Gillette, which reformulated its Liquid Paper products in response to an enforcement action, declared that Proposition 65 "provided an opportunity to improve product performance."[3] In fact, in every case that I have studied or been involved in, companies that reformulate the subject products have been able to use the reformulation as a marketing tool to boost sales.

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[1]Declaration of Deputy Attorney General Susan S. Fiering in Support of Motion for Entry of Permanent Injunctions and Consent Judgment, dated April 8, 1997, in People v. Warner-Lambert, et al. (No. 984503, San Francisco Superior Court).

[2]Rechtschaffen, "How to Reduce Lead Exposures with One Simple Statute: The Experience of Proposition 65," 29 *Environmental Law Reporter* 10581 (October 1999).

[3]See *Wall Street Journal*, California Spurs Reformulated Products (Nov. 1, 1990).

California's Office of Environmental Health Hazard Assessment (OEHHA), which is the lead agency in charge of Proposition 65 implementation, in its pamphlet on the law, notes that "Proposition 65 . . . provides a market-based incentive for manufacturers to remove listed [toxic] chemicals from their products," and summarizes the law's accomplishments as follows:

> Proposition 65 has provided an effective mechanism for reducing certain exposures that may not have been adequately controlled under existing federal or State laws. For example, a Proposition 65 enforcement action has resulted in the reduction of the amount of lead in ceramic tableware. Air emissions of certain chemicals – including ethylene oxide, hexavalent chromium, and chloroform – from facilities in California have been significantly reduced as a result of Proposition 65.
>
> Certain chemicals on the list are no longer used as constituents of some commonly used products – for example, trichloroethylene is no longer used in most correction fluids, toluene has been removed from many nail care products, and foil caps on wine bottles no longer contain lead.
>
> Proposition 65 has resulted in the extensive dissemination of important information regarding the dangers to the unborn child of drinking alcoholic beverages during pregnancy. The warnings about alcoholic beverage consumption during pregnancy are perhaps the most widespread and visible type of warning issued as a result of Proposition 65.[4]

According to a five-year review of Proposition 65 performance conducted by the California Environmental Protection Agency during the Pete Wilson Administration, Proposition 65 as of 1992 had produced the following achievements:

1. By federal standards, Proposition 65 has resulted in 100 years of progress in the areas of hazard identification, risk assessment, and exposure assessment.

2. There have been no legal challenges to any of the standards adopted under Proposition 65.

3. Proposition 65 has resulted in the application of internally consistent scientific criteria, reductions in actual exposures, and the acceptance by industry of primary responsibility for chemical exposures and discharges.

4. Proposition 65 has compelled businesses to know more about their products and has generally resulted in an increase in industry's preventive behavior.

5. Proposition 65's principal success has been in the altering of behavior by industry

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[4]OEHHA, "Proposition 65 in Plain Language!"

in the area of source reduction.

6. Proposition 65 has allowed the Attorney General to address risks which, although relatively easy to mitigate, are not on a scale to have been prioritized by other regulatory agencies.[5]

The U.S. EPA Administrator in the Bush Administration, describing Proposition 65, noted:

> The California warning law is effectively self-policing. [T]he Deukmejian Administration's . . . officials charged with implementing Proposition 65 recently observed 'the dire consequences of this law that were predicted by industry advocates have not occurred . . . and [it] . . . has proved instead to be a study of quiet compliance and responsible enforcement.

Outside of Gillete's Liquid Paper, there are numerous examples of Proposition 65's role in the quick and efficient reduction of the toxicity of consumer products:

- A mercury compound known to be a reproductive toxin was removed from Preparation H and other hemorrhoid suppository medications. According to the manufacturer's press release, the reformulated product is as effective as the version containing mercury.
- Manufacturers of faucet fixtures have agreed to phase out lead-containing brass from the products, and to provide warnings to consumers.
- Manufacturers of water meters whose water meters leach lead into sources of drinking water, have agreed to supply only lead-free water meters to California Water Districts.
- Manufacturers of nail care products have agreed to remove toluene and formaldehyde from their products.
- Recently, some major chains of dry cleaning stores agreed to phase out the use of dry cleaning machines that use Perchloroethylene, a known carcinogen.
- Several medical device manufacturers have agreed to phase out the use of Di(2-ethylhexyl)phthalate, a carcinogen. The chemical is used as a plasticizer in PVC products. It leaches out of medical devices causing patients to be exposed.

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[5]California Environmental Protection Agency, Summary Report on Panel Meetings, "Summary of issues: ACHIEVEMENTS," [first unnumbered page].

- Diesel fleet operators have agreed to implementation of a conversion program to phase out diesel engine vehicles in favor of vehicles that use alternative, non-polluting fuels such as propane.

- Sale of White Croaker fish contaminated with Dichlorodiphenyltrichloroethane (DDT) and Polychlorinated Biphenyls (PCBs) to Southern California consumers has been discontinued.

All of the above are subject to the jurisdiction of various federal agencies, including the U.S. Environmental Protection Agency, the U.S. F.D.A., and the U.S. Consumer Product Safety Commission. Yet, these benefits were only realized after initiation of Proposition 65 enforcement actions.

Proposition 65 does not present any federal constitutional issues under the Interstate Commerce Clause of the U.S. Constitution, as among other things, it does not differentiate between in-state and out-of-state manufacturers of consumer products. The statute time and again has withstood attacks based on its constitutionality and based on preemption. It is not preempted by the Federal Hazardous Substances Act,[6] the Federal Food, Drug and Cosmetics Act,[7] or the Federal Insecticide, Fungicide, and Rodenticide Act.[8] Nor does it violate constitutional separation of powers.[9]

B. Citizen Suit Enforcement Has Increased Proposition 65's Effectiveness.

As California Attorney General Lungren and other California officials have pointed out, Congress itself has included citizen suit provisions in several environmental laws in order, in Congress's words, to "complement" federal agency "efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources.[10] The same point was made by a federal appellate court:

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[6]See People v. Cotter & Company, 53 Cal. App. 4th 1373 (1997). Significantly, the Court here also found that Proposition 65 was *not* a labeling statute.

[7]See Committee of Dental Amalgam Manufacturers and Distributors v. Stratton, 92 F.3d 807 (9th Cir. 1996).

[8]See Chemical Specialties Manufacturers Association v. Allenby, 958 F.2nd 941 (9th Cir. 1992)

[9]See People v. Cotter & Company, *supra*.

[10]Senate Report No. 98-351, at 54, accompanying Hazardous and Solid Waste Amendments, Pub. L. No. 98-616, 1984 U.S. Cong. & Admin. News 5563, 5612.

> Citizen suits to enforce water quality standards effectuate complementary provisions of the [Clean Water Act] and the underlying purpose of the statute as a whole. Citizen suit enforcement of water quality standards is necessary to the effective enforcement of effluent limitations.[11]

As another federal appellate court has noted, in the context of the Clean Air Act, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."[12]

C. The Costs Associated with Proposition 65 Compliance, Particularly as to Consumer Product Manufacturers, Are Chronically Overstated.

During the past few years, my clients have brought citizen enforcement actions involving several hundred large and small businesses, individually and in groups or coalitions. For the most part, these actions have involved consumer products.

In my experience, manufacturers of consumer products that are asked to comply with Proposition 65 invariably claim that reformulation of their product(s) as a manner of coming into compliance is technically infeasible, or cost prohibitive, or otherwise unduly burdensome. However, equally, either some or all of the companies reach settlement agreeing to reformulate the products in question within a reasonable time period. Another common occurrence is that once some of the companies agree to reformulate, others will typically follow. This appears to be at least partly due to the fact that the reformulated products present a competitive advantage over the old products because they are exempt from any warning requirement, and at the same time are a good marketing point. Aside from the direct benefits, reformulation also helps build a positive, responsible image for the company. Obviously, these competitive advantages are an incentive for self improvement. Throughout my experience in this field, I have yet to find any company that has been disadvantaged in the market because of reformulation.

These observations hold true for small businesses as well as large. However, in my experience, small-business product manufacturers are rarely, if ever, isolated from large-business manufacturers of the same products in the context of Proposition 65 compliance. Both in defending enforcement actions and in compliance strategy, larger manufacturers of a particular product tend to take the lead role. In the case of Gillet's Liquid Paper product, for example, Gillette evaluated the feasibility of reformulating and made the decision to reformulate its product as the result of receiving a 60-day notice of a Proposition 65 enforcement action, and subsequent brief negotiation with the citizen enforcer and the Attorney General's office. Once that decision was announced, smaller competitors then followed suit with their competing

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[11] Northwest Environmental Advocates v. City of Portland 56 F.3d 979, 989 (9th Cir. 1995)

[12] Friends of the Earth v. Carey, 535 F. 2nd 165, 172 (2d Cir. 1996).

products, with virtually no additional enforcement activity under Proposition 65.

The one cost item that can rise to high levels is that of extended litigation in circumstances where low-cost alternatives were available to the company. In these situations, the cost is typically one that the company imposes upon itself. Frequently, from very early in the case, my clients are ready and willing to come to a reasonable settlement. And for the most part, companies are cooperative. However, there are situations where companies choose to litigate the case, at times filing counter suits and additional lawsuits in multiple courts throughout the State. This has occurred even in situations where the entity had little or no objection to the warning proposed or was otherwise

D. Small Businesses Throughout the Country Have Been On Notice of Proposition 65 for Several Years.

Any business, including small a one, that chooses to sell its product in a given state must regularly inform itself about and comply with the laws of that state. Therefore, complying with Proposition 65 is no different than any other state law that a business must observe.

Also, in cases that I have handled, it has not been unusual to come across documentation or correspondence from suppliers and/or customers regarding California's Proposition 65 requirements. For example, as early as 1988, retailers began providing effective notice of Proposition 65's requirements for consumer products to all manufacturers of consumer products selling through major California retail outlets. Basically, major retailers sent notices to each of their suppliers, whether in-state and out-of-state, informing them of the statute's requirements, and contractually placing the burden of providing warnings on the suppliers.

Additionally, immediately upon Proposition 65 taking effect in 1988, many suppliers of raw materials formed handbooks, informational pamphlets, and the such, for their customers informing them of potential Proposition 65 obligations. Also, various trade publications and associations that regularly update their members on Proposition 65.

There is no reasonable basis for any business selling consumer products on any regular basis in California to be unaware of Proposition 65's requirements or what compliance with those requirements entails.

E. Proposition 65 Makes a Policy Choice that Businesses Who Are Knowingly and Intentionally Exposing Individuals to Certain Toxic Chemicals Are Also Responsible for Knowing the Extent of those Exposures, and Whether They Exceed Health-Based Exemption Levels.

Proposition 65's warning requirement applies only to businesses that *know* they are exposing people, and *intend* to expose people, to chemicals that are *known* carcinogens or reproductive toxins. Unintentional, accidental, or inadvertent exposures are not covered by the

law. Neither are chemicals whose cancer-causing or birth-defect-causing effects are in debate. In other words, the only consumer product manufacturers that face potential Proposition 65 liability are those who know that their products, when handled, consumed or used as intended, will expose consumers or others to chemicals with clearly established toxic properties. There are no surprises to the manufacturer about the link between the product and the exposure to a known (and listed) toxic chemical.

In my experience, the primary source of concern about Proposition 65 in the consumer product area comes from the manufacturers' lack of knowledge, and therefore uncertainty, about *how much* exposure their products are responsible for, and/or about *how serious* that exposure is, in terms of cancer risk or risk of reproductive harm. When it comes to knowing and intentional exposures to specified known toxic chemicals, Proposition 65 represents a policy choice that the businesses which know they are responsible for those exposures should also know whether those exposures are serious enough to require a warning, or low-risk enough to qualify for exemption.

In practice, this seems to be a policy choice that manufacturers are reluctant to accept. Even for the known carcinogens and known reproductive toxins that Proposition 65 covers, product manufacturers in my experience do not seem to have this information in hand, or are unwilling to disclose it. If this knowledge, in reliable form, were in manufacturers' hands, nearly all controversy about Proposition 65's warning requirement would immediately disappear. And, assuming that manufacturers acted appropriately on that knowledge, so would Proposition 65 enforcement activity in this context. In my opinion, lack of this knowledge, and defensiveness about the lack of this knowledge, is at the root of opposition to Proposition 65 on the part of companies subject to the law.

In the United States House of Representatives
Committee on Small Business

Proposition 65's Effect on Small Businesses

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October 28, 1999

1. Introduction.

Proposition 65 was passed by voter initiative in California in November 1986. Its title, "The Safe Drinking Water and Toxic Enforcement Act of 1986," as well as the campaign launched by its supporters, primarily focused on cancer "clusters" that were appearing throughout California. It was premised on the claim that existing laws were insufficient to protect the drinking water supply and that citizens had a "right to know" about exposures to these chemicals. Quite often lost in the debate was the refrain sounded by some opponents that Prop 65 would ultimately result in a proliferation of warnings that would not provide any real information to consumers.

Few can argue with the concept that consumers should be warned about exposures to toxic chemicals; indeed the consumer's right to know about such exposures, and how to reduce their risk from such exposures, is at the heart of the Federal Hazardous Substances Act (FHSA), as well as a number of other federal and state laws.

Prop 65's proponents envisioned a simplified system of compliance and enforcement. Rather than requiring an agency to (1) identify which chemicals would be regulated; (2) set appropriate exposure levels and then require compliance; and (3) enforce violations through the administrative process, Prop 65 would turn the system around. The Governor is required to list *all* chemicals which were "known to the state" to cause cancer or reproductive toxicity, even where an "unsafe" level had not been determined. Any business which "knowingly and intentionally" exposed individuals to these chemicals is required to provide a "clear and reasonable" warning, unless the *business* could demonstrate that the exposure was either not "significant," for carcinogens, or 1/1000 of the "no observable effect level," for reproductive toxins. Enforcement was to be undertaken by public prosecutors or "private attorneys general," through lawsuits filed in California superior courts.

The California Health & Welfare Agency adopted regulations to implement certain aspects of Prop 65, which provided some guidance on how "clear and reasonable" warnings should be given, and what should be included in them.[1] While the agency refused to require any particular warning language, it concluded that the following warnings would be "deemed" to comply with Prop 65. For consumer products containing carcinogens, the language is "WARNING: This product contains a chemical known to the state of California to cause cancer." For reproductive toxins in such products, the language is "WARNING: This product contains a chemical known to the state of California to cause birth defects or

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[1] The responsibility for implementation of Prop 65 now lies with the California Environmental Protection Agency Office of Environmental Health Hazard Assessment (OEHHA).

other reproductive harm." There is no approved warning for products which contain both carcinogens and reproductive toxins.

The agency rejected a request that the warning identify listed chemicals included in products, realizing that most consumers would not gain any additional information. It also said that including any other information along with the "safe harbor" language would render the adequacy of a warning a "question of fact" in any enforcement action. For example, a product which contains a known human carcinogen (such as benzene) in a high concentration would carry the same safe harbor warning as a product which contained a chemical listed as a carcinogen based solely on laboratory animal studies (such as saccharin), in trace amounts. Even though the scientific basis for determining the likelihood of contracting cancer from high exposures to benzene is much more firm than from low doses of saccharin, companies electing to use the safe harbor (to attempt to prevent enforcement actions) would end up with the same warning for both products: "This product contains a chemical known to the state of California to cause cancer."

2. Conflict with other warning requirements.

A number of enforcement actions in the 1990s have illustrated the conflict between Prop 65 and warning schemes such as the FHSA. A well-known example is the series of enforcement actions brought by a private enforcer in 1991-93 against companies which manufactured paint strippers containing methylene chloride. After significant analysis of methylene chloride's carcinogenicity, and the commencement of a rulemaking process, the Consumer Product Safety Commission (CPSC) promulgated in 1987 an enforcement policy accepting a voluntary warning offered by industry. The warning stated that methylene chloride had been "shown to cause cancer in laboratory animals. Risk to your health depends upon level and duration of exposure." The enforcement policy also required that the front panel display contain the Warning: "Vapor Harmful," and that the label direct the consumer to use the product with adequate ventilation.[2] Companies utilizing this warning were nevertheless sued for violating Prop 65.

In one case, the defendant moved for summary judgment, claiming that the CPSC-approved labeling was "clear and reasonable" under Prop 65, because it accurately portrayed the state of scientific evidence regarding methylene chloride's carcinogenicity. Not only did the court deny that motion, it held *as a matter of law* that the CPSC-approved labeling was *not* "clear and reasonable" under Prop 65.

In another case, one of only two Prop 65 trials ever held, the jury concluded that the CPSC labeling was not clear and reasonable. It fined the defendant $2500 per can of

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[2] CPSC asserted several principles which were required for potential cancer hazards. First, it must indicate the potential cancer hazard. Second, it should explain factors that control the degree of risk. Third, it must indicate precautions to be taken by the user. 52 FED. REG. 34698 (September 14, 1987).

product that had no methylene chloride warning, and $2 per can of product that had the federal warning.

The most recent FHSA decision in California held that it did not preempt Prop 65 with respect to toluene exposures, even though a CPSC regulation mandated specific language for products containing >10% toluene. (*People v. Cotter & Company*, following *CSMA v. Allenby*).

Prop 65 has been held not to preempt warnings required by the FDA for medical devices (*Committee of Dental Amalgam Manufacturers v. Stratton*), or pesticides (*CSMA v. Allenby*). Following the OSHA rulemaking in 1997, it has been held that the federal OSH Act preempts the application of Prop 65 to out-of-state manufacturers (*ITA v. Henry*). A trial court recently held that, under Prop 65's regulations, FDA-approved labeling for prescription drugs complied with the state Act.

3. Implications for manufacturers.

Companies which sell products throughout the United States have potential issues with Prop 65 compliance. The following is a summary of some of the obstacles these companies have identified over the last 10 years.

1. Labeling vs. other warning schemes.

As its proponents point out, Prop 65 does not "require" labeling, and warnings can be given by other methods, such as point-of-sale signs. Manufacturers usually cannot rely upon non-label warnings, simply because they do not control how and where such warnings are posted at the retail outlet (if they are posted at all). Moreover, many large retailers will simply refuse to post point-of-sale signs for products in California, fearing that they will be assuming liability for Prop 65 penalties if the signs are not posted correctly.

A particularly telling example occurred with Cotter & Company, the member-owned manufacturing and distribution company for True Value Hardware Stores. Cotter had sent signs to its members informing them that Cotter's Tru-Test paints contained Prop 65 chemicals, and asked the members to post warning signs "close to" the products. Cotter was sued by the California Attorney General and a private enforcement group over alleged failure to warn for toluene exposures from spray paints. The Attorney General took the position that Cotter was obligated to do more than tell its members to post the signs— it was required to utilize its sales force to ensure proper placement, and to continually remind its members through direct mailings and its satellite television system, and essentially took the position that, even if members refused to post the signs (which some did), Cotter was responsible for that failure. Cotter asserted that this enforcement scheme was a "de facto" labeling requirement, but the Court of Appeal held that Cotter could not prevail on this argument unless it showed that compliance by point of sale signs was a "physical impossibility." Thus, the courts and enforcement community have refused to recognize the

practical realities of doing business in the modern environment and the burden forced on companies who choose not to label products.

For the overwhelming majority of manufacturers, product labeling is the only real compliance method available.

2. *California-only warnings.*

Some manufacturers, concerned over competitive pressures, have attempted to utilize separate inventory of product labeled just for California. Besides increasing the cost necessary to maintain separate inventory, they are not always successful in ensuring that only product carrying a Prop 65 warning will end up in California. This can happen for several reasons. First, a distributor or retailer may have a warehouse in a state other than California (perhaps in addition to one in California) which supplies California retail outlets; the manufacturer may have no knowledge of this. Second, because of fluctuations in inventory, some distributors may transship product in an East Coast or Midwest distribution center to one serving California. Under either of these scenarios, the manufacturer may have no actual knowledge, or reason to believe, that certain inventory is being shipped to California without a warning. Unfortunately, the construction of Prop 65 taken by the enforcement community and many courts is that manufacturers have an obligation to find out in advance whether product is being shipped to California from other sources, and are liable for violating Prop 65 if they fail to do so and unlabeled product ends up in retail stores in California.

3. *Competitive Issues.*

Prop 65 favors businesses which don't sell product in California. For example, two companies located in New Jersey may sell products that are essentially identical in composition, and both contain a Prop 65-listed chemical. If Company A sells in California, and takes the safe route by altering its product labeling to include the Prop 65 warning, consumers in other states may avoid the product, since it tells them that it contains a chemical known to the state of California to cause cancer. Therefore, even though Company B's product poses the same potential risk of harm, the fact that it does not sell in California gives it a competitive advantage over Company A throughout the areas in the rest of the country in which they compete.

4. *Uncertainty, Unpredictability, and Cost.*

Unlike traditional regulatory schemes, Prop 65 doesn't tell businesses "how much" of a listed chemical can be included in a product before a warning is required. As long as there is *any* exposure to a listed chemical, a warning must be provided, unless the company performs a risk assessment which demonstrates that no warning is necessary. There is, however, no way to be sure in advance that the risk assessment will be sufficient. The company bears the burden of proving, in an enforcement action, that no warning is necessary. If it approaches the agency for a "safe use determination," the agency's

conclusions are not binding upon public or private prosecutors, or on the courts (leading many to conclude "What's the use?"). Because risk assessments are filled with assumptions regarding product use, almost any risk assessment can be challenged by an enforcer, leaving the company to face significant and potentially crippling civil penalties if a court disagrees with its analysis.

Complicating the uncertainty of compliance is the uncertainty of enforcement. Because any private individual can sue a company 60 days after serving a notice on public prosecutors (and a prosecutor's lawsuit does not necessarily bar the private enforcer from "tagging along"), companies are unable to predict in advance what the enforcement posture will be. Private enforcers have ranged from the established environmental groups such as the EDF and Natural Resources Defense Council, to profiteer bounty hunters more interested in lining their pockets than in contributing to the public welfare. The enforcement agendas of each of these types of organizations can differ dramatically, and are often at odds with the positions taken by the California Attorney General, who is constitutionally charged with the uniform enforcement of the law.

The effect of private enforcement, and the shifting of the burden on businesses to prove that a warning is not necessary results in countless businesses simply agreeing to do what private enforcers demand, simply because of the cost and uncertainty of litigation and potential penalty assessments. Examples of this include the following:

- one small Los Angeles paint manufacturer used the following warning: "This product contains chemicals known to the state to cause cancer, birth defects, and other reproductive harm." It was sued by a private enforcer, who argued that the comma between "cancer" and "birth defects" was misleading, and should have been replaced with the word "and." The company spent over $60,000 in penalties, restitution, and attorney's fees (both its own and the private enforcer's) to settle, because of fear over the potential penalties.

- another small business from Pennsylvania received a 60-day notice from a Prop 65 private enforcer and changed its labels to read: "This product contains chemicals known to the state to cause cancer and reproductive toxicity." It was not sued on the first notice, but some time later received another notice from the same lawyer on behalf of a different plaintiff, contending that the term "reproductive toxicity" was misleading to consumers, and should have said "birth defects or other reproductive harm." The company was threatened with civil penalties and injunctive relief. It ultimately convinced the private enforcer to drop the case without monetary payments in exchange for rewording the labels, but not before expending a considerable sum on attorney's fees.

- several manufacturers of nail polish were sued under Prop 65 by a private enforcer over exposures to toluene. Although the manufacturers could have litigated the alleged violations, they chose to settle with the private enforcer, and

avoid significant potential penalties and injunctive relief. After a consent judgment was entered requiring warnings for occupational exposures only, some of these companies were sued by a different private enforcer for the same alleged violations. Again, these companies incurred significant legal fees in defending the second baseless action.

- one company settled a Prop 65 action pertaining to silica exposures from a household rust and stain remover labeled in accordance with FHSA, even though the company had a strong risk assessment defense. The company agreed to reformulate its product, and to pay $300,000 in liquidated damages (as a substitute for civil penalties) if it was unable to do so. Three years later, in 1999, OEHHA performed a risk assessment on other silica products which found a much higher "no significant risk" level than the level used by the company in litigation. The private enforcer now agrees that the original formulation does *not* require a Prop 65 warning under this no significant risk level. Even though the company's new formulation is not effective, and is twice as expensive, the private enforcer has taken the position that it will not voluntarily modify the consent judgment to allow sale of the original formula without a Prop 65 warning unless some portion of the "liquidated damages" is paid.

- The California Attorney General's office sued most of the calcium supplement and antacid industry, claiming that exposures to lead in calcium products— at levels below FDA standards— required a warning under Prop 65. Even though a regulation stated that no warning is required for "naturally-occurring" chemicals, and lead is present in calcium when it is mined, the Attorney General took the position that the manufacturers were required to seek out the source of the lowest level of "naturally-occurring" lead. Rather than defend the fact that the lead was naturally-occurring, and not introduced intentionally by the manufacturing process, the industry agreed to limits on the lead content of the calcium products and payment of substantial funds to settle the action.

4. Implications for consumers.

While the intent of Prop 65 was to "inform" consumers, the impact of warnings under the Act has been a proliferation of meaningless warnings. Virtually every business has some sort of Prop 65 warning sign posted, and innumerable products are labeled with the warning. From gas stations to hotels, from grocery stores to hardware stores, consumers are deluged with warnings that they are being exposed to unnamed carcinogens and reproductive toxins. They are not told either the degree of exposure or the likelihood that they may actually be impacted by it. Moreover, because the risks to business of not providing a warning, many provide a warning even though they don't actually know whether an exposure is occurring, or even if the exposure is trivial, further diluting the meaning of warnings to consumers.

Second, because manufacturers may differ in their approaches to Prop 65, products which contain similar ingredients may not be similarly labeled. Therefore, a consumer may see two nearly identical products, but only one contains the Prop 65 warning. Is the consumer really being "informed" about toxic exposures, or is Prop 65 encouraging manufacturers to warn just to "be safe."?

Third, it has been estimated that, from 1987 through the beginning of 1998, more than $25 million had been assessed in Prop 65 settlements, more than $50 million had been expended in attorney's fees by plaintiffs and defendants, and more than $250 million in product reformulations, process changes, and other business costs have been incurred to for Prop 65 compliance reasons.[3] Who is paying for all of this?

5. Suggestions for Addressing the Problem

FHSA and Prop 65 have the same underlying goal: assuring that consumers and users are informed about potential risks from exposures to hazardous substances. FHSA covers a broader spectrum of potential risks than does Prop 65, and also requires manufacturers to provide instructions for use that will minimize the potential for harm, as well as to provide first-aid measures.

So long as the California courts hold that FHSA-compliant warnings in themselves are not "clear and reasonable" under Prop 65, Congress's stated intent to provide for national uniformity in the communication of potential product hazards is thwarted. Manufacturers— especially small businesses— are subjected to unreasonable and unnecessary costs, and consumers are inundated with de-sensitizing warnings about remote and unlikely risks, and are forced to bear these costs.

FHSA and CPSC's implementing regulations address a state's desire to be exempted from the preemption provision of the federal act, which includes a showing that the proposed state regulation does not unduly burden interstate commerce. California has arrogated that decision to itself, and should be required to convince CPSC that its special regulation of products covered by FHSA is appropriate. A regulation which defines "cautionary labeling" to include point of sale signs, or other mechanisms, is within FHSA's scope and would fulfill the intent of Congress and properly compel California to comply with this federal mandate. Indeed, CPSC adopted a regulation in 1973 which defines "precautionary labeling" as including warnings (without any limitation), although this regulation was unnecessarily revoked by CPSC in 1982 because of changes in terminology used in FHSA. Yet, the point remains, CPSC has the authority *and the obligation* to act to address the interstate commerce burdens created by Prop 65, has defined precautionary labeling in the past, and should do so again.

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[3] Carrick, R.L., THE PROPOSITION 65 HANDBOOK (2d ed. 1998), p.2.

Moreover, when OSHA recently was asked by this Committee to harmonize Prop 65 and the Occupational Safety and Health Act, after notice and comment, it formally disapproved those portions of Prop 65 which were inconsistent with federal law, and required the State of California to ensure that private litigation and court decisions were consistent with OSHA's approval. The preemption provisions of FHSA not only authorize, but require, CPSC to do no less.

Interrogatory No. 18:

Please state all actions which you contend Cotter & Company did not take, which it was required to take, in order to comply with [Prop 65].

Response to Interrogatory No. 18:

The People object to this interrogatory on the grounds that *it is burdensome and harassing since it requires the People to imagine hundreds or perhaps thousands of actions that Cotter & Co. might have taken that would have brought it into compliance with Proposition 65*. In general, it is the People's contention that all manufacturers and distributors of products containing toluene must take reasonable steps to insure that persons exposed to the toluene are provided with a warning pursuant to [Prop 65]. It is the People's position that Cotter & Co. did not do so.

Plaintiff People of the State of California's Response to Defendant Cotter & Co.'s First Set of Special Interrogatories, *People v. Cotter & Company*, San Francisco Superior Court no. 954568, served June 2, 1994.

"I have no problem with having an economic incentive in [Prop 65]. Everybody wants to shy away from what people call . . . the bounty hunter provision. Why should people shy away? The economic incentive is for a reason, ***and if my client did not have an economic incentive or award, it would not be in this business***. . . . Funding something like this would cost hundreds of thousands of dollars without any reimbursement possibility. ***No one who knows anything about business would go into this public interest field***."

Argument of Clifford Chanler, counsel for As You Sow, *People v. Cotter & Company*, San Francisco Superior Court no. 954568, oral argument on defendant's demurrer to As You Sow's complaint, April 15, 1994.

ELLIS PAINT COMPANY

WARNING: This product contains

chemicals known to the State of

California to cause cancer, birth defects

or other reproductive harm.

BOUNTY HUNTER EXTORTION

"," instead of "*and*" = **$68,000**

in legal fees and re-labeling costs

(i.e. company's quarterly profit)

Activa Products, Inc.
TRADEMARK

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SUPPLEMENTAL STATEMENT OF FRANK STRAUSS
United States House of Representatives Committee on Small Business
The Effect of California's Proposition 65 on Small Business
October 28, 1999

Chairman Talent and Members of the Committee:

I was very pleased to testify before you at the October 28, 1999 hearing regarding the effect of Proposition 65 on small business. Having participated in the hearing and having listened to the testimony of the other witnesses, I would like to provide some additional information and to share some concerns that other witnesses' testimonies raised.

As you know from my earlier testimony, Activa Products, Inc. is a Texas company that sells art, school, crafts and hobby materials. We comply with the federal labeling requirements of the Federal Hazardous Substances Act ("FHSA"), as amended by the Labeling of Hazardous Art Materials Act ("LHAMA"). As members of the Art and Creative Materials Institute ("ACMI"), we also participate in ACMI's certification program.

One of our products, Scenic Sand, currently is the subject of a Proposition 65 lawsuit brought by a Proposition 65 "bounty hunter," or private citizen enforcer. Prior to putting this product on the market, we asked the Duke University toxicologist retained by ACMI to review this product, as required by LHAMA. Based on that analysis, the toxicologist determined that Scenic Sand is completely non-toxic. Activa nevertheless was sued under Proposition 65 for failing to provide a "clear and reasonable" warning that Scenic Sand contains crystalline silica, which is simply another name for sand. In this lawsuit, the bounty hunter also is claiming that Activa has violated California's Unfair Practices Act due to this alleged failure to warn. Additionally, the bounty hunter claims that Activa's advertising of this product is misleading and deceptive because the advertising does not contain the words "crystalline silica."

Deputy Attorney General Ed Weil testified that one of the ways to stop abuses of Proposition 65 enforcement is for his office to take over frivolous lawsuits, and to prosecute them in the name of the Attorney General instead. Let me be clear that Activa and other companies in our position are grateful for any action the Attorney General takes to stop meritless suits against us. Nevertheless, it does not make sense to me that, in order for me to get out of this baseless lawsuit, I have to ask the Attorney General to sue my company. I will still have to hire a lawyer to represent my company, and I will still have to incur other costs in proving to the Attorney General that my product is safe. All that is money that I could be investing in my company and in my employees. It seems to me that a better approach would be to ***prevent*** lawsuits from being filed in the first place where a company is already complying with rigorous federal warning laws that cover the same health risks as Proposition 65, as Activa does in complying with LHAMA.

Mr. Weil also discussed Proposition 65's "safe use determination" procedure, in which a company like mine could submit to the Office of Environmental Health Hazard Assessment ("OEHHA," the state agency that sets the Proposition 65 regulatory standards) toxicological information about a specific product. Based on that information, OEHHA may determine that no exposures above regulatory thresholds occur through use of the product, and that therefore no warnings are required. Again, any action that the State may take to cut off a baseless lawsuit is appreciated. I am advised, however, that the OEHHA procedure for issuing a safe use determination specifically prevents a company from obtaining that determination if a lawsuit has already been filed. Therefore, that procedure provides no benefits for companies like mine, which distribute their products with labeling that complies with LHAMA, and get sued anyway. I also am advised that such a determination would not be binding, even if were still available. Mr. Weil's testimony seemed to recognize this as well. Therefore, even if I had such a ruling in hand, my company still could be sued, would have to hire an attorney to present to the court the agency ruling for that product, and would have to hope that the court agrees. That does not seem to be a solution to the problems that my company, and others like it, face. Nor does it seem to be fair, given that I already have submitted my products to a toxicologist for evaluation prior to sale, at considerable cost, to comply with a comprehensive federal warning law.

Mr. Weil also pointed out that his office only pursues companies when it has data indicating that unlawful exposures to Proposition 65 chemicals are taking place. I believe that this is the most responsible means of Proposition 65 enforcement, but, as I understand the law, such pre-filing investigation is not required. As a result, companies like mine, which sell only products that have been deemed non-toxic by toxicologists, still are sued by bounty hunters even if there is no evidence of an exposure that would violate Proposition 65. In my case, for example, the attorney for the citizen enforcer in my lawsuit still has not provided my attorney with any information he has that formed the basis of the lawsuit, even after repeated requests.

The simple truth is this: a small company does not have enough resources to fight these kinds of lawsuits in California over and over again, especially when it already is incurring substantial costs to comply with federal laws, just so it can sell products in that state. Nor does a small company have the resources to indemnify each of its distributor and retailer customers that may be sued under Proposition 65, as my company would have to do just to keep my customers' business. As a result, I am forced to evaluate whether I can continue to sell my products in California at all. I think this violates the U.S. Constitution, because it places an improper burden on interstate commerce. The persons that would benefit from my decision to stop selling in California, if I have to do that, are California companies that market their product primarily in California, who will fill in the void that my company will leave behind. They can label their products with Proposition 65 warnings, whether or not their products are non-toxic, without competition from manufacturers from other states that sell their products nationwide.

It does not seem fair to me that this state law can, as a practical matter, prevent me (and, in the end, my distributor and retailer customers as well) from doing business in California, or can force me to make a choice between marketing my product in California at the expense of doing business in other states. I believe that something should be done to harmonize Proposition 65 with the federal labeling and warning laws with which Activa and other companies comply, so that consumers get the health information they need, and companies can continue to do business in other states, as well as in California, without sacrificing their abilities – and the abilities of ***their*** customers – to do business nationwide.

Thank you for this opportunity to provide additional testimony.

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SUPPLEMENTAL STATEMENT OF MARK GOLDEN
United States House of Representatives Committee on Small Business
The Effect of Proposition 65 on Small Business
October 28, 1999

Chairman Talent and Members of the Committee:

As you know, I provided both written and oral testimony at the October 28, 1999 hearing regarding the effect of Proposition 65 on small businesses like mine. I would like to take this opportunity to provide supplemental written testimony regarding certain issues and concerns raised by the testimony of the other witnesses at that hearing.

We at Golden Artist Colors, Inc. firmly believe in providing appropriate warning information to the people who use our products, and we do so by complying with federal warning laws that require thorough toxicological analysis of our products prior to sale. In his testimony, California Deputy Attorney General Ed Weil stated that Proposition 65 warnings have served a purpose by avoiding the need for "years long product-by-product standard setting." He further stated that the law has "enabled California to act on levels of toxic chemicals in consumer products that could not be defended as acceptable, safe products, but merely had fallen through gaps in the federal regulatory system." We vigorously respond that, beginning in the 1980s, art materials as a consumer product class were the subject of a product standard setting that ultimately matured as the federal Labeling of Hazardous Art Materials Act ("LHAMA"), an amendment to the Federal Hazardous Substances Act ("FHSA"). LHAMA, which specifically addresses chronic health risks from carcinogens, reproductive toxicants, and more, requires that ***each*** art material product undergo a toxicological evaluation prior to marketing. Instead of perpetuating a "gap" in the regulatory system, this law created uniform standards for professional toxicological evaluation of art material products that can be defended under the Proposition 65 "no significant risk" exemption.

We recently joined in a settlement of a Proposition 65 lawsuit brought by a citizen enforcer. Our decision to not mount a strong defense, but to settle, was purely a function of the ***legal cost*** involved and the ***financial risk*** of an adverse decision by a jury that is unlikely to comprehend fully the science of toxicology. Moreover, the inherent hazards of the Proposition 65 enforcement mechanism are not substantially mitigated by getting approvals, prior to marketing, through the Safe Use Determination procedure discussed by Mr. Weil. First, I understand that the procedure is not available to companies involved in pending litigation. Second, even if the California Office of Environmental Health Hazard Assessment (the agency that would review a request for a Safe Use Determination) determines that the use of a particular product does not expose persons above regulatory thresholds under Proposition 65, such a determination would not immunize a company from a lawsuit in the future.

As a practical matter, the Proposition 65 exemption applicable to alleged exposures below significant risk levels is wholly unusable in our industry, even despite the considerable efforts we undertake to provide appropriate health information and warnings to the users of our products. The result is that consumers are warned of "hazards" that do not exist. This is in glaring contradiction to the entire premise of LHAMA, which requires warnings only where there is a significant health risk associated with the use of a product.

Golden Artist remains very concerned about the conflicting and inaccurate health messages we are now required to place on our products under Proposition 65, where the products already have been determined to pose no significant risk and comply with federal toxicological labeling and warning requirements that address the same chronic health concerns as Proposition 65. As I indicated in my previous oral and written testimony, all of Golden Artist's paints undergo a rigorous toxicological analysis prior to sale. Based on that analysis, the products are labeled with any health warnings required under FHSA, as amended by LHAMA. Because Golden Artist is a member of the Art and Creative Materials Institute ("ACMI") and participates in ACMI's certification program (which incorporates LHAMA), our products also are labeled with appropriate ACMI seals. The vast majority carry the "AP" seal, which assures the consumer that the product does not present a significant risk in the opinion of a board-certified toxicologist, under the direction of a multi-member toxicological board and in application of Proposition 65 "significant risk" criteria.

Based on the results of the required toxicological analyses for each of these products, the product labels also bear the following health information:

> [This product is] certified in a program of toxicological evaluation by a medical expert to contain no material in sufficient quantities to be toxic or injurious to humans, or to cause acute or chronic health problems.

This statement appears on the labels for products that we sell nationwide and around the world.

Under the terms of the Proposition 65 settlement in which Golden Artist joined, which was memorialized in a court-approved Consent Judgment, Golden Artist must place Proposition 65 warnings on products that do not pose a significant risk. By way of example, a product containing stainless steel (a "nickel compound") must bear the following warning on its label:

> **WARNING:** This product contains a chemical known to the State of California to cause cancer.

To the uninformed, the two label statements above appear to contradict each other. Yet, we believe we would not be providing accurate health information under LHAMA if we removed that health information and relied solely on the Proposition 65 warning called for by the Consent Judgment. Accordingly, we believe we need to provide both the health information and the Proposition 65 warning on these products. At the same time, as a businessman, I am concerned that the placement of these two messages on a product label will confuse the consumer and substantially undermine the toxicological evaluation process our products undergo pursuant to LHAMA. The net effect of these conflicting messages will be for my company to lose sales, thereby placing at risk my employees, and the extensive benefits my company provides for them, even though my products have been certified as safe. From a larger perspective, it also seems that this confusing label information is something that the Consumer Product and Safety Commission surely would not wish to impose on American consumers.

I am also concerned that, despite the California Attorney General's efforts to stop Proposition 65 abuses, Golden Artist may not be able to sell its products in California. As I already have stated, Golden Artist firmly believes in providing accurate health information to the people who use its products. We believe that, in many contexts, Proposition 65 serves its purpose of promoting consumer safety. Golden Artist, however, already has been accomplishing

the purpose Proposition 65 seeks to attain by complying with FHSA, as amended by LHAMA. We do not understand why our products should be the targets of Proposition 65 enforcement lawsuits, given our compliance with these federal laws.

What frustrates us most about Proposition 65 is that the private citizen enforcement mechanism of that law makes it economically impossible to defend our products on toxicological grounds, even though a toxicologist has determined that the use of our products pose no significant risk not only under LHAMA but also under Proposition 65. Moreover, I continue to fear repeated lawsuits for alleged violations of Proposition 65 concerning the same products covered by the Consent Judgment. Despite what Mr. Weil stated in his testimony about a recent court decision that should prevent repeated lawsuits, I am still dealing with this issue right now.

I applaud the California Attorney General's efforts, as described by Mr. Weil in his testimony, to curb abusive tactics in the enforcement of Proposition 65. It seems, however, that such efforts are designed for curbing abuses ***after*** a lawsuit already has been filed, and not before. This is true even for the recent amendment to Proposition 65 that Mr. Weil discussed in his testimony. The information that would go to the Attorney General under this amendment would come after the lawsuit is over. Thus, a small business like mine still faces the risk of being sued unnecessarily (and incurring unnecessary litigation costs), and has no option other than asking the Attorney General for assistance ***after*** being sued. In fact, based on the testimony of Mr. Weil, it seems that the primary recourse a company like mine would have is to ask ***his*** office to sue, in order to prevent a private enforcer from suing. It makes no sense that a company would have to request the State of California to sue it, simply to curb abusive litigation tactics by a private enforcer. And, as Mr. Weil himself pointed out in his testimony, it is not always possible for the Attorney General to provide such assistance in every single case that warrants it.

Therefore, despite the Attorney General's intentions to curb abusive practices, my company continues to evaluate the option of not selling our products in California at all, because of the risk that Proposition 65 lawsuits places our ability to do business and to provide for our employees. The impact of eliminating sales in California, considering its population and demographics, would be enormous. Yet, the risk of further suits, relabeling expenses and/or lost sales due to consumer confusion in other states and countries also carry a huge cost. In the end,

Proposition 65 erects a barrier to our ability to do business in California – a particularly baseless barrier, given that our products already have been determined by a toxicologist to pose no significant risk and bear appropriate health information statements under federal labeling and warning laws.

We need help in order to do continue to do business. In his testimony, Shawn Khorrami opines that businesses should "know whether those exposures are serious enough to require a warning, or low-risk enough to qualify for exemption." We maintain that LHAMA, through its requirement for thorough product evaluations by board-certified toxicologists, has provided art materials manufacturers with that very knowledge. Yet, we have had to settle a Proposition 65 enforcement action, and face a new lawsuit alleging violations regarding the same products that were part of that settlement. We reiterate that the abuses possible due to citizen enforcement of Proposition 65 make it a practical impossibility to rely on the "no significant risk" exemption. Our frustration with Proposition 65 is based on the fact that we possess the knowledge, we historically have formulated products to fall under "significant risk" thresholds, and we still have been significantly economically penalized for following the very policies that Mr. Khorrami champions. We, and other companies like Golden Artist, need help to reconcile Proposition 65 with the federal warning laws with which we must comply, so that we can continue to do business in every state.

Thank you for allowing me to provide this supplemental testimony.

AMERICAN TRUCKING ASSOCIATIONS
430 First Street, S.E. ★ Washington, D.C. ★ 20003-1875

Driving Trucking's Success

James R. Whittinghill
Senior Vice President
Legislative and Intergovernmental Operations

November 23, 1999

The Honorable James Talent
Chairman
Committee on Small Business
United States House of Representatives
Room 2361
Rayburn House Office Building
Washington DC 20515

Dear Chairman Talent:

The American Trucking Associations appreciates the opportunity to enter this written statement into the record of the Committee's recent hearing on the impact of California's Proposition 65 on Small Business.

Since the trucking industry is predominately small business, our industry is particularly concerned about the overwhelmingly negative effects of Proposition 65 in its present form. Unfortunately, many California-based trucking companies have first-hand experience with Proposition 65, being the direct target of a series of lawsuits over the last two years based on the use of diesel fuel.

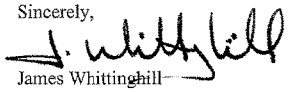
The lawsuits and threatening "notice of intent to sue" letters have sent chills throughout the trucking industry not only in California, but the entire nation. Trucking companies in that state are using engines and fuels certified and fully regulated by the state of California; even more stringent than federal regulations in some cases. Yet today, small family owned and operated trucking companies are fearful of having their entire livelihoods erased by having to defend themselves against the senseless legal actions encouraged by Proposition 65 that serve no public interest.

We appreciate the Committee's hearings on this matter and your personal leadership. Like other small business industries, California's trucking companies are responsible, safety-minded companies trying to earn a living and provide the goods and services demanded by consumers. They are responsible companies that spend hundreds of thousands of dollars each year to comply with state environmental health and safety rules to protect public health and welfare.

(202) 544-6245 ★ Fax: (202) 675-6568 ★ whit@trucking.org ★ www.trucking.org

Chairman Talent, thank you again for opening a dialogue on this serious issue. Please contact me if we can provide more information or a detailed briefing or arrange a meeting with some of our affected members. We look forward to working with the Committee on this matter.

Sincerely,



James Whittinghill

Enclosure
Cc: Joel Anderson
Executive Vice President
California Trucking Association

Before the US House of Representatives
Committee on Small Business

Hearing on
Proposition 65's Effects on Small Businesses

The American Trucking Associations, Inc. ("ATA") appreciates the opportunity to submit this testimony on the impact on small businesses of Proposition 65, (California Health and Safety Code §§ 39650-39675).

We applaud the committee for its efforts to investigate the impacts of this law and would like to recognize and thank Chairman James Talent for his leadership in this area, and for creating this forum.

Based on the past few years of experience of the trucking industry, the industry can say with confidence that Proposition 65 is a threat to the viability of the California economy and to the trucking industry in California, while providing little actual benefit to the citizens of California.

The Trucking Industry is Predominately Small Business.
According to the US Small Business Administration, approximately 87 % of all trucking companies have annual revenues less than $18.5 million, classifying them as small businesses.[1] Separately, 78 % of all registered trucking companies have six or fewer trucks.[2]

The industry is also a highly competitive and marginal industry. On average, profitability for most trucking companies is in the range of 1-3 percent. That means that for each dollar in revenue they earn, after paying salaries and all the associated employment taxes and costs and operating expenses (fuel, equipment, depreciation, etc.), they get one to three cents in profit. Because the industry is such a marginal industry and is predominately small business, it is especially vulnerable to the financial impacts stemming from Proposition 65 litigation.

Diesel Fuel Use is the Primary Concern under Proposition 65
The trucking industry's primary experience with Proposition 65 comes from the 1991 listing of diesel fuel on the list of chemicals covered by the law. Diesel fuel is the predominant choice of fuel for trucking companies operating large trucks in California.

[1] US Small Business Administration, Washington DC, 1998.
[2] US Department of Transportation, Washington DC, 1998.

It is a cost effective, widely available, reliable source of energy, providing 10-30 % more energy per unit of fuel than gasoline. Diesel fuel is a widely available commodity at retail gasoline stations, convenience stores and truck stops, available adjacent to gasoline dispensers. Diesel fuel is also used by an increasing number of non-commercial light-duty pick-up trucks, sport utility vehicles, and recreational vehicles.

In the case of the trucking industry, the concerns about Proposition 65 could extend beyond the borders of California. Due to the interstate nature of the industry, companies are concerned about their vulnerability to Proposition 65 challenges for trips through California. Ultimately, Proposition 65 has national significance for small businesses and the entire interstate transportation sector in particular. It would be a tragedy if other states, such as Massachusetts (in which legislators have proposed Proposition 65-like legislation the last two years), consider or adopt similar statutes in the future.

Public Welfare is Well Protected Under Existing Regulations
It is the strong view of the trucking industry that Proposition 65 serves no useful purpose with regard to warning the public about exposure to true risks, and we believe that diesel engine emissions are adequately regulated under other state and federal laws.

Diesel fuel, engine emissions and operations are covered by a broad array of stringent environmental laws in the California Health and Safety Code, and regulations developed by the California Air Resources Board (ARB), South Coast Air Quality Management District and an array of other agencies. These laws and regulations establish new engine emission standards, fuel quality specifications, in-use emissions inspection and enforcement programs, limitations on vehicle idling, requirements for fleet operation, and other measures. The diesel engine's design, manufacture and use are under a high degree of ongoing scrutiny by several branches of government in California and at the federal level. All of these regulations are designed around standards of protecting public health and welfare. In many cases these extensive discussions and establishment of public laws regarding the health effects of diesel exhaust exposure have occurred at several points over the last 20 years in California, well in advance of the Proposition 65 legislation.

Proposition 65 is Being Abused to Advance a Special Interest Agenda
In the last two years, owners and users of diesel engines as well as manufacturers have been the targets of multifaceted legal actions by a coordinated network of environmental and clean air groups and individual attorneys. The network has brought or threatened challenges against California-based trucking companies and fleet operators for failure to warn the public about diesel emissions. These special interest groups are intent on eliminating diesel fuel and diesel engines from California, seeking to replace them with mandated use of alternative fuels and engines powered by natural gas.

These lawsuits have been targeted at the manufacturers and users of the engines alleging that these companies failed to notify the public about the alleged hazards of diesel fuel used in the majority of large truck engines. Over 300 "notice of intent to sue" letters

have been received by trucking companies and other fleet operators in the last two years; many of these are small businesses.

Trucking companies in California - - who have been using California Air Resources Board–approved engines and diesel fuel, and passing truck emissions tests and other requirements - - now find themselves faced with the potential negative campaigns and economic impacts resulting from these meritless claims under Proposition 65.

Small businesses are ill-equipped to respond to these "notice of intetnt to sue" letters and in some cases even understand the meaning of the legal letters, notices and potential for negative publicity brought by these allegations. This requires small businesses to fund costly and unbudgeted expenses to seek outside legal counsel and experts to mount an effective response to these claims and letters; many of which are frivolous. Instead of spending the few dollars they earn to maintain their equipment or buy newer equipment, they are instead forced to spend them on legal fees. It is a tragedy that is being experienced by many small businesses in California and it must be stopped.

Proposition 65 May Increase, Not Decrease Danger From Chemicals.
The trucking industry also believes that Proposition 65 has the very real effect of reducing the public's sensitivity to true risks. The overwhelming volume of actual Proposition 65 notice and warning requirements on virtually every consumer product, chemical and device, coupled with those warnings not legally required but driven by fear of litigation when the risks are not real nor actually covered under Proposition 65, has created an environment with a tendency toward uselessness when "everyone is warned about everything," and no one is really warned about anything.

This sets up the unfortunate scenario that the public is unable to properly identify *real* risks, and instead becomes *less sensitized* to safety concerns *instead of more sensitized.* This phenomenon likely means that more people are hurt from chemicals, which can be directly attributed in part to the fear factor of Proposition 65 litigation.

The California legislation should be stripped of its "bounty hunter" provision, and replaced with a more moderate and equitable compensation system that is based on quantifiable proof of protection of the public from a specific risk through a legal action. The burden of proof in this scenario should be on the firms bringing the challenges, who should be required to justify the overall compensation and settlement. Under this suggested approach, the value of the attorney award would be based on degree of risk from a specific chemical, rather than a blanket $2,500 award. Perhaps such reforms would result in companies being more inclined to issue warning labels and notices in cases where they are truly warranted.

Conclusions

America's trucking industry is a responsible industry, providing one in 12 jobs, paying billions of dollars in taxes and fueling the economic growth of the entire US economy. The trucking industry also supports the goals of safe highways, clean air and clean water for all Americans.

Laws that are poorly designed can evolve into the kind of scenario that has resulted from Proposition 65, providing economic benefit for unscrupulous trial lawyers, extracting the very limited wealth and earnings of average Americans and small businesses while providing little or no benefit to the public. The legal assault or threat of lawsuits against the hundreds of thousands of small-business trucking companies that have been consistently abiding by a full array of laws to protect the environment is unwarranted and unfortunate, has increased the costs of goods and services, and already driven some companies directly out of business.

Proposition 65 has created its own economy and culture that has its majority effect the drain of the economic vitality from small businesses rather than informing and protecting the public of real risks. It is a law that must be stripped of its exorbitant legal bounty hunter provisions, and reformed to focus on real risks, rather than the risk of not complying to Proposition 65.

American Trucking Associations, Inc.
2200 Mill Road
Alexandria VA 22314-4677

Contact: Allen Schaeffer
Vice President for Environmental Policy
703-838-1844

California Environmental Protection Agency

Air Resources Board ◇ Department of Pesticide Regulation ◇ Department of Toxic Substances Control
Integrated Waste Management Board ◇ Office of Environmental Health Hazard Assessment
State Water Resources Control Board ◇ Regional Water Quality Control Boards

Winston H. Hickox
Secretary for Environmental Protection

Gray Davis
Governor

November 4, 1999

Honorable James Talent, Chair
House Small Business Committee
2361 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Talent:

On behalf of the California Environmental Protection Agency (Cal/EPA), I am pleased to submit the following comments for the record from the October 28, 1999, Small Business Committee hearing on Proposition 65.

The voters of California overwhelmingly passed Proposition 65 as a ballot proposition in November 1986. Officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, it requires the Governor of California to create and update at least annually a list of chemicals known to the state to cause cancer or reproductive toxicity. The Office of Environmental Health Hazard Assessment (OEHHA), within the Cal/EPA, is the lead agency for the implementation of Proposition 65.

Listed chemicals are subject to a warning requirement and to a discharge prohibition. Specifically, any business knowingly and intentionally exposing persons to the listed chemicals must first give "clear and reasonable warning," and discharges of listed chemicals into sources of drinking water are prohibited. Not all exposures or discharges are subject to these requirements, however. Carcinogens are exempt where the exposure or discharge poses "no significant risk," defined in regulation as a one in 100,000-lifetime risk of cancer. Reproductive toxicants are exempt where the exposure or discharge is less than one-thousandth the level that would cause no observable effect. Businesses with nine or fewer employees are exempt from the warning requirement and the discharge prohibition, and there is also an exemption for naturally occurring chemicals in foods.

It is important to emphasize that Proposition 65 does not ban the production or use of chemicals. Instead, it requires informing the people of California about exposures to carcinogens and reproductive toxicants in their environment. By setting a threshold level of risk before the Act's requirements apply, Proposition 65 encourages industries and businesses to implement changes to reduce the levels of toxic chemicals released into the environment and contained in their products, thereby leading to a healthier population.

Proposition 65 is a unique statute. It represents a sensible approach that empowers Californians to achieve control of the use and release of toxic chemicals, rather than a

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command and control approach. It is a simple, multi-media statute, which is self-executing. Below, I will provide specific examples of how Proposition 65 has been effective in reducing the levels of known carcinogens and reproductive toxicants in consumer products and the environment, all in the absence of the creation of complex regulatory processes or a regulatory bureaucracy. But first I wish to highlight another success of Proposition 65, that is, it has encouraged action at the federal level to reduce certain exposures that may not have been adequately controlled under existing federal or State laws. For example, in 1990, after California acted on lead in ceramic dishes pursuant to Proposition 65, the U.S. Food and Drug Administration (FDA) adopted stricter lead standards for tableware. As a second example, California brought action against lead foil wine bottle caps in 1991 and the following year FDA adopted a standard barring lead foil bottle caps. As a third example, California acted to reduce the lead content of calcium supplements and antacids, and FDA is now looking at this issue too.

Proposition 65 has played a role in reducing air emissions of listed chemicals from industrial facilities in California. In a recent analysis performed by the Environmental Defense Fund, air emissions of approximately 150 chemicals listed under both Proposition 65 and the United States Environmental Protection Agency's Emergency Planning and Community Right-to-Know Act (EPCRA) decreased more sharply between 1988 and 1995 in California than in the rest of the country. At the same time there was almost no difference in the rates of reductions of air emissions for chemicals subject only to EPCRA between California and the rest of the country.

Examples of reductions in toxic chemicals in consumer products as a result of Proposition 65 include:

- Lead, a carcinogen and a reproductive toxicant, has been significantly reduced or eliminated in a number of products, including all manner of plumbing products (such as faucets, water mains, valves, fittings), water filters, ceramic dishes, calcium supplements and antacids, mini-blinds, lead foil wine bottle caps, crystal decanters and glasses, cans used in a specific line of food packaging, and a widely used hair coloring agent.

- Tetrachloroethylene, (also known as perchloroethylene), a carcinogen, was removed from a major brand of clothing spot remover, to reduce exposure.

- Trichloroethylene, a carcinogen, was removed from typewriter correction fluids.

- An unspecified carcinogen was removed from a brand of waterproofing spray for shoes.

These are examples of many of the reformulations and reductions that we are aware of. There are undoubtedly numerous other product reformulations and process changes which businesses have made quietly, without fanfare.

Attached is a list of questions and answers on Proposition 65 impacts on small businesses for your information. In summary, I believe that Proposition 65 has achieved the goals for which it received support by the California voters in 1986. Proposition 65 has resulted in both reductions in exposure to toxic chemicals and protection of public health.

Thank you for the opportunity to share our views on this important environmental program.

Sincerely,

Winston H. Hickox

Winston H. Hickox
Agency Secretary

Attachment

cc: See next page.

cc: Honorable Juanita Millender McDonald
United States House of Representatives
419 Cannon House Office Building
Washington, DC 20515

Honorable Grace Flores Napolitano
United States House of Representatives
1407 Longworth House Office Building
Washington, DC 20515

Honorable Mary Bono
United States House of Representatives
516 Cannon House Office Building
Washington, DC 20515

Linda Adams
Governor's Office

Vincent Harris
Governor's Office

David Kim
Governor's Washington Office

QUESTIONS AND ANSWERS ON PROPOSITION 65 AND SMALL BUSINESSES

1. Isn't Proposition 65 duplicative of other State and Federal laws?

   - Independent state laws such as California's Proposition 65 are viewed within California as a necessary augmentation of federal action and in many cases Proposition 65 fills regulatory holes (such as, heavy metals in fertilizer). For example, there are many chemicals listed as carcinogens or reproductive toxicants on the Proposition 65 list that are not regulated as such by federal programs.
   - Proposition 65 is a unique law in that it places the regulatory burden of proof on the polluters and other regulated businesses instead of the government. This concept has made Proposition 65 successful in reducing emissions of Proposition 65 chemicals to the environment and reducing Proposition 65 chemicals in consumer products, not only in California, but also throughout the country since California is such a large market. The market-driven incentive of "not having to warn" of a Proposition 65 chemical is a powerful one. Unfortunately, because of confidential information in product formulation and industrial process, it is also a difficult benefit to quantify.
   - We have found that federal warnings (e.g., Consumer Product Safety Commission labels) are sometimes insufficient to warn consumers of potential exposures to carcinogens and reproductive hazards.

2. Doesn't Proposition 65 place an undue burden on small businesses in California?

   - Businnesses with fewer than ten employees are exempt
   - Public utilities are exempt
   - Not all exposures or discharges are subject to the Act
   - California has enjoyed a huge expansion in economic activity, which has risen more rapidly than in most other parts of the country. This growth has been led in a large part by new small businesses. The California regulatory climate has not changed appreciably over this time period.

3. Is there any indication that complying with Proposition 65 has contributed to the failure of any small businesses within California?

   - The Office of Health Hazard Assessment (OEHHA) does not have statistical information to indicate this, but general trends in the state economy do not suggest this impact has resulted from Proposition 65.

4. Does the warning information required under Proposition 65 have any effect on the behavior of California consumers, when it comes to buying consumer products?

   - OEHHA has not studied this but because of the keen interest by the affected parties in Proposition 65 there seems to be some competitive advantage to substances not being listed.

5. Are consumer products safer since the passage of Proposition 65?

   - Yes, at least with respect to the levels of chemical carcinogens and reproductive toxicants present in consumer products. Numerous consumer products have been reformulated to reduce or eliminate the presence of Proposition 65 listed chemicals.

6. Is Proposition 65 cost-effective?

   - Yes, by virtue of Proposition 65 shifting the burden of proof from government to businesses, to establish whether or not there was a violation and eliminating the need for a large government bureaucracy to enforce the Proposition. It is a simple, self-executing multi-media statute.

7. Suggestions have been made that lawsuits have been filed based on exposure scenarios that are unrealistic and overly conservative. Is Proposition 65 overly conservative and based on poor science?

   - The initial determination of whether an exposure will constitute a "significant risk" is the job of the polluters and regulated businesses, not the government or the citizenry. The law provides some guidance on this point such as one in 100,000 risk level as the cancer benchmark and 1000-fold below the no significant risk level for reproductive hazards. OEHHA provides these levels (safe harbors) for over 250 agents. These "safe harbor" numbers are based on the best available data, and have been developed using standard risk assessment techniques. The potential drinking water polluter or business causing exposure to listed chemicals can use these to quickly ascertain whether a given exposure is not likely to be significant, or the polluter or covered business may conduct a more detailed evaluation of the particular exposure relevant to the chemical and situation in question.

8. Some have claimed that the private enforcement provisions of the law are being abused. Do you believe this is the case? Are too many suits, many which are claimed to be frivolous, being filed?

- OEHHA is not involved directly in the lawsuits to enforce Proposition 65.
- The Attorney General's Office, which has the responsibility to enforce Proposition 65 disagrees with the assertion.
- In addition, the State Attorney General has oversight and can preempt the private party lawsuit if he believes it is a legitimate case.
- A law passed this last legislative session requires private parties to report the results of their lawsuits and will lead to more information regarding the number of frivolous lawsuits that are being filed.

November 23, 1999

Honorable James M. Talent
Chairman
House Committee on Small Business
2631 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Re: October 28th Hearing on California=s Proposition 65

Dear Chairman Talent and Members of the Committee:

I am the President of Sea Pearls, a small business based in Minnesota that manufactures diving equipment as well as products for other industries. Thank you for this opportunity to submit testimony regarding California's Proposition 65 and its effects on small businesses. I would like to share with the Committee the experience of Sea Pearls and some of its retailers with Proposition 65 and the public interest group **As You Sow** (AYS).

In January of 1999, Sea Pearls, Inc. received a *Notice of Violation* from attorney Frederic Evenson on behalf of AYS. The notice informed us that under California's Proposition 65 we were required to provide consumers with a warning on the dangers of the lead and lead compounds used in diving weights. We were not, at that time, aware of such requirements and contacted an attorney to assist us in complying with that law. Evenson stated that AYS' intention was to rectify the situation as soon as possible and claimed that AYS was interested in a "constructive resolution" of this matter in order to avoid prolonged and costly litigation.

Our attorney informed us that the company fell under the "less than 10 employees" exemption of the law and therefore was not subject to penalties and AYS' legal fees[1]. Nonetheless, we voluntarily took an active role in warning individuals against the possible exposure to lead since we agreed with the law's purpose. Evenson found this response unacceptable unless I submitted an affidavit stating that Sea Pearls had less than 10 employees and provided copies of W2 and 1099 tax forms and other payroll information. I provided an affidavit along with a list of all employees and the dates of their employment during the period in question, but refused to turn over any documents that would compromise employee privacy.

The preceding sequence of events took place over several months. Our attorney eventually informed AYS that if it continued to employ unreasonable tactics that were an abuse of the process, they could face an action for malicious prosecution. We have not heard from AYS since that time. Evidently they have now turned their attention to the retailers of our diving

[1] Section 25249.6 of the California Health and Safety Code (the failure to warn section) applies to a APerson in the course of doing business.≅ Under Section 25249.11, Aperson≅ is defined as, Aan individual, trust, firm, joint stock company, corporation, company, partnership, and association.≅ Furthermore, that section states that ""Person in the course of doing business" does not include any person employing fewer than ten employees in his business...≅

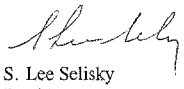
weights as well as other manufacturers.

At least five California-based Sea Pearls retailers or manufacturers have received demand letters from AYS including: Bamboo Reef (San Francisco, CA), Ocean Enterprises (San Diego, CA), Pacific Wilderness (San Pedro, CA), Sport Chalet (La Qienata, CA), and Trident Diving Equipment (Chatsworth, CA). The letters notify the retailers that they have failed to provide the consumer with Proposition 65 warnings, but offer to settle the matter for sums of money as high as $50,000. (In at least one instance, a retailer had routinely posted warnings for years but the warning was not phrased correctly according to AYS.) The retailers have subsequently posted notices and attached warning labels to the subject merchandise, and sent copies of the warning materials to AYS for their approval. AYS has not responded to these actions and it is unclear whether AYS intends to seek monies from these small businesses.

It is apparent that AYS targets a specific industry for Proposition 65 enforcement. It moves from top to bottom within that industry, pursuing the deepest pockets first. AYS also appears to vary the proposed settlement offer according to a company's size and ability to pay. Despite AYS' initial claims of benefiting the public interest and seeking a "constructive resolution", it is obvious that the only purpose served has been a money making crusade for a few individuals. This is a dangerous abuse of an otherwise reasonable and effective law.

Thank you for consideration of this testimony. If you have any questions, please feel free to contact me.

Sincerely,



S. Lee Selisky
President
Sea Pearls

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement') is entered into between As You Sow ("AYS") on the one hand, and Unlimited Holdings, Inc. ("UNLIMITED HOLDINGS") dba Added Extras; Magic Nails, Inc. ("MAGIC NAILS"); and Walgreen Co. ("WALGREEN"), on the other, as of August 12, 1999 ("Execution Date").[1]

A. RECITALS

1. AYS is a non-profit foundation dedicated to, among other causes, the protection of the environment, the promotion of human health, and the improvement of worker and consumer rights. AYS is based in San Francisco, California and incorporated under the laws of the State of California.

2. UNLIMITED HOLDINGS is a New York corporation which has distributed and sold in California certain nail polish products containing the chemical toluene, which is listed pursuant to Title 22, California Code of Regulations, §12000 et seq.;

3. MAGIC NAILS is a New York corporation which has distributed and sold in California certain nail polish products containing the chemicals toluene and formaldehyde, which are listed pursuant to Title 22, California Code of Regulations, §12000 et seq.;

4. The names of each of the products referenced in Paragraphs A.2 and A.3 above are set forth on Exhibit A, hereto, and are hereinafter referred to as the "Products";

5. WALGREEN is an Illinois corporation that has sold certain of the Products in California;

6. The Products were sold in California by the Settling Defendants between June 1998 and December 1998;

7. On January 1, 1991, toluene officially was listed by the State of California as a chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code §25249.8.

8. On January 1, 1988, formaldehyde officially was listed by the State of California as a chemical known to cause cancer, pursuant to California Health and Safety Code §25249.8;

9. On February 3, 1999, AYS served UNLIMITED HOLDINGS, WALGREEN and each of the appropriate public enforcement agencies with a document entitled 60-Day Notice that provided UNLIMITED HOLDINGS, WALGREEN and the public enforcement agencies with notice that UNLIMITED HOLDINGS and WALGREEN were in violation of California Health and Safety Code §25249.6 et seq. ("Proposition 65") for failing to warn the purchasers and individuals using the Products that the use of the Products exposes them to a chemical known to

---

[1] UNLIMITED HOLDINGS, MAGIC NAILS, and WALGREEN are herein after referred to collectively as the Settling Defendants.

the State of California to cause reproductive toxicity and/or cancer;

10. On April 12, 1999, AYS filed a complaint against UNLIMITED HOLDINGS and WALGREEN entitled As You Sow v. Unlimited Holdings, Inc., et al, Case Number 302726 (the "Action"), in San Francisco Superior Court, alleging violations of Proposition 65 and California Business and Professions Code §17200 *et seq.*; and,

11. The Action was brought by AYS in the public interest and on behalf of the public, the People of the State of California at least sixty (60) days after AYS provided notice of the alleged Proposition 65 violation to UNLIMITED HOLDINGS, WALGREEN and the appropriate public enforcement agencies and none of the public enforcement agencies had commenced and begun diligently prosecuting an action against UNLIMITED HOLDINGS or WALGREEN for such alleged violations.

B. TERMS

NOW, THEREFORE, in consideration of the promises, covenants and agreements herein contained and for other consideration, the sufficiency and adequacy of which is hereby acknowledged by the parties:

1. Sale of Products.

A. Beginning immediately, UNLIMITED HOLDINGS agrees that it will not ship (or cause to be shipped) for sale or use in California, or sell in California, any of the UNLIMITED HOLDINGS Products unless each unit of the UNLIMITED HOLDINGS Product is either reformulated to completely remove the chemical toluene from the UNLIMITED HOLDINGS Product, or unless each unit of the UNLIMITED HOLDINGS Product bears the following warning statement on its label:

WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

The warning statement shall be prominent and displayed on the unit packaging of each UNLIMITED HOLDINGS Product with such conspicuousness, as compared with other words, statements, or designs so as to render it likely to be read and understood by an ordinary individual purchasing or using the Product.

B. Beginning immediately, MAGIC NAILS agree that they will not ship (or cause to be shipped) for sale or use in California, or sell in California, any of the MAGIC NAILS Products unless each unit of the MAGIC NAILS Product is either reformulated to completely remove the chemicals toluene and formaldehyde from the MAGIC NAILS Product, or unless each unit of the

MAGIC NAILS Product bears the following warning statement on its label:

WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

The warning statement shall be prominent and displayed on the unit packaging of each MAGIC NAILS Product with such conspicuousness, as compared with other words, statements, or designs so as to render it likely to be read and understood by an ordinary individual purchasing or using the Product.

C. Beginning immediately, WALGREEN agrees that it will not sell in California, any of the Products (other than Products shipped before the Execution Date) unless each unit of the Product is either reformulated to completely remove the chemicals toluene and formaldehyde from the Product, or unless each unit of the Product bears one of the following warning statement on its label, as applicable:

For those Products containing a chemical or chemicals known to the State of California to cause cancer:

> **WARNING**: This product contains chemical(s) known to the State of California to cause cancer.

For those Products containing a chemical or chemicals known to the State of California to cause birth defects or other reproductive harm:

> **WARNING**: This product contains chemical(s) known to the State of California to cause birth defects or other reproductive harm.

For those Products containing a chemical or chemicals known to the State of California to cancer and also containing a chemical or chemical known to cause birth defects or other reproductive harm:

> **WARNING**: This product contains chemical(s) known to the State of California to cause cancer and birth defects or other reproductive harm.

The warning statement shall be prominent and displayed on the unit packaging of each Product with such conspicuousness, as compared with other words, statements, or designs so as to render it likely to be read and understood by an ordinary individual purchasing or using the Product.

2. **Restitution.** UNLIMITED HOLDINGS on behalf of itself, and UNLIMITED HOLDINGS and MAGIC NAILS on behalf of WALGREEN agree to make a restitutionary

payment in the amount of Thirty Thousand Dollars ($30,000) to AYS, which AYS shall forward to (a) California non-profit groups, and (b) the AYS Proposition 65 Enforcement Fund to reduce exposures to toxic chemicals, and to increase consumer, worker and community awareness of the health hazards posed by toxic chemicals.

This restitutionary payment shall be made as follows:

(1)	UNLIMITED HOLDINGS	$15,000
(2)	WALGREEN, by and through UNLIMITED HOLDINGS,	$7,500
	and MAGIC NAILS	$7,500

3. **Reimbursement of Fees and Costs.** UNLIMITED HOLDINGS on behalf of itself, and UNLIMITED HOLDINGS and MAGIC NAILS on behalf of WALGREEN agree to reimburse AYS for its reasonable investigative, expert, and legal fees and costs incurred as a result of investigating, bringing this matter to the attention of the Settling Defendants, and negotiating a settlement in the public interest. The Settling Defendants agree that the amount of these fees and costs is $7,800.

4. **Payment Schedule.** With regard to the monies to be paid to AYS pursuant to Paragraphs B.2 and B.3 herein, AYS and the Settling Defendants agree to the following payment schedule:

A. UNLIMITED HOLDINGS: $28,350, divided into three equal payments to be paid within 10 days of Execution Date, within 45 days of Execution Date, and within 90 days of Execution Date.

B. MAGIC NAILS: $9,450, divided into six equal payments to be paid within 30 days of Execution Date, within 60 days of Execution Date, within 90 days of Execution Date, within 120 days of Execution Date, within 150 days of Execution Date and within 180 days of Execution Date.

A "late charge" in the amount of five (5) percent shall be applied to each installment not postmarked on or before its due date as set forth above, for every ten days the installment payment is late.

5. **AYS Release.** AYS, by this Agreement, waives all rights to institute any form of legal action against the Settling Defendants, their officers, directors, attorneys and representatives under Proposition 65, or Business & Professions Code §§17200 et seq., based on Settling Defendants' alleged failure to warn about exposure to toluene or formaldehyde contained in any of the Products shipped on or before the Execution Date of this Agreement, including any action for penalties, injunctive relief, restitution, attorneys fees or costs brought under Proposition 65 or Business & Professions Code §§17200 et seq based on Settling

Defendants' alleged failure to warn about exposure to toluene or formaldehyde contained in any of the Products shipped on or before the Execution Date of this Agreement.

6. **Settling Defendants Release.** Settling Defendants, by this Agreement, waive all rights to institute any form of legal action against AYS, its officers, directors, attorneys and representatives (the "AYS Releasees") for all actions or statements made or undertaken by the AYS Releasees in the course of seeking enforcement of Proposition 65 or Business & Profession Code §§17200 et seq. against Settling Defendants in this Action.

7. **Stipulated Judgment.** Within five (5) days of the Execution Date of this Agreement, the parties shall file a stipulated judgment to be approved pursuant to California Code of Civil Procedure §664.6 by the San Francisco Superior Court in accordance with the terms of this agreement.

8. **No Admission of Liability.** The Settling Defendants' consent to this agreement is given in recognition of the risks of future litigation and the expense required to litigate their respective claims and defenses. It shall not be construed as an admission of liability or any admission that any of the facts asserted by any party to the various claims among the parties are true or that the claims, or any portion thereof, asserted by any party thereto are well founded.

9. **Successors.** This agreement binds and inures to the benefit of each party hereto and each party's agent(s), predecessor(s), representative(s), employee(s), affiliate(s), servant(s), heir(s), successor(s), and assign(s).

10. **Severability.** In the event that any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

11. **Enforcement.** In the event that a dispute arises with respect to any of the provisions of this Agreement, this Agreement may be enforced pursuant to Code of Civil Procedure §664.6 or any other valid provision of law. The prevailing party in any such dispute shall be awarded reasonable fees and costs incurred.

12. **Governing Law.** The terms of this Agreement shall be governed by the laws of the State of California.

13. **Integration & Modification.** This Agreement, together with the Exhibits hereto which are specifically incorporated herein by this reference, constitutes the entire agreement between the parties relating to the rights and obligations herein granted and assumed, and supersedes all prior agreements and understandings between the parties. Each party acknowledged that it has not relied upon any warranties, representations, or promises, except as set forth expressly in this agreement. Any prior correspondence, memorandum or agreement, whether oral or written, are superceded in total by this agreement. All words, phrases, sentences

and paragraphs including the recitals hereto are material to this agreement.

This Agreement may be modified only upon the written agreement of the parties. To the extent any such modification is made to this agreement that also requires modification of the Stipulated Judgment provided for herein, the parties shall cooperate in modifying the Stipulated Judgment submitted to the Court.

14. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

15. Authorization & Warranty. Each of the signatories to this agreement warrants that he or she is fully authorized to enter into the terms and conditions stated herein, to execute the agreement and to legally bind the party on whose behalf he or she is signing, and that they have not sold, assigned, transferred, conveyed or otherwise disposed of, any claim or demand relating to any matter covered by this agreement.

DATED: _____ BY: _____
Lawrence E. Fahn
Executive Director
As You Sow

DATED: _____ BY: _____
Name: _____
Title: _____
UNLIMITED HOLDINGS, INC.

DATED: _____ BY: _____
Name: _____
Title: _____
WALGREEN CO.

DATED: _____ BY: _____
Name: _____
Title: _____
MAGIC NAILS, INC.

EXHIBIT A

[RF to Revise]

UNLIMITED HOLDINGS PRODUCTS
Bear Necessities Scentables Fragranced Nail Lacquer

MAGIC NAILS PRODUCTS
Mystic Nails Duo

THE CHAIRMAN

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

December 20, 1999

BY FIRST CLASS MAIL AND FAX

Honorable James M. Talent, Chairman
House Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

Dear Chairman Talent:

The U.S. Consumer Product Safety Commission has received your December 10, 1999 letter captioned "Federal Hazardous Substances Act/Proposition 65." The entire Commission joins me in this response.

State and federal courts have explicitly held that the Federal Hazardous Substances Act does not preempt Proposition 65. Chemical Specialties Manufacturers Ass'n. Inc. v. Allenby, 958 F.2d 941 (9th Cir.) (describing contrary theory as "nonsensical" and one that "simply does not comport with common sense"), cert. denied, 113 S. Ct. 80 (1992); People v. Cotter & Co., 53 Cal. App.4th 1373 (Cal. App.) (describing contrary opinion of the Commission's Office of General Counsel as "plainly erroneous"), rev. denied, (Cal. July 9, 1997), cert. denied, 118 S. Ct. 601 (1997). Federal legislation could reverse those rulings, but there is no such legislation pending in Congress, and you indicated at the close of the October 28 hearing that you likely would not introduce legislation at this time.

Your first query pertains to "the standard the Consumer Product Safety Commission ('CPSC') applies when determining whether or not to commence a rulemaking pursuant to a petition or the legal standards governing possible promulgation of an interpretive rule." For the reasons we have previously provided, the Commission has no plans to initiate a rulemaking pertaining to Proposition 65. Moreover, no member of the public has petitioned the Commission to promulgate any rule pertaining to Proposition 65. Accordingly, it would be premature to opine in any further detail on the factors bearing on the hypothetical rulemaking.

Any member of the public, including members of Congress, may petition the Commission for promulgation of a rule. (In fact, the Commission currently has before it a bipartisan petition on bleacher safety from two members of Congress.) If you request, the Commission will designate your correspondence during 1999 with the agency and its staff to be a petition seeking promulgation of an interpretive rule aimed at preempting state law (Proposition 65) by federal law (the FHSA). You could thus direct the Commission to commence the rulemaking. The Commission's regulations governing petitions are at 16 C.F.R. Part 1051. Enclosed is a copy of these regulations, together with a copy of the Commission's directive entitled "Operational Procedures for Petitions."

Your second query essentially reiterates Question Nos. 4, 5 and 8 of your November 16, 1999 questions. The Commission cannot respond in further detail to those questions outside the context of a rulemaking proceeding. We are unaware of any instance in which the Commission has issued an "advisory opinion" identifying the full range of pertinent information that might bear on a possible future petition before actually receiving such a petition. The resources necessary to this effort would to a large extent replicate those involved in the rulemaking itself.

Thank you for your interest in the Commission.

Sincerely,

Ann Brown

Ann Brown

cc: Honorable Nydia Velazquez
Honorable Grace Napolitano
Commissioner Thomas H. Moore
Commissioner Mary Sheila Gall

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 1034.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4575, 4579, Feb. 5, 1986, as amended at 51 FR 4575, Feb. 5, 1986]

§§ 1034.171—1034.999 [Reserved]

PART 1051—PROCEDURE FOR PETITIONING FOR RULEMAKING

Sec.

1051.1 Scope.
1051.2 General.
1051.3 Place of filing.
1051.4 Time of filing.
1051.5 Requirements and recommendations for petitions.
1051.6 Documents not considered petitions.
1051.7 Statement in support of or in opposition to petitions; Duty of petitioners to remain apprised of developments regarding petitions.
1051.8 Public hearings on petitions.
1051.9 Factors the Commission considers in granting or denying petitions.
1051.10 Granting petitions.
1051.11 Denial of petitions.

AUTHORITY: 5 U.S.C. 553(e), 5 U.S.C. 555(e).

SOURCE: 48 FR 57123, Dec. 28, 1983, unless otherwise noted.

§ 1051.1 Scope.

(a) This part establishes procedures for the submission and disposition of petitions for the issuance, amendment or revocation of rules under the Consumer Product Safety Act (CPSA) (15 U.S.C. 2051 *et seq.*) or other statutes administered by the Consumer Product Safety Commission.

(b) Persons filing petitions for rulemaking shall follow as closely as possible the requirements and are encouraged to follow as closely as possible the recommendations for filing petitions under § 1051.5.

(c) Petitions regarding products regulated under the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261 *et seq.*) are governed by existing Commission procedures at 16 CFR 1500.82, 16 CFR 1500.201, and 21 CFR 2.65. Petitions regarding the exemption of products regulated under the Poison Prevention Packaging Act of 1970 (PPPA) (15 U.S.C. 1471 *et seq.*) are governed by existing Commission procedures at 16 CFR part 1702. In addition, however, persons filing such petitions shall follow the requirements and are encouraged to follow the recommendations for filing petitions as set forth in § 1051.5.

§ 1051.2 General.

(a) Any person may file with the Commission a petition requesting the Commission to begin a proceeding to issue, amend or revoke a regulation under any of the statutes it administers.

(b) A petition which addresses a risk of injury associated with a product which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be considered by the Commission under those Acts. However, if the Commission finds by rule, in accordance with section 30(d) of the CPSA, as amended by Public Law 94-284, that it is in the public interest to regulate such risk of injury under the CPSA, it may do so. Upon determination by the Office of the General Counsel that a petition should be considered under one of these acts rather than the CPSA, the Office of the Sec-

retary shall docket and process the petition under the appropriate act and inform the petitioner of this determination. Such docketing, however, shall not preclude the Commission from proceeding to regulate the product under the CPSA after making the necessary findings.

§ 1051.3 Place of filing.

A petition should be mailed to: Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207. Persons wishing to file a petition in person may do so in the Office of the Secretary, at either, 5401 Westbard Avenue, (third floor) Bethesda, Maryland or 1111 18th Street, NW, (eighth floor), Washington, DC.

§ 1051.4 Time of filing.

For purposes of computing time periods under this part, a petition shall be considered filed when time-date stamped by the Office of the Secretary. A document is time-date stamped when it is received in the Office of the Secretary.

§ 1051.5 Requirements and recommendations for petitions.

(a) *Requirements.* To be considered a petition under this part, any request to issue, amend or revoke a rule shall meet the requirements of this paragraph (a). A petition shall:

(1) Be written in the English language;

(2) Contain the name and address of the petitioner;

(3) Indicate the product (or products) regulated under the Consumer Product Safety Act or other statute the Commission administers for which a rule is sought or for which there is an existing rule sought to be modified or revoked. (If the petition regards a procedural or other rule not involving a specific product, the type of rule involved must be indicated.)

(4) Set forth facts which establish the claim that the issuance, amendment, or revocation of the rule is necessary (for example, such facts may include personal experience; medical, engineering or injury data; or a research study); and

(5) Contain an explicit request to initiate Commission rulemaking and set forth a brief description of the substance of the proposed rule or amendment or revocation thereof which it is claimed should be issued by the Commission. (A general request for regulatory action which does not reasonably specify the type of action requested shall not be sufficient for purposes of this subsection.)

(b) *Recommendations.* The Commission encourages the submission of as much information as possible related to the petition. Thus, to assist the Commission in its evaluation of a petition, to the extent the information is known and available to the petitioner, the petitioner is encouraged to supply the following information or any other information relating to the petition. The petition will be considered by the Commission even if the petitioner is unable to supply the information recommended in this paragraph (b). However, as applicable, and to the extent possible, the petitioner is encouraged to:

(1) Describe the specific risk(s) of injury to which the petition is addressed, including the degree (severity) and the nature of the risk(s) of injury associated with the product and possible reasons for the existence of the risk of injury (for example, product defect, poor design, faulty workmanship, or intentional or unintentional misuse);

(2) State why a consumer product safety standard would not be feasible if the petition requests the issuance of a rule declaring the product to be a banned hazardous product; and

(3) Supply or reference any known documentation, engineering studies, technical studies, reports of injuries, medical findings, legal analyses, economic analyses and environmental impact analyses relating to the petition.

(c) *Procedural recommendations.* The following are procedural recommendations to help the Commission in its consideration of petitions. The Commission requests, but does not require, that a petition filed under this part:

(1) Be typewritten,

(2) Include the word "petition" in a heading preceding the text,

(3) Specify what section of the statute administered by the Commission authorizes the requested rulemaking,

(4) Include the telephone number of the petitioner, and

(5) Be accompanied by at least five (5) copies of the petition.

§ 1051.6 Documents not considered petitions.

(a) A document filed with the Commission which addresses a topic or involves a product outside the jurisdiction of the Commission will not be considered to be a petition. After consultation with the Office of the General Counsel, the Office of the Secretary, if appropriate, will forward to the appropriate agency documents which address products or topics within the jurisdiction of other agencies. The Office of the Secretary shall notify the sender of the document that it has been forwarded to the appropriate agency.

(b) Any other documents filed with the Office of the Secretary that are determined by the Office of the General Counsel not to be petitions shall be evaluated for possible staff action. The Office of the General Counsel shall notify the writer of the manner in which the Commission staff is treating the document. If the writer has indicated an intention to petition the Commission, the Office of the General Counsel shall inform the writer of the procedure to be followed for petitioning.

§ 1051.7 Statement in support of or in opposition to petitions; Duty of petitioners to remain apprised of developments regarding petitions.

(a) Any person may file a statement with the Office of the Secretary in support of or in opposition to a petition prior to Commission action on the petition. Persons submitting statements in opposition to a petition are encouraged to provide copies of such statements to the petitioner.

(b) It is the duty of the petitioner, or any person submitting a statement in support of or in opposition to a petition, to keep himself or herself apprised of developments regarding the petition. Information regarding the status of petitions is available from the Office of the Secretary of the Commission.

(c) The Office of the Secretary shall send to the petitioner a copy of the staff briefing package on his or her petition at the same time the package is transmitted to the Commissioners for decision.

§ 1051.8 Public hearings on petitions.

(a) The Commission may hold a public hearing or may conduct such investigation or proceeding, including a public meeting, as it deems appropriate to determine whether a petition should be granted.

(b) If the Commission decides that a public hearing on a petition, or any portion thereof, would contribute to its determination of whether to grant or deny the petition, it shall publish in the FEDERAL REGISTER a notice of a hearing on the petition and invite interested persons to submit their views through an oral or written presentation or both. The hearings shall be informal, nonadversary, legislative-type proceedings in accordance with 16 CFR part 1052.

§ 1051.9 Factors the Commission considers in granting or denying petitions.

(a) The major factors the Commission considers in deciding whether to grant or deny a petition regarding a product include the following items:

(1) Whether the product involved presents an unreasonable risk of injury.

(2) Whether a rule is reasonably necessary to eliminate or reduce the risk of injury.

(3) Whether failure of the Commission to initiate the rulemaking proceeding requested would unreasonably expose the petitioner or other consumers to the risk of injury which the petitioner alleges is presented by the product.

(4) Whether, in the case of a petition to declare a consumer product a "banned hazardous product" under section 8 of the CPSA, the product is being or will be distributed in commerce and whether a feasible consumer product safety standard would adequately protect the public from the unreasonable risk of injury associated with such product.

(b) In considering these factors, the Commission will treat as an important component of each one the relative priority of the risk of injury associated with the product about which the peti-

tion has been filed and the Commission's resources available for rulemaking activities with respect to that risk of injury. The CPSC Policy on Establishing Priorities for Commission Action, 16 CFR 1009.8, sets forth the criteria upon which Commission priorities are based.

§ 1051.10 Granting petitions.

(a) The Commission shall either grant or deny a petition within a reasonable time after it is filed, taking into account the resources available for processing the petition. The Commission may also grant a petition in part or deny it in part. If the Commission grants a petition, it shall begin proceedings to issue, amend or revoke the rule under the appropriate provisions of the statutes under its administration. Beginning a proceeding means taking the first step in the rulemaking process (issuance of an advance notice of proposed rulemaking or a notice of proposed rulemaking, whichever is applicable).

(b) Granting a petition and beginning a proceeding does not necessarily mean that the Commission will issue, amend or revoke the rule as requested in the petition. The Commission must make a final decision as to the issuance, amendment, or revocation of a rule on the basis of all available relevant information developed in the course of the rulemaking proceeding. Should later information indicate that the action is unwarranted or not necessary, the Commission may terminate the proceeding.

§ 1051.11 Denial of petitions.

(a) If the Commission denies a petition it shall promptly notify the petitioner in writing of its reasons for such denial as required by the Administrative Procedure Act, 5 U.S.C. 555(e).

(b) If the Commission denies a petition, the petitioner (or another party) can refile the petition if the party can demonstrate that new or changed circumstances or additional information justify reconsideration by the Commission.

(c) A Commission denial of a petition shall not preclude the Commission from continuing to consider matters raised in the petition.

PART 1052—PROCEDURAL REGULATIONS FOR INFORMAL ORAL PRESENTATIONS IN PROCEEDINGS BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION

Sec.

1052.1 Scope and purpose.
1052.2 Notice of opportunity for oral presentation.
1052.3 Conduct of oral presentation.
1052.4 Presiding officer; appointment, duties, powers.

AUTHORITY: 15 U.S.C. 1193(d), 15 U.S.C. 2058(d)(2), 15 U.S.C. 2076(a), and 5 U.S.C. 553(c).

SOURCE: 48 FR 57122, Dec. 28, 1983, unless otherwise noted.

§ 1052.1 Scope and purpose.

(a) Section 9(d)(2) of the Consumer Product Safety Act, 15 U.S.C. 2058(d)(2), and section 4(d) of the Flammable Fabrics Act, 15 U.S.C. 1193(d), provide that certain rules under those statutes shall be promulgated pursuant to section 4 of the Administrative Procedure Act, 5 U.S.C. 553, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views or arguments in addition to the opportunity to make written submissions. Several rulemaking provisions of the statutes administered by the Commission are subject only to the rulemaking procedures of the Administrative Procedure Act. Section 4(c) of the Administrative Procedure Act provides that the opportunity for oral presentations may or may not be granted in rulemaking under that section. In addition, section 27(a) of the Consumer Product Safety Act, 15 U.S.C. 2076(a), authorizes informal proceedings that can be conducted in nonrulemaking investigatory situations.

(b) This part sets forth rules of procedure for the oral presentation of data, views or arguments in the informal rulemaking or investigatory situations described in subsection (a) of this section. In situations where the opportunity for an oral presentation is not required by statute, the Commission will determine whether to provide the opportunity on a case-by-case basis.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION	DIRECTIVES SYSTEM	NOTICE
		0605.0
		April 26, 1993

MANAGEMENT PROGRAMS

OPERATIONAL PROCEDURES FOR PETITIONS

1. **PURPOSE.** The purpose of this directive is to establish a procedure for the efficient and timely handling of petitions and possible petitions.

2. **POLICY.** It is the policy of the Commission that petitions and possible petitions will generally be processed according to these procedures.

3. **REFERENCES.**

a. 16 CFR Part 1051 - Procedure for Petitioning for Rulemaking.

b. Commission Notice 0601.6, Procedures for Sending Materials to the Commission.

4. **OPERATIONAL PROCEDURES FOR PETITIONS.** The Commission will take the following steps to address petitions and possible petitions. The Office of the General Counsel will decide whether a request should be docketed as a petition. The staff will prepare an initial brief assessment of the petition recommending that the Commission grant, deny, or defer action. The Commission may develop additional information or data for a later decision if more work is needed. A schematic of the operational procedures is attached.

a. The Office of the Secretary receives the request for agency action and forwards it to the Office of the General Counsel (OGC).

0605.0
April 26, 1993

b. OGC responsibilities. OGC will decide if the request for agency action should be docketed as a petition within 30 days of receipt of the correspondence by OGC. If OGC requests additional information before deciding whether to docket the matter as a petition, an additional 30 days will be allowed from receipt of the additional information. OGC's determination should be based on the criteria stated in the Commission's petition regulations, 16 CFR Sections 1051.5 and 1051.6.[1]

c. Staff briefing memorandum. The staff will prepare a briefing memorandum and forward it to the Commission within 180 days.[2] The Executive Director has the authority to extend the 180 day period for good cause.

(1) It is anticipated that information and analysis in this briefing memorandum will generally be brief and will be based on existing or easily obtainable data. Staff should periodically consult the attorney working on the petition for further guidance on the level of information necessary. The information and analysis needed in a briefing memorandum may vary depending on the petition. More or less information than that outlined below may be appropriate. For example, petitions seeking technical revisions, limited exemptions, or minor amendments to rules, will often require less information.

(2) The staff briefing memorandum will provide the Commission with initial information concerning the petition so the Commission can make an initial assessment. The Commission's initial assessment could be to grant the petition, deny the petition, or defer action on the petition until the staff obtains additional information relevant to the petition.

(3) If more in-depth work by the staff is necessary to adequately assess the validity of the petition, the additional work should be stated in the initial briefing memorandum. If the

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[1] When a petition is docketed, OGC will forward to the Commission a ballot vote sheet and a draft Federal Register Notice, providing a 60 day comment period. The Commission may, in its discretion, decide to publish the Federal Register Notice requesting comments.

[2] The 180 days will run from either: (1) the Commission's decision not to issue a Federal Register Notice soliciting public comments on the petition or (2) the close of the comment period if the Commission decides to issue a Federal Register Notice.

Commission chooses to pursue the additional work, it can reconsider the petition once the work is completed.

(4) Generally, and to the extent it can be obtained from existing or easily obtained data, the briefing memorandum should provide the following initial information to the Commission:

(a). **A preliminary sketch of the hazard information.** If feasible, the staff will estimate the annual number of injuries and deaths, discuss the population at risk, and summarize hazard patterns.

(b). **A brief discussion of market information.** Using readily available information from government, industry, or other such sources, the staff will provide data on sales, product use, the number and size of firms, and an estimate of product life and the number of products in use.

(c). **A preliminary estimate of the risk.** The staff will provide this estimate based on the hazard and market information.

(d). **A preliminary estimate of the annual cost to society of the hazard.** Estimates of the annual societal cost includes estimates on injuries from the CPSC injury cost model and other sources, property damage, and an assumed value per statistical life.

(e). **A discussion of any existing standards and activities.** The staff will summarize known existing domestic and international standards and activities that are intended to address the product or the hazard presented.

(f). **A discussion of past agency action on the issue.** The staff will summarize past petitions, compliance activities, information and education activities, and other Commission work on the issue.

(g). **Expert opinion from technical staff on whether the hazard can be addressed by the action requested by the petitioner and whether the action is feasible.** The technical staff will rely on the available information to render its opinion. The staff will not conduct injury surveys, exposure surveys, convene focus panels, or test the product in order to render an opinion.

0605.0
April 26, 1993

(h). In the case of a petition seeking an exemption from, an amendment to, or the repeal of an existing rule, the staff should provide available information and a brief analysis concerning the potential impact of the exemption, amendment, or repeal on injuries.

(i). A discussion of the pros and cons of granting the petition, denying the petition, and deferring action on the petition. The staff will discuss each option and make a recommendation, based on the information and analysis outlined above. There will be a discussion of the resources required to implement a Commission decision to grant the petition.[3] There will be a discussion of what work is needed if the Commission defers action on the petition.[4]

(j). Other readily available information that is relevant to the petition.

Jacqueline Jones-Smith
Chairman

Attachment: Schematic - Operational Procedures for Petitions

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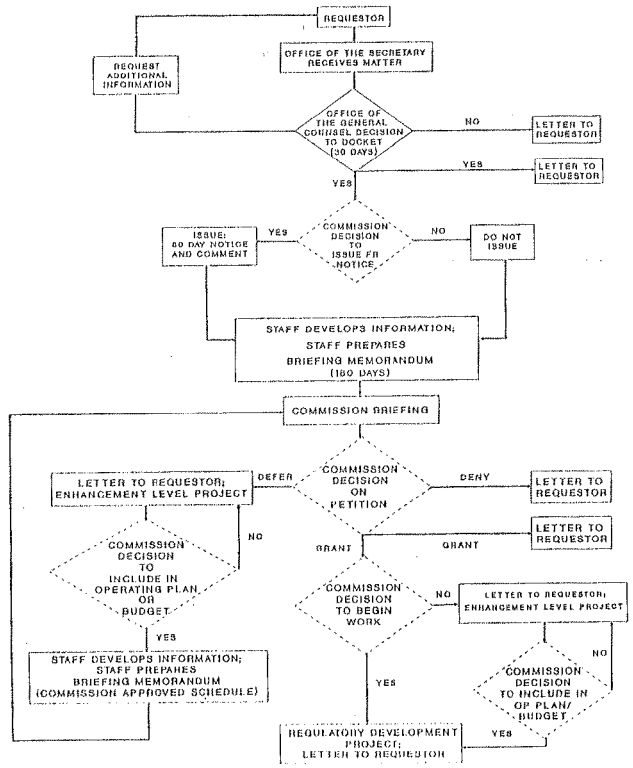
[3] If the Commission grants the petition, the staff will prepare a memorandum discussing when project work would begin, and what other operating plan work would not be done if the Commission decides to immediately begin the project. If the Commission grants the petition and decides not to modify the operating plan at the time, the staff will prepare an enhancement level project sheet for Commission consideration at the earliest opportunity: next mid-year review, operating plan or budget.

[4] Staff will prepare an enhancement level project sheet for this work for consideration in the next mid-year review, operating plan or budget, if the Commission defers action.

OPERATIONAL PROCEDURES FOR PETITIONS



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December 10, 1999

BY HAND

Roger Keller, Esq.
Counsel
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

Re: CPSC — Proposition 65 — Preemption Hearing

Dear Mr. Keller:

We are pleased to enclose additional materials for your consideration for inclusion in the record of the October 28, 1999 hearing. The materials are as follows:

- Correspondence from Representatives Tauzin and Northup (dated May 4, 1999 and May 19, 1999) regarding conflicting state regulation under Proposition 65.
- Summary of 26 cases brought by private parties under Proposition 65 against defendants subject to CPSC jurisdiction under the Hazardous Substances or other Federal Acts.
- Letters from companies located in New York and Ohio doing business in interstate commerce relating to the preemption/Proposition 65 issue.
- Letter dated July 21, 1997 from Greg Watchman, Acting Assistant Secretary, Department of Labor, to Chairman Talent describing implementation of OSHA's action plan with the State of California limiting Proposition 65 actions which would impair the Occupational Safety and Health Act.
- Newspaper articles (dated January 27, 1999 and November 11, 1999) relating to the impact of Proposition 65 on commerce.

- Letter of Winston & Strawn dated October 27, 1998 to the CPSC's General Counsel, including examples of Proposition 65 burdening interstate commerce.
- Letter dated July 22, 1998 from Winston & Strawn to the CPSC's General Counsel submitting a document entitled "FHSA Cautionary Labeling: The Need for the CPSC Action to Maintain a Uniform National Labeling Program and Avert Conflicting State Requirements and Inequitable Enforcement." The document includes examples of litigation (Tab D) and labeling (Tab F) burdening or duplicating federal requirements.

Please let us know if we can furnish additional information to the Committee on this subject.

Sincerely,

WINSTON & STRAWN

Michael R. Lemov

Enclosures

cc: William N. Hall, Esq.

BILLY TAUZIN
Third District, Louisiana
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CHAIRMAN
Subcommittee On Telecommunications, Trade, and Consumer Protection
RESOURCES COMMITTEE
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212 East Main Street
New Iberia, LA 70560
Telephone: 225-431-9400
Assumption Parish Courthouse East
648 South Main Blvd.
Room 213-A
Donaldsonville, LA 70346

May 4, 1999

The Honorable James Talent
Chairman, Committee on Small Business
2361 Rayburn Building
Washington, DC 20515

Dear Mr. Chairman:

It is my understanding that your Committee is reviewing California's "Proposition 65" as it affects small businesses which must comply with existing federal regulatory schemes, especially the Federal Hazardous Substances Act (FHSA). Conflicting, non-uniform or unjustified requirements imposed by states on products which move in interstate commerce cannot only burden such commerce, but may, in fact, work against the original intent of the federal regulatory scheme. These concerns must, of course, be weighed against the proper responsibility of the states to protect their citizens.

As you know, my Subcommittee on Telecommunications, Trade and Consumer Protection, has jurisdiction over the Consumer Product Safety Commission (CPSC) which administers the FHSA, and shares your concerns regarding the well-intentioned, but potentially deleterious effects of state initiatives which can detract from the effectiveness of well-considered federal preemptive regulatory programs. In this vein, I am aware of the positive impact that a review by you committee in 1997 had on a similar "Proposition 65" issue relating to Federal-State OSHA conflicts.

In my view, adverse impacts of potentially overreaching state initiatives must be addressed to avoid compliance conflicts and consumer confusion (for example caused by a multiplicity of difficult to interpret state-specific labels and labeling systems) by ensuring that the federal preemptive scheme is maintained intact unless state deviation can be specifically justified.

In the case of the FHSA, as it applies to consumer products, a CPSC clarification of the definition of "cautionary labeling" would seem to draw a bright line between state and federal authority. This approach would be consistent with CPSC's Advisory Opinion 312 (1991, reaffirmed 1995) with which I am in agreement. Administrative confirmation of federal preemption would leave open the option of a state petitioning for an exception to the federal rule where appropriate. This approach maintains an essential balance among several critical interests: (1) improved protection of the public through confusion avoidance; (2) state authority to compel federal review of "local" conditions; and (3) protection of interstate commerce from duplicative and counterproductive regulatory requirements.

It has also come to my attention through the enclosed article published in the Los Angeles Daily Journal (Jan. 27, 1999) that the most controversial feature of California's Proposition 65, the so-called "bounty-hunter" provision, has apparently reached epic proportion. While I am sure that allowing private enforcement of public laws was intended to conserve scarce public enforcement resources, it may have become a vehicle for harassment and unwarranted private profit through misuse of legal process. This does not appear to be the best method for gaining public respect for the law and should be carefully examined as it may affect federal programs designed to protect public health.

I applaud your efforts to help bring sense and balance to this issue and would like to offer my assistance in your efforts if and when that would be helpful.

Sincerely,

W.J. "Billy" Tauzin

enclosure

ANNE M. NORTHUP
3RD DISTRICT, KENTUCKY

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Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEE:
APPROPRIATIONS
SUBCOMMITTEES:
LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION
TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT
VA, HUD, AND INDEPENDENT AGENCIES

May 19, 1999

The Honorable James T. Walsh
Chairman
Subcommittee on VA, HUD, and Independent Agencies
H-143 Capitol
Washington, D.C. 20515-6022

Dear Jim:

Recently, I have been contacted by several of my constituents who manufacture paints and coatings in Louisville, Kentucky. They have recently alerted me to a matter which is creating significant burdens on the sale of their products in interstate commerce.

Specifically, states such as California have created "clear and reasonable" labeling and warning requirements (under Proposition 65) which appear to duplicate warning requirements under the Federal Hazardous Substances Act (FHSA). Many states, including Ohio and Massachusetts, appear to be seriously considering similar state legislation.

With labeling and warning requirements potentially varying widely from state to state, my constituents who sell products on a nationwide basis find it virtually impossible to ensure that each product they produce will be in compliance with specific labeling and warning requirements unique to each state. For example, in California alone, over $300 million has already been needlessly spent by as many as 3,000 businesses -- largely by producers selling *in interstate* commerce -- for penalties, legal fees, and increased labeling costs associated with Proposition 65 non-conformance.

I believe there is a reasonable remedy to this growing problem. The Consumer Product Safety Commission (CPSC), under the authority of the FHSA, has the responsibility to ensure that consumer confusion is eliminated and guidelines on interstate commerce are clear. To this end, it seems logical to request the CPSC to exercise its regulatory authority to initiate a rulemaking proceeding defining "cautionary labeling" and safety standards for consumer products in interstate commerce. While I strongly support a state's right to regulate commerce within its own borders, a rulemaking would eliminate duplicative and confusing state-specific labeling requirements when interstate commerce is involved.

The Honorable James T. Walsh
May 19, 1999
Page Two

I strongly urge you to consider including appropriate language in the CPSC's Fiscal Year 2000 appropriations measure which would have the effect of initiating a rulemaking process. Thank you for your consideration of this request.

Sincerely,

Anne M. Northup
Member of Congress

AMN:jpl

PROPOSITION 65 LITIGATION -- SELECTED RECENT CASES

TOTAL CASES: 26

TOTAL PENALTIES, DAMAGES, FEES, AND COSTS: $8,975,145

CASE	SUMMARY	SETTLEMENT STATUS
As You Sow v. Akzo Nobel Coatings, Inc.	• Defendant exposed persons to toluene, carbon black, formaldehyde, chromium, lead and lead compounds, silica, aluminum flake, CI Pigment Brown 24, antimony trioxide, toluene disocyonate, cadmium, nickel, ethylene glycol, and monomethyl ether.	Settlement Terms • Defendant agreed to label certain of its automotive paint and paint-related products with Proposition 65 warnings. Penalties, Damages, Fees, and Costs • Defendant agreed to pay $35,000 for enforcement of Proposition 65 and for educational purposes. • Defendant agreed to pay $20,000 penalty plus fees and costs. • Total: $55,000

CASE	SUMMARY	SETTLEMENT STATUS
Northcoast Environmental Center and Clean Air Network v. Louisiana-Pacific	• Defendant exposed persons to Proposition 65 chemicals, particularly formaldehyde. Defendant failed to provide a clear and reasonable warning to those exposed.	Penalties, Damages, Fees, and Costs • Defendant agreed to pay $5,000 in attorney's fees and costs. • Total: $5,000

CASE	SUMMARY	SETTLEMENT STATUS
People v. Sherwin-Williams Company; As You Sow v. Sherwin-Williams Company; People v. Ace Hardware, et al; As You Sow v. Longs Drugs	• Suit brought by the Attorney General and a group of citizens. • Defendant exposed users to toluene.	Settlement Terms • Sherwin-Williams, DAP Devcon and Ace Hardware must provide warnings by sending signs to retail stores and must follow-up to ensure that retail stores are posting the warning signs. Penalties, Damages, Fees, and Costs • Sherwin-Williams, DAP Devcon, and Ace Hardware must pay $1.2 million in penalties and costs (penalties can be reduced up to $372,000 if the companies make specific efforts to remove toluene and other hazardous solvents from the products). • Defendant Cotter settled for the total amount of $275,000 ($155,000 in penalties, $100,000 in restitution to environmental projects through the California Public Health Foundation ("CPHF"); $10,000 to Proposition 65 Enforcement Fund through the CPHF; and $10,000 to the Attorney General's office). • Total: $1,475,000

CASE	SUMMARY	SETTLEMENT STATUS
Mangini v. Waterford,; Mangini v. Baccarat, Inc.; Mangini v. Saks & Company,; Mangini v. Durand	• Defendant failed to provide warnings.	Settlement Terms • The terms of Saks & Company's settlement agreement were sealed. • Defendants, except Saks & Company, agreed to provide a joint in-store warning for leaded crystal, unless defendants show that their products do not leach detectable lead. Penalties, Damages, Fees, and Costs • Defendants, except Saks & Company, settled for $795,000 ($362,500 to University of California - San Francisco for lead research, $60,000 to the CPHF for lead education activities, $322,500 in attorney's fees and $50,000 in costs). • Total: $795,000

CASE	SUMMARY	SETTLEMENT STATUS
Near v. United Airlines	• Defendants failed to warn plaintiffs of smoking in the terminals in conjunction with the sale of alcoholic beverages in the terminal "clubs" and on the airplanes.	Settlement Terms • Defendant agreed to post smoking warnings and "safe harbor" alcoholic beverage warnings in terminal. Penalties, Damages, Fees, and Costs • Defendants settled for $40,000 in attorney's fees • Defendants must contribute $60,000 to the city. • Total: $100,000
Environmental Defense Fund v. Dowbrands, Inc.	• Defendant failed to provide a warning that its product contained perchloroethylene in an amount which poses a significant risk of cancer to product users.	Settlement Terms • Defendant agreed to reformulate its product to remove perchloroethylene and must offer customers the opportunity to exchange the old product for the new product. Penalties, Damages, Fees, and Costs • Defendant agreed to pay $115,000 in attorney's fees and costs, a portion of which will be placed in a trust fund for further enforcement of Proposition 65. • Total: $115,000

CASE	SUMMARY	SETTLEMENT STATUS
Environmental Defense Fund v. Sunnyside Corp.; Environmental Defense Fund v. Trutest Manufacturing Co.;Environmental Defense Fund v. Savogran Company; Environmental Defense Fund v. Star Bronze Company Inc.; Environmental Defense Fund v. Thompson & Formby; Environmental Defense Fund v. Parks Corporation	• Defendants failed to warn of exposure to methylene chloride by manufacturers of paint strippers and removers.	Settlement Terms • Defendants must provide warning material to retailers and distributors for all products being sold and must follow-up to assure that retailers actually post the warnings. • Defendants must also promote and provide alternative stripper products that do not contain methylene chloride. Penalties, Damages, Fees, and Costs • Defendants settled, except for Parks Corporation, for $417,000 in attorney's fees, of which Thompson paid $190,000. • Parks Corporation must pay civil penalties of $2 per can for each can with the weaker "federal" methylene chloride warning and $2,500 per can for each can with no warning at all, totaling $210,000 in civil penalties. • The Environmental Defense Fund ("EDF") was awarded $191,000 in attorney's fees and costs, which was increased to $350,000. • Total: $977,000

CASE	SUMMARY	SETTLEMENT STATUS
As You Sow v. Ashland Chemical, Inc.	• Defendant failed to warn consumers that use of their products would expose them to toluene and benzene.	• Pending
Hernandez v. Black & Decker, Inc.	• Defendants manufactured and distributed Repel Dog and Cat Repellent that contains paradichlorobenzene without a proper warning as required by Proposition 65.	• Pending

CASE	SUMMARY	SETTLEMENT STATUS
As You Sow v. BASF Corporation	• Defendants exposed persons to chromium, formaldehyde gas, nickel compounds, toluene and lead compounds in BASF'S automotive paint products.	Settlement Terms • Defendants agreed not to ship any products without proper warning labels. Penalties, Damages, Fees, and Costs • Defendants agreed to pay $5,750 to As You Sow's Proposition 65 Investigation Fund. • Defendants agreed to pay $1,750 to the Citizens for a Better Environment. • Defendants agreed to pay $36,500 in attorney's fees and costs. • Defendants agreed to pay $70,000 in penalties. • Total: $114,000
As You Sow v. United Gilsonite Labs	• Defendant failed to provide adequate warnings for its products containing chemicals listed in Proposition 65.	Settlement Terms • This case settled for updated warnings. Penalties, Damages, Fees, and Costs • Plaintiff waived fees and penalties.

CASE	SUMMARY	SETTLEMENT STATUS
Dennison-Leonard v. Stanford University	• Defendant failed to warn persons of exposure to lead through lead-based paints at the facility.	Settlement Terms • Defendants must provide warnings, undertake lead abatement activities, and provide blood-lead testing for children living in the housing. Penalties, Damages, Fees, and Costs • Defendants must pay $166,265 in penalties and costs. • Total: $166,265
As You Sow v. Revlon, Inc.; As You Sow v. Orly International,; As You Sow v. Apple Cosmetics,; Cosmetic, Toiletry, and Fragrance Association v. As You Sow	• Defendant failed to warn persons of nail polish containing toluene.	Settlement Terms • Defendants agreed to reformulate and provide warnings. Penalties, Damages, Fees, and Costs • Defendants will pay $206,000 in attorney's fees to As You Sow. • Defendants will pay $330,000 in attorney's fees to Cosmetic, Toiletry, and Fragrance Association and 13 other makers of home use nail polish. • Total: $536,000

CASE	SUMMARY	SETTLEMENT STATUS
Gonzales v. Sam's Group, Inc. dba Rubber Stampede	• Defendants exposed toluene without warning, as well as various wrongful discharge claims.	Penalties, Damages, Fees, and Costs • Defendants agreed to pay $150,000 in penalties, damages, fees and costs. • Total: $150,000

CASE	SUMMARY	SETTLEMENT STATUS
As You Sow v. U.S. Chemical & Plastic (Dupont); As You Sow v. Grow Group, Inc.; As You Sow v. Yenkin-Majestic Paint Corp. (PPG Industries)	• These cases involved occupational and consumer exposures.	Settlement Terms • Dupont will not ship products that contain Proposition 65 chemicals into California w/o a specified warning and will reprint product labels to include appropriate Proposition 65 warnings. • PPG Industries will place warning labels on all automotive coating products that contain Proposition 65 chemicals, reprint labels and provide for employee job training. • PPG Industries will reduce the sale of products that contain a certain percentage of lead compounds in 1995, 1996, and 1997 by 10% and will not formulate any new products that contain heavy metal components. Penalties, Damages, Fees, and Costs • Dupont will pay $11,000 to the Santa Clara Center for Occupational Safety and Health for educational purposes; $10,000 to the West County Toxics Coalition to assist low and moderate income residents in environmental issues; $8,000 to As You Sow's Proposition 65 Investigation Fund for research; $2,200 to the Citizens for a Better Environment for public education; $58,800 for attorneys' fees and costs to As You Sow; $40,000 in civil penalties; and $130,000 in the event that it fails to invest $10,000 in employee and job training or formulates or sells any new automotive paint products that contain cadmium, lead or chromium. • PPG Industrial will pay $10,000 to As You Sow for enforcement and educational purposes; $49,110 for attorneys' fees and costs; and $10,000 in civil penalties. • If PPG is unable to comply with these conditions it will pay a $60,000 fine per year. • Total: $328,980

CASE	SUMMARY	SETTLEMENT STATUS
Environmental Law Foundation v. Jeneric/Pentron, Inc.	• Defendant failed to warn dental amalgam of exposure to mercury caused by fillings in teeth.	Settlement Terms • Defendant will provide warnings on its product containers and will send dentists warning signs for posting, along with instructions and return card to indicate compliance. Penalties, Damages, Fees, and Costs • Defendant must pay $26,400 in penalties fees and costs. • Total: $26,400

CASE	SUMMARY	SETTLEMENT STATUS
Mateel Environmental Justice Foundation v. Mitsubishi Caterpillar, Inc.	• Defendant exposed diesel engine exhaust and other listed chemicals, which are components of diesel exhaust, without required warnings.	Settlement Terms • Defendants must place the required warnings either on the equipment or in the operator's manual. Penalties, Damages, Fees, and Costs • Defendants must pay $100,000 in civil penalties. • Defendants must pay $100,000 for warning advertisements to run in industry and union magazines. • Defendants must pay $280,000 in attorneys' fees. • Total: $480,000
Environmental Defense Fund v. C. Palmer Manufacturing, Inc., Lee Precision, Inc. and Do-It Corp., Hilts Molds; Environmental Defense Fund v. Blount, Inc.; Cabela's Lyman Products Corp., Midway Rapine Bullet Mold Manufacturing Co., Gander Mountain, Inc., Midsouth Shooter Supply Co.	• Defendants failed to warn persons that molded-leaded hobby products expose the consumer to levels of lead higher than permitted by law.	• Pending

CASE	SUMMARY	SETTLEMENT STATUS
Mateel Environmental Justice Foundation v. Accu-Tek	• Defendants failed to warn gun users that guns and ammunition would result in exposure to chemicals known to cause cancer and birth defects.	• Pending
Mateel Environmental Justice Foundation v. Pacific Gas & Electric	• Defendants exposed persons to seven separate Proposition 65-listed chemicals in the absence of clear and reasonable warnings.	• Pending
Bostean v. Becton-Dickinson Consumer Products	• Defendant failed to provide warning for mercury exposures from damaged or cracked thermometers.	Settlement Terms • Defendant must include a warning and instructions on what to do about disposal or breakage with the thermometers. Penalties, Damages, Fees, and Costs • Defendant will pay $20,000 in civil penalties. • Defendant will pay $30,000 in attorneys' fees and costs. • Total: $50,000
Mateel Environmental Justice Foundation v. Louisiana Pacific Lumber Co.	• Defendant exposed persons without warning to hexavalent chromium and arsenic.	• Pending

CASE	SUMMARY	SETTLEMENT STATUS
Mateel Environmental Justice Foundation	• Defendant exposed people without warnings to carbon monoxide, benzene, acetaldehyde and formaldehyde, all found in automobile exhaust.	• Pending
Mateel Environmental Justice Foundation v. Koll Management Services	• See Heitman Properties	Settlement Terms • Cushman & Wakefield agreed to post specific warning signs at the entrance of the parking garages on specified properties. Penalties, Damages, Fees, and Costs • Cushman & Wakefield will pay $30,000 in civil penalties. • Cushman & Wakefield will pay $5,000 to the CPHF. • Cushman & Wakefield will pay $15,000 to the plaintiff for distribution to nonprofit organizations "involved with and interested toxic chemical and air pollution issues." • Cushman & Wakefield will pay $15,000 in attorneys' fees. • Total: $65,000

People v. Gallo Vineyards, Inc.	• Suit brought by the Attorney General • Defendants exposed persons to lead through the use of lead foil caps on the bottles.	Penalties, Damages, Fees, and Costs • Defendants must establish a $700,000 fund that provides for warning signs and media advertisements that promote a "wipe before you pour" campaign throughout 1992. • Defendants must pay an additional $200,000 in penalties. • Total: $900,000

NRDC v. Price PFister	• Suit brought by the Attorney General • Defendants violated both the warning requirement and the discharge requirement because of the lead, which leaches into the water and remains in the brass components of the faucets.	Penalties, Damages, Fees, and Costs • Manville Manufacturing paid $60,000. • B&K Industries paid $90,000. • Woodmark International paid $50,000. • Nu-Tone paid approximately $36,500. • Price PFister paid a total of $2,400,000 ($100,000 in civil penalties; $200,000 in funds to reimburse the Attorney General's Office for the cost of the prosecution; and $500,000 to provide funding for lead education and reduction activities). • Price PFister also paid for attorney's fees to private litigants who had filed a coordinated action. • Total: $2,636,500 + attorney's fees to private litigants.

POTTER PAINT INDUSTRIAL COATINGS
POTTER PAINT CO., INC. • P.O. BOX 150 • CORTLAND, N.Y. 13045 • TELEPHONE (607) 753-6754
FAX # (607) 753-6757

April 30, 1999

Honorable James P. Walsh
Chairman
House Appropriations Subcommittee
VA-Independent Agencies
H-143 Capitol Building
Washington, DC 20515-6022

Dear Chairman Walsh:

I write to you as President of a paint manufacturing company in your district which employs around 11 people, and is a member of the National Paint and Coatings Association.

We appreciate the consideration your committee is giving to putting Report Language in the appropriations FY 2000 measure instructing CPSC to preempt Prop-65 styled state labeling requirements which deviate from the Federal Hazardous Substances Act.

Specifically, we are extremely concerned with state-specific "clear and reasonable" labeling and warning requirements and the impacts they will have on the sale of thousands of consumer product lines across the nation. These warnings, commonly referred to as "Proposition 65" requirements patterned after California legislation, are being enacted or considered in many states. We have learned that as many as 3,000 businesses in California alone have been subject to costly claims for not utilizing California's warning requirements. In addition, we have read that over $300 million have been expended, largely by producers selling in interstate commerce, for penalties, legal fees, and increased labeling costs, due to the California state requirements alone.

Your leadership on the troubling issue would reflect common sense, congressional intent, and help companies like ours transact business across state lines with unjustified impediments. Thank you.

Sincerely,

POTTER PAINT COMPANY, INC.

Peter A. Potter
President

PAP/mf

cc: Mr. Frank Cushing, NPCA

RPM, INC. • 2628 Pearl Rd. • P.O. Box 777 • Medina, OH 44258 • 330-273-8883 • Fax 330-225-6574

P. Kelly Tompkins
Vice President-General Counsel
Secretary

April 30, 1999

The Honorable Marcy Kaptur
United States House of Representatives
2311 Rayburn House Office Building
Washington, D.C. 20515-1703

VIA FACSIMILE

Dear Representative Kaptur:

RPM, Inc. and other RPM, Inc. businesses are extremely concerned with state-specific "clean and reasonable" labeling and warning requirements and the impacts they will have on the sale of our products across the nation. These warnings, commonly referred to as "Proposition 65" requirements patterned after California legislation, are being enacted or considered in many states. We have learned that as many as 3,000 businesses in California alone have been subject to costly claims for not utilizing California's warning requirements.

My experience as General Counsel to RPM, Inc has included several "clashes" with Proposition 65 involving several RPM, Inc. operating companies. In addition, we have read that over $300 million has been expended, largely by producers selling in interstate commerce, for penalties, legal fees, and increased labeling costs, due to the California state requirements alone.

As a manufacturer of paints, coatings and specialty chemicals, our sales and distribution network is national in scope. Uniformity in consumer labeling and warning requirements is, therefore, critical in packaging and selling our diverse line of products nationwide. It is our understanding that, under the Federal Hazardous Substances Act (FHSA), once federal authority is exercised, such authority is intended to broadly preempt state authority to regulate the same product hazards. In other words, once regulated, state product bans are not even permitted. To this end, RPM, Inc. requests your support in prompting the U.S. Consumer Product Safety Commission (CPSC) to commence a rule-making proceeding to develop a substantive federal regulation defining "cautionary labeling" under FHSA to preempt duplicative and conflicting labeling requirements applicable to consumer products within the jurisdiction of the CPSC.

RPM, Inc. and other similarly situated industrial companies across the state of Ohio are very concerned with both the immediate and long-term effects of Proposition 65-type state legislation on our ability to manufacture and distribute our products nationwide. Your assistance and support in addressing our concerns is greatly appreciated. I am very hopeful that your efforts and influence can result in substantive changes which will preserve national uniformity and fairness in consumer labeling and warning requirements.

Please do not hesitate to call me at (330) 273-8883.

Sincerely,

P. Kelly Tompkins

P. Kelly Tompkins

PKT:cro

M:\Legal Group\PKT\Ltrs\Kaptur 043099

Paints

Thomas J. Puette
Director of Legal Services

The Glidden Company
925 Euclid Avenue
Cleveland
Ohio 44115 USA
Telephone (216) 344-8399
Fax (216) 344-8935
e-mail: tom_puette@ici.co.uk

April 30, 1999

The Honorable Allan Mollohan
United States House of Representatives
Washington, DC 20515-4801

Dear Representative Mollohan:

The Glidden Company, is extremely concerned with state-specific "clear and reasonable" labeling and warning requirements and the impacts they will have on the sale of our products across the nation. These warnings, commonly referred to as "Proposition 65" requirements patterned after California legislation, are being enacted or considered in many states. I am sure that you have heard and read about the many businesses in California that have been subject to costly claims for not utilizing California's warning requirements.

As a manufacturer, our sales distribution network is national in scope through our do-it-yourself chain customers, independent dealers and our ICI Dulux® paint stores. Uniformity in consumer labeling and warning requirements is therefore critical in packaging and selling our diverse line of products nationwide. It is our understanding that under the Federal Hazardous Substances Act (FHSA), once federal authority is exercised, such authority occupies the field and broadly preempts state authority to regulate the same product hazards. To this end, The Glidden Company requests your support in prompting the U.S. Consumer Product Safety Commission (CPSC) to commence a rule-making proceeding to develop a substantive federal regulation defining "cautionary labeling" under FHSA to preempt duplicative and conflicting labeling requirements applicable to consumer products within the jurisdiction of the CPSC.

The Glidden Company and other industries across the state of West Virginia are very concerned with both the immediate and long-term effects of Proposition 65-type state legislation on our ability to manufacture and distribute our products nationwide. Your assistance and support in addressing our concerns are greatly appreciated. I am very hopeful that your efforts and influence can result in substantive changes which will preserve national uniformity and fairness in consumer labeling and warning requirements.

Sincerely,

THE GLIDDEN COMPANY

Thomas J. Puette

TJP/kk

The Glidden Company is a member of the ICI Paints World Group

Benjamin Moore & Co. *Paints • Stains • Clear Finishes*

EXECUTIVE OFFICE • 51 CHESTNUT RIDGE ROAD • MONTVALE, NEW JERSEY 07645-1962 • (201) 573-8600 • FAX: (201) 573-9046

WEBSITE: www.benjaminmoore.com

May 3, 1999

Via Facsimile (202) 225-9476
and Regular Mail

The Honorable Alan B. Mollohan
United States House of Representatives
Ranking Member
VA-Independent Agencies Subcommittee of
House Appropriations Committee
Washington, DC 20515-4801

Attention: Del Davis

Dear Representative Mollohan:

Benjamin Moore & Co. is extremely concerned with any state-specific "clear and reasonable" labeling and warning requirements and the impacts they will have on the sale of our products across the nation. These warnings, commonly referred to as "Proposition 65" requirements patterned after California legislation, are being enacted or considered in many states. We have learned that as many as 3,000 businesses in California alone have been subject to costly claims for not utilizing California's warning requirements. In addition, we have read that over $300 million has been expended, largely by producers selling in interstate commerce, for penalties, legal fees, and increased labeling costs, due to the California state requirements alone.

Proposition 65 and its bounty hunters have crippled so many industries to the personal enrichment of the bounty hunters. The original intent of the Proposition was distorted by the poorly drafted legislation and the conflicts with the federal laws. Unfortunately, this enabled the bounty hunters to benefit rather than the consumers.

Benjamin Moore & Co. was served and hunted down by the bounty hunters and treated as one of their prey. There was no rational basis for their claim. I cannot begin to tell you the horror stories I encountered when speaking to other companies about their experiences. The harm this Proposition has caused to so many industries and consumers is abhorrent.

Benjamin Moore & Co. distributes its products through independent dealers in your district and has a manufacturing facility in Richmond, Virginia. As a manufacturer, supplier and retailer, our sales distribution network is national in scope. Uniformity in consumer labeling and warning

requirements is therefore critical in packaging and selling our diverse line of products nationwide. It is our understanding that under the Federal Hazardous Substances Act (FHSA), once federal authority is exercised, such authority occupies the field and broadly preempts state authority to regulate the same product hazards. To this end, Benjamin Moore & Co. requests your support in prompting the U.S. Consumer Product Safety Commission (CPSC) to commence a rule-making proceeding to develop a substantive federal regulation defining "cautionary labeling" under FHSA to preempt duplicative and conflicting labeling requirements applicable to consumer products within the jurisdiction of the CPSC.

Benjamin Moore & Co. and other industries across the state of West Virginia are very concerned with both the immediate and long-term effects of Proposition 65-type state legislation on our ability to manufacture and distribute our products nationwide. Your assistance and support in addressing our concerns are greatly appreciated. I am very hopeful that your efforts and influence can result in substantive changes which will preserve national uniformity and fairness in consumer labeling and warning requirements.

Sincerely,

Benjamin Moore & Co.

JoAnn Glaccum
General Counsel-Commercial Affairs

JG/sr

OHIO PAINT COUNCIL

280 SOUTH THIRD STREET
COLUMBUS, OHIO 43215
TEL: 614/221-1240
FAX: 614/221-2865

April 29, 1999

Honorable Marcy Kaptur
U.S. House of Representatives
Washington, DC 20515-3509

Dear Representative Kaptur:

I am writing to you on behalf of the Ohio Paint Council (OPC) which is a statewide association representing Ohio manufacturers, wholesalers and retailers of paint and coatings products. We directly represent 79 Ohio businesses with over 6,000 employees. As you may know, Ohio is the leader in the manufacture of paint and coatings products in the United States. OPC members are extremely concerned with state-specific "clear and reasonable" labeling and warning requirements and the impacts they will have on the sale of their products across the nation. These warnings, commonly referred to as "Proposition 65" requirements patterned after California legislation, are being enacted or considered in many states. We have learned that as many as 3,000 businesses in California alone have been subject to costly claims for not utilizing California's warning requirements. In addition, we have read that over $300 million have been expended, largely by producers selling in interstate commerce, for penalties, legal fees, and increased labeling costs, due to the California state requirements alone.

As I am sure you remember, a similar "Proposition 65" type issue was presented to Ohio voters as State Issue 5 in 1992. Issue 5 was soundly defeated by Ohio voters by a vote of 78% to 22%. About 3.5 million Ohioans voted against this ballot measure.

Many OPC members have sales distribution networks which are national in scope. Uniformity in consumer labeling and warning requirements is therefore critical in packaging and selling their diverse line of products nationwide. It is my understanding that under the Federal Hazardous Substances Act (FHSA), once federal authority is exercised, such authority occupies the field and broadly preempts state authority to regulate the same product hazards. To this end, the OPC requests your support in prompting the U.S. Consumer Product Safety Commission (CPSC) to commence a rulemaking proceeding to develop a substantive federal regulation defining "cautionary labeling" under FHSA to preempt duplicative and conflicting labeling requirements applicable to consumer products within the jurisdiction of the CPSC.

Ohio Paint Council members and other industries across the state of Ohio are very concerned with both the immediate and long-term effects of Proposition 65-type state legislation on our ability to

manufacture and distribute our products nationwide. Your assistance and support in addressing our concerns are greatly appreciated. I am very hopeful that your efforts and influence can result in substantive changes which would preserve national uniformity and fairness in consumer labeling and warning requirements.

Sincerely,

John T. McGough
Executive Director

JTM:jy

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 21 1997

The Honorable James M. Talent
Chairman, Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515-0315

Dear Chairman Talent:

As we indicated to you in our letter of July 7, we have written to the California Occupational Safety and Health State Plan Designee, John Duncan, requesting that the State submit an action plan for fulfilling California's responsibilities under OSHA's approval decision to oversee hazard communication enforcement throughout the State and to assure that all State plan commitments are being fulfilled. The letter also clarifies the applicability of the State's hazard communication standard with regard to out-of-state manufacturers. A copy of that letter is enclosed for your information.

As promised in our earlier letter, we will provide you a copy of the State's response when it is submitted. We appreciate your interest in this complex issue.

Sincerely,

Greg Watchman
Acting Assistant Secretary

Enclosure

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 7 1997

The Honorable James M. Talent
Chairman, Committee On Small Business
U.S. House of Representatives
Washington, D.C. 20515-0315

Dear Chairman Talent:

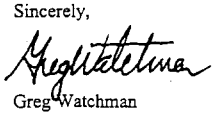
This is in response to your June 23, 1997, letter concerning the Occupational Safety and Health Administration's approval, subject to specific limiting conditions, of the California Hazard Communication standard. I appreciated the opportunity to discuss the details of the decision with you personally.

Your letter accurately portrays OSHA's approval decision as establishing a "bright line" test which is "conduct-based." It is our intent to further explain the conditions of Federal approval in a letter to the California State Designee, John Duncan, Acting Director, Department of Industrial Relations, within the next week to 10 days. In that letter we will also make clear the requirement that the State designee is ultimately responsible for all activities which are a part of the approved State plan, whether or not he personally controls such activity, and must take appropriate regulatory, judicial or legislative action to correct any deficiencies that result. This principle clearly applies to the approval of Proposition 65 in its occupational context as a part of the State plan and any supplemental enforcement activity taken thereunder. We will request that Cal/OSHA establish mechanisms for tracking supplemental enforcement actions and develop a strategy for assuring that enforcement of its hazard communication standard and Proposition 65 results in "at least as effective" worker protection and is consistent with the conditions of Federal approval. California may want to consider issuing regulations that enable appropriate tracking and formalize OSHA's conditions of approval. We will ask Cal/OSHA to provide us with an Action Plan within 30 days as to how they intend to assure that the conditions of approval of the hazard communication standard are fulfilled. Regional and National OSHA staff will be made available for discussions with the State. OSHA will also actively monitor the State's achievement of its Action Plan and will promptly respond to any complaints we receive about final State actions that are viewed as contrary to our decision. We will provide you with copies of both our letter to California and the State's Action Plan when it is submitted.

As you are well aware, the issues presented by the California standard are technically complex and raise major public policy concerns with regard to Federal/State relationships and the national impact of occupational safety and health standards. I appreciate your personal interest in this

issue and am hopeful that OSHA's decision will alleviate some of the practical difficulties produced by this unique State standard while at the same time allowing the concerns of the voters of California for workplace hazard communication to continue to be addressed in the manner they chose.

Sincerely,



Greg Watchman
Acting Assistant Secretary

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 21 1997

John Duncan, Acting Director
California Department of Industrial Relations
45 Fremont Street
San Francisco, California 94105

Dear Mr. Duncan:

This letter is intended as a follow-up to OSHA's June 6, 1997 notice in the Federal Register approving, subject to certain conditions, the hazard communication standard (HCS) submitted by California as part of its State plan. The notice of approval specifies that the agency designated with responsibility for administering the State plan must assure that occupational hazard communication enforcement activity (including suits by private plaintiffs under Proposition 65, which, in its occupational application, is a part of the Cal/OSHA hazard communication standard) is in accordance with applicable State plan criteria and the conditions set forth in Federal OSHA's approval decision . The purpose of this letter is to ask that the State provide information concerning the manner in which Cal/OSHA will carry out its continuing responsibility to oversee implementation of the decision.

We request that you submit for OSHA review an action plan and timetable for fulfilling California's responsibilities under OSHA's approval decision to oversee hazard communication enforcement throughout the State and to assure that all State plan commitments are being fulfilled. This plan should be submitted no later than August 18. As required by 29 CFR 1902.3(b)(2), your plan should include any regulations and interagency agreements needed to provide the designated State agency with the necessary authority to effectively monitor statewide occupational hazard communication enforcement, and to assure that supplementary enforcement activity is consistent with State plan commitments. We understand that the Cal/OSHA regulations may be amended to conform to the recently promulgated Office of Environmental Health Hazard Assessment regulations on filing of 60-day notices; Cal/OSHA may wish to include other clarifications in any upcoming regulatory revision.

As you may recall, several of the comments submitted to OSHA argued that enforcement of Proposition 65 requirements by entities other than Cal/OSHA -- in particular, enforcement by plaintiffs in private lawsuits -- violates section 18(c)(1) of the OSH Act, which requires State plans to be administered by a designated State agency or agencies. OSHA determined that the inclusion of private enforcement rights as a supplement to conventional enforcement would not violate 18(c)(1) so long as Cal/OSHA retained overall responsibility for overseeing the

administration of hazard communication enforcement throughout the State. This decision is consistent with OSHA's State plan regulations, which allow States a degree of organizational flexibility in administering their Federally-approved plans; as set out in 29 CFR 1902.3(b)(2), operational responsibility may be shared by multiple agencies or entities within a State, but the designated State agency must retain "adequate authority by statute, regulation or agreement, to insure that the commitments of the State under the plan are fulfilled."

Because OSHA has approved a Cal/OSHA hazard communication standard whose supplementary enforcement procedures include suits under Proposition 65 by local prosecutors and private plaintiffs, these enforcement proceedings are now part of California's Federally-approved State plan. OSHA's June 6 decision specifically charges Cal/OSHA with an ongoing responsibility "to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is Federally approved." Thus, even though the State plan agency is not required to directly participate in all enforcement proceedings, it must keep informed of current developments and must "take ... the appropriate and necessary administrative, legislative or judicial action" to correct any State plan deficiencies resulting from adverse court decisions, as specified by 29 CFR 1902.37(b)(14).

California's newly-approved hazard communication requirements are unusual among State plan States, in that agencies and individuals outside the State plan agency are authorized to carry on supplemental hazard communication enforcement. Nevertheless, section 18(c) of the Act and OSHA's decision approving the hazard communication supplement clearly require Cal/OSHA to be "responsible for administering the plan throughout the State." The decentralized nature of Proposition 65 enforcement will require Cal/OSHA to undertake substantial oversight and coordination efforts to assure that all of the conditions of Federal approval continue to be met.

While the specifics of such a program can be developed by the State, the system must be sufficient for Cal/OSHA to determine whether supplemental enforcement actions are meeting the conditions under which the standard was approved. We would recommend that the following elements be considered in the development of your action plan:

Proposition 65 Enforcement Filings - Cal/OSHA should be aware of the 60-day notices filed by prospective plaintiffs under Proposition 65 as well as actual court filings throughout the State, including those by local or State prosecutors and private plaintiffs. Cal/OSHA should have a current listing of such filings and court cases and should be in a position to distinguish potential Proposition 65 environmental or consumer cases from those which allege occupational exposures or violations. If current procedures for the filing of 60-day notices are inadequate to provide this information, the State's regulations should be amended to provide it. The State should pay special attention to cases in which there is any indication that the conditions regarding State plan enforcement are not being observed-- i.e., complaints involving out-of-state activity or efforts to impose warning requirements beyond those in the HCS. The Attorney General's Office should be helpful in developing a tracking system.

Participation in Litigation - Referrals by State courts under the doctrine of primary jurisdiction can be a useful mechanism in assuring that State plan commitments are satisfied, and therefore Cal/OSHA should prepare court filings whenever courts in Proposition 65 cases request the agency's views on alleged hazard communication violations. Amicus participation by Cal/OSHA in particularly significant cases is encouraged in appellate-level cases which are likely to impact the effective enforcement of HCS or a violation of the conditions of approval.

Address Adverse Court Decisions - As set out in 29 CFR 1902.37(b)(14), State plans are generally required to take administrative, legislative or court action to assure that when adverse court decisions are rendered, the effectiveness of the State plan will not be affected. In the area of hazard communication, the State of California must take prompt and effective action to assure that adverse judicial rulings do not impair the effectiveness of the HCS or violate the conditions under which it was Federally approved.

We would also like to take this opportunity to clarify the condition in the approval determination that hazard communication requirements can be enforced as part of the State plan only with respect to conduct which occurs within the State. This limitation is required not only by the statutory language of section 18 of the OSH Act but also by the practical need to avoid overlapping responsibilities and inconsistent requirements among the various State plan and Federal agencies responsible for enforcing labeling and Material Safety Data Sheet (MSDS) requirements for products used in workplaces throughout the nation.

OSHA's approval decision is intended to establish a "bright line" test which is conduct-based. Employers are subject to hazard communication requirements under the California State plan only with respect to activity carried on within the State.

Under OSHA's approval decision, a company that manufactures products in California must comply with Cal/OSHA hazard warning requirements with respect to those products. On the other hand, a company which manufactures goods outside California is not subject to enforcement under the California State plan with respect to those goods, but instead must comply with the warning requirements imposed on manufacturers by the State plan in effect where the manufacturing is carried on, or by the Federal HCS if there is no plan.

The fact that a company may also have workplaces in California does not make its out-of-state manufacturing activity subject to California's State plan requirements, whether derived from the general hazard communication standard or from Proposition 65. Of course, all workplaces in California are subject to the Cal/OSHA requirements applicable to the activities carried on there.

I have asked Deputy Assistant Secretary Frank Strasheim and staff involved in the decision to be available to meet with you if this would be useful in developing your action plan. OSHA is also available to consult with you on any legal or procedural issues that should arise to assure that the State's position is consistent with OSHA's expectations. OSHA expects to monitor California's implementation of this decision and respond to any Complaints about State Program Administration that may result. If there is anything OSHA can do to assist you, please let us know.

As you are aware, Congressman James Talent, Chairman of the House of Representatives Committee on Small Business, has expressed an interest in enforcement of Proposition 65, especially against out-of-state employers. Congressman Talent's June 23 letter and our reply are enclosed for your information.

Sincerely,

Greg Watchman
Acting Assistant Secretary

Enclosures

LOS ANGELES DAILY JOURNAL • WEDNESDAY, JANUARY 27, 1999 •

Prop. 65 Plaintiffs' Group Sues Attorney

By Dennis Pfaff
Daily Journal Staff Writer

SAN FRANCISCO — As You Sow, one of the earliest and most prolific plaintiff groups pursuing cases under California's Proposition 65, has sued its longtime attorney Clifford Chanler for allegedly inflating his bills and misappropriating confidential information for his own use.

The lawsuit centers on approximately $7 million in fees and costs Chanler purportedly received from lawsuits filed on the organization's behalf over a six-year period — an amount representing 85 percent of the $8.2 million the suits generated for the group.

Filed Jan. 19 in San Francisco Superior Court, it says Chanler helped form the organization purely as a money-making venture for himself.

As You Sow also accused Chanler of maneuvering to use information gathered while working for the organization for lawsuits that were later filed on behalf of other plaintiffs.

Chanler, through a spokesman, immediately denied any wrongdoing and accused the San Francisco group of "sour grapes" because Chanler has moved on and is now successfully representing other clients.

"There is no basis for their complaint," said spokesman Gary Pike.

Lawrence Fahn, As You Sow's executive director, said the litigation comes at the end of eight months of "strenuous efforts to try to resolve the differences" short of a lawsuit. He suggested a key problem involved the lack of time sheets and cost records.

"Any substantiation in terms of those fees and costs has just been refused," Fahn said.

The lawsuit, *As You Sow v. Chanler*, 300622, says Chanler retained more than $6.4 million in fees, plus nearly $500,000 in costs, equal to 85 percent of the $8.2 million the lawsuits generated for As You Sow over the past six years.

Two other attorneys who have worked with Chanler and a man the lawsuit identifies as an investigator for Chanler were also named as defendants.

Chanler's 1992 fee agreement with the group, the lawsuit said, had provided for him to be paid an hourly rate, contingent on the recovery of enough money from Proposition 65 lawsuits to pay the fees.

However, the lawsuit charges Chanler never "provided the plaintiff with accurate time records or an accounting of the attorney's fees incurred." As You Sow's lawsuit said the organization believes Chanler's invoices "included inflated hours" and they were based on "excessive and unapproved billing rates."

Payments made to Chanler "are substantially greater than the actual number of hours and the agreed upon hourly rates for legal services provided to plaintiff are unconscionable," the lawsuit charges.

CLIFFORD CHANLER — The attorney best known for filing Proposition 65 violation lawsuits has been sued by the plaintiff group, As You Sow.

The lawsuit does not specify exactly how much it believes it was overcharged, although it says Chanler failed to reimburse the organization nearly $500,000 in costs in one case and withheld more than $39,000 in costs in another.

Proposition 65, approved by California voters in 1986, requires companies to warn consumers of products that that may expose them to substances causing cancer or birth defects. The unusual law is enforced primarily by private lawsuits that provide plaintiffs 25 percent of the penalties, which can run up to $2,500 per violation.

Although the law contains no specific fee recovery provision, Proposition 65 cases rarely proceed beyond the settlement stage and fees are commonly a part of such agreements.

Chanler has been closely identified with the law since the early 1990s, when he represented the Environmental Defense Fund in Proposition 65 cases and then, after a bitter breakup with that organization in 1992, he began representing As You Sow.

The organization has filed Proposition 65 actions against more than 800 companies, according to figures supplied by the state attorney general's office last year, although it is not known exactly how many of those Chanler worked on. Fahn said the group stopped referring new cases to him in late 1996.

The volatile Chanler has long battled frequent criticisms by defense attorneys and even some of his plaintiffs' colleagues, who say his primary interest has been financial. In response, Chanler has been quick to point out that the cases he has brought have resulted in major reductions in chemical exposures to consumers, as companies changed their products after being sued.

But now, Chanler is facing the critique from a surprising new source, the organization itself.

"Chanler created and intended to use AYS as a vehicle to make money for Chanler and not further the environmental goals and philosophies of AYS," the group's lawsuit charged.

"It's a sad day," said Thomas Van Dyck, chairman of the As You Sow board and a friend of Chanler for 20 years. The two "brainstormed" the concept of the organization together, he said.

Pike on Monday said Chanler had, in fact, supplied the organization with time and billing documentation over the years but that the group had not always requested the information. However, he said As You Sow had the ultimate authority to approve the settlements.

"If AYS had any question, they never should have signed the settlement agreements," Pike said. "If they had any question they never should have approved them."

An outline provided by Pike says the dispute began in October 1996 when As You Sow refused to pay two invoices totaling nearly $100,000 for expert witness expenses. The group, the Chanler document alleges, is in arrears for more than $180,000.

But Fahn said the organization had always expected detailed records to be provided.

"Until late 1995, AYS never even had a regular staff person," said Fahn. "We relied on Chanler to be accountable and forthcoming."

Pike also said Chanler denies using information obtained during the course of his representation of As You Sow for outside litigation.

The lawsuit says Chanler, while investigating a case involving the use of lead for welding, also learned of possible violations involving other companies. Later, 27 companies were sued by Chanler and another attorney, David Bush, on behalf of Michael DiPirro, an investigator for Chanler.

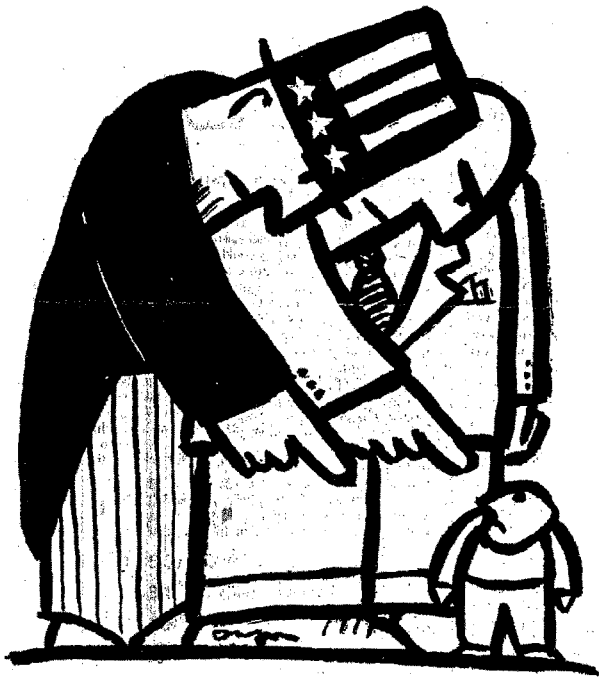
Through Pike, Chanler denied using information obtained while working for As You Sow to generate the other lawsuits. Pike said the information came from a conference in Los Angeles attended by the attorneys.

Bush, who was named as a defendant in the As You Sow case, also said the information on the welding companies was obtained independently.

"I am completely confident that all the information we used came 100 percent separately from As You Sow," Bush said.

Forum

LOS ANGELES DAILY JOURNAL • THURSDAY, NOVEMBER 11, 1999 • PAGE 6



Wasted Warning

Proposition 65's Unfairness Must Be Exposed

By Jeffrey B. Margulies

Proposition 65 was passed by voter initiative in California in November 1986. Its title, "The Safe Drinking Water and Toxic Enforcement Act of 1986," as well as the campaign launched by its supporters, primarily focused on cancer "clusters" that were appearing throughout California. It was premised on the claim that existing laws were insufficient to protect the drinking water supply and that citizens had a right to know about exposures to chemicals "known to the state" to cause cancer or reproductive toxicity.

Lost in the debate was the refrain sounded by some that Proposition 65 would ultimately result in a proliferation of warnings that would not provide any real information to consumers.

Few can argue with the concept that consumers should be warned about exposures to toxic chemicals. The consumer's right to know about such exposures, and how to reduce their risk from such exposures, is at the heart of the federal Hazardous Substances Act, as well as a number of other federal and state laws.

Two aspects of Proposition 65 have created consequences presumably unintended by those who voted for it.

Yet two aspects of Proposition 65 have created consequences presumably unintended by those who voted for it: Proposition 65's scheme does not help businesses with their efforts to comply. And it is enforced by lawsuits that can be filed by private individuals who are unaccountable to the public and can abuse the system.

While some regulations have been adopted to implement Proposition 65, there has been little certainty regarding how and when to provide warnings. Including any information in a warning other than stating that the chemical is "known to the state of California to cause cancer" means that the adequacy of a warning is a "question of fact" in any enforcement action. This means that all products containing listed carcinogens — whether in substantial or trace amounts or whether known to be human or animal carcinogens — are forced to carry the same warning.

A Proposition 65 warning must be provided if there is any exposure to a listed chemical, unless the company can demonstrate no warning is necessary. There is, however, no way to be sure in advance that the risk assessment will be sufficient. And a state's "safe use determination" is not binding on public or private prosecutors or on the courts (leading many to ask "What's the use?").

Because risk assessments are filled with assumptions about product use and exposure, almost any risk assessment can be challenged by an enforcer, leaving the company to face potentially crippling civil penalties if a court disagrees with its analysis. As a result, many businesses provide warnings regardless of the extent to which the users are exposed to the listed chemical, simply to avoid litigation.

Private enforcers can exploit the uncertainty of compliance by threatening lawsuits in which they can recover 25 percent of any civil penalties and, sometimes, attorney fees. While the intent of Proposition 65 was to "inform" consumers, the threat of penalties and fees, coupled with the expense of litigation, have caused a proliferation of meaningless warnings. Virtually every business and innumerable products have some sort of Proposition 65 warning sign posted.

Jeffrey B. Margulies, a partner with the Santa Monica office of Haight, Brown & Bonesteel, recently testified about Proposition 65 before the House's Small Business Committee.

Consumers are deluged with warnings of exposure to carcinogens and reproductive toxins. They are not told either the degree of exposure or the likelihood that they may actually be affected by it. Moreover, because of the risks of not providing a warning, many provide one even with no knowledge of the amount of exposure, diluting the impact of warnings on consumers.

Because manufacturers may differ in their approaches to Proposition 65, products that contain similar ingredients may not be similarly labeled. Therefore, a consumer may see two nearly identical products, but only one contains the Proposition 65 warning.

It has been estimated that, from 1987 through the beginning of 1998, more than $25 million had been assessed in Proposition 65 settlements, more than $50 million had been expended in attorney fees, and more than $250 million in product reformulations, process changes and other business costs have been incurred to comply with Proposition 65. Who is paying for all of this? The same consumers who don't understand what these warnings mean.

In 1996, then-Attorney General Dan Lungren sponsored an unsuccessful bill to attempt to make it harder for private enforcers to pursue frivolous or "de minimus" violations. His successor, Bill Lockyer, according to his Oct. 28 testimony filed with the U.S. House of Representatives Small Business Committee, admitted that he is powerless to stop the frivolous actions filed by "unscrupulous" private enforcers.

The U.S. Occupational Safety and Health Administration in 1997 approved the use of Proposition 65 for exposures to listed chemicals in the workplace. OSHA, however, prohibited the use of Proposition 65 against out-of-state manufacturers, since the use of California law in such a manner is pre-empted by federal law.

OSHA also requires that the state ensure that private enforcement actions are undertaken consistent with OSHA's approval. Since that approval, Proposition 65 compliance in the workplace has become more certain and frivolous private lawsuits have essentially disappeared.

The Federal Hazardous Substances Act also pre-empts state cautionary labeling laws that are "not identical," yet California courts have found that Proposition 65 is not pre-empted, as it only requires "warnings," not "labeling," in spite of the U.S. Consumer Product Safety Commission's conclusion that Proposition 65 warnings are pre-empted under the FHSA. CPSC has been afforded an opportunity to define "cautionary labeling" by regulation, but the testimony of its chairperson, Ann Brown, to the congressional committee, indicates that won't take on the task in light of the court decisions in California.

Tackling this tough issue would require California to seek an exemption from pre-emption, and allow CPSC to assert the same types of conditions that OSHA found necessary. By doing so, CPSC could take a dramatic step toward making warnings under both Proposition 65 and the FHSA meaningful to consumers, reduce uncertainty and abuse on businesses and eliminate unnecessary costs.

According to supporters of Proposition 65, for example, the Environmental Defense Fund, enforcement complaints are nothing more than an attempt to undo the proposition. Not so. The business owners who testified are in favor of public disclosure of health hazards. They, along with most of the committee members, only want to fix a system that allows unscrupulous private enforcers to exploit the uncertainty in the law for profit. Businesses simply want to be told what they need to do to comply, not play "California Roulette."

WINSTON & STRAWN

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October 27, 1998

BY HAND

Jeffrey S. Bromme
General Counsel
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Jeff:

We appreciate the opportunity to meet with you regarding the adverse impact of California Proposition 65 on the effectiveness of the labeling and warning provisions of the Federal Hazardous Substances Act. We previously furnished you our memorandum dated July 20, 1998 (FHSA Cautionary Labeling: The Need for the CPSC Action to Maintain a Uniform National Labeling Program and Avert Conflicting State Requirements and Inequitable Enforcement) which includes numerous examples of duplicative labeling and costly litigation expenses incurred by manufacturers doing business in interstate commerce.

Since that time, we have been furnished with ten additional examples of situations where California Proposition 65 undermines the effectiveness of the Federal Hazardous Substances Act. We would emphasize that these are examples only and, in our opinion, represent only a small portion of the available evidence. These examples (copies attached) may be summarized as follows:

- Frazee Industries, Inc. - $50,000 in attorneys fees defending lawsuit; all stores contained conspicuous notice complying with Proposition 65.

- Products/Techniques, Inc. - Litigation threatened under Proposition 65, although company sells only to industrial users.

- Hunter-Ruiz examples:
  - Manufacturer receives 60-day notice under Proposition 65 threatening suit, although products identified are not sold in California.
  - Manufacturer receives 60-day notice under Proposition 65, product does not contain any listed chemicals.
  - Manufacturer receives 60-day notice under Proposition 65, company is not subject to state law since it employs fewer than ten employees.
  - Manufacturer receives notice under Proposition 65, although product in question is sold only to U.S. military installations outside California.
  - Manufacturer receives Proposition 65 notice threatening litigation, although foreseeable use of the product does not give rise exposure by means of inhalation.
  - A 60-day notice threatening litigation filed, although manufacturer determines the products named contain the alleged chemical only in trace amounts.
- Letter regarding $1.1 million settlement by Ashland Chemical Company where the plaintiff allegedly received $611,000 in attorneys fees and expenses from $1.1 million settlement.
- Memorandum from attorney Andre V. Tolpegin describing costly tactics of plaintiffs under Proposition 65 and the burden of vague state standard of "clear and reasonable warning . . ." utilized by plaintiffs to force costly settlements on interstate and California sellers.

WINSTON & STRAWN

We trust that these illustrations, as well as those furnished in our memorandum of July 20, 1998, fully establish a burden on interstate commerce and undermining of the provisions of the Federal Hazardous Substances Act.

We look forward to discussing this issue with you further.

Sincerely,

WINSTON & STRAWN

William N. Hall

William N. Hall

Michael R. Lemov

Attachment

cc: Thomas H. Graves
National Paint & Coatings Association

FRAZEE INDUSTRIES, INC.

6625 Miramar Road
San Diego, CA 92121
(619) 276-9500
FAX (619) 453-3429

Hobart L Overocker
President

April 9, 1996

Assembly Member Keith Olberg
State Capital
Sacramento, CA 95814

Re: AB-3160

Dear Honorable Member Olberg,

Frazee Paint will celebrate its' 100th anniversary in business in Southern California this year. We are a 550 employee company with approximately 50 stores in Los Angeles, Orange County and San Diego.

To date, over the course of the last five months, I have spent approximately $50,000 in attorneys fees defending Frazee against a lawsuit by As You So (a bounty hunter).

None of this money has gone toward any corrective or remedial action since the nature of the problem has not been clearly identified by As You So. Frazee, by the way, is a strong supporter of appropriately identifying dangerous chemicals to the public and does everything possible to comply with the regulations of Prop 65.

This "bounty-hunter" provision wastes time, money and, most importantly, does nothing to further protect citizens from dangerous chemicals.

I fully support the intent of Prop. 65 and am perfectly prepared to ensure that all of my products are adequately identified. Since all of my stores are company operated, a conspicuous notice along the lines of Prop. 65 warning is placed in all stores. Since the store managers all work for me, and they know the importance of adhering to the regulations, I am confident that whatever store the bounty-hunter visited, there was a sign.

I fully support the intent of AB3160 and feel that the California industry currently operates at a distinct disadvantage to those companies who can operate outside of the state and are not so susceptible to this ridiculous and wasteful practice.

Respectfully,

FRAZEE INDUSTRIES, INC.

H.L. Overocker

cc: CPC
Members of the Environmental Safety and Toxic Materials Committee

STEVEN D. ANDREWS
Attorney at Law
6101 Pinecrest Drive
Los Angeles, CA 90042
(213) 258-6503
Fax (818) 294-0808

APR 8 1996

April 2, 1996

The Honorable Mr. Keith Olberg
State Capitol
Sacramento, CA 95814

Dear Mr. Olberg:

This letter will introduce myself as General Counsel for Products/Techniques, Inc. (PTI). PTI is a manufacturer of industrial paints and coating systems. PTI was targeted by "As You Sow" in 1994, for alleged proposition 65 warning violations. In 1995, we concluded a negotiated settlement of AYS' lawsuit against PTI.

Because PTI is a small manufacturer, there was no possibility of resolving this matter apart from a negotiated settlement where AYS was paid damages. This, despite the fact that, arguably, Proposition 65 does not apply to companies who sell only to industrial users. What is more, Cliff Chanler himself complimented PTI on its two-tier warning system.

None of these things, all verifiable fact, were taken into account by AYS in evaluating whether their lawsuit was meritorious. Neither were they willing, in PTI's case, to address whether PTI had complied with the language of Proposition 65 that permits manufacturers and distributors the latitude to use language and warnings systems other than the statutory safe harbors. Given the approach, it is difficult to see how the public benefited.

In addition to the warning system, PTI diligently screens all of its customers to insure that they are industrial users. PTI also takes back from its customers its unused product (at its expense), to insure that it is lawfully and responsibly disposed of. I tell you this, because PTI is still concerned about by what means AYS obtained its product. Despite my repeated requests, AYS has not returned the product, nor have they delivered to me a manifest showing that it was disposed of in accordance with applicable environmental legislation. All those who have been targets of AYS are in the chain of liability if AYS does not dispose of their products in an appropriate manner.

While the handling and disposal of products obtained by public interest groups is not a subject dealt with by Proposition 65, it is a source of concern for those in the industry. It is also, as you are well aware, a matter of some importance to the public. I hope your proposed legislation will address this issue. I also hope that the Attorney General will investigate AYS and other groups, to insure that they have properly handled and disposed of the products they have acquired.

Sincerely,

Steven D. Andrews

cr1073.SDA

HUNTER RUIZ
Research, Consulting, and Advocacy

22 March 1996

The Honorable Keith Olberg
State Capitol, Room 4112
Sacramento, CA 95814

Re: AB 3160, as introduced
Client: The Environmental Working Group
Position: **Support**

Dear Assemblyman Olberg,

The Environmental Working Group is a lobbying coalition formed shortly after the passage of Proposition 65 to work on the implementation of the initiative. As such, EWG has been involved in every phase of the implementation from listing chemicals, developing regulations and twice introducing legislation related to the 1000 fold safety factor. EWG **supports** your measure AB 3160.

Some of the members of EWG have been subjected to the vagaries of the bounty hunter provisions of the initiative. We have become increasingly concerned with bounty hunter actions that appear to have been pursued primarily in the financial interest of the bounty hunter. The thrust of enforcement, we thought, was to be protecting the public from exposures to listed chemicals.

Whether these actions are meritorious or not they are costly to the companies accused of violating the provisions of Proposition 65. Many of the recent bounty hunter actions appear to be very broad-based and designed to maximized the amount recoverable to the bounty hunter. Several industry sectors report receiving a generalized notice of "violation" of Proposition 65 which are, simply put, fishing expeditions by the bounty hunter looking for a defendant with deep pockets.

Some specific examples of such actions:

- A manufacturer receives a 60-day notice of a group's intention to file suit under Proposition 65 based on sales of several products which are alleged to have contained listed chemicals. The notice is followed by an offer to engage in settlement negotiations in advance of litigation. After engaging counsel, the manufacturer investigates and determines that the products identified in the 60-day notice letter have not been sold in California or even to a distributor who does business in California.

- A manufacturer receives a 60-day notice from a group alleging that they have failed to warn about the presence of a listed chemical contained in their product. The notice is followed by an offer to engage in settlement discussions in advance of litigation. The manufacturer investigates and determines that, in fact, the product does not contain any listed chemicals.

1130 K Street, Suite 350
Sacramento, California 95814
Telephone: 916.552.6700
Fax: 916.552.6705

- A manufacturer receives a 60-day notice alleging failure to warn for the presence of listed chemicals in their product. The notice is followed by an offer to engage in negotiations. The manufacturer begins to engage in settlement discussions and discovers that plaintiffs are demanding in excess of $100,000 in penalties and attorney fees. Although the group sending the 60-day notice does not disclose it, the manufacturer later learns that they are not subject to Proposition 65 because they employ fewer than 10 employees.

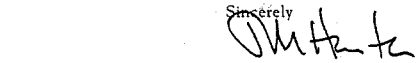
- A manufacturer receives a notice of intent to file suit under Proposition 65 concerning the presence of a listed chemical in their product. The notice is followed by an offer to engage in settlement negotiations. The manufacturer investigates and discovers that the product in question was only sold to U.S. Military installations outside of California and that the product was formulated pursuant to "classified" specifications.

- A manufacturer receives a 60-day notice of intent to file suit under Proposition 65 concerning the presence of a listed chemical in their product. The notice is followed by an offer to engage in settlement negotiations. Although not recognized in the 60-day notice, the Proposition 65 listing of the chemical in question has been restricted to the inhalation route of exposure. The foreseeable use of the product in question does not give rise to an exposure by means of inhalation.

- A group files a 60-day notice alleging that product X and Y and "similar products that you offer for sale in California" contain listed chemical Z and "other chemicals known to the State of California to cause cancer or birth defects or other reproductive harm." The notice is followed by an offer to engage in settlement discussions. The manufacturer determines that products X and Y contain chemical Z, but only in trace amounts (less then 0.01%). The group filing the 60-day notice acknowledges that warnings are not required for products X and Y, but threatens a suit concerning the other, unnamed products unless a settlement is reached.

Your bill will put in place a mechanism that will prevent the more egregious practices engaged in bounty hunter under Proposition 65 while assuring that those interested in good faith enforcement of the act will be free to continue their actions.

Sincerely



John M. Hunter for
The Environmental Working Group

cc: Members of Assembly Committee on Environmental Safety and Toxic Materials

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ANDRE V. TOLPEGIN

April 25, 1996

Mr. Lance Hastings
Office of Assemblyman Keith Olberg
State Capitol, Rm. 4112
Sacramento, CA 95814

Re: Assembly Bill 3160

Dear Mr. Hastings:

I enclose a Xerox of an article from the San Francisco Recorder, April 16, 1996, which refers to the settlement of an As You Sow lawsuit against Ashland Chemical Company.

On the right side of the enclosure I have entered a breakdown of how the $1.1 million will be distributed.

Under Health and Safety Code section 25192(a) (as applied to Health & Saf. Code § 25249.5, et seq.), 50% of the penalties go to the State of California, Hazardous Substances Account of the General Fund; 25% to the Department of Toxic Substances Control; and 25% to the "whistle-blowing" attorneys. Under this law, As You Sow's attorneys get $17,500. However, they have also asked for their attorneys' fees and costs in the sum of $511,000. When you add those two figures to the As You Sow Proposition 65 Enforcement Fund and the As You Sow Education Fund, you find that As You Sow gets $611,500 and the State of California $52,000. Under the settlement agreement as reported in the Recorder, Ashland has $330,000 deferred depending upon the nature of their educational program. This leaves $117,000 to be distributed to the "Local Environmental Groups," which I have listed under paragraph 2. Based on my experience with them, As You Sow's attorneys require

LELAND PARACHINI STEINBERG
FLINN MATZGER & MELNICK, L.L.P.

payment of such sums to As You Sow, with eventual distribution to certain named groups. I like to think that all of the $117,000 will therefore be distributed to the local environmental groups.

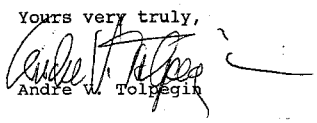
It will be interesting to see whether my faith in human nature holds true.

In any event, the nature of this settlement and the paucity of funds available for the state in its environmental efforts illustrate why some version of A.B. 3160 should be enacted into law.

There is an additional issue that will be of interest. In speaking to the attorneys for Ashland, I received the rare admission that they are a "high-priced" corporate firm. Despite their admission, their fees totalled $250,000. As You Sow's attorneys claimed $700,000 and, I am told, only agreed to the $511,000 figure "reluctantly."

Should you have any questions or comments or require my assistance based on experience with several of these cases, please do not hesitate to call.

Yours very truly,



Andre W. Tolbegin

AVT:mnj
encl.
16\avt\varn\hastings

Chemical Maker Settles Prop 65 Suit for $1.1M

By TODD WOODY

Proposition 65 litigator As You Sow on Monday settled the first of several toxics suits against major chemical manufacturers, reaching a $1.1 million agreement with Ashland Chemical Co.

The settlement filed in San Francisco Superior Court provides $200,000 to be distributed to Bay Area public interest groups, $400,000 in potential penalties and $511,000 in attorneys fees and costs.

"It certainly is going to provide an excellent stepping stone for our case against Shell Oil," said As You Sow attorney Clifford Chanler, referring to another of the Oakland organization's cases.

Ashland spokeswoman Stacie Noel said the company settled to avoid costly litigation.

California's toxics control law, commonly known as Prop 65, requires companies to provide warnings if their products contain substances that can cause cancer or birth defects. Since voters passed Prop 65 in 1986, prosecutors and environmental groups mainly have enforced the law against companies that make consumer products.

But over the past two years, As You Sow has pursued companies like Ashland that sell chemicals in bulk to manufacturers.

Represented by Chanler & Somers, As You Sow sued Ashland in 1995, contending that the Dublin, Ohio, company failed to give adequate warnings about methylene chloride, toluene and 16 other chemicals.

The settlement requires Ashland to place warning labels on 55-gallon drums and other containers it ships to clients. Ashland also must put the warnings on the material safety data sheets provided to workers that use the chemicals.

Ashland can avoid paying $330,000 of the $400,000 penalty if it spends the same amount on educational seminars for its California customers, continues efforts to reduce the toxicity of its products and improves a material safety data sheet computer system.

Ashland spokeswoman Noel said those provisions of the settlement reflect programs already under way. Ashland began providing the warning labels required by the settlement after As You Sow notified the company of the potential violations, she added.

CHANLER

"We did go back and review our labeling program to ensure that it's in full compliance with Prop 65," Noel said.

As You Sow's Prop 65 enforcement fund will receive $60,000 of the $200,000 in restitution while its educational program will get $23,000. The remainder of the restitution will be divided among Baykeeper, Communities for a Better Environment, Data Center, Santa Clara Center for Occupational Safety & Health and the Silicon Valley Toxics Coalition.

Senior writer Todd Woody's e-mail address is twoody@counsel.com

Analysis of Settlement

1.	**State of California**		
	Hazardous Substances Account of General Fund (Health & Saf. Code § 25192(a)(1))	$ 35,000	
	Dept. of Toxic Substances Control (Health & Saf. Code § 25192(a)(3)	$ 17,500	
	Total to State		$52,000
2.	**Local Environmental Groups**		
	Baykeeper, Communities for a Better Environment, Data Center, Santa Clara Center for Occupational Safety & Health, and Silicon Valley Toxics Coalition (Based on other settlements, the total payable to these groups will be paid to As-You Sow for distribution to them.)		
	Total to Local Groups		$117,000
3.	**Deferred**		
	Ashland in-house programs		$330,000
4.	**As You Sow and its Attorneys**		
	Fees (Health & Saf. Code § 25192(a)(2))	$ 17,500	
	AYS Prop. 65 Enforcement Fund	$ 60,000	
	AYS Education Fund	$ 23,000	
	Attorney Fees and Costs	$511,000	
	Total to As You Sow		$611,500

SUMMARY OF EXPERIENCES WITH AS YOU SOW AND THEIR ATTORNEYS, CHANLER & SOMERS IN REPRESENTING TWO SEPARATE CLIENTS

1. First Notice of Claim by As You Sow is 60-Day Notice Required by Health and Safety Code Section 25249.7(d)

Ideally, AYS must send a 60-day notice of Proposition 65 violations to the Attorney General and to the district attorneys of some of the larger counties. A copy of the notice goes to the targeted manufacturer, usually out of state.

When confronted by discovery inquiries as to whether or not the said public officials were in fact sent these notices, the reply has been only that "all of them were sent notices" without specifying who. Consequently, it is almost impossible to find out exactly what public officials were served with these notices.

The 60-day notices are vague and while they may specify a product, there is nothing to indicate where or when the product was purchased, i.e., in California or elsewhere.

The notices are accompanied in many cases by samples of other settlements entered into by AYS including the monetary amounts thereof.

All of the notices that I have seen, including notices to my clients, were on AYS stationery, but signed "for AYS" by Mara Lefkowitz, an administrator in the offices of Chanler & Somers. In a full year of litigation, I have yet to see or meet anyone actually from AYS.

When a target who wishes to comply with Proposition 65, while avoiding legal expenses, tries to negotiate with As You Sow, they are confronted with a demand for sales figures for all the target's products in California for the past four years. Ultimately, the discussion reaches the point where As You Sow's attorneys want to know not only gross sales figures but unit sales figures from which they calculate the penalties under the Health and Safety Code, and restitution under Business and Professions Code Section 17200.

Negotiations with As You Sow and Chanler & Somers are invariably about money. It is difficult to have a target obtain any information as to exactly what is wrong with their labels and/or their Material Safety Data Sheets (MSDS).

Both of my clients, and from what I have heard, other parties, have attempted to try to negotiate without a lawsuit being filed.

Oftentimes, a promise is made by Chanler & Somers that they will indeed not file a lawsuit pending negotiations, followed by an immediate filing.

In one of my cases, a small New Jersey paint company asked Chanler & Somers not to file suit, was promised that no suit would be filed, submitted some documents to Chanler & Somers, and was greeted with a lawsuit.

In a second case, as the attorney for the target, I tried to preclude a lawsuit. When a promise not to file one was immediately followed by service of summons, it was explained to me that "corporate lawyers all cheat anyway, so that it is all right for us to break our promise."

None of the steps described help public health or safety. All help AYS justify its fees and expenses.

2. When a Lawsuit is Filed, It is Always Filed in Either San Francisco or Marin County Superior Courts

There are presently about 130 As You Sow lawsuits on file in those two counties.

When a complaint is filed, it is filed under both the Health and Safety Code sections encompassing Proposition 65 and also under the Business and Professions Code, claiming unfair competition. As shall be explained infra, it is under the Business and Professions Code that As You Sow/Chanler & Somers collect the major part of their attorneys' fees.

Immediately after service of process, the defendant is served with a Request for Admissions, two separate sets of interrogatories and a Request for Production of Documents.

In both of my cases, the discovery was identical, and, as a matter of fact, in one case, my office was served with various discovery directed to other defendants not connected in any way with the lawsuit against my client. AYS/Chanler discovery is obviously "canned" computerized documents, but the claim is that each is worth about three or four days' work by each attorney.

If not provided in pre-litigation negotiations, plaintiffs will demand a list of unit sales so as to enable Chanler & Somers to figure out As You Sow's attorneys' fees.

A demand is also made for a list of both the targets' distributors (to whom the target company sells) and a list of the targets' chemical suppliers.

A list of distributors is accompanied by a suggestion for a confidentiality agreement.

From my experience, the confidentiality agreement is breached as soon as it is signed, with As You Sow/Chanler & Somers only claiming that they are doing their duty on behalf of the people of the State of California. Such further investigation, however, is

listed as further "fees and expenses" by their attorneys and investigators.

All discovery to AYS is met with objections of relevancy and the grounds that all of AYS's investigations are part of the attorney-client and attorney work product privileges.

Depositions of As You Sow personnel are strongly resisted as "irrelevant." Judge Stuart Pollak, San Francisco Superior Court, told me in one case that he would not allow depositions of any As You Sow personnel because he didn't see the "relevancy of it."

As You Sow itself is at best, a shadow organization. They have no office, apparently only a mailbox address, and I have been unable to locate their name in the Oakland telephone book.

3. Negotiations are Designed to Enforce Fees to As You Sow's Attorneys

Under Health and Safety Code section 25192, any recovery under statutes such as Proposition 65 goes one-half to the state, one-quarter to selected environmental groups, and one-quarter to the bounty hunter attorney.

However, not only Chanler & Somers, but all bounty hunters attempting to "enforce" Proposition 65 seek restitution under Business and Professions Code section 17200 et seq. It is here that Chanler & Somers make their money. Restitution under the Business and Professions Code results in 100% attorneys' fees to them. Therefore, any settlement ends up with the following breakdowns:

State of California, Environmental Defense Fund	25%
Various Small Environmental Groups	12-1/2%
Bounty Hunting Attorneys:	
Under Health & Safety Code	12-1/2% plus
Under the Business and Professions Code	50%

In short, attorneys such as Chanler & Somers end up with 62-1/2% of any settlement.

Resistance to any demands or any discovery is met with a flurry of deposition notices, motions to compel, etc. With a few exceptions, we have found that the judges are unwilling to challenge a group which claims to be acting on behalf of the people. In San Francisco, Judge Stuart Pollak and Judge Thomas Cahill are particularly sympathetic to As You Sow and Chanler & Somers.

4. Proposition 65 Violations Are Only What As You Sow Says They Are

Health and Safety Code section 25249.6 requires "clear and reasonable warning . . . ." What is "clear and reasonable" has been the subject of some discussion, but no real definition by statute or case law. Proposition 65's implementing statutes, for example, contained in 22 California Code of Regulations, especially section 12601 et seq. provide some guidelines but no specific parameters.

As You Sow/Chanler & Somers use those guidelines, especially to the unwary target or attorneys who are not proficient in Proposition 65 as if the warning suggestions of section 12601 are mandatory. They are not, but only suggestions.

As a result of the above confusion, and the dearth of law on the subject, if As You Sow finds that labels are improper, they go after the target on labeling violations without talking about material safety data sheets. Conversely, if the labels are adequate, As You Sow/Chanler claim that the MSDS's are inadequate.

Settlements are based upon hyper-technical evaluations of what Proposition 65 requires.

In one case, I have even called Ed Weill, Deputy Attorney General in Oakland who is in charge of Proposition 65 enforcement. Mr. Weill's views are not often followed by As You Sow/Chanler if it is in their financial interest to argue. For example, in a settlement conference which just took place in February, 1996, the labels by my clients said ". . . Cancer, Birth Defects . . . ." We spent an hour arguing whether this as a sufficient warning for two chemicals, one of which was an alleged carcinogen and the other a reproductive toxicant, and suggested, pursuant to the Attorney General's advice to change our warning to read ". . . Cancer and Birth Defects. . . ." After some two hours of discussion, it was finally agreed that because the carcinogen in my clients' product was of such small volume, that we didn't need to have a cancer warning at all. The case was then settled, with a promise by Chanler & Somers to send my client a letter saying that no carcinogen warning was required. (To date, no such letter has been received.)

One settlement with As You Sow does not mean that you are forever rid of them. Chanler & Somers investigators start investigating as soon as they have settled, and I am aware of one company, a competitor of my clients, who has now been sued twice, the second time because of the alleged discovery of some old products that did not contain proper Proposition 65 warnings. .

As You Sow has never tried a case before a jury. They make pre-trial discovery horribly expensive, so that the legal expenses combined with possible exposure of $2,500 per day for each day of violation, makes defendants fold before trial.

By the time negotiations reach a critical stage, labels and MSDS's are all but forgotten, and the subject comes down to money.

5. Tactics

As You Sow's attorneys are especially adept at writing letters to the judge supervising a case. This would be, at worst, annoying, were it not for Chanler & Somer's tactics in sending a letter to a judge that arrives at the courthouse at noon, but not getting a copy of the letter to opposing counsel until after the end of the business day.

Proposed orders, required by judges to be "approved as to form" are invariably sent before approval. I have a letter where a Chanler & Somers associate told the judge that I had approved an order that I had not yet seen.

Chanler & Somers live by the fax. About 75% of my letters from them have come in between 6:00 p.m. and 9:00 p.m. The same letter will arrive the next day by mail, for which additional fees and costs are charged.

Most egregious of all is the boycott. In one case, a client's distributors who followed Proposition 65 requirements to the letter were nevertheless threatened with litigation unless they "cooperated" with AYS.

There are two and sometimes, three, lawyers who appear for every task. The latest gimmick is to add a "general counsel of As You Sow" who appears as either a third attorney or as the "clients'" observer. A check with State Bar records shows the attorney to be registered (March 1, 1996), but not at "As You Sow."

Fees are grossly inflated. Within the last two weeks, I received a simple Motion to Compel Further Answers to Interrogatories. The estimated billing time for that task was 36 hours by an associate (approximately one week) plus two by a supervising partner.

While some judges will cut those fees, they do not do so by much.

To summarize all of the above, it is quite apparent to me that there really is no As You Sow per se. It does operate as a shell non-profit corporation employing attorneys who theoretically are their outside counsel. I cannot prove this, since Chanler & Somers vigorously fight any inquiry into their affairs. Most judges ar e afraid to touch them.

The ultimate result is that industry, particularly small industry, who are the targets of a $10,000 - $20,000 settlement demand for doing nothing wrong are being terrorized. Many of them depend heavily on the California market, and will do anything to keep shipping products into California. The issue is not whether they are not shipping products without proper warnings, but whether

they are shipping products with warnings that do not satisfy Chanler & Somers. The price to pay even for a simple "violation" of $10,000 - $20,000 is exacerbated and increased dramatically should the target decide to fight back.

Most of what I have described can be documented and I will be happy to provide the same (assuming that I am not breaking any confidences).

March 6, 1996 Andre V. Tolpegin

Andre V. Tolpegin

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July 22, 1998

BY HAND

Jeffrey S. Bromme
General Counsel
Consumer Product Safety Commission
4330 East West Highway
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Dear Jeff:

Thank you for taking the time to meet with me yesterday regarding the impact of California Proposition 65 on the effectiveness of the labeling and warning provisions of the Federal Hazardous Substances Act (FHSA). Please extend my thanks to Walt Sanders and Steve Lemberg for their excellent contributions to our meeting.

As I indicated to you, our client the National Paint & Coatings Association, and other industries, such as chemicals, toiletries, food and cement are all adversely affected by the effects of Proposition 65, which we believe should be preempted by FHSA. In our meeting yesterday, you suggested that before the Commission could consider addressing the problem, we should furnish some evidence that the implementation of Proposition 65 undermines the FHSA warning scheme mandated by Congress.

As a first step toward establishing that the FHSA is, in fact, being undermined by California law, I am enclosing a summary we have prepared entitled: FHSA Cautionary Labeling: The Need for the CPSC Action to Maintain a Uniform National Labeling Program and Avert Conflicting State Requirements and Inequitable Enforcement. This summary is an initial effort to document the problem and furnish preliminary information that California law is burdening interstate commerce and impinging on the

uniform national labeling program established by Congress. In particular, I would like to call you attention to the following information contained in the enclosed volume:

- Tab D contains summaries of eight lawsuits brought by private parties or the Attorney General of California which forced interstate shippers of paints or other products to utilize confusing and duplicative labels, pay substantial attorneys fees or incur fines to the state of California. Each of these cases represents a economic burden on interstate commerce.

- Tab E includes legislation which exists, or has been proposed in the states of Massachusetts, Connecticut, Ohio, Hawaii and New Jersey and which imposes, or would impose, conflicting state requirements on manufacturers of products sold in interstate commerce. These statutes impose labeling requirements which dilute the effectiveness and clarity of FHSA warnings and labeling requirements.

- Tab F includes illustrations of certain labels which have been involved in litigation in California cases brought under Proposition 65. All of these labels comply with the comprehensive federal scheme under the FHSA. The last label in the group, Tru Bond Rubber Adhesives also includes a duplicative label mandated by the state of California. This situation is being replicated throughout California and other states. This creates confusion in the consuming public and dilutes the value of FHSA warnings and labeling requirements.

- Tab I is particular significant. This excerpt from the Proposition 65 Handbook (Second Edition) furnishes cost data from a respected source on the impact of the Proposition 65. According to the material cited (p. 2), there have been more than 950 Proposition 65 60-day notice letters initiating private enforcement actions. affecting 3,710 separate businesses. Equally important, the total cost to products affecting interstate commerce exceeds $325 million. This is in addition to costs incurred in complying with the federal Act. The result is unnecessary costs passed on to consumers despite the Congressional plan of national uniformity, reflected in the legislative history of the Consumer Product Safety Act, which was the basis for FHSA's preemption section:

> It is intended that Federal authority—once exercised—occupy the field and broadly preempt State authority to regulate the same product hazards. Accordingly, the Federal preemption is intended to extend not only to State authority to set standards on labeling requirements but also to prevent States from acting to ban products which conform to applicable Federal safety standards where the purpose of the ban is to protect the public from the same product hazard. H. Rep. 92-1153 (June 20, 1972).

As you will recall, I suggested at our discussion yesterday, that it would be useful to have industry representatives meet with you and others at CPSC, to further document the burden on interstate commerce and the adverse impact on the Commission's regulatory mandate of Proposition 65. After you have had an opportunity to review the enclosed materials, I would like to set up that meeting with you and your colleagues.

Again, I am most appreciative of your willingness to meet with me regarding this important matter. I look forward to continuing our discussion toward an effective resolution of this issue. I will call you within the next few weeks to set up a further meeting.

Sincerely,

WINSTON & STRAWN

Michael R. Lemov

Enclosure

cc: Walter Sanders (w/encl.)
Stephen Lemberg (w/encl.)

FHSA CAUTIONARY LABELING: THE NEED FOR CPSC ACTION TO MAINTAIN A UNIFORM NATIONAL LABELING PROGRAM AND AVERT CONFLICTING STATE REQUIREMENTS AND INEQUITABLE ENFORCEMENT

Michael R. Lemov
William N. Hall
Winston & Strawn
Counsel for
National Paint &
Coatings Association

July 20, 1998

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A

SUMMARY OF ISSUE

- The Problem

  The Congressionally-mandated primacy of the Federal Hazardous Substances Act (FHSA) as a uniform national labeling law for consumer products is being threatened by the development of conflicting state labeling requirements and private enforcement mechanisms. For example, the California Proposition 65 regime imposes different and conflicting labeling requirements and allows private organizations to recover their attorneys fees and a portion of any fine in an enforcement action, or to settle for substantial "damages." In response to over 3,000 "bounty hunter" actions in the past 10 years, many companies have settled for substantial amounts to avoid litigation costs, even though their labels comply with FHSA. At least five other states have, or are considering their own version of Proposition 65 which may include private enforcement provisions.

  To address this problem, CPSC should take action to maintain the primacy of FHSA's comprehensive cautionary labeling program for consumer products. This action would require states to adhere to the statutorily-prescribed process for obtaining a preemption exemption for divergent state labeling requirements.

- Burden on Interstate Commerce

  State labeling and/or point of sale requirements mandated by California Proposition 65 impose a burden on interstate manufacturers of consumer products. The burden is based on duplicative regulation, increased costs and competitive disadvantage.

- Competitive Inequality and Cost

  The only practical way to insure compliance with California Proposition 65, is to modify all labels used in interstate commerce and in 49 other states. Monitoring point of sale warnings at thousands of retail establishments is impractical and expensive. This imposes California's requirements on other states and burdens manufacturers already complying with the Federal Hazardous Substances Act. It creates a competitive disadvantage for national manufacturers in contrast with those operating within one state, or

in states other than California. The cost of manufacturer compliance with Proposition 65 is estimated by the Proposition 65 Handbook at over $325 million to date.

- OSHA Ruling

Other provisions of California's Proposition 65 may or may not conflict with federal labeling and warning requirements, depending on implementation. A similar conclusion was reached by the Occupational Health and Safety Administration (62 Fed. Reg. 31159 (June 6, 1997)) in holding that Proposition 65 may not be enforced against out-of-state manufacturers and must be implemented in a manner which will not render enforcement ineffective under federal standards.

- CPSC Advisory Opinion

CPSC Opinion 312 (March 6, 1991) specifically ruled on federal preemption in connection with California's Proposition 65. The opinion held that the "FHSA provides a comprehensive scheme for ensuring that hazardous substances intended for use in the household or by children bear cautionary labeling." The Commission's General Counsel also held that the preemption provision 15 U.S.C. § 1261(note) includes accompanying literature that provides directions for use of consumer products. The opinion states that a warning that a product can cause cancer or birth defects, is an implied direction for use. Accordingly, the General Counsel determined that point of sale warnings, as well as labeling under Proposition 65 are preempted by the requirements of the Federal Hazardous Substances Act. This opinion was reaffirmed by the CPSC General Counsel on October 17, 1995.

- Legislative History

The FHSA was enacted "to provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." [Moss v. Parks Corp., 985 F. 2d 736, 739 (4th Cir.) (quoting H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960)), cert. denied, 509 U.S. 906 (1993).] "If a state or local government desires to continue or put into effect its own requirement, it would have to seek an exemption from the Commission." H. Conf. Rep. No. 94-1022 (1976) (emphasis added).

- CPSC/FDA Precedents

The CPSC (and before it the FDA, which administered the FHSA before 1976) have interpreted the FHSA preemption provision broadly to encompass not only state requirements that prescribe the precise content of "labeling" but also their functional equivalent. According to a regulation adopted by both agencies and in force for more than a decade:

> Federal preemption applies to any labeling requirement intended to serve as or be a part of or is in the nature of, precautionary labeling. Precautionary labeling includes such information as warnings, *** disclosure of hazards, antidote information, *** and other similar labeling requirements."

[21 C.F.R. § 191.4 (1973) (quoted in 37 Fed. Reg. 18628, 18629 (Sept. 13, 1972)) (emphasis added); 16 C.F.R. § 1500.7 (1974) (quoted in 38 Fed. Reg. 27012, 17016 (Sept. 27, 1973)) (emphasis added).]

This regulation was revoked in 1982 only because aspects of it - in particular, its statement that "Federal preemption does not apply to a State or local ban on a household product" [16 C.F.R. § 1500.7(d) (1974)] (emphasis added))] - "became incompatible with" changes made to the FHSA preemption provision in 1976. See 47 Fed. Reg. 57489 (Dec. 27, 1982).

- Other Laws

The Food, Drug & Cosmetic Act (FDCA) defines "labeling" broadly to include "all labels and other written, printed, or other graphic matter (1) upon any article or any of its containers or wrappers, or (2) *accompanying such article*." 21 U.S.C. § 321(m) (emphasis added). [See generally Kordell v. United States, 335 U.S. 345, 247-50 (1948) (discussing breadth of "labeling" under FDCA)]

The Federal Insecticide Fungicide & Rodenticide Act, 7 U.S.C. § 136(p) defines "labeling" under FIFRA as including "all labels and all other written, printed, or graphic matter - *(A) accompanying the pesticide or device at anytime*." (emphasis added). Many courts have indicated that FIFRA and the FHSA should be interpreted as having the same preemptive force because of the similar structure and purpose. [In CSMA v. Allenby, 958 F.2d 941, 945 (9th Cir.) (1991), the Court stated unequivocally that "the preemption issues arising under FHSA are identical to those arising under FIFRA."]

- State Petition Authorized

  The FHSA authorizes the CPSC to grant exemptions from federal preemption for state requirements that "provide . . . a significantly higher degree of protection" than the federal requirements, "do . . . not unduly burden interstate commerce," and (if complied with) "would not cause the hazardous substance" to violate any federal cautionary labeling requirement. [15 U.S.C. § 1261n (b)(3)]

  Similarly, Proposition 65 contains an exemption from its warning requirement for "[a]ny exposure for which federal law governs warning in a manner that preempts state authority." [Cal. Health & Safety Code § 25249.10(a)]

- Recommended Approach

  CPSC should issue a regulation similar to the definition of labeling under the Federal Insecticide Fungicide & Rodenticide Act. This regulation would necessitate California's filing for an exemption under the FHSA, which might then be issued assuming the statutory elements were met. The California exemption from the FHSA preemption regulation could include, if appropriate, the same conditions (including private enforcement) as set in OSHA's decision, 109 Fed. Reg. 31159 (June 6, 1997).

7/20/98

B

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207
March 6, 1991

#312
CPSA § (b)(1) Cleared
X No Mfrs/Prvt Ltrs or Products Identified
___Excepted by_____
___Firms Notified.
Comments Processed.
OFFICE OF THE GENERAL COUNSEL

Stephen S. Kellner, Esquire
Vice President and Corporate Secretary
Chemical Specialties Manufacturers Association
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Clifford Rechtschaffen, Esquire
Deputy Attorney General
Department of Justice
State of California
2101 Webster Street
Oakland, CA 94612-3049

Gentlemen:

This is in response to a request from the Chemical Specialties Manufacturers Association for an advisory opinion from the Consumer Product Safety Commission addressing the following question.

> Do the signal word and principal statement of hazard "WARNING: This product contains a chemical known to the state to cause cancer (or birth defects)," when used in connection with the sale (e.g., shelf sign, brochure, display sign) of an FHSA hazardous substance constitute "directions for use" pursuant to FHSA § 2(n), 15 U.S.C. § 1261(n), thereby rendering them accompanying literature subject to the labeling requirements of FHSA § 2(p), 15 U.S.C. § 1261(p)?

This office has also received correspondence from the State of California concerning how the Commission interprets the Federal Hazardous Substances Act ("FHSA") as it concerns issues raised by California's Safe Drinking Water and Toxic Enforcement Act (Proposition 65). Because the answer to CSMA's question is relevant to these concerns, this letter is also being sent to the California Department of Justice.

ADVISORY OPINION

000711

The FHSA provides a comprehensive scheme for ensuring that hazardous substances intended for use in the household or by children bear cautionary labeling. Included within the FHSA's definition of hazardous substances are those substances that are toxic because they present a risk of cancer or other types of chronic toxicity, such as reproductive toxicity. CPSC General Counsel's Advisory Opinion No. 309 at 1 (March 19, 1987). Thus, a product would be regulated under the FHSA if (1) it is intended or packaged in a form suitable for use in the household or by children and (2) if the exposure to the product creates a significant risk of cancer or reproductive toxicity as a proximate result of any customary or reasonably foreseeable handling or use.

Section 2(p)(1) of the FHSA requires hazardous substances to bear certain types of label messages. Included within the types of labeling required are:

1. The name of each component that contributes substantially to the hazard,

2. A signal word (in the case of chronic hazards, "WARNING" or "CAUTION"),

3. An affirmative statement of the hazard or hazards (e.g., "Vapor harmful"),

4. Precautionary measures describing the action(s) to be taken or avoided,

5. Any necessary or appropriate instruction for first aid treatment,

6. Any required instruction for special handling or storage of the package, and

7. The statement "Keep out of the reach of children," or its equivalent.

FHSA Sec. 2(p)(1)(B), (D)-(J)(i), 15 U.S.C. § 2(p)(1)(B), (D)-(J)(i). Except for the signal word, the FHSA generally does not require particular label language and permits manufacturers to decide on the specific language. (In addition, the Commission may, by rule, require different or additional labeling where required by a special hazard presented by the substance. Section 3(b) of the FHSA, 15 U.S.C. § 1262(b). Where labeling cannot

adequately protect the public, the Commission may ban a hazardous substance. Sec. 2(q)(1)(B), 15 U.S.C. § 1261(q)(1)(B).)

Section 2(n) of the FHSA defines "label." In addition to specifying that matter on the product or its container is part of the label, section 2(n) reads, in pertinent part:

> a requirement [under the FHSA] that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears ... (2) on all accompanying literature where there are directions for use, written or otherwise.

15 U.S.C. § 1261(n) (emphasis added). In other words, where accompanying literature contains directions for use, it must contain all the cautionary labeling required on the product label by the FHSA.

The Commission's regulations specify that:

> "accompanying literature" is interpreted to mean any placard, pamphlet, booklet, book, sign, or other written, printed, or graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance ....

16 C.F.R. § 1500.3(c)(9) (emphasis added). Shelf signs, brochures, and display signs are "accompanying literature" under this definition.

A warning that a product can cause cancer or birth defects is not an express direction for use. Nevertheless, it conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure. Stated another way, the warning itself can also serve as a direction for use. An example of the dual function performed by statements warning of hazards a product presents is in the Commission's regulations at 16 C.F.R. § 1500.123. That section states:

> Whenever the statement of the principal hazard or hazards itself provides the precautionary measures to be followed or avoided, a clear statement of the principal hazard will satisfy the requirements of section 2(p)(1)(E) [statement of principal hazard] and

Stephen S. Kellner, Esquire
Chemical Specialties Manufacturers Association

Clifford Rechtschaffen, Esquire
California Deputy Attorney General

Page 4

(F) ["precautionary measures describing the action to be followed or avoided"] ...

Thus, for example, a product having flammable vapors might have a statement of principal hazard, such as "FLAMMABLE," that could serve also as the required statement of action to be avoided, which, if stated separately, might read "do not use near open flame." Similarly, the statement of principal hazard "HARMFUL IF SWALLOWED" could negate the need to state additionally "for external use only." Also, the statement "VAPOR HARMFUL" could also serve instead of an additional statement to "avoid prolonged inhalation of vapors."

Therefore, although the warning quoted in your inquiry does not necessarily convey specific actions to be taken in the use of the product, it does convey information about how the product should be used (steps should be taken to reduce exposure). Accordingly, this office views the statement as a direction for use. It follows, therefore, that signs and the like bearing such warnings are "accompanying literature containing directions for use" and thus are labeling under FHSA § 2(n). The fact that such signs are considered labeling, however, does not mean that the sign complies with any or all of the FHSA labeling requirements described above.

I trust that this information responds fully to your inquiry. Please contact me if you have further questions.

Sincerely,

Clement D. Erhardt, III
General Counsel

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Eric A. Rubel
General Counsel
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October 17, 1995

BY FAX AND U.S. MAIL

Jeffrey B. Margulies, Esq.
Haight, Brown & Bonesteel
1620 26th Street
Suite 4000 North
Santa Monica, CA 90404

Dear Mr. Margulies:

This responds to your letter dated September 26, 1995, which requests that the Office of the General Counsel ("OGC") respond to several questions relating to OGC Advisory Opinion No. 312.

Advisory Opinion No. 312 has never been modified, revoked, suspended, or superseded by the General Counsel or the Commission. Nor are we aware of any intervening actions by Congress, actions by any Federal agency, or court decisions which would alter the analysis in that Advisory Opinion.

One reported case involving the Federal Hazardous Substances Act ("FHSA") conflicts with Advisory Opinion 312. Chemical Specialties Manufacturers Ass'n v. Allenby, 958 F.2d 941 (9th Cir. 1992), cert. denied, 113 S.Ct. 80 (1992). However, this does not alter the Advisory Opinion, and the Commission has not changed the Opinion in response to that case.

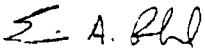
The Commission has delegated to the General Counsel the authority to provide advisory opinions. 16 C.F.R. § 1000.7(a). The General Counsel's advisory opinions are authorized and authoritative interpretations of the acts the Commission administers unless and until the Commission takes a contrary position. In addition, it should be noted that Advisory Opinion No. 312 was provided to the Commission on a "no objection" basis before it was issued. And, none of the Commissioners objected.

You also pose a hypothetical state law and ask whether it is a "cautionary labeling requirement," as defined in the FHSA.

Unfortunately, due to time and resource constraints, we are unable to provide an analysis of that question beyond that in Advisory Opinion No. 312.

Please contact me if you have any further questions.

Sincerely,



Eric A. Rubel

306

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

11 APR 1985

OFFICE OF THE
GENERAL COUNSEL

Mr. S. J. Golub
Assistant Director
Albany International Research Co.
1000 Providence Highway
Dedam, Massachusetts 02026

Dear Mr. Golub:

This is in response to your letter dated March 27, 1985, concerning the preemptive provisions of section 16 of the Flammable Fabrics Act (FFA, 15 U.S.C. 1203) and their applicability to California state flammability requirements for specified fabrics, garments, and products sold for use in hospitals.

In your letter, you asked whether decisions about preemption of state flammability requirements by a Federal standard in effect under the FFA are made by the Consumer Product Safety Commission, or by the courts. As this office advised you by letter dated March 21, 1985, the Commission has no authority to enforce the preemptive provisions of the FFA. (A copy of the text of Section 16 of the FFA is enclosed.) When the issue of preemption by a Federal flammability standard arises during litigation concerning compliance with state flammability requirements, that issue must be resolved by the court which is trying the case. However, we offer the following observations in response to the questions posed in your letters of February 15, and March 27, 1985.

The Standard for the Flammability of Clothing Textiles (16 CFR Part 1610) is a standard of flammability in effect under the FFA as enacted in 1953. The Flammable Fabrics Act of 1953 and the Standard for the Flammability of Clothing Textiles are included in the enclosed booklet as Part 1609 and Part 1610, respectively. The flammability test contained in the clothing textiles standard was made mandatory by the Flammable Fabrics Act of 1953 to prohibit the manufacture for sale, or sale, in commerce of fabrics and garments which are so highly flammable as to be dangerous when worn by individuals. See sections 3 and 4 of the Flammable Fabrics Act of 1953, on pages 494 and 495 of the enclosed booklet.

CPSA § (b)(1) Cleared 4/12/85
X No Mfrs/Prvtlbls or Products Identified
Approved by _____

ADVISORY OPINION

Mr. s. J. Golub
Page 2

The Standard for the Flammability of Clothing textiles is applicable to "clothing and textiles intended to be used for clothing." See section 1610.2 of the clothing textiles standard, on page 498 of the enclosed booklet. As used in section 1610.2, the term "clothing" includes robes in sizes larger than children's size 14 which are sold for use in hospitals.

Your letter of March 27, 1985, enclosed a copy of the California state requirements for the flammability of certain garments, including robes in adult sizes which are sold to hospitals. The state requirements under consideration appear to be applicable to such robes when sold to any hospital, rather than purchasing specifications established by the State of California for its own use.

Section 1160.2 of the California flammability requirements under consideration states that they were adopted "for the purpose of providing reasonable standards governing the flammability" of the fabrics garments, and products subject to their provisions "for the protection of the public interest."

The California requirements under consideration provide that robes in adult sizes sold for use in hospitals after July 1, 1977, must be "flame resistant" in accordance with the Standard for the Flammability of Children's Sleepwear: Sizes 0 through 6X (DOC FF 3-71) [16 CFR Part 1615]; the Standard for the Flammability of Children's Sleepwear: Sizes 7 through 14 (DOC FF 5-47) [16 CFR Part 1616]; or "anv other standard approved by the State Fire Marshal which will provide a level of flame resistance substantially equal to" the children's sleepwear standard referenced above.

The flammability requirements of the children's sleepwear standard codified at 16 CFR Parts 1615 and 1616 are not identical to the requirements of the clothing textiles standard codified at 16 CFR Part 1610.

The State of California has not petitioned the Commission to exempt the flammability requirements under consideration from preemption by the Federal clothing textiles standard in accordance with provisions of section 16(c) of the FFA.

In these circumstances, this office believes that provisions of section 16(a) of the FFA are applicable. The relevant part of that section provides:

> [W]henever a flammability standard or other regulation for a fabric, related material, or product is in effect under this Act,

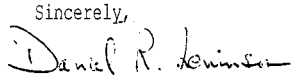
no State or political subdivision of a State may establish or continue in effect a flammability standard for other regulation for such fabric, related material, or product if the standard or other regulation is designed to protect against the same risk of occurrence of fire with respect to which the standard or other regulation under this Act is in effect unless the State or political subdivision standard or other regulation is identical to the Federal standard or other regulation.

The Standard for the Flammability of Clothing Textiles is a standard in effect under the FFA and applicable to hospital robes in adult sizes, the same garments which are subject to the California state requirements under consideration. The test specified in the Federal clothing textiles standard is not identical to the tests specified in the California requirements for hospital robes in adult sizes,

The remaining issue is whether the California requirements are "designed to protect against the same risk of the occurrence of fire" as the Standard for the Flammability of Clothing Textiles in effect under the FFA. It is the view of this office that the Federal standard and the state requirements both address the "same risk of the occurrence of fire," and for that reason provisions of section 16(a) of the FFA prohibit the continued enforcement of the California requirements with respect to any robes in sizes larger than children's size 14, including those sold to hospitals.

The views expressed in this letter are those of the Office of the General Counsel and are based on the most current interpretation of the law by this office. However, this letter has not been reviewed or approved by the Commissioners of the agency, and could be superseded by them.

Sincerely,



Daniel R. Levinson
General Counsel

Albany International Research *Co.*
1000 Providence Highway
Dedham, Massachusetts 02026
Tel. 617 / 326-5500

ALBANY
INTERNATIONAL

March 27, 1985

Stephen Lemberg, Assistant General Counsel
Office of the General Counsel
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Mr. Lemberg:

Thank you for your letter of March 21, 1985 regarding my inquiry about California's flammability requirements for hospital robes. I should have sent you the California requirements, and now enclose them herewith.

Since the robe was an adult robe sold in interstate commerce, I have assumed that CS191-53 would be the pertinent test, but I may be wrong.

Is this within CPSC's province to decide, or must a court decision be made?

I will appreciate your early advice. Thank you.

Sincerely yours,

S. J. Golub
Assistant Director

SJG:ccr

RECEIVED
MAR 29 1985
Consumer Product Safety Commission
Office of the General Counsel

PART 2. FLAMMABILITY STANDARDS FOR HOSPITAL FABRICS

Article 12. General Provisions

1160. Title. These regulations shall be known as the "Regulations of the State Fire Marshal," may be cited as such and will be referred to herein as "these regulations."

NOTE: Authority cited: Section 19818, Health and Snfetp Code. Reference: Sections 19810–19818, Health and Safety Code.

History: 1. New Article 12 (Sections 1160, 1160.1–1160.6) filed 12-15-75; effective thirtieth day thereafter (Register 75, So. 51).

1160.1. Authority. These regulations are adopted pursuant to the provisions of Section 19818, Health and Safety Code.

1160.2. Purpose. These regulations have been prepared and adopted for the purpose of providing reasonable standards governing the flammability of fabric and fabric-like materials in certain items of apparel and bedding used in hospitals and related institutions for the protection of the public interest.

1160.3. Scope. These regulations shall apply to fabric and fabric-like materials used as examination gowns, sleepwear*, robes*, sheets and pillowcases and used in all hospitals as defined herein.

Exceptions: (a) Fabrics or fabric-like materials used in operating rooms, including emergency surgery, OB delivery, and general surgery rooms.

(b) Fabrics or fabric-like materials which are the personal property of patients.

(c) The provisions of these regulations shall not apply to fabrics and fabric-like materials used in hospitals, as defined herein, which are owned by any local agency until such time as justified cost factors are appropriated in accordance with the provisions of Section 2231, Revenue and Taxation Code.

* Note: All new children's sleepwear and robes, sizes 0 through 14, must be flame resistant in accordance with Federal standards.

1160.4. Validity. If any article, sec tion, subsection, sentence, clause or phrase of these regulations is for any reason held to be unconstitutional, contrary to statute, exceeding the authority of the State Fire Marshal, otherwise tive, such a decision shall not affect validity of the remaining portion of these

1160.5. Definitions. (a) the of these terms, words, and their derivatives shall be construed as set forth in this section. Words used in the singular include the plural, and words used in the plural include the feminine, and words used in the feminine gender include the masculine. an article or section is referred to in these regulations by number, it shall be understood to refer to an article or section of regulations.

(b) "Fabric and fabric-like" means materials formed of fibers or yarns, either natural or synthetic, knitted, felted, bonded, woven, or non-woven; and flexible film or sheeting formed of synthetic resins, supported or unsupported.

(c) "Hospital" means acute general hospital, (general acute care hospital), acute psychiatric hospital, skilled nursing facility or intermediate care facility.

(d) "Items" means examination gowns, robes, sleepwear, sheets or pillowcases made of fabric or fabric-like material.

1160.8. Effective Date. (a) All items purchased after January 1, 1976, for use in any hospital shall conform to the applicable provisions of Commercial Standard 191-53 (Class 1 or Class 2) as adopted under the Federal Flammable Fabric Act.

(b) All items purchased after July 1, 1976, for use in any hospital shall conform to the applicable Criteria of Acceptance set forth in Article 13. (See Section 1160.16)

> **Exception:** Robes larger than size 14 may be purchased until July 1, 1977, without conforming to the applicable Criteria of Acceptance set forth in Article 13.

(c) All items governed by the scope of these regulations used in any hospital after July 1, 1977, shall conform to the applicable Criteria of Acceptance set forth in Article 13.

> **Exception:** Robes larger than size 14 may be used until July 1, 1978, without conforming to the Criteria of Acceptance set forth in Article 13.

Article 13. Criteria of Acceptance

1160.10. General. (a) **Examination Gowns and Sleepwear.** Fabric or fabric-like material in examination gowns and sleepwear * shall be tested in accordance with the provisions of Chapter 4, Standard Number 702-1975 of the National Fire Protection Association and shall have an average time of burning of 8.0 seconds or more.

> **Exceptions:** (1) Smooth-surfaced fabrics (without nap or pile) weighing 4.0 ounces per square yard or more. Weight shall be determined in accordance with ASTM D1910.
>
> (2) Items need not be preconditioned as specified in Sections 3-2 and 4-1 of Standard 702 if they are intended to be used only once and discarded, not intended to be washed or laundered, and are labeled accordingly.

(b) **Sheets and Pillowcases.** Fabric or fabric-like material in sheets and pillowcases shall have an average time of burning of 7.0 seconds or more when tested in the manner specified in Section 1160.10(a).

> **Exceptions:** (1) Smooth-surfaced fabrics (without nap or pile) weighing 3.2 ounces per square yard or more. Weight shall be determined in accordance with ASTM D1910.

(2) Items need not be preconditioned as specified in Sections 3-2 and 4-1 of Standard 702 if they are intended to be used only once and discarded, not intended to be washed or laundered, and are labeled accordingly.

* **Note:** See note in Section 1160.3.

NOTE: Authority cited: Section 19818, Health and Safety Code. Reference: Sections 19810–19813, Health and Safety Code.

History: 1. New Article 13 (Sections 1160.10–1160.11) filed 12-15-75; effective thirtieth day thereafter (Register 75, No. 51).

1160.11. Robes. Fabric or fabric-like material in robes * shall be flame resistant in accordance with any of the following:

(a) Federal Children's Sleepware Standard DOC FF3-71 as published in the Federal Register, May 21, 1972.

(b) Federal Children's Sleepware Standard DOC FF5-74 as published in the Federal Register, May 1, 1974.

(c) Any other standard approved by the State Fire Marshal which will provide a level of flame resistance substantially equal to (a) or (b) above.

* **Note:** See note in Section 1160.3.

Article 14. Labeling and Certification

1160.15. Labeling. Not later than January 1, 1977, all packages or containers of items purchased for use in any hospital shall be labeled to indicate conformance with the applicable Criteria of Acceptance set forth in Article 13.

NOTE: Authority cited: Section 19818, Health and Safety Code. Reference: Sections 19810–19813, Health and Safety Code.

History: 1. New Article 14 (Sections 1160.15–1160.16) filed 12-15-75; effective thirtieth day thereafter (Register 75, No. 51).

1160.16. Certification. Manufacturers of items may be required to furnish substantiation of conformance in a form satisfactory to the inspection authority, such as a formal certification, or may be required to furnish a copy of the test report from a qualified testing laboratory.

statistical purposes only. To the full extent permitted by law, BLS will hold the information in confidence and will not disclose it without the written consent of respondents.

Type of Review: New Collection.

Agency: Bureau of Labor Statistics.

Title: Research on the Feasibility of Collecting Occupational Wage Data by Union Status.

Activity form(s)	Total number of respondents	Affected public	Frequency	Total annual response	Average time per response	Est. total burden hours
Case Study	2,500	Business and other for profit	Once FY98	1,725	10 minutes	288
Survey Form Test BLS–2877 715–EZ; BLS–2877 715 Test1; BLS–2877 715 Test2.	9,000	Business and other for profit	Once FY99	7,000	1 hour	7,000
RAS BLS–2877 715–RAS	2,500	Business and other for profit; Not for profit inst.	Once FY98/FY99.	2,250	30 minutes	1,125
Totals	14,000			10,975		8,413
Two year average	7,000			5,488		4,207

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the ICR; they also will become a matter of public record.

Signed at Washington, DC, this 3rd day of June, 1997.

W. Stuart Rust, Jr.,

Acting Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 97–14816 Filed 6–5–97; 8:45 am]

BILLING CODE 4510–24–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Supplement to California State Plan; Approval

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Approval; California State Standard on Hazard Communication Incorporating Proposition 65.

SUMMARY: This notice approves, subject to certain conditions, the California Hazard Communication Standard, including its incorporation of the occupational applications of the California Safe Drinking Water and Toxic Enforcement Act (Proposition 65). Where a State standard adopted pursuant to an OSHA-approved State plan differs substantially from a comparable Federal standard, the Occupational Safety and Health Act of 1970 (the OSH Act) requires that the State standard be "at least as effective" in providing safe and healthful places of employment. In addition, if the standard is applicable to a product distributed or used in interstate commerce, it must be required by compelling local conditions and not pose an undue burden on commerce.

After consideration of public comments and review of the record, OSHA is approving the California standard, with the following conditions, which are applicable to all enforcement actions brought under the authority of the State plan, whether by California agencies or private plaintiffs:

(1) Employers covered by Proposition 65 may comply with the occupational requirements of that law by complying with the OSHA or Cal/OSHA Hazard Communication provisions, as explicitly provided in the State's regulations.

(2) The designated State agency, Cal/OSHA, is responsible for assuring that enforcement of its general Hazard Communication Standard and Proposition 65 results in "at least as effective" worker protection; the agency must take appropriate action to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is Federally approved.

(3) The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.

These conditions are based on OSHA's understanding of the State's regulations and on general State plan law. Finally, Proposition 65 also is applicable to non-occupational (i.e. consumer and environmental) exposures. OSHA has no authority to address Proposition 65's non-occupational applications; consequently, they are not at issue in this decision and will be unaffected by it.

EFFECTIVE DATE: June 6, 1997.

FOR FURTHER INFORMATION CONTACT: Bonnie Friedman, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone: (202) 219–8148.

SUPPLEMENTARY INFORMATION:

Contents of OSHA'S Decision

I. Background
- A. Pertinent Legal Authority
- B. Description of the California State Plan Supplement
  - 1. Federal and State Hazard Communication Standards
  - 2. Proposition 65
  - 3. OSHA Review and Public Comment

II. Summary and Explanation of Legal Issues
- A. Applicability of Product Clause to Proposition 65 Requirements
- B. Overview: OSHA Review of State Standards Under the Product Clause
- C. Burden of Proof
- D. Application of the California Standard to Out-of-State Manufacturers and Distributors
- E. Designated State Agency
- F. Exemption for Public Sector Employers

III. Summary and Explanation of Remaining Issues Under Section 18
- A. Compelling Local Conditions
  - 1. Overview
  - 2. Commentor Rebuttal Arguments
- B. Remaining 18(c)(2) Issues
  - 1. Overview
  - 2. Businesses Can Comply With Proposition 65 by Using Methods Prescribed by the Federal Hazard Communication Standard
  - 3. Comparison of Coverage Under Federal Standard and Proposition 65
    - Overview
    - Mixtures
    - Articles
    - Pesticides
    - Aflatoxins
    - California Non-Chemical Manufacturers
  - 4. Substantive Differences Between the Federal and General California Standards
    - Trade Secrets
    - California's Omission of Federal Exemptions and Exclusions

California's Requirement for Use of Lay Terminology on MSDSs
5. Supplemental Enforcement Effectiveness
Product Clause
C. Inspections, Employer/Employee Rights
D. Qualified Personnel
IV. Decision
V. Location of Supplement for Inspection and Copying

References to the record are made in the text of this decision. The docket number in this case is T-032. References to exhibits in the docket appear as "Ex. _____." Exhibit 18 contains all of the public comments filed. Each individual comment has been assigned a number and this notice will refer to individual comments by these numbers—"Ex. 18-_____."

I. Background

A. *Pertinent Legal Authority*

The Occupational Safety and Health Act generally preempts any State occupational safety and health standard that addresses an issue covered by an OSHA standard, unless a State plan has been submitted and approved. See *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992). Once a State plan is approved, the bar of preemption is removed and the State is then able to adopt and enforce standards under its own legislative and administrative authority. As a consequence, any State standard or policy promulgated under an approved State plan becomes enforceable upon State promulgation. Newly-adopted State standards must be submitted for OSHA review and subsequent approval under procedures set forth in 29 CFR Part 1953 and OSHA Directive STP 2-1.117, but are enforceable by the State prior to Federal review and approval. See *Florida Citrus Packers v. California*, 549 F. Supp. 213 (N.D. Cal. 1982); *Chemical Manufacturers Association v. California Health and Welfare Agency*, No. CIV. S-88-1615 LKK (E. D. Cal. 1994). On May 1, 1973, OSHA published its initial approval of the California State plan in the **Federal Register**. 38 FR 10717, 29 CFR Part 1952, Subpart K.

The requirements for adoption and enforcement of safety and health standards by a State with an approved State plan are set forth in Section 18(c) of the OSH Act and in 29 CFR Parts 1902, 1952 and 1953. OSHA regulations require States to respond to the adoption of new or revised permanent Federal standards by promulgating comparable standards. As explained in more detail in section B, OSHA adopted a hazard communication standard in November 1983. California adopted its own hazard communication standard in 1981 and revised it, in response to the Federal standard, in November 1985. California submitted its Hazard Communication Standard to OSHA for approval on January 30, 1986. On January 30, 1992, the State submitted changes to this standard by incorporating relevant provisions of the Safe Drinking Water and Toxic Enforcement Act (Proposition 65). *See* California Health and Welfare Code §§ 25249.5-25249.13.

Under Section 18(c) of the Act and OSHA's regulations, State plans and plan changes must meet certain criteria before they are approved. The principal criteria are:

- The State must designate a State agency or agencies which is responsible for administering the plan throughout the State. 29 U.S.C. § 667(c)(1).
- If a State standard is not identical to Federal standards, the State standard (and its enforcement) must be at least as effective as the comparable Federal standard. Moreover, if a non-identical State standard is applicable to products distributed or used in interstate commerce, it must be required by compelling local conditions and must not unduly burden interstate commerce. (This latter requirement is commonly referred to as the "product clause.") 29 U.S.C. § 667(c)(2).
- The State must provide for a right of entry and inspection of all workplaces which is at least as effective as that provided in section 8 of the Act and must prohibit advance notice of inspections. 29 U.S.C. § 667(c)(3).
- The responsible State agency or agencies must have "the legal authority and qualified personnel necessary for the enforcement of such standards and adequate funding." 29 U.S.C. § 667(c)(4)-(5).
- To the extent the State's constitutional law permits, it must establish a comprehensive occupational safety and health program for employees of public agencies of the State and its political subdivisions which is at least as effective as the standards contained in an approved plan. 29 CFR § 1952.11.

In enacting the State plan system, Congress' intention was to encourage the States "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." 29 U.S.C. § 651(b)(11); 29 CFR § 1902.1. Consistent with this Congressional declaration, OSHA has interpreted the OSH Act to recognize that States with approved State plans retain broad power to fashion State standards. As President Reagan noted in Executive Order 12612 (October 26, 1987), "[t]he nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues." Section 18 of the OSH Act reflects this "search for enlightened public policy" not by delegating Federal authority to the States but by removing the bar of preemption through plan approval and, thus, allowing States to administer their own workers' protection laws so long as they meet the floor established by the Federal OSHA program.

B. *Description of the California State Plan Supplement*

1. Federal and State Hazard Communication Standards

On September 10, 1980, the Governor of California signed the Hazardous Information and Training Act, California Labor Code, §§ 6360-6399. This Act instructed the Director of Industrial Relations, the State's designee responsible for operation of the OSHA-approved State plan (known as Cal/OSHA) to establish a list of hazardous substances and to issue a standard setting forth employers' duties toward their employees under that Act. The standard, General Industry Safety Order 5194 (8 CCR § 5194), was adopted by the State in 1981. Both the Director's initial list and the standard became effective on February 21, 1983.

Federal OSHA promulgated a hazard communication standard (29 CFR § 1910.1200) in November 1983. The State amended its law in 1985, and, after a period for public review and comment, the California Standards Board adopted a revised standard for hazard communication on October 24, 1985. The standard became effective on November 22, 1985. By letter dated January 30, 1986, with attachments, from Dorothy H. Fowler, Assistant Program Manager, to then Regional Administrator, Russell B. Swanson, the State submitted the standard and incorporated the standard as part of its occupational safety and health plan.

In addition to the supplemental provisions of Proposition 65, the State Hazard Communication Standard differs from the Federal standard in a few minor respects:

(1) The State standard requires that each Material Safety Data Sheet contain certain information including Chemical Abstracts Service (CAS) name (unless its disclosure could reveal a trade secret),

while the Federal standard does not require inclusion of the CAS;

(2) The State standard specifically requires a description in lay terms of the particular potential health risks posed by the hazardous substance, while the Federal standard more broadly requires "appropriate" hazard warnings;

(3) While the Federal standard allows for release of trade secret information to health professionals who enter into confidentiality agreements, the California standard allows access to such information to safety professionals as well; and

(4) The State standard does not include some of the exemptions and exceptions added to the Federal standard in 1994.

See Section II.B.4.

Cal/OSHA enforces the California Hazard Communication Standard, like its other standards, under approved procedures similar to those of Federal OSHA. Safety and health inspectors from the Division of Occupational Safety and Health conduct on-site inspections in response to complaints of workplace hazards or when the establishment is selected for a programmed inspection based on objective criteria, etc. Employer and employee representatives may accompany the inspector. If violations are noted, a citation and proposed penalties are issued to the employer, who has the right of appeal to the California Occupational Safety and Health Appeals Board and thereafter to the courts.

2. Proposition 65

In a 1986 referendum, voters of the State of California adopted Proposition 65, the "Safe Drinking Water and Toxic Enforcement Act." Proposition 65 and implementing regulations require any business with ten or more employees that "knowingly and intentionally" exposes an individual to a chemical known to the State to cause cancer or reproductive toxicity to provide the individual with a "clear and reasonable" warning. California Health and Safety Code sections 25249.5 through 25249.13; 22 CCR §§ 12000 *et seq.* In accordance with Proposition 65, the State annually publishes a list of chemicals known to cause cancer or reproductive toxicity. 22 CCR § 12000. Proposition 65 applies broadly to all exposures to listed chemicals; consequently, the law has consumer and environmental applications, as well as the occupational exposures relevant here. Under the Office of Environmental Health Hazard Assessment (OEHHA) regulations, a "consumer product" exposure is "an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service." 22 CCR § 12601(b). An "occupational exposure" is "an exposure, in the workplace of the employer causing the exposure, to any employee." 22 CCR § 12601(c). "Environmental exposures" include exposures resulting from contact with environmental media such as air, water, soil, vegetation, or natural or artificial substances. 22 CCR § 12601(d). OSHA has no authority to address Proposition 65's consumer and environmental applications; consequently, they are not at issue in this decision and will be unaffected by it.

Proposition 65 was passed by referendum of the voters of California in 1986. On January 23, 1991, the California Court of Appeal ordered the California Occupational Safety and Health Standards Board to amend the State's Hazard Communication standard to incorporate the occupational warning protections of Proposition 65. See *California Labor Federation, AFL-CIO* v. *California Occupational Safety and Health Standards Board*, 221 Cal. App. 3d 1547 (1990).[1] These changes were adopted on an emergency basis on May 16, 1991, and became effective on May 31, 1991. A permanent standard became effective on December 17, 1991. On January 30, 1992, the State submitted amendments to its Hazard Communication Standard, adapting both the substantive requirements and enforcement mechanism of Proposition 65 and OEHHA's implementing regulations, for application to the workplace. Ex. 4.

Two State agencies have been authorized to issue regulations interpreting and implementing Proposition 65's occupational aspects. As discussed in greater detail in Section III.B.2, Cal/OSHA and OEHHA regulations governing occupational exposures provide three alternative methods of complying with Proposition 65:

(1) Warnings may be given through the label of a product;

(2) Warnings may be given via a workplace sign; or

(3) The general California or Federal Hazard Communication Standard may be followed.

See 8 CCR §§ 5194(b)(6) (B)–(C) and 22 CCR § 12601(c). Compliance with Section 12601(c)—which allows use of California or Federal hazard communication methods—is a defense to supplemental enforcement actions brought under Proposition 65. 8 CCR § 5194(b)(6)(E). The regulations also provide sample language for the label and sign warnings.[2] The sample label and sign language, however, represents a "safe harbor" method of providing Proposition 65 warnings. Again, compliance with either the Federal or general State hazard communication procedures constitutes compliance with Proposition 65 and is a defense to any enforcement action. 8 CCR § 5194(b)(6) (B), (C), (E); 22 CCR § 12601(c)(1)(C).

The Proposition 65 requirements of the California standard are enforceable with regard to occupational hazards through the usual California State plan system of inspections, citations and proposed penalties which has been determined to be at least as effective as Federal OSHA enforcement. 38 FR 10717 (May 1, 1973). The Cal/OSHA enforcement directive on hazard communication (Policy and Procedure C-43) provides that a covered employer may comply with the incorporated Proposition 65 requirements by including the substance in the employer's Hazard Communication Program. In addition, the Cal/OSHA standard incorporates the enforcement mechanism of Proposition 65, which provides for supplemental judicial enforcement by allowing the State Attorney General, district attorneys, city attorneys, city prosecutors, or "any person in the public interest" to file civil lawsuits against alleged violators. Private plaintiffs bringing actions must first give notice to the Attorney General and appropriate local prosecutors, and may proceed if those officials do not bring an action in court within sixty days.

Proposition 65 provides for penalties of up to $2500 per day, per violation. A

[1] In 1988, the Chemical Manufacturers Association (and other plaintiffs) challenged the applicability of Proposition 65 in the workplace, arguing that the law was preempted because it was not a part of the approved State plan. In 1994, the U.S. District Court for the Eastern District of California ruled that the plaintiffs, as a result of the State's incorporation of Proposition 65 into the State plan, did not have standing to pursue their action and that the issues were not ripe for review. *Chemical Manufacturers Association* v. *California Health and Welfare Agency*, slip op. at 15–25.

[2] For labels, the warnings which are deemed to meet the requirements of Proposition 65 are: "WARNING: This product contains a chemical known to the State of California to cause cancer," or "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." For signs, the language deemed to meet the requirements is: "WARNING: This area contains a chemical known to the State of California to cause cancer," or "WARNING: This area contains a chemical known to the State of California to cause birth defects or other reproductive harm."

private plaintiff may obtain up to 25% of penalties levied against a company found in violation of Proposition 65 for failing to provide required warnings. Private actions with regard to occupational exposures have been brought in California courts, and many more have been settled on varying bases prior to trial or prior to initiation of formal court action.

3. OSHA Review and Public Comment

On April 18, 1995, the Coalition of Manufacturers for the Responsible Administration of Proposition 65 (the Coalition), filed a petition with OSHA requesting that the Plan change submitting the California Hazard Communication Standard with its incorporation of Proposition 65 be rejected. Ex. 8. The Coalition argued that the substantive and enforcement aspects of Proposition 65 unduly burden interstate commerce. Various parties wrote to OSHA to express support for, or opposition to, the Coalition's petition. Exs. 9–16. Other parties expressed concern to OSHA about the continued enforceability of the private right of action provisions of Proposition 65 in the workplace during the pendency of the OSHA review process.

On September 13, 1996, OSHA requested public comment (61 FR 48443) as to whether to approve the California Hazard Communication Standard incorporating Proposition 65 pursuant to 29 CFR parts 1902 and 1953. OSHA had preliminarily determined that the California plan change was at least as effective as the Federal standard and was applicable to products used or distributed in interstate commerce. OSHA sought comment on these determinations as well as the "product clause" requirements for standards which differ from the relevant Federal standard—i.e. whether the State standard is required by compelling local conditions or poses any undue burden on interstate commerce. (As discussed in Section II.B, in its Directive STP 2–1.117 governing the review of different State standards, OSHA specifically stated that public comment would constitute its initial means of assessing the product clause implications of a State standard and that absent record evidence to the contrary a State standard would be presumed to meet the test.)

Following OSHA's September 13, 1996 request for comment on the proposed standard, 207 commentors submitted statements. Many of the commentors opposing the standard are companies which have experienced, or fear experiencing, private enforcement lawsuits under Proposition 65. In a number of these cases, the commentor did not make it clear whether the company involved had been sued under Proposition 65's occupational, consumer or environmental applications. *E.g.*, Ex. 18–2, 18–23, 18–127, 18–130, 18–133. As noted previously, OSHA's decision can have no effect upon enforcement actions alleging consumer or environmental exposures.

II. Summary and Explanation of Legal Issues

The comments filed with OSHA presented a variety of issues, each of which will be discussed below. Section III of this notice discusses the more specific provisions of the California standard in light of the requirements of Section 18 of the OSH Act, particularly the product clause. In this Section, however, OSHA will discuss several general legal questions at issue here.

Some commentors have raised issues involving application of the OSH Act's "product clause" to the Proposition 65 elements of the California standard. First, several commentors have questioned whether OSHA should apply the product clause to Proposition 65's substantive requirements and enforcement methods. See Section II.A. Second, OSHA provides an overview of the product clause and outlines the principles OSHA will apply in analyzing product clause issues. See Section II.B. Third, OSHA historically has treated State standards as presumptively compliant with the product clause. OSHA Instruction STP 2–1.117 (August 31, 1984); *see, e.g.*, 62 FR 3312 (January 22, 1997) (approval of Washington State standard amendments for acrylonitrile, 1,2-dibromo-3-chloropropane, and confined space). A few commentors maintain that California must bear the burden of proof on this issue under the Administrative Procedure Act (APA). See Section II.C. Section II.D discusses a jurisdictional issue: whether California may, under the auspices of its OSHA-approved State plan, apply its standard to out-of-state manufacturers. Some commentors argue that Proposition 65's supplemental enforcement mechanism violates Section 18's requirement that a "designated State agency" bear responsibility for administering a State plan. See Section II.E. Finally, Section II.F addresses Proposition 65's exemption for public sector employers.

A. Applicability of Product Clause to Proposition 65 Requirements

Cal/OSHA, writing on behalf of itself, the State Attorney General, and OEHHA, maintains that the product clause does not apply to the substantive requirements imposed by Proposition 65. Ex. 6; see also Exs. 18–61, 18–62, 18–111, 18–155. Some commentors (e.g. Ex. 18–155) also have argued that, even assuming the product clause applies to the substantive provisions of Proposition 65, it does not apply to the law's supplemental enforcement provisions.[1] Because OSHA finds that Proposition 65's supplemental enforcement provisions do not violate the product clause (see Section III.B.3, below), it is not necessary for OSHA to decide whether State enforcement may in some cases, be subject to the product clause. Accordingly, the remainder of this section will address only Cal/OSHA's argument about the product clause's applicability to Proposition 65 substantive provisions.

Ex. 18–155, page 9.

Relying upon statements made in Congressional debate leading to enactment of the OSH Act in 1970, California argues that the product clause was intended only "to limit states from imposing different product design standards for the safety of products," specifically machinery products. Ex. 6 pages 21–22. In contrast,

> Far from requiring changes to equipment products moving in interstate commerce, Proposition 65's warning requirement only requires that warnings be given somehow. They need not be given by a product label, or even through the (Hazard Communication Standard). Compliance may be obtained where the employer posts an appropriate sign meeting all of the requirements set forth in 22 CCR § 12601(c). This could be accomplished without making any change the MSDS, and results in complete compliance with Proposition 65.

Ex. 6, pages 21–22. Other supporters of the proposed standard argue, more generally, that the product clause does not apply to warning requirements because warnings (*e.g.* labels, signs, material safety data sheets, training) do not affect product design. *E.g.* Exs. 18–61, 18–62.

As other commentors (*e.g.* Exs. 18–5, 18–148, 18–153, 18–154, 18–156) point out, however, in its Hazard Communication Standard rulemaking

[1] This argument rests upon the language of Section 18(c)(2):

> [T]he text of the Occupational Safety and Health Act is clear that the product clause and its two-part test do not even apply to enforcement. Rather, § 667(c)(2) requires "standards (and their enforcement)" to be at least as effective as Federal standards, but the product clause applies only to "standards," and makes no mention of enforcement. Thus, OSHA need only consider whether the enforcement of California's HCS and Prop 65 is "least as effective" as Federal OSHA, and OSHA need not concern itself with whether the private right of action in any way burdens interstate commerce.

OSHA determined that the product clause is applicable to substantive State hazard communication requirements "[b]ecause the Hazard Communication Standard is 'applicable to products' in the sense that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets[.]" 48 FR 53280, 53323 (November 25, 1983). Similarly, in its decision approving California's ethylene dibromide standard, OSHA found the product clause applicable because "the standard establishes conditions and procedures which restrict the 'manufacture, reaction, packaging, repackaging, storage, transportation, sale, handling and use' of the chemical product, ethylene dibromide (EDB), as well as the handling and exposures which may result after EDB has been applied as a fumigant to fruit products." 48 FR 8610, 8611 (March 1, 1983).

OSHA continues to believe that the product clause applies to substantive State hazard communication requirements. As several commentors note (*e.g.* Exs. 18–41, 18–153), Section 18(c) is phrased broadly. On its face, the statute says simply that the product clause applies to all standards which are "applicable to products which are distributed or used in interstate commerce[.]" 29 U.S.C. § 667(c)(2). It is undisputed that the California standard may, in certain circumstances, apply to products "distributed or used in interstate commerce" because California employers may receive goods from out-of-state suppliers. Thus, the standard comes within the plain language of Section 18(c). OSHA's current interpretation of the product clause is most consistent with this statutory language. *See generally* Sutherland Statutory Construction, §§ 45.02, 46.01 (4th ed. 1984).[4]

B. Overview: OSHA Review of State Standards Under the Product Clause

OSHA's decision on the approvability of the California standard involves the relationship between the State police power to regulate health and safety and the Federal power to regulate commerce. Throughout the history of the United States, the States and localities traditionally have used their police powers to protect the health and safety of their citizens. *Medtronic v. Lohr, Inc.*, ____ U.S. ____, 116 S. Ct. 2240, 2245 (1996). At the same time, the Commerce Clause of the U.S. Constitution provides that "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states[.]" Article I, section 8.

In the absence of a Federal statute specifically addressing the issue, the Federal courts have interpreted the Commerce Clause to limit, implicitly, the power of the States to regulate interstate commerce. Under this "dormant commerce clause," the courts have "distinguished between State statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). As the Court stated in *Taylor*, "[t]he limitation imposed by the Commerce Clause on State regulatory power 'is by no means absolute,' and 'the States retain authority under their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected.'." *Id., citing Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *see also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *Kleenwell Biohazard Waste v. Nelson*, 48 F.2d 391, 398 (9th Cir.), *cert denied* 115 S. Ct. 2580 (1995) (footnote omitted). In reviewing State legislation under the dormant commerce clause, courts consider both the nature and importance of the local interest and any burden on commerce. The case law recognizes that a State has an important stake in promoting the health of its citizens through measures that do not discriminate against or impermissibly restrict interstate commerce. *Id.; see also Taylor*, 477 U.S. 131.

In the OSH Act, Congress has enacted a statute, and the preemptive effect of that statute turns on Congressional intent. *See generally Medtronic; Gade*, 505 U.S. 88. The language of the product clause must be read against the backdrop of longstanding judicial deference to State sovereignty in the area of health protection. *Medtronic*, 116 S. Ct. at 2250. In *Gade*, the Court held that the OSH Act preempts States without State plans from enforcing occupational safety and health standards on issues addressed by Federal standard; laws of general applicability are not preempted. 505 U.S. at 97, 107–108.

As discussed in Section I.A, Section 18 of the OSH Act removes the bar of Federal preemption for approved State plans, restoring to the States the police power to protect occupational safety and health, provided that the requirements of Section 18 are met. See also *Gade*, 505 U.S. at 102 (describing Section 18 as giving "States the option of pre-empting Federal regulations by developing their own occupational safety and health programs").

The ability of the States to devise and develop occupational safety or health approaches is limited by the requirements of Section 18(c), including the product clause, which requires that State standards applicable to products not unduly burden interstate commerce, and that they be justified by "compelling local conditions." At the same time, however, Section 18 specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The Act's drafters clearly envisioned the "at least as effective" requirement as providing a floor, not a ceiling, for future worker protections efforts by State plan States. *See* Senate Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970* at 297, 1035 (92d Congress, 1st Session, June 1971) (*Legislative History*). Thus, State standards must pass the "product clause" test, but the States also are free to devise not only more stringent substantive standards but also supplementary enforcement procedures. *See Legislative History* at 1035 (OSH act does "not envision a complete takeover of the field by the Federal government"; OSHA's responsibility is "merely to see to it that certain minimum requirements were met and that beyond those the health and safety of most workers would be left to [the] states"). The flexibility granted the States under Section 18 also is in keeping with Congress' stated purpose of "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws' and its intent to allow the States "to conduct experimental and demonstration projects in connection therewith[.]" 29 USC § 651(b)(11).

The OSH Act's product clause reflects in substantial part terminology and principles developed by the Federal courts in applying the dormant aspects of the Commerce Clause. Notwithstanding the limits of the dormant commerce clause, Congress may grant to the States greater powers to regulate commerce than they otherwise would possess. *Maine v. Taylor*, 477 U.S. at 138–39; *citing Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *see also Florida Citrus Packers v. California*, 549 F. Supp. at 215. In *Citrus Packers*,

[4] As discussed in Section II.B, however, the legislative history of the product clause is a helpful aid in understanding the somewhat ambiguous structure of the product clause "test," which requires an examination of compelling local conditions and the extent of any burden on commerce.

the court found that Section 18 of the OSH Act represents "a broad grant of regulatory power to the states" and, thus, "an attack based upon unduly burdening commerce is limited to those situations where the product standard applies." 549 F. Supp. at 216. The similarity in language between Section 18(c)(2) and dormant commerce clause principles, then, suggests that a principal function of the product clause is to ensure that Section 18 is not read as a grant of power to violate normal Commerce Clause restrictions.

Thus, OSHA agrees with those commentors (*e.g.*, Exs. 18–40, 18–160, 18–163, 18–164, 18–167, 18–174) who have argued that dormant commerce clause case law is relevant to analysis of issues under the product clause. That said, however, OSHA concludes that Congress authorized the agency to give somewhat more strict review under Section 18(c)(2) to State standards that address issues covered by a Federal standard than a court would give under the dormant commerce clause. This conclusion is supported by the limited legislative history of the product clause and the different structural positions presented. In dormant commerce clause cases, courts are considering State attempts to promote health and safety or other local interests in the absence of Federal regulation. Under Section 18(c)(2), on the other hand, the Federal standard provides a uniform floor of protection.

Although there is no committee report explaining the language, the limited Congressional floor discussion concerning the product clause focused on possible State design requirements for machinery products and the possible economic waste resulting from non-uniform State requirements. *See, e.g.*, *Legislative History* at 500–501, 1042 (statements of Representative Railsback and Senator Saxbe). Absent some indication of protectionist discrimination, it is doubtful that a court would reject a State safety requirement because it led to "economic waste." *See, e.g.*, *South Carolina State Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177 (1938) (upholding State regulation of weight and width of trucks); *compare Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (rejecting similar statute where majority of justices found that the State statute either created a disproportionate burden for out-of-state interests or was protectionist in intent); *National Paint & Coatings Ass'n* v. *City of Chicago*, 45 F.3d 1124, (7th Cir. 1995) (sustaining city ban on spray paint, despite possibility that it was "economic folly"). The examples considered by Congress suggest that it envisioned OSHA's disapproval of State standards under some circumstances in which the courts would uphold a State law against a dormant commerce clause challenge.

At the same time, the Congressional intent to allow States the flexibility to develop their own occupational safety and health plans, with the Federal standards as a "floor" rather than a "ceiling," must be kept in mind. OSHA's interpretation of the product clause should be "consistent with both federalism concerns and the historic primacy of State regulation of matters of health and safety," *see Medtronic*, 116 S. Ct. at 2250, and with Congress' use of terminology which harkens back to dormant commerce clause principles.

Accordingly, in analyzing differences between Federal and State standards under the product clause, OSHA will first determine whether the State standard is required by compelling local conditions. Consistent with the State historic power to regulate health and safety, a State standard that advances the health and safety of the State's workforce meets this test, provided that the standard does not promote or result in economic protectionism. As discussed in the next section, OSHA will accept the State's determination on this point, in the absence of evidence to the contrary. Thus, OSHA will not simply defer to the State's determination, but will consider "rebuttal" evidence and arguments. In addition, even if a State standard is required by compelling local conditions, OSHA must determine whether the standard imposes an undue burden upon commerce. The burden of establishing an undue burden will be upon the opponents of a State standard (see also Section D); OSHA will consider any alleged burdens in light of the importance of the State interest involved.

OSHA will consider the specific "compelling local conditions" underlying the California standard in Section III.A. Here, however, OSHA notes that many commentors opposing the standard interpret the phrase "compelling local conditions" to be limited to interests which are "unique" to California.[5] *E.g.* Exs. 18–41, 18–58. OSHA disagrees. Conditions unique to a given State are a sufficient, but not a necessary, basis for a finding of compelling local conditions. Although its focus in past State plan supplement decisions has been on the conditions prevailing in the State involved (*see, e.g.*, 48 FR 8610 (decision approving California ethylene dibromide standard)), OSHA has never said that a State must establish that the conditions of concern to the State's lawmakers are not prevalent in any other State as well. Such an interpretation would be inconsistent with the plain meaning of "compelling": more than one State may have a compelling interest in regulating particular safety issues. Simply put, "compelling local conditions" are compelling conditions which exist locally.

Requiring a State to establish unique local conditions also would be inconsistent with the courts' treatment of this issue under the dormant commerce clause. Under the dormant commerce clause, courts look for "local" conditions which may be, but frequently are not, unique to the State involved. *E.g. Maine* v. *Taylor*, 477 U.S. 131 (upholding discriminatory Maine statute banning importation of baitfish); *Kleenwell Biohazard* Waste, 48 F.3d at 396 (upholding State concern with ensuring safe disposal of solid waste).

C. Burden of Proof

A few commentors assert that California should bear the burden of proving that its proposed standard is at least as effective as the Federal standard and does not violate the product clause. *E.g.* Ex. 18–160[6] at pages 2–4 and 18–174 at pages 4–5. This argument relies upon Section 556(d) of the Administrative Procedure Act (APA), 5 USC § 556(d), and the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994). California, in response, argues that Section 556(d) is not applicable to these proceedings because no formal hearing is involved. Ex. 22. The AFL-CIO (Ex. 18–155) points out that the applicable OSHA Instruction, STP 2–1.117 (August 31, 1984) effectively places the burden of proof upon opponents of a State standard for purposes of the effectiveness and product clause tests:

> In the absence of record evidence to the contrary (including evidence developed by or submitted to OSHA during its review of the standard), the State standard shall be presumed to be 'at least as effective' as the Federal standard and shall be presumed to be in compliance with the product clause test of section 18(c)(2) of the Act.

[5] Industry commentors also have maintained that Proposition 65's exemption for public sector and some small employers demonstrates that there is no compelling need for the law. OSHA discusses this argument in Section II.A.2.

[6] Shell Oil and Elf Atochem further assert that California must meet its burden of proof by "more than a mere preponderance of the evidence." Ex. 18–160, pages 7–8. The burden of proof under the APA is preponderance of the evidence. *Greenwich Collieries*, 114 S. Ct. at 2257; *Steadman* v. *SEC*, 450 U.S. 91, 95 (1981). OSHA has not changed that test by regulation or policy.

STP 2–1.117, page 2.

Initially, OSHA notes its agreement with California that Section 556(d) of the APA does not apply to this decision to approve the State standard. Section 556(d) applies only "to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." This decision involves no hearing, and Sections 553 and 554 do not apply. Section 553 applies only to rulemakings. This decision is not a rulemaking, but rather an "order" within the nomenclature of the APA. The decision is a final disposition in an agency process respecting the "grant" or "conditioning" of an agency "approval" or "other form of permission." 5 U.S.C. §§ 551 (6)–(9).

Section 554 does not apply because that section applies only to adjudications "required by statute to be determined on the record after opportunity for agency hearing." The OSH Act requires "due notice and opportunity for a hearing" before OSHA *rejects* a State plan or plan modification, but requires no hearing before OSHA approves a plan or modification. 29 USC § 667(d). The statutory language quoted above regarding plan rejection proceedings may be insufficient, by itself, to trigger application of Section 554 or 556. *See Chemical Waste Management* v. *EPA*, 873 F.2d 1477, 1480–82 (D.C. Cir. 1989); *U.S. Lines* v. *FMC*, 584 F.2d 519, 536 (D.C. Cir. 1978). OSHA, however, has by regulation made Section 556 applicable to rejection proceedings. 29 CFR §§ 1902.17–18, 1953.41(d)(2). The regulations expressly authorize, on the other hand, a decision to approve a State plan or modification without a formal hearing. 29 CFR §§ 1902.11, 1902.13. It is therefore abundantly clear that Section 556(d) does not apply here.

The formal distinction between the process for approving or rejecting a State standard under an approved State plan reflects the real difference between these decisions under the framework of Section 18 and the Federal system. A modification to an approved State plan takes effect prior to and pending OSHA review of the modification. A decision to reject the modification works an abrupt change in the status quo and overrides the determination of a sovereign State. A decision to approve, on the other hand, leaves the status quo and the State's determination unchanged. In effect the decision is not to institute the formal trial-type proceedings required for rejection.

OSHA's historic placement of the burden of proof upon parties opposing a State standard is consistent with Section 18(c)(2), the applicable regulations, the APA, and the case law. As was discussed in the preceding section, the product clause reflects in substantial part dormant commerce clause case law. Under that case law, the burden of persuasion rests upon the party claiming that a State regulation violates the dormant commerce clause (unless there is evidence of protectionist discrimination by the State). *Pacific Northwest Venison Producers* v. *Smitch*, 20 F.3d 1008, 1012 (9th Cir.), *cert denied* _____ U.S. _____, 115 S. Ct. 297 (1994), *citing Northwest Central Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493, 525–26 (1989); *Maine* v. *Taylor*, 477 U.S. at 138; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

In addition, under the dormant commerce clause, the judgments of State lawmakers about the necessity or wisdom of non-discriminatory laws are entitled to considerable, and perhaps total, deference from the courts: if a State articulates a legitimate, non-discriminatory local interest to support an enacted law, "courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'" *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 92 (1987), *citing* Justice Brennan's concurring opinion in Kassel, 450 U.S. at 679; *Pacific Northwest Venison Producers*, 20 F.3d at 1012.

Because of the similarities between dormant commerce clause principles and the product clause, OSHA believes it is appropriate to apply the same burdens of proof and persuasion as are applied under the dormant commerce clause. Nevertheless, because OSHA also concludes that Congress intended State standards to be subject to somewhat greater scrutiny than they might receive by the courts applying the dormant commerce clause (see Section II.B, above), OSHA will not defer to a State's legislative judgment regarding local conditions to the extent a court might. The agency will presume that a State standard meets the requirements of Section 18(c)(2), but that presumption may be rebutted with appropriate evidence.

This overall approach is in harmony with the idea that Congress, by enacting the product clause, intended to recognize that States adopting State plans retain broad regulatory power over workplace safety and health, but not to allow the States to engage in regulation which otherwise would violate the dormant commerce clause. Imposing the burden of persuasion upon parties opposing a State regulation also is consistent with the basic nature of the "defense" available under the dormant commerce clause or product clause; these are affirmative defenses. *See, e.g.*, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25 (1937) (treating constitutional challenge to National Labor Relations Act as affirmative defense). Under the APA, the party presenting an affirmative defense bears the burden of persuasion. *Greenwich Collieries*, 114 S. Ct. at 2257–58; *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

In keeping with the principles applied under the dormant commerce clause and the nature of the product clause "defense," parties opposing a State standard should bear the burden of proving violations of Section 18(c)(2), unless there is evidence that the standard is linked to economic protectionism. Here, there is no evidence that the voters of California were motivated by economic protectionism in passing Proposition 65.[7] The law, as enacted, applies with equal force to in-state and out-of-state businesses. In addition, although several commentors rely upon dormant commerce clause case law involving discriminatory statutes (*e.g.*, Exs. 18–40, 18–160), they presented no evidence suggesting the statute is discriminatory. See also Ex. 22 (Attachment B, description of ballot initiative). Opponents of the California standard, therefore, bear the burden of proving that it does not satisfy Section 18(c)(2).

D. Application of the California Standard to Out-of-State Manufacturers and Distributors

Several commentors raised the issue of whether supplemental enforcement of Proposition 65 against out-of-state manufacturers and distributors[8] is in accordance with Federal and State requirements. Section 18(b) of the Act provides that "[a]ny State which * * * desires to assume responsibility for development and enforcement therein of occupational safety and health standards * * * shall submit a State plan[.]" Section 18(c)(1) of the Act and 29 CFR § 1902.3(b) require that a State plan designate the agency or agencies responsible for administering the plan throughout the State.

[7] As discussed in Section II.D. Proposition 65 as incorporated into the State plan can apply only to California employers. When determining whether the statute was motivated by economic protectionism, however, it is appropriate to examine the intent behind the statute as a whole, not simply its occupational applications. The remaining discussion in this section, therefore, should be understood in this light.

[8] Whenever this decision uses the word "manufacturers" or "vendors," it is intended to include distributors.

To date, Cal/OSHA itself has not enforced its Hazard Communication Standard, including Proposition 65, against out-of-state vendors. However, private parties have instituted enforcement actions against out-of-state manufacturers in their role as vendors of products to which employees of other employers are exposed in California.

Several commentors cite statements by various California officials which appear to indicate that Proposition 65 as incorporated into the State plan may not be enforced against out-of-state vendors. Exs. 18–153, 18–154, 18–162, 18–174. While Proposition 65 itself applies to any "business" exposing an individual to a hazardous substance, the regulation incorporating Proposition 65 into California's Hazard Communication Standard states that an "employer which is a person in the course of doing business . . . is subject to [Proposition 65]." 8 CCR § 5194(b)(6)(A). The Initial Statement of Reasons issued by the Cal/OSHA Standards Board in adopting Proposition 65 said that the purpose of the incorporation was so "employers in California who come within the scope of Proposition 65 will be prohibited from knowingly and intentionally exposing their employees[.]" Ex. 18–156.

In addition, some commentors cite an October 1, 1992 letter from Steve Jablonsky, Executive Officer of the Cal/OSHA Standards Board, to OSHA, which states that employers need not rely on suppliers in order to comply with Proposition 65 as incorporated into the State plan. Mr. Jablonsky stated that employers could comply with Proposition 65 in various ways, including compliance with the general hazard communication provisions and posting of signs in the workplace. Exs. 18–156, 18–162, 18–174. Similarly, a February 16, 1996 letter from John Howard, Chief, Division of Occupational Safety and Health, to OSHA indicated that there should be no effect on out-of-state employers because signs in the workplace, which are the responsibility of the California employer of the exposed employees, would be sufficient warnings. Ex. 6. In addition, in October 1992, when moving to dismiss *Chemical Manufacturers Association, et al.* v. *California Health and Welfare Agency*, the California Attorney General noted that Proposition 65 does not place any burdens on out-of-state suppliers. Ex. 18–174.

Commentors claim that private enforcement appears to place full responsibility for warning California employees upon out-of-state manufacturers and that application of the standard against out-of-state manufacturers is inconsistent with California's past statements on this subject. Exs. 18–81, 18–153, 18–154, 18–162. Organization Resource Counselors maintains that product manufacturers who distribute signs for workplace postings are sued despite providing the signs. Ex. 18–150. Others note that the California Attorney General argued, in *Industrial Truck Association, Inc.* v. *Henry*, that the State standard authorizes enforcement of Proposition 65 against out-of-state manufacturers who supply their products to California employers. Exs. 18–153, 18–154, 18–162, 18–174.

Some commentors assert that Proposition 65 as incorporated into the State standard should not be enforced against out-of-state manufacturers because a State plan by definition can only be enforced against in-State employers. Shell Oil Company and Elf Atochem North America maintain that a State plan cannot reach beyond its own borders to bring enforcement actions against employers for conduct that occurred in workplaces in other States covered by their own State programs or Federal OSHA. Ex. 18–160. Melvin B. Young notes that this is the only part of any State plan which provides for enforcement against businesses outside of the State. Ex. 18–142.

California's response relies upon the fact that Federal OSHA also imposes duties on manufacturers and that the courts have upheld such requirements. Ex. 22. *See General Carbon Company* v. *Occupational Safety and Health Review Commission*, 860 F.2d 479 (D.C. Cir. 1988). Others who support enforcement of the standards against out-of-state employers maintain that manufacturers are in the best position to assess the hazards and effectively communicate them. In these commentors' views, if manufacturers are not held responsible for exposures to their products, the burden will fall on tens of thousands of California employers. *E.g.*, Ex. 18–167.

OSHA finds that under its requirements governing State plans, a State plan may only enforce its standards within its borders. This conclusion is based upon the language of Section 18 of the OSH Act. Section 18(b) provides that a State may "assume responsibility for development and enforcement *therein* of occupational safety and health standards" (emphasis added). 29 U.S.C. § 667(b). Similarly, Section 18(c)(1)'s requirement for a designated State agency assigns responsibility to that agency for enforcing the State plan "throughout the State[.]" 29 U.S.C. § 667(c)(1); *see also* 29 CFR § 1902.3(b). Clearly, although Congress provided broad powers to the States under Section 18, these powers did not extend to enforcing State laws outside of the State's boundaries.

OSHA's conclusion on this point also is consistent with the practical aspects of the State plan system. No other State plans enforce their occupational safety and health standards against employers who do not have workplaces in the State. Some States have adopted standards which differ from Federal standards and which indirectly affect (but do not regulate) out-of-state manufacturers, and these standards have been reviewed and approved under the product clause requirements of Section 18(c)(2) of the Act. *See, e.g.*, 51 FR 17684 (approval of Arizona's short-handled hoe standard); see also OSHA Directive STP 2–1.117. However, in these cases, the State does not take action against out-of-state manufacturers but against those in-state employers who use the affected product. Although, as noted in California's response, the Federal and other State-plan Hazard Communication Standards do impose responsibilities on manufacturers, State plans do not issue citations against out-of-state manufacturers for incomplete or inaccurate Material Safety Data Sheets (MSDS) used by in-state employers. Rather, the State would refer the matter to the Federal Area Office or other State plan in whose jurisdiction the manufacturer operates. Similarly, if Federal OSHA finds during an inspection that an MSDS used by an employer is incomplete or inaccurate and the manufacturer or supplier is located in a State with an approved State plan, OSHA would refer the matter to the State plan. OSHA Instruction CPL 2–2.38C, page 18 (October 22, 1990).

Out-of-state chemical manufacturers and distributors are subject to the Federal Hazard Communication Standard, or to the State plan standard for the State in which they are located. Allowing application of the California standard out-of-state would mean that out-of-state manufacturers are subject to duplicative regulation. As the Supreme Court noted in *Gade*, "the OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation[.]" 505 U.S. at 100.

Based upon the information in the record, it is unclear to OSHA whether the State, by its incorporation of Proposition 65 into the State plan, intended to apply Proposition 65 to out-of-state employers in their role as vendors. On the one hand, a facial understanding of the regulatory language suggests, as some commentors argue, that the State standard applies only to "employers" who expose their own "employees," in the employer's

own workplace, to Proposition 65 chemicals. 8 CCR § 5194(b), 22 CCR § 12601(c). On the other hand, some statements from California agencies, especially the Attorney General's statements in the *Industrial Truck Association* case, appear to endorse the idea of out-of-state application of the State plan.

Whatever the truth may be about the State's intentions here, the OSH Act does not permit out-of-state enforcement of a State's laws under the auspices of an approved State plan. Therefore, Proposition 65 as incorporated into the State plan may only be enforced against in-State employers. The State may, of course, apply its laws to all workplaces within California, including those maintained by manufacturers or distributors incorporated in other States; in that situation, the "out-of-state" business also would be an "in-state" employer. Additionally, OSHA is addressing only the State's authority under the State plan. This decision leaves open the possibility that the State may have other legal authority under which it can apply Proposition 65 to out-of-state businesses. OSHA has no authority to resolve that question. Most important, as OSHA has noted previously, Proposition 65 applies to consumer and environmental exposures. This decision does not affect actions brought under these aspects of the law.

E. Designated State Agency

Several commentors addressed the issue of whether Proposition 65's provision for supplemental enforcement violates the OSH Act's criteria for a designated State agency. Section 18(c)(1) of the OSH Act and regulations at 29 CFR § 1902.3(b) require that a plan designate a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State. Although Section 1902.3(b)(3) allows an agency to delegate its authority through an interagency agreement, the State designee must retain legal authority to assure that standards and enforcement provided by the second agency meet Federal effectiveness criteria.

Commentors raised two issues regarding the relation of Proposition 65 to these criteria. The first issue involves the diversity of agencies involved in the enforcement of Proposition 65, including the OEHHA, the State Attorney General and local prosecutors. The Proposition 65 regulations which were incorporated into the California Hazard Communication Standard were originally promulgated by OEHHA. The State Attorney General has interpreted Proposition 65 when representing the State in lawsuits in filed against it. The Attorney General and District Attorneys may also initiate enforcement actions under Proposition 65. Some commentors contend that because these agencies may take action independently of Cal/OSHA, their role does not meet the criteria in Section 18(c)(1) of the Act and 29 CFR § 1902.3(b). Exs. 18–41, 18–88, 18–127, 18–156, 18–164, 18–174, 18–191, 18–201.

Some commentors allege that these agencies have not issued appropriate guidance to employers on complying with Proposition 65. For example, Ashland Chemical Company comments that it sought confirmation from the Attorney General that its warnings were acceptable under Proposition 65 and did not receive a reply. Ex. 18–191. Commentors have also pointed out that California agencies have issued conflicting interpretations about Proposition 65 in its workplace application. The Coalition notes that an October 1, 1992 letter from Steve Jablonsky, Executive Officer of the Cal/OSHA Standards Board, to OSHA states that employers need not rely on suppliers in order to comply with Proposition 65 as incorporated into the State plan. However, the Attorney General argued in *Industrial Truck Association, Inc.* v. *Henry* that Proposition 65 does apply to out-of-state manufacturers who supply their products to California employers. Ex. 18–174.

Some commentors also maintain that the private right of action authorized by Proposition 65 as included in the California Hazard Communication Standard violates the requirement for a designated agency because the designee does not retain authority over private enforcement actions. Exs. 18–81, 18–96, 18–121, 18–144, 18–147, 18–150, 18–160, 18–164, 18–169, 18–173, 18–174, 18–191, 18–201, 18–204. These commentors assert that the negotiation of settlements between plaintiffs and employers results in different requirements for different employers, so that employers cannot be aware in advance of the requirements placed upon them. According to these comments, no California agency has, or is willing to exercise, an oversight role of private litigation which would provide consistent and coherent interpretations. Some commentors also claim that the absence of a private right of action under the Federal OSH Act indicates that Congress did not favor occupational safety and health enforcement by private parties. Therefore, according to these commentors, OSHA should not approve a private right of action in a State plan.

Other commentors maintain that nothing in the OSH Act precludes a State from allowing private rights of enforcement under a State plan, and as long as the basic plan meets the criteria for a designated agency, any additional enforcement would only increase effectiveness. Exs. 18–155, 18–168.

In response to the comments, the State of California (Ex. 22) notes that Cal/OSHA remains responsible for the administration and enforcement of standards set forth in the plan. OEHHA does not have authority to make changes to the State plan; any change in the Proposition 65 regulations would have to be adopted by the Standards Board. On the issue of private litigation, the State asserts that since private enforcement only applies to Proposition 65, the standard remains as effective as the Federal. Cal/OSHA also points out that courts have the authority to stay litigation of some Proposition 65 occupational exposure claims, pending resolution by Cal/OSHA of issues within its expertise. This has been done in *As You Sow* v. *Turco Products*. The State contends that Cal/OSHA should not be held responsible for suits of private parties or settlements reached without court involvement.

OSHA finds that neither a distribution of functions among agencies nor private rights of action are prohibited under State plan provisions. OSHA has approved a provision for court prosecution of occupational safety and health cases by local prosecutors under the Virginia State plan (see 41 FR 42655; September 28, 1976). Although the Federal Occupational Safety and Health Act does not authorize private enforcement, OSHA State plans do not operate under a delegation of Federal authority but under a system which allows them to enact and enforce their own laws and standards under State authority. Therefore, nothing in the Act prevents States with approved plans from legislating such a supplemental private right of action in their own programs. In fact, other State plans include OSHA-approved provisions for private rights of action in cases of alleged discrimination against employees for exercising their rights under the plans.

In the case of Proposition 65, private enforcement is supplemental to, not a substitute for, enforcement by Cal/OSHA. Private enforcement, therefore, should not detract from Cal/OSHA's responsibilities to enforce State standards. In addition, OSHA notes that California is required under Proposition 97 to "take all steps necessary to prevent withdrawal of approval for the

State plan by the Federal government." California Labor Code § 50.7(d).

However, under the Act and OSHA regulations, the designated agency must retain overall authority for administration of all aspects of the State plan. State designees are required to take appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in their enforcement programs resulting from adverse administrative or judicial determinations. See 29 CFR § 1902.37(b)(14).) Therefore, OSHA expects Cal/OSHA to ensure that enforcement of the standard remains at least as effective as the Federal Hazard Communication Standard and consistent with the conditions under which the standard is Federally approved by taking appropriate action when necessary to address adverse court decisions in private party suits, Cal/OSHA enforcement actions or State Attorney General or local prosecutors' actions. Failure to pursue necessary remedies would result in OSHA's reconsideration of its approval of the standard.

F. Exemption for Public Sector Employers

Section 18(c)(6) of the Act and regulations at 29 CFR § 1902.3(l) require that a State plan must, to the extent permitted by its constitutional law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which is as effective as the standards contained in the plan.

The Coalition asserts that the exemption of public sector agencies from providing Proposition 65 warnings violates this criterion. Ex. 18–174. In its response, the State of California maintains that since State and local government employees are covered by the other hazard communication provisions, their lack of coverage under the supplemental provisions should not pose a problem. The State also notes that government employees would receive warnings from other businesses which supply products to public agencies. In addition, the State contends that because government officials are accountable to the public in other ways, it is not necessary for them to be subject to the requirements of Proposition 65 as well. Ex. 22.

The basic warning requirements of the Hazard Communication Standard and Cal/OSHA's enforcement of the standard do apply to public sector employers. As discussed below, the chemicals covered by, and the warning requirements of, Proposition 65 do not differ significantly from, and thus are not significantly more protective than, California's other hazard communication requirements. Moreover, because compliance with Proposition 65 can be achieved via use of the measures provided in the Cal/OSHA or Federal Hazard Communication Standard (see Section III.B.2), public sector employers will, in fact, be in compliance with Proposition 65 for all substances covered by the general California standard if they comply with the general standard. As a practical matter, this means that public sector employers will only be exempt from Proposition 65 warning requirements relating to a few substances (*e.g.* aflatoxins, discussed in Section III.B.3, below). Therefore, OSHA finds that California's protection of those employees is as effective as its protection of private sector employees, meeting the criterion in section 18(c)(6) of the Act.

OSHA has never required States to use the same enforcement methods in the public sector as they do in the private sector. Nevada, among other States, imposes penalties upon public sector employers only for serious violations. 46 FR 42843 (August 25, 1981). California itself does not have financial penalties for public sector employers. See California Labor Code § 6434. OSHA also has approved other State plans which lack public sector penalties. *E.g.* 44 FR 44 28327 (May 15, 1979) (Maryland). Therefore, OSHA finds that the exemption of public agencies from suits under Proposition 65 is not in violation of OSHA requirements for public sector programs, particularly as public sector employers are subject to enforcement actions by Cal/OSHA for non-compliance with the general State Hazard Communication Standard. In addition, Federal requirements which would force a State to submit to private suit raise issues under the Eleventh Amendment. *See Seminole Tribe of Florida* v. *Florida*, 116 S. Ct 1114 (1996).

III. Summary and Explanation of Remaining Issues Under Section 18

In this Section, OSHA will analyze the remaining issues, which involve combined legal and factual questions arising under the various provisions of Section 18(c)(2). Initially, OSHA notes that although many comments assume significant differences between the substantive provisions of Proposition 65 and the Federal standard, OSHA's detailed analysis of the California regulations and the record discloses that most of these alleged differences do not, in fact, exist. With a few exceptions, Proposition 65 and the Federal standard cover the same chemicals and the same concentrations of chemicals. See Section III.B.3.

Whenever chemicals are covered by both Proposition 65 and the Federal standard, they will be covered by the general State standard. In that situation, employers must comply with the State standard's general (i.e. non-Proposition 65) hazard communication requirements, which are virtually identical to the Federal standard's requirements. In those relatively few cases where a chemical is not covered by Federal or State hazard communication requirements, businesses can comply with Proposition 65's occupational aspects by applying Federal hazard communication methods to those chemicals. Consequently, Proposition 65, in practice, should impose only minor additional requirements. See Section III.B.3.

Procedurally, there are several differences between the Federal and State standards. Most obviously, the State standard provides for supplemental enforcement by private parties; the Federal standard does not. OSHA concludes, however, that these procedural differences do not require rejection of the California standard. See Section III.B.5.

Accordingly, and as set forth below, OSHA is approving the California standard, including Proposition 65. This approval, though, is contingent upon OSHA's understanding of Proposition 65's compliance provisions and the conclusion that the State cannot apply Proposition 65 to out-of-state businesses under the auspices of the State plan. OSHA also expects Cal/OSHA to exercise its role as the designated State agency to ensure that Proposition 65's enforcement comports with these understandings and does not result in a less effective standard.

A. Compelling Local Conditions

1. Overview

As outlined in Section II.B, OSHA's analysis under the product clause first requires it to consider whether "compelling local conditions" support the California standard. OSHA finds that the State plan requirements presently under review, including the general California Hazard Communication Standard and the occupational aspects of Proposition 65, are justified by compelling local health and safety concerns.

When Proposition 65 was adopted by the voters of the State of California in 1986, the law's public-health objectives

were succinctly set forth in the ballot initiative and in the law's preamble, which found that the "lives of innocent people are being jeopardized" by the lack of information about toxins; that "hazardous chemicals pose a serious threat to their well-being;" and that conventional enforcement efforts by public agencies "have failed to provide them with adequate protection." Ex. 22, Attachment B.

"Right to know" laws like Proposition 65 promote the general public's knowledge about safety and health issues. By ensuring that people have information about hazards and risks associated with chemicals, these laws allow workers and other persons to protect themselves against hazardous exposures and resulting illnesses. Right-to-know laws also encourage the market to reformulate hazardous products to reduce or eliminate the risks associated with a product's use. Absent access to relevant information about chemical hazards and risks, workers cannot protect themselves or the public at large from potentially devastating exposures.

Access by workers and their representatives to information about toxic substances in the workplace is an issue recognized by OSHA, by Congress, and generally by the occupational safety and health community as a central element in any effort to provide for safe and healthful workplaces throughout the nation. Congress included in OSHA's standard-setting authority an explicit requirement to "prescribe the use of labels or other appropriate forms of warning" for the protection of workers from the hazards of chemicals in their workplaces. 29 U.S.C. §655(b)(7). In promulgating the Federal HCS in 1983, OSHA extensively reviewed available statistics and documented an unacceptably high incidence of chemically-related illnesses and injuries. 48 FR 53282 (1983). OSHA also found—with substantial support not only from workers, other government agencies and public interest groups, but from many industry members and trade associations—that implementation of appropriate hazard communication in the nation's workplaces "would serve to decrease the number of such incidents by providing employees with the information they need to help protect themselves, and ensure that their employers are providing them with the proper protection." *Id.* The crucial importance of hazard communication was well-recognized in OSHA's 1989 Safety and Health Program Management Guidelines, which provide that one of the cornerstones of effective protection of worker safety and health is ensuring that workers have adequate information to protect themselves and others:

> The commitment and cooperation of employees in preventing and controlling exposure to hazards is critical, not only for their own safety and health but for that of others as well. That commitment and cooperation depends on their understanding what hazards they may be exposed to, why the hazards pose a threat, and how they can protect themselves and others from the hazards.

See 59 FR 3904.

Right-to-know laws also enhance the ability of the public and individuals to ensure that their government (Federal, State or local) acts appropriately to protect their interests. Committee on Risk Perception and Communication, National Research Council,[9] *Improving Risk Communication* 111 (National Academy Press, 1989) ("[a] central premise of democratic government—the existence of an informed electorate—implies a free flow of information"). By enacting Proposition 65, the voters sought to exercise their right and responsibility to oversee the functioning of their government. Thus, the principles which led California voters to enact Proposition 65 in 1986—the perceived threat to the "lives of innocent people" and their well-being, the lack of information about hazardous chemicals, and the failure of "conventional enforcement efforts by public agencies" (Ex. 22, Attachment B)—are widely known and accepted.

One factor OSHA has historically considered in determining whether a State's interest is a compelling one is the extent to which the industrial hazard sought to be addressed is prevalent within the State. Here, the standard at issue relates not to a particular trade but to the hazard posed by toxic chemicals used throughout industry. Although the commentors raise some arguments against a finding of compelling local conditions (see discussion in Section III.A.2 and discussion below), none question the State's interest in hazard communication or the extent of hazardous exposures in California. Moreover, it is obvious that California, with an economy larger than that of most of the world's nations, has within its jurisdiction a significant portion of the toxic exposures occurring daily in the United States. *See also* 48 FR 8610 (decision approving California ethylene dibromide standard and noting extent of relevant exposure within State). The number of out-of-state businesses responding to OSHA's request for comments, and the volume of chemical shipments to California suggested in their submissions, also attest to the number of occupational chemical exposures likely to occur within the State.

California's interest in protecting the public's "right to know" is particularly compelling here because it is acting not only to protect the general public health and safety, but to protect the rights of individual citizens to make informed decisions about matters affecting their own health and welfare. Just as a patient has the right to consent to, or refuse, medical treatment, *see Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 269 1990) citing *Schloendorff* v. *Society of New York Hospital*, 105 N. E. 92, 93 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body"), so, more generally, persons have a right to understand the hazards to which they are exposed and determine whether they wish to take any risk involved.

Dormant commerce clause case law also supports OSHA's analysis. As OSHA discussed in Section III.A., there is no evidence that the California voters harbored any intent to discriminate against out-of-state employers or manufacturers; to the contrary, the law on its face is fully applicable to all private sector businesses which meet the ten-employee size limit. Instead, California voters appear to have been exclusively concerned with public health and safety, which undeniably constitutes a "legitimate" or "compelling" objective within the meaning of dormant commerce clause decisions. *See, e.g. Kleenwell Biohazard Waste* v. *Nelson*, 48 F.3d 391, 397 (9th Cir. 1995) ("[r]egulations that touch on safety are those that the Court has been most reluctant to invalidate"), *citing Raymond Motor Trans. Co.* v. *Rice*, 434 U.S. 429 (1978); *see generally Goehring* v. *Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) ("Public health and well-being have been recognized as compelling governmental interests in a variety of contexts"). Consequently, under the dormant commerce clause, California's non-discriminatory intent would lead the courts to uphold Proposition 65.

Finally, the primary difference between the California and Federal standards is the California standard's incorporation of Proposition 65's provision for citizen enforcement of disclosure laws to augment the scarce resources available to regulatory agencies and public prosecutors. Thus, California may reasonably conclude that enactment of Proposition 65 should lead

[9] The National Research Council comprises councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

to more effective enforcement of the measures prescribed in the Federal standard and improved dissemination of information about hazardous chemicals. (By way of example, in Section III.B.5, OSHA discusses an instance in which an employer who was not in compliance with the general California (or Federal) standard was brought into compliance as a result of a private enforcement action.) This additional enforcement mechanism also is entirely consistent with the employee-protection concerns that motivated Congress in 1970 and that remain relevant today. In 1970, Congress found safety and health inspectors in "critically short supply[.]" Legislative History at 161. Today, there are two thousand Federal and State plan inspectors, who must cover more than six million workplaces. Neither OSHA nor Cal/OSHA has "the resources to find every violation of every law," *Carnation Co. v. Sec'y.*, 641 F.2d 801, 805 (9th Cir. 1981).

OSHA emphasizes that private suits under Proposition 65 form a supplement, not a substitute, to conventional enforcement of the State's Hazard Communication Standard already being provided by Cal/OSHA. Indeed, the California standard reflects OSHA's previous findings in its hazard communication rulemakings because the primary focus of the State standard is a close adaptation of the Federal standard. Under the applicable regulations, compliance with the measures prescribed by the Federal standard is an acceptable means of compliance with Proposition 65. See Section III.B.2. Accordingly, the State's further incorporation of Proposition 65 into the standard simply provides a supplemental method of ensuring that the standard, as a whole, functions effectively.

Other State plans approved by OSHA contain private rights of action intended to supplement the anti-discrimination provisions of the State plan. North Carolina Code § 95–243; California Labor Code § 98.7(f). Whether such supplements are a useful or appropriate addition to State plan authority is a matter for the State to decide. In the present case, OSHA accepts the judgment of California voters that compelling local conditions justify the inclusion of Proposition 65's additional enforcement remedies into the State plan.

It is true, as several industry commentors point out, that the Federal OSH Act contains no private rights of action or citizen suit provisions. Exs. 18–41, 58, 65, 96, 139, 150, 160, 162, 165. As OSHA explained in Section I.A, however, the OSH Act specifically allows States to adopt and enforce standards and enforcement procedures which are more stringent in protecting worker safety and health than those of Federal OSHA. The OSH Act, therefore, does not bar the States from adopting supplemental enforcement mechanisms.

As OSHA noted at the outset, the voters of California have a compelling interest in protecting their right to information about possible risks to their safety and health. *Id.; compare C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 409 (1994) (rejecting a discriminatory town regulation governing solid waste disposal because the town had "any number of nondiscriminatory alternatives * * * [including] uniform safety regulations enacted without the object to discriminate"). There is no indication in the statutory language of Section 18(c)(2) or the legislative history of the Act that Congress intended to bar a State's voters from determining how to best protect their right to make informed decisions. Rather, the limited legislative history shows that Congress simply wanted "to prevent States from making unreasonable limitations[.]" *Legislative History* at 501 (statement of Senator Saxbe).

2. Commentor Rebuttal Arguments

As discussed in Sections II.B and II.C, OSHA will presume in the absence of evidence to the contrary that a State's law enacted to foster its workers' safety and health meets the product clause's requirement for compelling local conditions. Industry commentors raised two arguments to rebut the idea that Proposition 65 is supported by compelling local conditions. First, as OSHA outlined and rejected in Section II.B, industry commentors have alleged that California must establish conditions unique to California in order to support approval of the standard. Second, the commentors also assert that the State's failure to apply Proposition 65 to public sector employers (and small businesses) constitutes evidence that California has no compelling local need for Proposition 65. *E.g.*, Exs. 18–150, 18–174. Organization Resource Counselors (ORC) (Ex. 18–150) states that these exemptions effectively exclude 50% of California employees from coverage. California, in response, says that "while the exemption for small businesses may cover a large number of businesses, such businesses are responsible for a relatively small share of the handling of hazardous chemicals." Ex. 22, pages 11–12. California maintains that the law applies "to the big businesses that produce more than 90% of all hazardous waste in California." *Id.*, citing Proposition 65 ballot argument, Attachment B to Exhibit 22.

Proposition 65's exemptions do not provide evidence of discriminatory intent, and do not undermine California's putative interest in protecting its workers' safety and health. The exemption for businesses employing ten persons or fewer applies to all such businesses, regardless of whether they are located inside or outside of the State. Moreover, even assuming that ORC has correctly estimated the percentage of employees covered, its comment does not address the percentage of employees exposed to covered chemicals. No inference, then, can be drawn regarding the intent of California's voters in passing Proposition 65, or the effect of the exemptions.

Finally, as outlined in Section C, there are, in fact, few differences between the occupational aspects of Proposition 65 and the Federal or general State standard. As a practical matter, the effect of the public sector and small business exemptions is to free these entities from the threat of supplemental enforcement. OSHA concludes that it is within the voters' discretion to conclude that small businesses should not be subject to the penalties available under Proposition 65. Employees working for these businesses will still be protected by the general California standard.

B. Remaining Section 18(c)(2) Issues

1. Overview

The following sections of OSHA's decision analyze the remaining issues arising under Section 18(c)(2) of the Act: whether the California standard is at least as effective as the Federal standard, and whether the California standard imposes an undue burden upon commerce.

Commentors have argued that the Proposition 65 components of the California standard require warnings for chemicals not covered by the Federal Hazard Communication Standard and that Proposition 65's warning requirements are in addition to those required by the Federal standard. Section II.B.2 addresses OSHA's reasons for concluding that use of the measures prescribed by the Federal or general California Hazard Communication Standard will constitute compliance with Proposition 65. Section III.B.3 discusses coverage issues. First, OSHA addresses its reasons for concluding that almost all of the chemicals and concentrations of chemicals covered by Proposition 65 are covered by the Federal standard as well. Second, the

decision addresses Proposition 65's applicability to California manufacturers other than chemical manufacturers. Section III.B.4 discusses the substantive differences between the Federal and general California hazard communication standards, including the argument by some commentors that the California standard does not protect trade secrets as effectively as the Federal standard. Section III.B.5 discusses Proposition 65's supplemental enforcement provision.

2. Businesses Can Comply With Proposition 65 by Using Methods Prescribed by the Federal Hazard Communication Standard

Although there are minor differences, discussed in the next section, between the coverage of the Proposition 65 elements of the State plan and the Federal standard, the requirements for compliance are the same. Some commentors have argued that the Proposition 65 elements of the California standard require businesses to provide warnings which are not required by the Federal Hazard Communication Standard. The particular focus of these comments is upon the possibility that Proposition 65 requires a "safe harbor" label where the Federal standard would not, or where the Federal standard would require only Material Safety Data Sheet. E.g. Exs. 18–3, 18–149, 18–162.

Other commentors point out that the California standard, as discussed in Section III, permits businesses to comply with Proposition 65 by complying with the general State or Federal standards. Exs. 18–61, 18–143, 18–155. OSHA agrees with the latter commentors and is noting this understanding as a basis for its approval of the standard. OSHA's analysis of the California standard is as follows.

Section 5194(b)(6) of the standard, 8 CCR § 5194(b)(6), incorporates Proposition 65 and outlines the various permutations possible between the remainder of the California standard and its Proposition 65 elements. Admittedly, Section 5194(b)(6) is not a model of clarity. As OSHA's analysis of the regulations shows (see below), however, when a chemical is covered solely by the Proposition 65 list, businesses may comply with Proposition 65 by complying with the Federal Hazard Communication Standard. And when a chemical is covered both by Proposition 65 and the general State standard, businesses must comply with Proposition 65 by complying with the general State standard, which is virtually identical to the Federal Hazard Communication Standard. (For the minor differences, see Sections III.B.3 and 4.)

Section 5194(b)(6) divides exposures into three types:

(1) Section 5194(b)(6)(B) covers exposures to chemicals which appear on the Proposition 65 list and which are subject to general State hazard communication requirements. For these exposures, businesses must comply with the general State hazard communication requirements.

(2) Section 5194(b)(6)(C) covers exposures to chemicals which appear on the Proposition 65 list but which would not otherwise be subject to general State hazard communication requirements. For these exposures, businesses have a choice between several alternative methods of compliance, one of which is compliance with the information, training and labeling requirements of the Federal Hazard Communication Standard.

(3) Section 5194(b)(6)(D) covers exposures to chemicals which do not appear on the Proposition 65 list. These exposures are not relevant to OSHA's analysis here.

As a practical matter, almost all chemicals covered by Proposition 65 will be covered by the Federal and general State hazard communication requirements and, therefore, will be subject to Section 5194(b)(6)(B). For these exposures, compliance with subsections (d) through (k) of the California standard [8 CCR §§ 5194 (d)–(k)] is "deemed compliance with the Act." 8 CCR § 5194(b)(6)(B). With some slight variations discussed elsewhere in this decision (see Section III.B.4), Sections 5194(d) through (l) track the provisions of the Federal Hazard Communication standard at 29 CFR § 1910.1200(d)–(l). Section 5194(k) sets forth five appendices. Appendices A–D appear to be identical to Appendices A–D to 29 CFR § 1910.1200, the Federal standard.[10]

In those rare situations involving exposures to chemicals which appear on the Proposition 65 list but which are not covered by the Federal or general State standards, Section 5194(b)(6)(C) will govern. Under that regulation, employers must provide "a warning to employees in compliance with California Code of Regulations Title 22 (22 CCR) Section 12601(c)" (the OEHHA regulations implementing Proposition 65) or comply with the requirements of Sections 5194(d)–(k). 8 CCR §§ 5194(b)(6)(C). Under Section 12601(c), compliance with Proposition 65 can be achieved via compliance with the Federal (or, if the business so chooses, the general State) Hazard Communication Standard. 22 CCR § 12601(C)(1)(c).

Section 12601(c) begins with the statement:

Warnings for occupational exposures which include the methods of transmission and the warning messages as specified by this subdivision shall be deemed clear and reasonable.

The remainder of Section 12601(c) sets forth three alternative methods of providing acceptable warnings:

1. The business may place on the product's or substance's label a warning which complies with the criteria for consumer product warnings (*see* 22 CCR §§ 12601 (b)(1)(A), (b) (3)–(4), (c)(1)(A), (c)(2)); or

2. The business may post a clear and conspicuous workplace sign (*see* 22 CCR §§ 12601(c)(1)(B)); or

3. The business may comply with the information, training, and labeling requirements of the Federal Hazard Communication Standard, the California Hazard Communication Standard, or (in cases involving pesticides) California's Pesticides and Worker Safety requirements [see 22 CCR § 12601(c)(1)(C)].

Except in the case of pesticides (discussed in Section III.B.3), then, Section 12601(c) provides that compliance with the measures provided by the Federal Hazard Communication Standard constitutes compliance with Proposition 65.

Although California's statements about the proper interpretation of its standard have been ambiguous, OSHA believes the foregoing understanding is consistent with the State's interpretations. In its February 16, 1996 submission (Ex. 6), Cal/OSHA (on behalf of itself, OEHHA and the Attorney General), stated that:

> [T]he Cal-HCS allows compliance to be achieved either through compliance with subsections (d) through (k) of the HCS, or, where the HCS would not require a warning, either through the methods set forth in subsections (d) through (k) or the alternative warning methods in 22 CCR § 12601(c).

Under the "HCS Method," "a company may simply give the Proposition 65 warning through a method that complies with the HCS." Ex. 6, page 6; see also Ex. 6, pages 7–9; Ex. 18–174A.

[10] There is no Section 5194(i). Appendix E consists of Proposition 65 regulations from Title 22 of the California Code of Regulations, which "are printed in this Appendix *because they provide terms and provisions referred to in subsection (b)(6)* (emphasis added). Appendix E also includes all of the regulations governing warnings for consumer and environmental exposures. 22 CCR §§ 12601(b), (d). OSHA interprets the California standard to include these provisions solely for the purpose of providing easy access to code sections referenced in the Standard.

Attachment 5, page 3) (Letter from California DOSH to parties in *AYS v. Turco*). Such methods generally would include providing relevant material safety data sheets, labels, and (for employers) training. Similarly, California states that if a business chooses to comply with Section 12601(c),

§ 12601(c) itself refers back to the HCS warning methods by providing that compliance may be achieved through 'a warning to the exposed employee about the chemical in question that fully complies with all information, training and labeling requirements of the Federal Hazard Communication Standard" * * *. However, the regulation does *not* provide specific safe harbor warning language where the HCS method is used to give the warning.

Ex. 6, page 11; see also Cal/OSHA Enforcement Directive, Policy and Procedure C–13. Similarly, Section 5194(b)(6)(E) provides that compliance with the Federal Hazard Communication Standard "shall be deemed a defense" in any enforcement action brought under Proposition 65. *Id.*, incorporating 22 CCR § 12601(C)(1)(c).

California does point out that while the language of any "hazard warning" "need satisfy only the more general standard of § 5194(c)"—i.e. "Any words, pictures, symbols or combination thereof appearing on a label or other appropriate form of warning which convey the health hazards and physical hazards of the substance(s) in the container(s)—such a warning must be "clear and reasonable" to meet the requirements of Proposition 65. See Ex. 6 page 9; *see also* 29 CFR § 1910.1200(c).

One commentor, Dow Chemical (Ex. 18–162, page 9), seizes upon a similar statement by OEHHA in its promulgation of 22 CCR § 12601(c) (see Ex. 18–174A, Attachment 2 at page 37) to argue that California will not, in fact, recognize compliance with the Federal standard as compliance with Proposition 65. In its statement however, OEHHA's focus was upon the fact that the Federal standard requires only an "appropriate" warning and does not prescribe specific warning language;[11] thus, OEHHA believed that California would have to independently evaluate Federal label or MSDS warnings to determine if they were "clear and reasonable" in accordance with Proposition 65's requirements. In OSHA's view, Dow's comment misses a central point. The Federal standard does not prescribe specific warning language. That fact, however, is not a license for businesses to create unclear or unreasonable warnings. An unclear or unreasonable warning would not meet Federal requirements. Thus, there is no substantive distinction between the Proposition 65's requirement of a "clear and reasonable" warning and the Federal (and State) requirement of an "appropriate" warning. Compliance with the Federal standard, then, constitutes compliance with the Proposition 65.[12] As stated previously, however, in most cases chemicals on the Proposition 65 list will be subject to the general State Hazard Communication Standard and, therefore, employers will have to comply with the State standard. No commentor has pointed to any significant differences between the labeling and MSDS requirements of the two standards. Compare 29 CFR §§ 1910.1200 (f)-(g) with 8 CCR §§ 5194 (f)-(g); see also discussion of trade secrets (California requirement of CAS numbers) in Section III.B.4. Proposition 65, therefore, does not undermine effectiveness or result in an undue burden on commerce.[13]

3. Comparison of Coverage Under Federal Standard and Proposition 65

Overview: OSHA has identified three general areas in which the California standard, including Proposition 65, differs from the Federal standard. In sections three through five, OSHA will discuss these differences and analyze them in light of the requirements of Section 18 of the OSH Act.

Before proceeding to these differences, however, it is important to recognize the overall similarities between the State and Federal standards. In particular, many commentors maintain that the chemicals and concentrations of chemicals covered by Proposition 65 and the Federal standard differ significantly. See, for example, Exs. 18–153, 18–154, 18–162, 18–164, 18–165, 18–166. This is understandable, particularly in light of the fact that the California standard's incorporation of Proposition 65 specifically provides for "Exposures Subject to Proposition 65 Only." 8 CCR § 5194(b)(6)(B). However, once the Federal and State standards are analyzed, it becomes apparent that they are, in fact, quite similar. Most important, both standards require appropriate warnings whenever there is reliable scientific evidence to support the view that a particular chemical is hazardous. As a consequence, both standards, with a few exceptions, cover the same chemicals and concentrations of chemicals.

Under the Federal standard, covered businesses must take appropriate steps to communicate possible chemical health hazards (including carcinogens and reproductive toxins) whenever

a. A chemical appears on certain "floor" lists referenced in the standard; or

b. "There is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees" (see 29 CFR § 1910.1200(c))

See 29 CFR § 1910.1200(c), (d) (3)–(4). The general California standard is equally specific. 8 CCR §§ 5194(c), (d) (3)–(4). Accordingly, Federal and State hazard communication coverage is not limited to specific lists of chemicals but is broad and flexible enough to take into account any chemical which, whether listed or not, meets the "one study" test.

Proposition 65 relies upon a list of chemicals. The Proposition 65 "list" is based in part upon the "floor" lists used in the Federal standard and in part upon the State's evaluation of scientific evidence. *See generally* California Health and Welfare Code §§ 25249.8 (a)–(b).

Much of the confusion in the comments over the chemical coverage issue appears to reflect an undue focus upon comparing the floor lists referenced in the Federal standard with the Proposition 65 list.[14] Although there

[11] OEHHA also noted that there might be situations in which the Federal standard would not apply to particular employees, but Proposition 65 would. OEHHA did not want Section 12601(c) to be understood to relieve businesses of the duty of providing warnings to these additional employees. Ex. 18–174A, Attachment 2 at page 37.

[12] For example, it appears that several businesses have been sued because the warnings they provided were phrased in "and/or" terms and, thus, did not specify whether the chemical involved was a carcinogen or a reproductive toxicant. *E.g. Ex.* 18–39. An "and/or" warning also would fail to meet the requirements of the Federal standard because it does not "convey the specific physical and health hazard(s)[.]" 29 CFR § 1910.1200(c) (emphasis added).

[13] Assuming, for purposes of argument, that the California standard did require businesses to add a consumer "safe harbor" label warning to a product for which the Federal standard would require only an MSDS, OSHA finds that such a requirement neither undermines effectiveness nor constitutes a violation of the product clause. Although some commentors asserted that these labels result in "over warning," the record contains no copies of labels which would undermine the effectiveness of the Federal standard and there is no evidence demonstrating the burden on commerce which has resulted. Most of the commentors' complaints, in any case, focus on the requirements imposed by voluntary settlements, a subject we discuss below.

[14] The existence of the Proposition 65 list represents another difference between the California and Federal standard, but the list itself does not violate the product clause. There is no evidence that California's preparation of a list of hazardous chemicals results in a less effective standard or imposes a burden upon commerce. Indeed, the list as a supplement to the general hazard communication requirements should benefit

is a great deal of overlap between these Federal and Proposition 65 lists, preoccupation with them overlooks the fact that even if a chemical is not on the Federal floor list, it must be classified as a hazardous chemical under the Federal standard if there is at least one scientifically valid study to support a finding that the chemical poses a health hazard to employees. Similarly, chemicals are placed on the Proposition 65 list only after a finding by the State (or another Federal agency) that valid scientific evidence supports their classification as a carcinogen or reproductive hazard.[15]

Proposition 65 requires the California Governor to compose (and regularly update) a list of chemicals known to be carcinogens or reproductive toxins. The statute established four mechanisms for including a particular chemical on this list. First, Proposition 65 created an initial list, which consisted of chemicals automatically included by virtue of their recognition as carcinogens or reproductive toxins by the International Agency for Research on Cancer (IARC) or OSHA. *See* California Health and Safety Code § 25249.8(a), *incorporating* California Labor Code §§ 6382 (b)(1), (d); *see also AFL–CIO* v. *Deukmejian*, No. C002364 (California Court of Appeals, 1989). As the court in AFL–CIO recognized, the initial Proposition 65 list simply mirrored the Federal floor listing references to carcinogens identified by the National Toxicology Program (NTP) or IARC and to carcinogens or reproductive toxins otherwise covered by OSHA (under 29 CFR Part 1910 subpart Z). *See* 29 CFR §§ 1910.1200(d) (3)–(4) and Appendix A. Consequently, the initial Proposition 65 list represented chemicals which would be covered under the Federal standard.

Proposition 65 also provides three methods of supplementing the initial list. These three methods rely upon scientific evidence that a chemical causes cancer or reproductive toxicity and, thus, again mirror the Federal standard. Under California Health and Safety Code Section 25249.8(b), a chemical is listed if, "in the opinion of the state's qualified experts"

a. "Scientifically valid testing" shows that the chemical causes cancer or reproductive toxicity;

b. "A body considered to be authoritative by" the State's experts formally identifies the chemical as a carcinogen or reproductive toxin [hereafter, "authoritative bodies mechanism"]; or

c. A State or Federal agency has "formally required" the chemical to be labeled or identified as a carcinogen or reproductive toxin [hereafter, "formally required to be labeled mechanism"].

The California Code of Regulations, see 22 CCR §§ 12301–12306, implements these provisions by creating a "Science Advisory Board" (SAB) which, in turn, comprises two committees: the "Carcinogen Identification Committee" and the "Developmental and Reproductive Toxicant (DART) Identification Committee." 22 CCR § 12302(a). The committee members are the "State's qualified experts" in their relevant fields for purposes of Proposition 65. See 22 CCR § 12301–2. They advise and assist the California lead agency, the Office of Environmental Health Hazard Assessment (OEHHA), in implementing Proposition 65. 22 CCR § 12305.

As is clear from the statute, when the committees themselves determine that a particular chemical causes cancer or reproductive toxicity, they must rely upon "scientifically valid testing." California Health and Welfare Code § 25249.8(b); 8 CCR §§ 12305 (a)(1), (b)(1). This same "scientifically valid testing" would trigger the Federal standard's requirement for hazard communication when "there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles" of a potential health hazard. Here again, then, Proposition 65 would not apply to chemicals not covered by the Federal standard.

The committees similarly must rely upon valid scientific evidence when they identify a chemical through Proposition 65's authoritative bodies mechanism.[16] To rely upon an authoritative body's identification of a chemical as hazardous, the committees must find "sufficient evidence" of carcinogenicity or reproductive toxicity from studies in humans or in experimental animals. 22 CCR § 12306 (e)–(g). Moreover, OEHHA can reject a chemical "if scientifically valid data which were not considered by the authoritative body clearly establish that the chemical does not satisfy the criteria" of subsections (e) and (g). 22 CCR § 12306 (f), (h). OEHHA also affords all interested persons an opportunity to object to a chemical's listing on "the basis * * * that there is no substantial evidence that the criteria identified in subsection (e) or in subsection (g) have been satisfied." 22 CCR § 12306(l). The "scientifically valid data" required when the committees identify a chemical for listing under the authoritative bodies mechanism would activate hazard communication requirements under the Federal standard as well.

Finally, under 22 CCR § 12902, OEHHA can identify a chemical pursuant to Proposition 65's "formally required to be labeled" mechanism when "substantial evidence exists to support a finding that the chemical meets the requirements of this section." Labeling requirements imposed by a State or Federal agency would have to be based upon at least some scientific evidence; thus, the Federal standard would cover these chemicals if they were not excluded for other reasons.

Thus, regardless of the mechanism used to list a chemical under Proposition 65, the ultimate question is whether there is scientific evidence to support a finding that a chemical is a carcinogen or reproductive toxin.

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both workers and businesses by providing another, comprehensive resource for obtaining information about certain substances.

[15] For example, Dow Chemical Company cites fifteen substances which, it states, "are treated as carcinogens by Prop. 65 but are not similarly classified by OSHA/NTP/IARC[.]" Ex. 18–152, page 14 footnote 6. Although it is not entirely clear, this statement suggests that Dow believes hazard communication about cancer risk is unnecessary unless a chemical is specifically recognized as a carcinogen by IARC, NTP or an OSHA standard. This focus misses the "one study" requirement of Section 1910.1200(c). The flaw in Dow's analysis is apparent when at least one of its sample chemicals, captan, is considered. Captan's primary use is as a pesticide and that use generally would be regulated by the U.S. Environmental Protection Agency rather than OSHA. See OSHA's 1994 preamble to the Hazard Communication Standard, 59 FR 6126, page 6143 (February 9, 1994). OSHA, however, would regulate the manufacture and formulation of captan and its non-pesticidal uses and recognized the possibility that it is a carcinogen in its 1992 proposed rule on air contaminants, noting that animal studies have been contradictory but that "high doses caused significant incidences of" cancer in mice. See 57 FR 26002 (June 12, 1992). Thus, there appears to be "statistically significant evidence based on at least one study" that captan is a carcinogen and subject to OSHA hazard communication requirements.

[16] As of September 1996, California had identified five "authoritative bodies": IARC; the National Institute for Occupational Safety and Health (NIOSH); the National Toxicology Program (NTP); the U.S. Environmental Protection Agency (USEPA); and the U.S. Food and Drug Administration (USFDA). 22 CCR § 12306(l). Here again, there is considerable overlap between the Federal and State standards: the Federal standard similarly explicitly recognizes IARC and NTP as authoritative sources for identifying hazardous chemicals. See 29 CFR §§ 1910.1200(d)(4)(i)–(ii) and Appendix A. In addition, OSHA has consistently relied upon information provided by NIOSH in promulgating hazard communication requirements. See, for example, the preamble to the 1994 amendments to the Federal standard, 59 FR 6126, 6150–51, 6154 (February 9, 1994). The Federal standard does not similarly require reliance upon "lists" compiled by USEPA or USFDA. However, because those agencies base their determinations upon scientific evidence, it is highly likely that the Federal standard would treat a chemical as hazardous if those agencies determined it to be so. (As a practical matter, however, such chemicals might be exempted under 29 CFR § 1910.1200(b)(6), a question addressed below).

Because the Federal standard requires hazard communication so long as there is one reliable scientific study to support the requirement, it is no less expansive than Proposition 65 with regard to cancer and reproductive hazards. 29 CFR §§ 1910.1200(c) (definition of "health hazard"), 1910.1200(d).

Indeed, the Federal standard may, if anything, encompass more chemicals than Proposition 65:

> The results of any studies which are designed and conducted according to established scientific principles, and which report statistically significant conclusions regarding the health effects of a chemical, shall be a sufficient basis for a hazard determination and reported on any material safety data sheet. 29 CFR § 1910.1200, Appendix B, paragraph 4. Businesses also may report "other scientifically valid studies which tend to refute the findings of hazard," but the existence of refuting studies does not dissolve the obligation to report the hazard. Id. In contrast, it appears that, except for its initial listing mechanism, Proposition 65 requires that the weight of the evidence support the placement of a substance on the statutory list.[17].

The only exceptions to this general principle involve certain chemicals or concentrations of chemicals which are exempted from coverage under the Federal standard in some circumstances. OSHA will discuss these in the next sections and analyze them in light of "effectiveness" and "undue burden" requirements of Section 18(c)(2).

Mixtures: Under the Federal standard, chemicals present at certain low concentration levels in "mixtures" may not be subject to hazard communication requirements. Some commentors (e.g. 18–65, 18–96) allege that Proposition 65 requires businesses to provide a warning for such chemicals when the Federal standard would not. To some degree, these commentors misunderstand the Federal requirements; they are correct, however, to the extent that Proposition 65 allocates the burden of proof differently than the Federal standard does. This different allocation of burden of proof, however, does not violate Section 18 of the Act. See below.

A "mixture," under the Federal standard, is "any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction." 29 CFR § 1910.1200(c). Section 1910.1200(d) requires businesses to determine the hazards of chemical mixtures. It further provides, with respect to health hazards associated with untested mixtures, that "the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section[.]" 29 CFR § 1910.1200(d)(5)(ii). In the case of mixtures containing chemicals in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent), businesses must communicate hazards if they have evidence that the chemical involved "could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, *or could present a health risk to employees in those concentrations*[.]" 29 CFR § 1910.1200(d)(5)(ii) (emphasis added).

Thus, under the Federal standard, a business must follow hazard communication requirements a) whenever a reproductive toxin is present in a mixture at a concentration of one percent; b) whenever a carcinogen is present at a concentration of 0.1% or greater; or c) whenever either hazard is present at any concentration and there is evidence that an exposure limit will be exceeded or a possible health risk posed.

Proposition 65 similarly exempts certain chemical mixtures from coverage, but the relevant exemption is phrased differently: a chemical exposure is exempted from coverage if "the person responsible" for the exposure can show that:

> a. "The exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer" and
>
> b. "That the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity[.]"
>
> California Health and Welfare Code § 25249.10(c); see also 8 CCR § 5194(b)(5)(D).

Some commentors appear to interpret the Federal standard's reference to "a concentration of one percent" (or .1%) as a "cut off" point at which no hazard communication warning is required. *E.g.* 18–106. This understanding is not quite correct. Both the Federal standard and Proposition 65 require hazard communication whenever a chemical poses a health risk, regardless of its concentration in a mixture. Similarly, both provide an exemption from coverage for chemicals which do not pose a health risk to workers. The central difference between the two standards is in the allocation of burden of proof: the California standard imposes the burden of proof upon the business causing the exposure; the Federal standard does not. In essence, the substance of the two standards is the same but the procedures used to apply them differ.

The contrasting burdens of proof under the Federal and California standards do not provide any basis for OSHA to reject the California supplement. It cannot logically be argued that imposing the burden of proof upon business will result in less effective protection for workers. If anything, reversal of the burden of proof should result in more effective protection by requiring employers to provide a warning unless they have some affirmative proof that a substance is not hazardous in a particular concentration.

This difference between the standards also does not create an undue burden on commerce. First, the Supreme Court has held that a State statute's creation of a presumption which may be rebutted by a defendant does not offend the dormant commerce clause. See *Atlantic Coast Line R. Co.* v. *Ford*, 287 U.S. 502, 509 (1933). In keeping with OSHA's earlier statements (see Section II.B) about the importance of dormant commerce clause case law in analyzing OSH Act product clause issues, OSHA finds that California's decision to shift the initial burden of proof to defendants does not impose an undue burden on commerce.[18]

Second, even assuming this statutory presumption theoretically could impose an undue burden on commerce, there is no evidence to support such a burden in this case. Although many commentors

[17] Under the non-Proposition 65 elements of the California standard, of course, businesses would be required to educate workers about hazards covered by the Federal standard, regardless of Proposition 65's applicability.

[18] Shell Oil also maintains that Proposition 65's rebuttable presumption offends Federal APA and the due process clause of the fourteenth amendment to the U.S. Constitution. 18–160, page 21. The Federal APA does not apply to State proceedings. See 5 U.S.C. § 551; *Day* v. *Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994). Rebuttable statutory presumptions do not offend due process, when there is a rational connection between "the fact proved and the fact inferred." *Atlantic Coast Line*, 287 U.S. at 508–9 (upholding presumption of negligence where railroad company failed to give prescribed warning signals); *see also Usery* v. *Turner-Elkhorn Mining Company*, 428 U.S. 1, 28 (1976) (upholding various presumptions under Federal Black Lung Benefits Act). The presumption created by Proposition 65 is rational because there is a logical connection between the fact that a particular substance is hazardous (the fact proved by the substance's presence on the Proposition 65 list) and "the fact inferred"—that the substance is hazardous in a particular mixture. Id.

complained generally about the burden imposed by Proposition 65's "no significant risk" option, none provided sufficient information addressing the specific point at issue here—that is, whether any business producing a mixture with a chemical which would not require hazard communication under the Federal standard was required by Proposition 65 to provide a warning. Rather, the examples provided by the commentors tend to bolster the opposite point of view.

One commentor, Chemspec, for example, stated that it was "sued by a private bounty-hunter under California's Proposition 65 for our products that contain nitrilotriacetic acid and its salt (NTA), which appear on the Proposition 65 chemical list" as a carcinogen. In response to the threatened suit, the Chemspec states, it produced two consultant reports demonstrating that not "only did both risk assessments predict exposures well below any warning threshold, both independent risk assessments cross-correlated. The bounty-hunter, however, simply dismissed the results out of hand, and threatened to leave the question to a 'battle of experts' trial." Ex. 18–127; see also Ex. 18–174, page 47.

The lawsuit against Chemspec involved nitrilotriacetic acid (NTA), trisodium nitrilotriacetate ($NTA\text{-}Na_3$) and 1, 4-Dioxane. Ex. 18–174B, Attachment 25, Exhibit 3 (settlement agreement). One consultant's report (18–127A) addresses $NTA\text{-}Na_3$ and indicates that Chemspec primarily sells two carpet cleaning agents in California, "powdered Formula 90 and liquid Formula 77," which "typically contain 4.6 percent $NTA\text{-}Na_3$ and 6.5 percent $NTA\text{-}Na_3$ respectively." The second consultant's report addresses NTA, with respect to a variety of both consumer and occupational products.[19] The consultant's analysis indicates that NTA's concentration in all of these products is .1% or greater. See 18–127B, pages 14–20.

Given the fact that NTA and $NTA\text{-}Na_3$ are present in these products at concentrations of 0.1% or greater, the Federal Hazard Communication Standard requires appropriate hazard warnings regardless of the consultant's predictions about ultimate exposure. See *General Carbon Co.* v. *Occupational Safety & Health Review Comm'n*, 860 F.2d 479, 483–85 (D.C. Cir. 1988) (accepting OSHA's interpretation of standard as requiring manufacturer to label product, even where product, as ultimately used by worker, might not pose a hazard). Although it is not entirely clear from Chemspec's comments or the remaining material in the record,[20] it is possible that Chemspec believes the low concentrations and exposure assessments relieve it of any burden to provide hazard warnings. This, if true, would be an incorrect assumption.

Articles: The Coalition (Ex. 18–174) alleges that Proposition 65 treats "articles" differently than the Federal standard. OSHA concludes that this is a distinction without a difference.

The Federal standard defines an "article" as:

> a manufactured item other than a fluid or particle: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, e.g., minute or trace amounts of a hazardous chemical (as determined under paragraph (d) of this section), and does not pose a physical hazard or health risk to employees.

29 CFR § 1910.1200(c). Articles are specifically exempt from coverage under the Federal standard; however, manufacturers bear the burden of proving that the product is an article as defined in Section 1910.1200(c), 29 CFR § 1910.1200(b)(6)(iv). Establishing exemption requires the manufacturer to show, inter alia, that the product poses no health risk. *Sec'y of Labor* v. *Holly Springs*, 16 BNA OSHC 1856 (June 16, 1984).

Proposition 65 does not have a similarly explicit exemption for "articles"; however, as a practical matter, a manufacturer can establish a California exemption for a product which is a Federal "article" by showing that the product poses no significant risk (or no observable effect, in the case of reproductive toxins). Under both the Federal and California standards, then, the manufacturer bears the burden of proving that the product poses no health risk and the distinction, as initially noted, is one without a difference.[21]

Pesticides: The Federal standard exempts from labeling requirements "[a]ny pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), when subject to the labeling requirements of that act and labeling regulations issued under that Act by the Environmental Protection Agency." 29 CFR § 1910.1200(b)(5)(i). In its 1994 amendment of the Federal standard, OSHA further indicated that, following EPA's promulgation of its Worker Protection Standard for Agricultural Pesticides, OSHA agreed "not to cite employers who are covered under EPA's final rule with regard to hazard communication requirements for pesticides." 59 FR 6126, 6143 (February 9, 1994).

The Western Wood Preservers Institute (Ex. 18–2) objects to Proposition 65's application to arsenically-treated wood products.[22] The Institute also outlined a settlement agreement it reached with a private plaintiff, under which members of the industry provide Proposition 65 warnings via ink stamps or end tags. In this context, arsenic is a pesticide and thus would be subject to regulation by EPA rather than OSHA. The National Cotton Council (Ex. 18–159) objected

[19] Neither consultant's report addresses 1, 4-Dioxane and neither Chemspec nor the Coalition mention this chemical in their comments. Consequently, even assuming that the private plaintiff's complaints about NTA and $NTA\text{-}Na_3$ were without merit under Proposition 65, OSHA could not conclude that the lawsuit, as a whole, had no legal basis. Similarly, to the extent the private lawsuit was based upon consumer product exposure, OSHA's review of the California standard could have no effect.

[20] Although the Coalition maintains that Chemspec "labeled their products and distributed MSDSs in full compliance with the Federal standard" (Ex. 18–174, page 47), the Coalition does not state whether "full compliance" included labeling and MSDSs for all of the chemicals and products involved in this lawsuit. Chemspec itself does not address this issue and there is no indication that it ever attempted to argue that, because it was in "full compliance" with the Federal standard, it was in compliance with Proposition 65. As discussed in Section III.B.2, where, as here, a chemical is covered by both Proposition 65 and general State—and Federal—hazard communication requirements, compliance with the general State standard constitutes compliance with Proposition 65, and the compliance requirements of the State and Federal standards are virtually identical. The omission of this issue from Chemspec's or the Coalition's discussion suggests that Chemspec might have believed the Federal standard imposed no obligations for the particular products in question. On the other hand, the record contains MSDSs for two, and a label for one, of Chemspec's products, all of which contain what appear to be hazard communication warnings for the chemicals involved here. Ex. 18–127, 18–127A. Because the lawsuit involved twenty-one other products, however, OSHA cannot determine whether Chemspec believes it was in compliance with the Federal standard.

[21] It is true that the California standard outlines specific requirements for proving "no significant risk" and the Federal does not. See 22 CCR §§ 12705–12821. OSHA, however, has never dictated to the States exactly how they must interpret phrases such as "no significant risk." In any case, no commentor has come forward with evidence comparing the burdens of proving "no significant risk" under the State and Federal standards.

[22] In terms of product clause analysis, WWPI's comments focus solely on an alleged burden placed upon out-of-state manufacturers shipping treated wood into California. OSHA's finding that California may not apply its State plan standards to out-of-state manufacturers should ameliorate WWPI's concern. In addition, these products have consumer uses which are not addressed by this decision.

more broadly to Proposition 65's application to pesticides, noting that "the Federal HCS does not require labeling of pesticides[], which are covered by U.S. EPA regulations, whereas the CA Governor's List[] * * * includes many pesticides." [footnotes omitted].

OSHA finds that neither comment provides a basis for rejecting the State standard. First, where pesticides are concerned, compliance with Proposition 65 in the occupational setting is based upon compliance with California's Pesticides and Worker Safety Requirements. See 3 CCR §§ 6701–6761, as incorporated into the State plan by 8 CCR § 5194(b)(6)(C) and 22 CCR § 12601(c)(1)(C). Neither the Western Wood Preservers nor the Cotton Council alleges that compliance with California's worker pesticide regulations has proven burdensome in the past.[33] With respect to the settlement outlined by the Wood Preservers, the comment provides insufficient information for OSHA to determine whether occupational exposures were involved; assuming they were, however, Section 12601(c) of OEHHA's occupational regulations provides that compliance with California's worker pesticide regulations constitutes compliance with Proposition 65. The Institute's member companies, therefore, faced no additional compliance burden under Proposition 65 which they did not face as a result of the worker pesticide regulations. The voluntary settlement reached by the Institute does not negate the defense available through Section 12601(c). The industry simply failed to avail itself of that defense.

Second, to the extent these commentors object to "labeling" requirements allegedly imposed by Proposition 65, they overlook the Ninth Circuit's decision in *Chemical Specialties Manufacturers Ass'n* v. *Allenby*, 958 F.2d 941 (9th Cir. 1992), cert. denied 506 U.S. 825 (1992). In CSMA, the court found that Proposition 65 does not require labeling and that, if it did, the law would be preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). 958 F.2d at 945. Consequently, pesticide manufacturers and users cannot be required by private plaintiffs enforcing Proposition 65 to provide particular labeling.

Aflatoxins: The National Cotton Council (18–154) argues that Proposition 65 covers aflatoxins, a biological hazard, whereas the Federal standard does not. The Council is correct. The Federal Hazard Communication Standard does not require warnings for aflatoxins or other biological hazards. This is because aflatoxins do not come within the scope of the Federal standard, which was "intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards" (emphasis added). 29 CFR § 1910.1200(a)(2). In 1994, OSHA specifically amended the standard to reflect this fact, adding Section 1910.1200(b)(6)(xii), which exempts biological hazards. 29 CFR § 1910.1200(b)(6)(xii). OSHA then explained that:

> Although OSHA has never considered either radioactivity or biological hazards to be covered by the HCS, OSHA has received inquiries regarding such coverage, and therefore added specific exemptions for these types of hazards in the NPRM. * * * OSHA believes that this particular rulemaking is more appropriately limited to chemical hazards, although OSHA does not discourage employers from including coverage of such agents in their hazard communication programs.

59 FR 6126, 6155 (February 9, 1994).

It is unclear whether Cal/OSH's incorporation of Proposition 65 into the State plan was intended in bring aflatoxins (and other biological hazards) within the scope of the State plan. In practical terms, aflatoxins would be unlikely to present an occupational hazard; their presence on the Proposition 65 most likely relates to the hazard they present in consumer products which, as stated previously, will not be affected by OSHA's decision. If the State does not intend to bring aflatoxins within the scope of the State plan, California need not establish that Proposition 65's coverage of biological hazards meets the requirements of Section 18(c)(2).

If the State does intend to apply its Hazard Communication Standard to biological occupational hazards, OSHA finds that Section 18(c)(2) does not prohibit the State from doing so. As OSHA stated in the 1994 preamble, the Federal exclusion of biological hazards was not intended to discourage employers from including these hazards in their hazard communication programs. A State standard covering biological hazards is more effective than a Federal standard which does not cover such hazards. In addition, there is no evidence that coverage of biological hazards would impose an undue burden on commerce. Only one commentor (the Cotton Council) raised this issue and it presented no evidence of Proposition 65 enforcement actions involving occupational biological hazards.

California Non-Chemical Manufacturers: The Coalition argues that the California standard increases the kinds of products to which hazard communication requirements apply by requiring manufacturers other than chemical manufacturers (e.g. truck manufacturers) to provide warnings. Ex. 18–174, page 28. Based upon OSHA's findings on the out-of-state manufacturers issue (see Section II.D), the State plan will not regulate out-of-state vendors; this finding may moot the bulk of the Coalition's objections. The question remains, however, whether the California standard covers in-state manufacturers other than chemical manufacturers (hereafter "non-chemical" manufacturers), which would make its coverage more expansive than the Federal standard, which applies only to chemical manufacturers as manufacturers. As discussed in Section II.D, above, California's position on application of its standard to non-chemical manufacturers is unclear. On the one hand, California's incorporation of Proposition 65 imposes the law's obligations upon "employers" (8 CCR § 5194(b)(6)) and defines an "occupational exposure" as one occurring "in the workplace of the employer causing the exposure, to any employee." 22 CCR § 12601(c), as incorporated into the California standard by 8 CCR § 5194(b)(6)(C). This regulatory language suggests that the State plan would subject a manufacturer to Proposition 65 requirements only if the manufacturer was an "employer" within the meaning of the State plan and only with respect to the manufacturers' particular employees.

On the other hand, the California Attorney General has argued that the State plan's Proposition 65 requirements also apply to manufacturers other than chemical manufacturers (hereafter "non-chemical manufacturers"). The Attorney General's position appears to be based upon the fact that some products of non-chemical manufacturers may be combined with a chemical to produce a hazardous chemical. For example, an industrial truck uses diesel fuel, which produces exhaust which is a hazardous chemical. See Ex. 18–156. The Attorney General also has taken the position that Section 12601(c)'s definition of an "occupational exposure" does not limit the State plan's Proposition 65 coverage to the duties owed by manufacturers to their own employees. Rather, the Attorney General has maintained that the State plan imposes obligations upon manufacturers in their relation to the employees of other businesses.

[33] California promulgated the regulations referenced in Section 12601(c) in 1988.

Consequently, it appears that California may extend hazard communication requirements to non-chemical manufacturers in their role as manufacturers, which exceeds the scope of the Federal standard.[24] Ex. 18–174, Attachment 31.

OSHA finds that this potential difference in coverage between the Federal and State standards does not violate Section 18(c). Facially, application of hazard communication requirements to non-chemical manufacturers should lead to more, not less, effective protection for employees and there is no evidence suggesting otherwise. Accordingly, OSHA finds that this requirement does not result in less effective protection. Application of Proposition 65 to California non-chemical manufacturers also does not violate the product clause.

Proposition 65, by its terms, applies only to exposures occurring within California. Goods which are manufactured in California by California employers and which remain in that State do not enter interstate commerce, and requirements applicable to such products do not constitute a burden on interstate commerce. Although some manufacturers maintain that they cannot distinguish between goods that will be shipped to points in California and goods that will be shipped elsewhere (and they therefore may elect to apply Proposition 65 warnings to all products regardless of destination), the manufacturer's voluntary assumption of such a task is not imposed by Proposition 65's terms. Finally, even assuming that non-chemical manufacturers are induced by Proposition 65 to provide labeling not otherwise required by hazard communication requirements, they have submitted no concrete evidence establishing the extent of the burden imposed.

4. Substantive Differences Between the Federal and General California Standards

In addition to the objections raised to the Proposition 65 elements of the California standard, commentors have objected to several parts of the general (*i.e.* non-Proposition 65) California standard. These objections relate to trade secret issues; the failure of the State standard to exclude all substances excluded by the Federal standard; and a requirement in the State standard that potential health risks be described "in lay terms."

Trade Secrets: Some commentors allege that the California Hazard Communication Standard does not provide adequate protection for trade secrets, as required by OSHA. OSHA's general State plan regulations at 29 CFR § 1902.4(c)(viii) require that a State plan provide adequate safeguards to protect trade secrets, by such means as limiting access to such trade secrets to authorized State officers or employees and by providing for the issuance of appropriate orders to protect the confidentiality of trade secrets.

Shell Oil Company and Elf Atochem North America, Inc., maintain that the California standard does not meet this criterion because it allows access to trade secrets by safety professionals who are not State officials or employers. Ex. 18–160. Other commentors assert that the California requirement that Material Safety Data Sheets (MSDS) contain the Chemical Abstract Service number will jeopardize trade secrets by allowing outsiders to determine the composition of products. Exs. 18–40, 18–154. The Federal standard does not require inclusion of the CAS number. The Color Pigments Manufacturers Association alleges that the California standard fails to require health and safety professionals to treat trade secrets confidentially. Ex. 18–40.

The California Hazard Communication Standard allows disclosure of information to both safety and health professionals, while the Federal Hazard Communication Standard requires disclosure only to health professionals. The inclusion of health professionals in the Federal standard extends trade secret access beyond State officials and employers, the groups previously listed in the general State plan regulation. The State argues that its provision further broadening access to safety professionals is more protective of worker safety, because many safety and health programs are managed by safety professionals who have both safety and health expertise. Importantly, the State requires all persons receiving such trade secret information to treat it confidentially 8 CCR § 5194(l)(3)(E). OSHA finds that California has adequate reason to extend disclosure to safety professionals and that this extension of access does not result in less effective protection of trade secrets. In addition, while requiring that CAS numbers be included on a MSDS, the standard also provides an exemption for trade secrets. 8 CCR § 5194(l)(1). Therefore, OSHA finds that the State standard's protection of trade secrets is in accordance with State plan requirements.

California's Omission of Federal Exemptions and Exclusions: The Chemical Manufacturers Association (CMA) generally protests that the California standard does not include "the exemptions and exception added to the Federal HCS in 1994." Ex. 18–154, page 12. One of these differences, the Federal exclusion of biological hazards, is discussed above (see "Aflatoxins"). In any case, however, CMA does not explain how this difference results in a less effective standard or produces a burden on commerce and, in fact, states that the differences between the Federal and general California standard "in practice * * * have not presented significant problems for employers and manufacturers." *Id.*, page 4. Logically, if California's standard is stricter than the Federal standard, it should result in more effective protection for workers. OSHA therefore concludes that California's failure to adopt all of the exemptions or exceptions added to the Federal standard in 1994 does not require rejection of the standard.

California's Requirement for Use of Lay Terminology on MSDSs: The general California standard requires that an MSDS include "[a] description in lay terms, if not otherwise provided, * * * of the specific potential health risks posed by the hazardous substance intended to alert any person reading the information." 8 CCR § 5194(g)(2)(M). The Federal standard does not include this language, but does require that the MSDS describe "[t]he health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical." 29 CFR § 1910.1200(g)(2)(iv). The Chemical Manufacturers Association objects to the California requirement but, again, does not explain how it could result in less effective protection or impose an undue burden upon commerce. Ex. 18–154, page 12. See also Ex. 18–121. California's requirement for the use of lay terminology on MSDSs does not appear to undermine the potential effectiveness of its standard. Indeed, in a 1990 grant program announcement, OSHA recognized that the use of lay language on MSDSs may enhance worker understanding of hazards. 55 FR 18195 (May 1, 1990). There also is no evidence that a requirement for the use of lay terminology would pose an undue burden on commerce. As similarly discussed in the context of Proposition 65 (see Section III.B.2), "appropriate" hazard warnings should be "clear and reasonable'; warnings which use lay

[24] California has the power to impose hazard communication requirements obligations upon all employers (in their role as employers) located within the State. The California standard does not exceed the Federal in this respect. Equally clearly, and as discussed above, it cannot impose such obligations upon out-of-state employers under the State plan.

possibly avoid any award of damages). OSHA finds that any burden imposed by voluntary settlements reached between businesses and private plaintiffs in individual cases is not an undue burden on commerce for purposes of the product clause. Although some commentors attempt to characterize such settlements as "extortion" (Exs. 18–92, 18–145, 18–162), there is no evidence to support the idea that these settlements have been involuntary. Nor can OSHA assume, in the absence of specific information, that cases that are voluntarily settled are without merit.

The litigation costs cited by the commentors (*e.g.* Exs. 18–23, 18–40, 18–41, 18–58, 18–65, 18–75, 18–164) also do not establish an undue burden on commerce. To begin with, it seems questionable whether the burden of litigating a case could constitute a burden on "commerce," if the substantive requirements at issue in the litigation are legitimate State requirements. In fact, no commentor cited, and OSHA could not locate, any cases specifically addressing the general question of whether a law's enforcement provisions can burden commerce if its substantive provisions do not. The Supreme Court has rejected the argument that a State statute shifting attorney fees violates the dormant commerce clause. *Missouri, Kansas & Texas Railway Co. of Texas* v. *Harris*, 234 U.S. 412, 416 (1914). Proposition 65's provision for attorney's fees, therefore, does not constitute an undue burden on commerce. The only other relevant cases are two decisions addressing the question of whether an award of punitive damages could create an undue burden on commerce. Both courts rejected this idea. *Daugherty* v. *Firestone Tire & Rubber Co.*, 85 F.R.D. 693 (U.S. District Court for the Northern District of Georgia, 1980); *Brotherton* v. *Celotex Corp.*, 493 A.2d 1337 (Superior Court of New Jersey, Law Division, March 15, 1985). These decisions suggest that the penalties available under Proposition 65 also do not constitute an undue burden on commerce.

The dearth of relevant case law on this enforcement issue reflects the fact that the courts, in considering cases under the Commerce Clause, do not consider the enforcement provisions of particular laws. Rather, these decisions focus on burdens posed by the substantive aspects of particular laws. The courts' focus on the substantive aspects of laws is logical because the burden of litigating a case is not a burden on "commerce." The product clause, like the Commerce Clause, "protects the interstate market, not particular interstate firms[.]" *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127–28 (1978); *Kleenwell Biohazard Waste*, 48 F.3d at 397.

Although burdens on individual businesses could, in some circumstances, add up to a burden on the interstate market, the purely anecdotal evidence in this record does not support such a finding. OSHA received 156 comments from opponents of the standard, but only about fifteen provided specific information about particular lawsuits and the burdens allegedly imposed. Most of these lawsuits involved out-of-state businesses, many of whom should be exempt from enforcement under the auspices of the State plan, as discussed in Section II.D. Almost all of these lawsuits, as stated before, involved voluntary settlements, which have limited relevance to OSHA's consideration of product clause issues. Many cases involved consumer and environmental exposures; the expenses associated with settlements or litigation of such cases are not imposed by Proposition 65's occupational applications.

For example, one lawsuit brought to OSHA's attention was *As You Sow* v. *Shell Oil, Inc.* This case is now pending before the San Francisco Superior Court. Although this suit appears to have occupational aspects, the plaintiff's arguments also focus on potential exposure to consumers. See Ex. 18–174A, Attachment 3 (plaintiff's pleading), pages 3, 5, 14–15, 26. Furthermore, several of the issues pending before the court appear to turn on the proper interpretation of Proposition 65 and OEHHA regulations—*e.g.* what does it mean to "knowingly and intentionally" expose someone to a Proposition 65 chemical? Issues relating to consumer exposures are beyond OSHA's jurisdiction. Some additional issues do involve the intersection between Proposition 65 and the Federal Hazard Communication Standard—*i.e.* As You Sow argues that Shell's warning system does not comply with the Federal standard (and therefore does not comply with Proposition 65); Shell argues that it does. See Ex. 18–174A, Attachment 3, pages 18, 27–28 and Ex. 18–174B, Attachment 12 (defendant's pleading), pages 20–31. However, OSHA has no evidence showing that the California court is not capable of resolving the contested issues fairly and reasonably.

Finally, even where the commentors do provide information about expenses associated with lawsuits which were, at least in part, related to occupational exposures, the evidence is insufficient to allow OSHA to judge the quality and extent of any burden imposed. For example, one of the few cases about which information is available is As You Sow's lawsuit against Chemspec. See Exs. 18–127, 18–174 (pages 47–48). Chemspec itself provided no specific information about the financial burden imposed by the settlement. However, the Coalition states that Chemspec paid $12,000 in "[d]irect costs of settlement" and $40,000 "to rework labels, MSDSs, and reformulated [sic] products[.]" Neither Chemspec nor the Coalition provided information regarding Chemspec's financial condition or the extent to which Chemspec manufactured or sold listed chemicals, which makes it impossible for OSHA to determine the relative burden imposed. In addition, it is unclear whether Chemspec was in compliance with the Federal standard for the chemicals in question prior to the settlement of the lawsuit. See Section III.B.2. Finally, as noted in Section III.B.3, some of the products involved in the lawsuit were consumer products; to the extent the settlement and other expenses reflect costs attributable to Proposition 65's consumer applications, those expenses are not relevant to OSHA's consideration under the product clause.

Accordingly, there is insufficient evidence in the record to allow OSHA to find that the occupational aspects of Proposition 65 have created an undue burden on interstate commerce.

C. Inspections, Employer/Employee Rights

Some commentors also addressed whether Proposition 65's private enforcement mechanism, as incorporated into the State plan, meets OSHA requirements for enforcement under a State plan, including employer and employee rights. Section 18(c)(3) of the OSH Act requires State plans to provide for a "right of entry and inspection of all workplaces" which is at least as effective as the provisions of the Act. OSHA regulations require that a State plan: provide for inspection of covered workplaces in the State where there are reasonable grounds to believe a hazard exists (29 CFR § 1902.4(c)(2)(I)); provide an opportunity for employees and their representatives to bring possible violations to the attention of the State agency with enforcement responsibility (29 CFR 1902.4(c)(2)(ii)); provide for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties (29 CFR 1902.4(c)(2)(xii)); and for employees or their representatives to

have an opportunity to participate in review proceedings (29 CFR 1902.4(c)(2)(xii)).

Several industry commentors allege that because the Proposition 65 supplemental enforcement provisions do not involve on-site inspections, walkaround by employer and employee representatives, and administrative review, they do not meet these criteria and should not be approved. Exs. 18–41, 18–58, 18–59, 18–65, 18–81, 18–96, 18–121, 18–134, 18–142, 18–144, 18–148, 18–150, 18–152, 18–153, 18–154, 18–160, 18–164, 18–169, 18–174. (No workers or organizations representing their interest complained about the rights afforded employees, however.) Some commentors believe that businesses are not given adequate notice of alleged Proposition 65 violations and a reasonable amount of time to abate them. The Industrial Truck Association asserted that OSHA cannot enforce without conducting an inspection and that the agency therefore cannot authorize such enforcement by a State plan. Ex. 18–160.

Cal/OSHA in its response asserts that as long as it continues to enforce the Hazard Communication Standard in accordance with its approved inspection procedures, supplemental private enforcement does not need to meet the criteria. (Ex. 22)

As discussed in Section I.A, State plans do not operate under a delegation of Federal authority but under their own authority, and therefore they may use methods of enforcement not included in the Federal Act. OSHA finds that the private enforcement mechanism of Proposition 65 incorporated into the State plan serves only to supplement the enforcement provided by Cal/OSHA and therefore does not need to include the same enforcement mechanisms used by Cal/OSHA. Regular State plan enforcement of the Hazard Communication Standard, including Proposition 65, is still available. Employees continue to have the right to file complaints with Cal/OSHA regarding alleged hazard communication violations, including violations of Proposition 65, and to participate in inspections and review proceedings. In addition, employees have the right to file suits under Proposition 65 and may file amicus briefs in third-party actions. Significantly, neither workers nor organizations representing their interests complained of the rights afforded to employees under Proposition 65's supplemental enforcement provision.

While Proposition 65 does not provide for the setting of specific abatement dates, employers must be served with a "Notice of Intent to Sue" before a private suit is filed. Some commentors have stated that these notices have been inadequate in the past. E.g. 18–133, 18–144, 18–164, 18–207. Employers, of course, have all rights available under the judicial system in enforcement proceedings and may bring any inadequacies in the notices of intent to sue to the attention of the courts. Moreover, California recently adopted regulations which clarify the notice requirements and require greater specificity than some previous notices of intent contained. See 22 CCR § 12903 (effective April 22, 1997). These new regulations should alleviate the concerns raised in the comments.

D. Qualified Personnel

Some commentors have questioned whether Proposition 65 as incorporated into the California Hazard Communication Standard complies with the OSHA requirement that State plans be enforced by qualified personnel. Section 18(c)(4) of the OSH Act and 29 CFR § 1902.3(h) require that the designated agency or agencies have a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards. Several commentors pointed out that the prosecutors and private citizens bringing enforcement actions under Proposition 65 need not have specific training or expertise in occupational safety and health. Ex 18–63, 18–150, 18–160, 18–162, 18–166, 18–174. In its response, California maintains that as long as the basic hazard communication requirements are enforced by qualified Cal/OSHA personnel, the supplemental enforcement need not meet these criteria.

OSHA finds that since the designated agency, which enforces hazard communication requirements comparable to those of Federal OSHA, does have qualified personnel to enforce those requirements, there is no violation of this requirement. In addition, while actions under Proposition 65 may be brought by prosecutors or private citizens, the decisions in these cases are made by State courts, which are also the final arbiters in contested Cal/OSHA enforcement actions.

IV. Decision

Based upon the analysis set forth in Sections II and III, OSHA approves the California standard, including Proposition 65 and its supplemental enforcement provision, but subject to the following conditions, which are applicable to all enforcement actions brought under the authority of the State plan, whether by California agencies or private plaintiffs:

- Employers covered by Proposition 65 may comply with the occupational requirements of that law by complying with the measures provided by the OSHA or Cal/OSHA Hazard Communication Standard, as provided in the State's regulations.
- The designated State agency, Cal/OSHA, is responsible for assuring that enforcement of its general Hazard Communication Standard and Proposition 65 results in "at least as effective" worker protection, the agency must take appropriate action to assure that court decisions in supplemental enforcement actions do not result in a less effective standard or in inconsistencies with the conditions under which the standard is federally approved.
- The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.

With these conditions in mind, OSHA has determined that:

(1) The California standard is at least as effective as Federal OSHA's Hazard Communication Standard. With a few additions which do not undermine (and may enhance) protection of employees' rights to know about workplace hazards, the standard covers the same chemicals and concentration of chemicals as are covered by the Federal standard. Similarly, the California standard, like the Federal standard, requires clear and reasonable communication of hazard information. The standard also adequately protects business trade secrets. Finally, the evidence available to OSHA does not show that supplemental enforcement of Proposition 65 has resulted in less effective enforcement of hazard communication requirements.

(2) The substantive hazard communication requirements contained in the California standard are applicable to products which are distributed or used in interstate commerce. Consistent with the principle set forth in the 1983 Federal Hazard Communication Standard, OSHA finds that the standard is applicable to products in the sense that it permits the distribution and use of hazardous chemicals in commerce only if they are in labeled containers accompanied by material safety data sheets.

(3) The California standard does not pose an undue burden on interstate commerce. The substantive differences

between the general hazard communication requirements and the Federal hazard communication standard have not been shown to pose a burden on commerce. In addition, the substantive requirements of Proposition 65 may be met by compliance with the general Federal and State hazard communication requirements, thus not posing any additional burden on employers. Finally, based on the evidence in this record, neither financial burdens associated with voluntary settlement of Proposition 65 cases nor the burden of litigating cases has been shown to create an undue burden on interstate commerce within the meaning of the product clause.

(4) The California standard is required by compelling local conditions. The voters of California have a legitimate and compelling local interest in determining how their right to hazard information can best be protected.

(5) The California standard also complies with the remaining requirements of Section 18 of the Act. Cal/OSHA, as the designated State agency, is responsible for the effective administration of the plan throughout the State. This designation meets the requirements of Section 18(c)(1). The State also has adequately trained personnel for the enforcement of the standard, pursuant to Section 18(c)(4). Finally, both the administrative system available under the general California standard and the judicial enforcement available under Proposition 65's supplemental enforcement mechanism adequately protect the rights of employers and employees.

OSHA, accordingly, approves the California Hazard Communication Standard, including its incorporation of Proposition 65, subject to the stated conditions. Finally, as noted at the outset of this decision, OSHA has no authority to address Proposition 65's consumer and environmental applications, and this decision does not affect those applications.

V. Location of Supplement for Inspection and Copying

A copy of the California Hazard Communication standard may be inspected and copied during normal business hours at the following locations: Office of the Regional Administrator, OSHA, 71 Stevenson Street, Suite 415, San Francisco, California 94105; and California Division of Occupational Safety and Health, Department of Industrial Relations, 45 Fremont Street, Room 1200, San Francisco, California 94105; Office of the Director, Federal-State Operations, OSHA, U.S. Department of Labor, Room N-3700, 200 Constitution Avenue, NW, Washington, DC 20210.

Authority: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR part 1902, Secretary of Labor's Order No. 1-90 (55 FR 9033).

Signed in Washington, D.C., this 2nd day of June, 1997.

Greg Watchman,

Acting Assistant Secretary.

[FR Doc. 97-14723 Filed 6-5-97; 8:45 am]

BILLING CODE 4510-26-P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste; Notice of Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 93rd meeting on July 23–25, 1997, in Building 189—Auditorium, Southwest Research Institute, Center for Nuclear Waste Regulatory Analyses (CNWRA), 6220 Culebra Road, San Antonio, Texas.

The entire meeting will be open to public attendance.

The schedule for this meeting is as follows:

Wednesday, July 23, 1997—8:30 a.m. until 6:00 p.m.

Thursday, July 24, 1997—8:30 a.m. until 6:00 p.m.

Friday, July 25, 1997—8:30 a.m. until 12:00 noon

A. A full day's session will be devoted to reviewing the performance assessment (PA) capability of the NRC and CNWRA staffs. This review will include discussions of both high- and low-level waste PA, as well as, the use of PA in site decommissioning management plan remediation efforts. The session will also focus on the use of PA in calculating the consequences of igneous activity on a high-level waste repository, on the use of PA in the prioritization process, and on PA integration into the overall regulatory process.

Representatives from the NRC and CNWRA will participate.

B. A full day's session will be devoted to reviewing the use of probabilistic performance assessment approaches for waste management. The transition to risk-informed, performance based regulation will form part of the discussion. Representatives from the NRC, CNWRA, DOE, and the nuclear industry will participate.

C. The ACNW will hear a description of science and engineering experiments currently in progress at the CNWRA.

D. *Preparation of ACNW Reports*—The Committee will discuss potential reports, including igneous activity related to the proposed Yucca Mountain Repository, and other topics discussed during the meeting as the need arises.

E. *Committee Activities/Future Agenda*—The Committee will consider topics proposed for future consideration by the full Committee and Working Groups. The Committee will discuss ACNW-related activities of individual members.

F. *Miscellaneous*—The Committee will discuss miscellaneous matters related to the conduct of Committee activities and organizational activities and complete discussion of matters and specific issues that were not completed during previous meetings, as time and availability of information permit.

Procedures for the conduct of and participation in ACNW meetings were published in the **Federal Register** on October 8, 1996 (61 FR 52814). In accordance with these procedures, oral or written statements may be presented by members of the public, electronic recordings will be permitted only during those portions of the meeting that are open to the public, and questions may be asked only by members of the Committee, its consultants, and staff. Persons desiring to make oral statements should notify the Chief, Nuclear Waste Branch, Mr. Richard K. Major, as far in advance as practicable so that appropriate arrangements can be made to schedule the necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during this meeting will be limited to selected portions of the meeting as determined by the ACNW Chairman. Information regarding the time to be set aside for this purpose may be obtained by contacting the Chief, Nuclear Waste Branch, prior to the meeting. In view of the possibility that the schedule for ACNW meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should notify Mr. Major as to their particular needs.

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by contacting Mr. Richard K. Major, Chief, Nuclear Waste Branch (telephone 301-415-7366), between 8:00 A.M. and 5:00 P.M. EDT. The CNWRA contact in San Antonio is Ms. Bonnie Caudle (telephone 210-522-5157).

ACNW meeting notices, meeting transcripts, and letter reports are now available on FedWorld from the "NRC MAIN MENU." Direct Dial Access

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FHSA/California-Preemption Case #1 - Ohio

An Ohio manufacturer of paint strippers containing methylene chloride labels its products in compliance with FHSA, to contain the following CPSC-approved language:

> WARNING: Contains methylene chloride, which has been shown to cause cancer in laboratory animals. Risk to your health depends upon level and duration of exposure.

After methylene chloride is included in the Prop 65 list in 1991, the manufacturer also begins to sticker its products with the Prop 65 language:

> WARNING: This product contains a chemical known to the State of California to cause cancer.

The manufacturer notifies its customers and distributors of the Prop 65 Warning requirement, provides them with stickers, and offers to make additional stickers available if needed. It is sued in California, along with three other paint stripper manufacturers, by a private organization, because the enforcer has found recently-shipped product in the state without a warning. It turns out that the product found by the enforcer has been transshipped by a Texas wholesaler to California without the California warning. The manufacturer had no knowledge that the wholesaler would be shipping to California.

During hearings on a motion for preliminary injunction, the court imposes the manufacturer's California sticker (size, placement, and language) on the other interstate manufacturers, and enters a preliminary mandatory injunction against all, requiring them to notify their customers by certified mail, and refuse to ship any further product to any customer who does not return a signed "compliance card" or promise over the phone to sticker all products.

Manufacturer is also forced to settle for $60,000 in attorney's fee, and incurs approximately $50,000 in its own attorney's fees. A court in a subsequent action (EDF v. Thompson & Formby) with a different manufacturer holds the CPSC warning for methylene chloride to be inadequate under Prop 65 *as a matter of law*, although the same court held that a manufacturer is not liable for product shipped by wholesaler to California of which the manufacturer had no knowledge.

FHSA/California-Preemption Case #2 - Pennsylvania

A Pennsylvania manufacturer of paint strippers (which comply with CPSC's methylene chloride requirement) receives a 60-day notice at the same time as the first manufacturer, but is never sued. After receiving the notice, and on advice of counsel, it changes its labels on all products including Prop 65 chemicals to include a Prop 65 non-safe harbor warning that says:

> WARNING: This product contains chemicals known to the state of California to cause cancer and reproductive toxicity.

Two years later, the manufacturer is sued for both the paint stripper identified in the first notice and for other products. The private enforcer claims that the label is inadequate because the term "reproductive toxicity" is vague; "birth defects or other reproductive harm" should have been used. The manufacturer offers to change the warning language, but refuses to pay any penalties or fees to the enforcer. After the manufacturer has incurred over $10,000 in legal fees, the private enforcer decides the fight is not worth it, and takes the manufacturer's offer in settlement.

FHSA/California-Preemption Case #3 - California

A small paint manufacturer in California, which complies with FHSA labeling requirements, diligently researches which products require warnings under Prop 65. They use the following language:

> WARNING: This product contains chemicals known to the state of California to cause cancer, birth defects, or reproductive harm.

The manufacturer is sued by a private enforcer who claims that the warning "misleads" consumers about the potential risks. The manufacturer is forced to accept a settlement (because of the risk of litigation) that requires *two* warnings on the product, as follows:

> WARNING: This product contains a chemical known to the state of California to cause cancer. WARNING: This product contains a chemical known to the state of California to cause birth defects or other reproductive harm.

The manufacturer is forced to pay $34,000 to the plaintiff to settle the case ($15,000 directly to the private enforcer, and $19,000 in the enforcer's attorney's fees), and incurs approximately $25,000 in its own attorney's fees.

FHSA/California-Preemption Case #4 - Interstate Shipper

A manufacturer of paint strippers shipping products in interstate commerce complies with the CPSC methylene chloride labeling requirement in 1990. It is sued for failing to comply with Prop 65, and relies on the federal warning. A jury assesses penalties of $2500 per can for product without the federal warning (i.e., shipped prior to 1990) and $2 per can for product with only the federal warning for a total damage award of $210,000. The manufacturer is also ordered to pay $378,000 in legal fees to the private enforcer.

FHSA/California-Preemption Case #5 - Illinois

An Illinois manufacturer which complies with FHSA labeling requirements settles over the paint stripper allegations and, as part of the settlement, agrees to provide product-specific point of sale signs to its retailers for those products. It is later sued for toluene-containing spray paints (labeled in accordance with FHSA) by the California Attorney General. For *all* of its products, it had sent point of sale signs to retailers asking them to post the signs close to all of its products. The signs were not product-specific.

The Attorney General claims that the manufacturer violated Prop 65 by failing to use product-specific signs, and by failing to take steps to ensure that the retailers would post the signs. When asked in discovery what steps the manufacturer should have taken to comply with prop 65, the AG objects, claiming that it would be "burdensome and oppressive to imagine the thousands of ways" that the company could have complied. Eventually, the state claims that manufacturer reps should have ensured compliance when visiting the stores, and that the company should have used its satellite TV system, held seminars and meetings for its retailers, etc.

The company eventually settles with the state for in excess of $250,000 in penalties, restitution, and fees. It also was required to pay over $300,000 in fees to the private enforcer that first brought the notice, even though the court ruled that the private enforcer could not directly enforce Prop 65 and could only intervene subject to the AG's control.

FHSA/California-Preemption Case #6 - Maryland

A small Maryland company sells to the General Services Administration throughout the United States. Its products are also on the Qualified Products List (QPL), available to government contractors, and complying with US Government specifications. GSA warehouses in California receive shipments, but the company does not know whether the product is being used in California. It does not otherwise sell directly or indirectly in California. It has no idea that Prop 65 even exists.

The manufacturer is sued by a private party in California. It resists imposition of jurisdiction and loses. It is forced to agree to provide warnings by labeling, pay nearly $30,000 in penalties and attorney's fees, and incurs its own attorney's fees of around $15,000.

FHSA/California-Preemption Case #7 - New Jersey

A New Jersey manufacturer whose product complies with FHSA receives a vague 60-day notice that identifies one or two chemicals, and one product, "among others," that the manufacturer has not sold in California for years. It tries to settle with the private enforcer. The enforcer claims that it cannot settle until it has been provided with all of he manufacturers' products containing Prop 65 chemicals, and sales data (gross dollars and units sold in California). The manufacturer must turn over this information, or risk being sued. It refuses, and the private enforcer serves written discovery asking for the same information. The courts routinely order that it be produced, notwithstanding the fact that the private enforcer had no evidence of Prop 65 violations for non-identified products.[1/]

The manufacturer finally agrees to settle, contingent upon labeling including Prop 65 warnings, and payment of $5000 in penalties, $5000 in "restitution," and $6400 in attorney's fees and costs.

1/ This abuse was apparently curtailed in 1995, when the sate agency adopted a regulation defining the 60-day notice requirement, and limiting enforcement actions to chemicals and products actually identified in the notice. Some private enforcers are still refusing to settle without being provided such information, or simply threaten the defendant with an endless line of enforcement actions as they discover each of the allegedly violative products. Thus, it is still easier for a defendant to provide this information and enter into a global settlement for all products.

FHSA/California-Preemption Case #8 - New Jersey

A New Jersey manufacturer purchases a product line from another manufacturer. The contract contains a provision stating that all products comply with Prop 65 (and other labeling requirements such as FHSA), and the buyer is given a summary risk assessment for each product showing compliance. The manufacturer is sued over one of the products by a private enforcer. It immediately commissions another risk assessment (showing compliance), but stickers product in (and going to) California for the duration of the lawsuit.

The manufacturer tries to obtain the Attorney General's assistance in getting the case dismissed, but the Attorney General cannot get a firm commitment from the agency to agree with the risk assessment, although they "generally" agree with it. Faced with the prospect of a multimillion dollar penalty assessment at trial, the best settlement the manufacturer is able to obtain requires: (a) payment of $200,000 in attorney's fees; (b) a $300,000 penalty clause that is waived if the manufacturer reformulates the product without Prop 65 chemicals within one year; (c) continued labeling with the Prop 65 warning.

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MASSACHUSETTS 181ST GENERAL COURT -- 1997 REGULAR SESSION

SENATE BILL 1970

SENATE NO. 1970
THE COMMONWEALTH OF MASSACHUSETTS
IN THE YEAR ONE THOUSAND NINE HUNDRED AND NINETY-SEVEN.

1997 MA S.B. 1970

VERSION: Introduced

VERSION-DATE: October 16, 1997

SYNOPSIS:

AN ACT ENTITLED "THE MASSACHUSETTS CITIZENS' RIGHT TO KNOW ACT".

TEXT: Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Whereas, the people of the commonwealth of Massachusetts have a fundamental right to know about toxic chemicals contained in commonly used consumer products; and

Whereas, products in widespread commercial use often contain significant quantities of toxic substances linked to long term health threats such as cancer, infertility and birth defects; and

Whereas, citizens of Massachusetts are currently being denied their right to know and their ability to make informed decisions about their exposures to hazardous substances because most manufacturers are not required to provide warnings for products containing toxic chemicals;

It is hereby resolved that the policy goal of this Act shall be to ensure that reasonable and clear information about toxic chemicals contained in consumer products is made available by manufacturers to the general public so that parents can take steps to protect their children, consumers can make informed choices, and workers and communities can protect themselves and work with industries to promote cleaner and safer methods of production.

SECTION 2. The General Laws are hereby amended by inserting after chapter 21J the following chapter: -

Chapter 21K. Massachusetts Citizens' Right to Know Act.

Section 1. This chapter shall be known and may be cited as the "Massachusetts

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Citizens' Right to Know Act."

Section 2. Definitions. In this chapter, the following words and phrases shall have the following meanings:

new wording

"Adequate margin of safety", one thousand times the no observed adverse effect level unless (a) the chemical is an essential human nutrient and the department has determined the highest multiple that is not likely to inhibit human consumption in essential quantities, in which case the department may set that multiple as the margin, or (b) the department has determined that potential human exposures to the chemical are well characterized and that adequate dose response data in humans exist for the chemical for the effect in question (i.e., reproductive toxicity or developmental toxicity or neurotoxicity), in which case the department may set a multiple lower than one thousand for that particular effect that it determines represents an adequate margin of safety, provided that in no event shall the margin be less than the margin that has been determined or used for the same effect of the same chemical under any federal law or the law of any other state.

"Commissioner", the Commissioner of Public Health.

"Department", the Department of Public Health.

new

"Level in question", the quantity of chemical to which an individual is exposed during a single 24-hour day during which the individual comes in contact with the consumer product, which shall constitute the rate of exposure per day for purposes of calculating lifetime exposure.

"Massachusetts substance list", a compilation of toxic or hazardous substances promulgated pursuant to section four of chapter one hundred and eleven F.

"Naturally occurring substance", a natural constituent of a food, or if it is present in a food solely as a result of absorption or accumulation of the chemical which is naturally present in the environment in which the food is raised, or grown, or obtained; a chemical is naturally occurring only to the extent that the chemical did not result from any known human activity; where a chemical contaminant can occur naturally in a food, the chemical is naturally occurring only to the extent that it was not avoidable by good manufacturing practices.

new wording

"No significant risk", for substances known to the department to cause cancer, a reasonable likelihood that no harm will result from exposure, and for substances known to the department to cause reproductive toxicity, developmental toxicity, or neurotoxicity, no observable adverse effect with an adequate margin of safety.

"Penalty", the amount of money that may be fined to a person who violates any provision of this chapter.

"Person", an individual, partnership, firm, company, corporation, trust, association, group of individuals, estate, legal representative or agent.

"Product", any goods sold or intended to be sold, including food.

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"Reproductive toxin", a substance known to cause reproductive or developmental disorders, including but not limited to birth defects, teratogenicity, fetal toxicity, mutagenicity, and sterility.

"Substance", any chemical substance or mixture.

"Toxic effects warning list", a list of substances with toxic effects established by section four.

"Violation". refers to each instance in which a person is exposed to a listed substance absent a required warning.

"Warning", a communication to potential purchasers and users of consumer products, which need not be provided separately to each affected individual and may be provided by general methods such as labels on products, notices posted in stores, and the like, provided that the warning accomplished is clear and reasonable. In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing section three shall to the extent practicable place the obligation to provide any warning materials on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical listed under section four into the consumer product in question. The warning shall disclose the name of any listed substance(s) triggering the warning requirement and disclose the potential health risks associated with the substance(s).

Section 3. Warning Requirements for Products.

No person in the course of doing business shall expose any individual to a substance known to the department to cause cancer, reproductive toxicity, developmental toxicity, or neurotoxicity, through a consumer product, without first providing a clear and reasonable warning except as provided in section five.

Rules and regulations implementing this section shall to the extent practicable place the obligation to provide labels or other warnings on the producer or packager, except where a retail or wholesale seller is responsible for introducing into a product a substance subject to this section.

Section 4. The Toxic Effects Warning List.

(a) The department of public health shall establish on or before September first, nineteen hundred and ninety-eight, a toxic effects warning list which shall include those substances known to the department to be carcinogens, reproductive toxins, developmental toxins, and neurotoxins.

The list shall include, but not be limited to, those substances designated as carcinogens, neurotoxins, teratogens, mutagens, and extraordinarily hazardous substances on the Massachusetts substance list promulgated pursuant to section four of chapter one hundred and eleven F.

(b) The department shall cause the toxic effects warning list to be revised in light of additional knowledge and to be republished at least once per year.

(c) A substance is known to the department to cause cancer, reproductive

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toxicity, developmental toxicity, or neurotoxicity if:

(1) in the opinion of the department, the substance has been shown through scientifically valid testing or other valid scientific evidence, according to generally accepted principles, to cause cancer, reproductive toxicity, developmental toxicity, or neurotoxicity; or

(2) an agency of the state or federal government has formally required it to be labeled or identified as a substance that causes cancer, reproductive toxicity, developmental toxicity, or neurotoxicity; or

(3) a body considered to be authoritative by the department has formally identified it as causing cancer, reproductive toxicity, developmental toxicity, or neurotoxicity.

Section 5. Exemptions from Warning Requirement.

No warning requirement established by section three shall apply to:

(a) an exposure for which federal law governs warnings in a manner that pre-empts state authority; or

(b) an exposure that takes place less than twelve months subsequent to the listing of the substance in question on the toxic effects warning list; or

(c) an exposure which results solely from a naturally occurring substance in the product; or

(d) an exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question. In any action brought to enforce section five, the burden of showing that an exposure meets the criteria of this section shall be on the defendant.

Section 6. Duties of State Agencies.

(a) The department may in its discretion adopt and modify regulations, rules, standards, and permits as it deems necessary to implement this chapter and further its purposes. The department shall seek to prevent and minimize frivolous, misleading or inadequate warnings through regulations as necessary. The department, or the department of environmental protection if so designated by the governor, may upon request or at its own initiative determine levels below which exposures to a substance would satisfy section five. Said department may assess reasonable charges to recover its costs in determining such levels.

(b) The department may establish a scientific advisory committee to advise it concerning the department's duties under sections four and five of this chapter, or may designate a committee already established with similar composition and purpose to advise it concerning its duties under section four. The members of the committee shall serve without compensation. No more than one-fourth of the committee shall consist of industry representatives or individuals compensated by persons responsible for satisfying the requirements of section three. No less than one-fourth of the committee shall consist of nominees of public health, consumer advocacy, or environmental organizations.

Section 7. Penalties and Enforcement.

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(a) Any person violating the provisions of this chapter may be enjoined in the superior court for the jurisdiction in which such violation is occurring.

(b) Any person who violates any provision of this chapter shall be subject to a civil penalty not to exceed two thousand, five hundred dollars per unit of product for each violation in addition to any other penalty established by law. Such civil penalties may be assessed and recovered in a civil action brought in the superior court for the jurisdiction in which such violation has occurred.

(c) Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice in writing of the violation which is the subject of the action to the attorney general and to the alleged violator, and (2) the attorney general has not commenced and is not diligently pursuing an action against such violation. A court may award costs of litigation, including reasonable attorney and expert witness fees, to any party that advances the purposes of this statute through an action that it brings pursuant to this paragraph.

(d) Action pursuant to this section may be brought by the attorney general. If the attorney general brings an enforcement action pursuant to the written notice described in paragraph (c), the noticing party shall be permitted to intervene in the action on such terms as the court finds appropriate.

Section 8. Nothing in this chapter shall diminish any legal obligation otherwise required at common law or by statute or regulation, and nothing in this chapter shall create or enlarge any defense in any action to enforce such legal obligation. Penalties and sanctions imposed under this chapter shall be in addition to any penalties and sanctions otherwise prescribed by law.

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*** THIS SECTION IS CURRENT THROUGH CH. 443, 12/20/96 ***

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE XVI. PUBLIC HEALTH
CHAPTER 111F. Hazardous Substances Disclosure by Employers

Mass. Ann. Laws ch. 111F, § 4 (1996)

§ 4. Massachusetts Substance List; Contents and Update; Emergency Amendments; Toxic or Hazardous Substances; Notice, Hearings, and Appeals; Dissemination of Information.

(a) For the purposes of this chapter, the commissioner of DPH shall establish the Massachusetts substance list and make said list available to manufacturers, employers, municipal coordinators, and the commissioners of DOL and DEP. Substances on the list may be designated by their chemical name or common name(s) , and CAS number. Only those substances specifically enumerated on the list shall be subject to the provisions of this chapter, and no articles as defined in section one shall be included on the list. The commissioner of DPH shall prepare and amend the list according to the following procedures, and shall promulgate said list pursuant to the rulemaking provisions of chapter thirty A on an annual basis. The annual list shall become effective ninety days after its promulgation. In the case of substances which are extraordinarily hazardous and a threat to public health, the commissioner of DPH may promulgate emergency amendments to the list according to the laws of the commonwealth, provided that appropriate procedures for amending the list, as specified in this section, are followed. 1. Environmental Protection Agency Restricted Use Pesticides--40 CFR 162.30 2. International Agency for Research on Cancer (Sublist: "Substances found to have at least sufficient evidence of carcinogenicity in animals") 3. National Toxicology Program List of chemicals published in the bfAnnual Report on bfCarcinogens. 4. Occupational Safety and Health Administration Toxic and Hazardous Substances--29 CFR 1910, Subpart Z 5. National Institute for Occupational Safety and Health/Occupational Safety and Health Administration bfOccupational Health Guidelines for Chemical Hazards 6. American Conference of Governmental Industrial Hygienists bfThreshold Limit Value for Chemical Substances and Physical bfagents in the Workplace 7. National Fire Protection Association Hazardous Chemicals Data (NFPA 49) 8. National Fire Protection Association Fire Hazard Properties of Flammable Liquids, Gases, Volatile Solids (NFPA 325 M) (All items rated II through IV as health hazards or III through IV as flammability or reactivity hazards.) 9. Environmental Protection Agency Carcinogen Assessment Group's List of Carcinogens 10. National Cancer Institute (Substances that meet the NTP criteria for significant carcinogenic effect.)

(b) The list shall consist initially of all chemical substances enumerated in any of the following designated source lists, exclusive of generic categories:

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(c) The commissioner, in promulgating the Massachusetts substance list and its amendments shall designate on said list any substance which is a

carcinogen, mutagen, teratogen, or neurotoxin, based on a preponderance of substantial and valid scientific evidence.

(d) For the purposes of this chapter, a toxic or hazardous substance is present in any mixture if it is one per cent or more of the mixture or two per cent if the toxic or hazardous substance exists as an impurity in the mixture; provided, however, that the commissioner of DPH may, by regulation, raise the concentration requirement for a toxic or hazardous substance which he or she finds is not toxic or hazardous at the threshold levels; and may lower the concentration requirement for a toxic or hazardous substance including carcinogens, mutagens, teratogens, and neurotoxins for which there is valid and substantial scientific evidence that the substance is extraordinarily hazardous.

The manufacturer of a toxic or hazardous substance shall notify the commissioner of DPH of any valid evidence which indicates either: that the concentration requirement for a toxic or hazardous substance is higher than what is necessary to protect employees who work with, or may be exposed to, the substance; or that the concentration levels should be lowered because there is valid and substantial evidence that the substance is extraordinarily hazardous.

The provisions of this chapter shall not apply to impurities which develop as intermediate materials during chemical processing but are not present in the final mixture, and to which employee or community resident exposure is unlikely.

(e) The commissioner of DPH shall amend the Massachusetts Substance List by adding, in place of the generic categories excluded pursuant to subsection (b) of this section, those specific toxic or hazardous substances which fall within said generic categories and which, in his judgment, should be subjected to the provisions of this act. Provided that such amendment shall be made only after opportunity has been provided for public comment and hearing pursuant to the rulemaking provisions of chapter thirty A and upon the commissioner's finding that according to the preponderance of the evidence, substantial and valid scientific evidence exists that any substances added pursuant to this subsection may result in an acute or chronic risk to human health or safety.

(f) Any substance added to or deleted from the source lists designated in subsection (b) of this section by the agency responsible for preparing and amending said list shall be added to, or deleted from, the Massachusetts substance list as part of its annual amendment by the commissioner of DPH.

(g) Further amendments to the Massachusetts substance list may be established by the commissioner of DPH, pursuant to the following process:

The commissioner shall publish a notice of intent to add a substance to the Massachusetts substance list. This notice shall identify the proposed substance and shall inform interested persons of their right to request a proceeding pursuant to this section. Any person showing that he may be substantially and specifically affected by the proposed addition to the substance list may file a request for such hearing provided that such request is filed in writing with the commissioner within thirty days of the date that the notice was published.

Upon receipt of a request for a hearing, the commissioner shall set a hearing date. Reasonable notice of the hearing shall be afforded all persons requesting a hearing and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them

reasonable opportunity to prepare evidence and argument.

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The commissioner shall allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose, as the agency may order.

Unless otherwise provided by law, the commissioner, or his hearing officer, need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The commissioner may exclude unduly repetitious evidence.

Every party shall have the right to call and examine witnesses, to introduce exhibits, and to submit rebuttal evidence. Cross-examination shall not be allowed.

All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

The commissioner shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the commissioner may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

A decision to place a substance on the list pursuant to this subsection, must be based upon the commissioner's finding that according to the preponderance of the evidence, substantial and valid scientific evidence exists that the substance poses an acute or chronic risk to human health or safety. The commissioner's decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision. Parties to the proceeding shall be notified in person or by mail of the decision, of their right to appeal the decision to the Superior court and the time limits on their right to appeal. A copy of the decision and of the statement of reasons shall be delivered or mailed upon request to each party and to his attorney of record.

Any person aggrieved by the decision of the commissioner may appeal such decision to the Superior court for Suffolk county. The standards for review shall be in accordance with the standards provided in section fourteen of chapter thirty A.

(h) Substances not present on the Massachusetts substance list established pursuant to this section shall not be subject to the provisions of this chapter.

(i) The commissioner of DPH shall be responsible for the dissemination of all information available on the nature and hazards of toxic or hazardous substances, from the chemical substances information networks of the federal

environmental protection agency, the health hazard evaluation program of the national institute of occupational safety and health and any and all other information sources. DPH shall promptly assist employers, employees, community residents, municipal coordinators and state personnel with inquiries concerning the toxic or hazardous nature of such substances. DPH shall assist DLI in its responsibilities with respect to preparing or obtaining MSDS information pursuant to section nine (b) .

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STATE OF CONNECTICUT

Raised Bill No. 389 Page 1

Referred to Committee on GENERAL LAW

LCO No. 1231

Introduced by (GL)

General Assembly
February Session, A.D., 1998

AN ACT CONCERNING CITIZENS' RIGHT TO KNOW.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) As used in sections 1 to 7, inclusive, of this act:

(1) "Adequate margin of safety" means one thousand times the no observed adverse effect level unless (A) the substance is an essential human nutrient and the commissioner has determined the highest numerical multiple that is not likely to inhibit human consumption of the substance in essential quantities, in which case the commissioner may, by regulation adopted under section 5 of this act, set that multiple as the margin, or (B) the commissioner has determined that potential human exposures to the substance are well characterized, that adequate dose response data in humans exist for the chemical for the effect in question, and that as a result a numerical multiple lower than one thousand will fully protect the health of the public consistent with the purposes of sections 1 to 7, inclusive, of this act, in which case the commissioner may, by such regulation, set that multiple as the margin for that effect and that substance, provided, in no event shall the multiple be less than ten nor shall the margin be less than the highest margin that has been determined for the same effect of the same chemical under any federal law;

(2) "Commissioner" means the Commissioner of Public Health;

(3) "Level in question" means the quantity of substance to which an individual is exposed during a single twenty-four-hour day during which the individual comes in contact with the substance, which shall constitute the rate of exposure per day for purposes of calculating lifetime exposure;

(4) "Naturally occurring substance" means an inherent constituent of a food in its natural state, or a substance present in a food solely as a result of absorption or accumulation of the substance which is naturally present in the environment in which the food is raised, grown, or obtained, provided (A) a substance is a naturally occurring substance only to the extent that the substance did not result from any known human activity, and (B) where a substance can occur as a contaminant in a food, the substance is a naturally occurring substance only to the extent that it was not avoidable by good manufacturing practices including good agricultural practices;

(5) "No significant risk" means (A) for substances known to the commissioner to cause cancer, a reasonable likelihood that no harm will result from exposure, and (B) for substances known to the commissioner to cause reproductive toxicity, no observable adverse effect assuming an adequate margin of safety;

(6) "Person" means an individual, partnership, firm, association, company, trust, corporation, association, or other legal entity of any kind;

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(7) "Person in the course of doing business" means any person employing more than ten employees in his business, but does not include any federal, state or municipal agency or quasi-public agency;

(8) "Reproductive toxicity" means toxicity which causes reproductive or developmental disorders, including, but not limited to, birth defects, teratogenicity, fetal toxicity, developmental toxicity, mutagenicity, and sterility;

(9) "Substance" means any chemical substance or chemical mixture; and

(10) "Warning" means a communication to potential purchasers and users of consumer products, which need not be provided separately to each affected individual and may be provided by general publication including, but not limited to, labels on products, posting of notices and placing notices in the news media.

Sec. 2. (NEW) (a) No person in the course of doing business shall knowingly and intentionally expose any individual to a substance listed under section 3 of this act without first providing a clear and reasonable warning, except as provided in section 5 of this act.

(b) No warning provided by placing notices in the news media shall be considered clear and reasonable for purposes of subsection (a) of this section unless (1) regulations defining the circumstances under which such notices shall constitute clear and reasonable warning for purposes of sections 1 to 7, inclusive, of this act have been adopted by the commissioner under section 5 of this act and (2) such regulations are fully complied with. In order to minimize the burden on retail sellers of foods and other consumer products, any regulations adopted by the commissioner to implement this section shall, to the extent practicable, place the obligation to provide any labels or other warning materials on the producer or packager rather than on the retail seller, except where the retail seller is responsible for introducing a substance listed under section 3 of this act into any such food or other consumer product.

Sec. 3. (NEW) (a) On or before June 1, 1999, the commissioner shall, after notice and opportunity for public comment, publish a list of those substances known to the commissioner to cause cancer or reproductive toxicity. The commissioner shall cause such list to be revised and republished in light of additional knowledge by June 1 at least every other year thereafter. Notwithstanding the provisions of subdivision (13) of section 4-166 of the general statutes, such list shall not be considered a regulation for purposes of chapter 54 of the general statutes.

(b) A substance is known to the commissioner to cause cancer or reproductive toxicity for purposes of subsection (a) of this section if: (1) In the opinion of the commissioner, the substance has been shown through scientifically valid testing or other valid scientific evidence, according to generally accepted principles, to cause cancer or reproductive toxicity; (2) an agency of this state or the federal government has formally required it to be labeled or identified as a substance that causes cancer or reproductive toxicity; or (3) a private or public entity considered to be authoritative by the commissioner has identified it as causing cancer or reproductive toxicity.

Sec. 4. (NEW) No warning requirement pursuant to section 2 of this act shall apply to:

(1) An exposure for which federal law governs warnings in a manner that preempts state authority;

(2) An exposure that takes place less than twelve months subsequent to the listing of the substance pursuant to section 3 of this act;

(3) An exposure which results from a naturally occurring

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substance in the product;

(4) An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question; or

(5) An exposure which is below any level established by the commissioner pursuant to section 5 of this act.

Sec. 5. (NEW) (a) The commissioner may adopt regulations, in accordance with chapter 54 of the general statutes, to carry out the provisions of sections 1 to 7, inclusive, of this act. The commissioner may seek to prevent and minimize frivolous, misleading or inadequate warnings through such regulations as the commissioner deems necessary. The failure of the commissioner to adopt such regulations shall not affect any liability under said sections. The commissioner may determine by any such regulation the levels of exposure for a listed substance below which exposures to that substance would qualify for exemption under subdivisions (4) and (5) of section 4 of this act. If requested to adopt any such regulation, the commissioner may assess the person making such request reasonable charges to recover the commissioner's costs in determining such levels. In determining such levels, the commissioner may adopt levels which have been adopted or determined for the same purpose by a private or public entity, including a federal or state agency, considered to be authoritative by the commissioner.

(b) The commissioner may establish a scientific advisory committee to assist him in carrying out his duties under sections 1 to 7, inclusive, of this act. The members of the advisory committee shall serve without compensation, but may receive reimbursement for actual reasonable expenses. Not more than one-fourth of the committee shall consist of representatives of businesses which manufacture, distribute or sell substances listed under section 3 of this act or products which contain such substances and are subject to the warning requirements of section 2 of this act, or of individuals compensated by such businesses. Not less than one-fourth of the committee shall consist of representatives of public health, consumer advocacy or environmental nonprofit organizations.

Sec. 6. (NEW) (a) Any person who violates any provision of sections 1 to 7, inclusive, of this act shall be subject to a civil penalty not to exceed two thousand five hundred dollars per day for each violation. Such civil penalty may be assessed and recovered in a civil action brought by the Attorney General in the judicial district of Hartford-New Britain.

(b) Any person may bring an action to enforce the provisions of sections 1 to 7, inclusive, of this act if (1) the action is commenced more than sixty days after the person has given notice in writing of the violation which is the subject of the action to the Attorney General and to the alleged violator, and (2) the Attorney General has not commenced and is not diligently pursuing an action against such violator. The court shall award costs of litigation, including reasonable attorneys' fees and expert witness fees, to any prevailing plaintiff. If the Attorney General brings an enforcement action pursuant to the written notice described in this subsection, the person providing such notice shall be permitted to intervene in the action on such terms as the court finds appropriate.

(c) In any action brought under this section, the burden of showing that an exposure is exempt pursuant to section 4 of this act shall be on the defendant.

Sec. 7. (NEW) Nothing in sections 1 to 7, inclusive, of this act shall diminish any legal obligation otherwise required at common law or by statute or regulation, and nothing in said sections shall create or enlarge any defense in any action to enforce such legal obligation. Penalties and sanctions imposed

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under sections 1 to 7, inclusive, of this act shall be in addition to any penalties and sanctions otherwise prescribed by law.

STATEMENT OF PURPOSE: To require businesses which cause known exposure to chemicals known to be harmful to humans to provide notice of the exposure to the persons exposed.

[Proposed deletions are enclosed in brackets. Proposed additions are all capitalized or underlined where appropriate, except that when the entire text of a bill or resolution or a section thereof is new, it is not capitalized or underlined.]

TOP

Received Jun 24 01:15PM (14:06) on WINSTON & line [6] for 'MLEMOV' WORKSRV1 printed FAX3590FC134780 on Jun 24 01:40PM 1998 * Pg
JUN 24 '98 13:09 STATE/FEDERAL P.14
02/20/98 13:28 GROCERY MANUFACTURER->Nat'l Paint & Coatings Assn/Lloyd, David 003
02/20/98 16:59 ☎202 337 4508 GeMsA 004/007

Connecticut SB 389 Talking Points

Duplicates Existing Laws and Regulations with No Added Public Health Benefit

The provisions of the bill duplicate existing food safety provisions under both the federal and Connecticut law. Existing federal laws provide a strong and reliable safety net to protect the public health against unsafe food and consumer products.

Duplication of federal safety regulations waste limited state resource, and misappropriate funds that could be allocated to programs with real public benefit, such as education systems, law enforcement and criminal prosecution.

This bill would require warnings determined to be unnecessary by the U.S. Food and Drug Administration and other federal agencies. This would disrupt interstate food distribution, mislead consumers and ultimately harm public health.

The bill would add burdensome new requirements, but will provide Connecticut citizens with no additional useful information and would not enhance personal or public health protection.

Potential Consumer Confusion

The bill is an example of how state-by-state regulations can undermine federal assurances of product safety and lead to consumer confusion.

The plethora of unnecessary warnings required by this bill would make it difficult for consumers to distinguish between real hazards and insignificant hazards.

Some experts feel that consumers have seen so many government warnings that they are inured to them ("Danger: Warning Labels May Backfire," WSJ, April 28. 1997).

A Bill Based on Bad Science

The act is based on the faulty premise that there is a significant public health problem related to toxic components in food and consumer products. There is no creditable evidence to support such a premise.

Sound public health programs not only provide accurate information on risks, but also provide appropriate solutions or alternatives within the current infrastructure. It is a public disservice to provide information on a possible hazard without a means to manage it. This bill address the information side of this equation, but offers no management solutions, as the threats are too insignificant to manage.

Received Jul 01 12:46PM (01:03) on WINSTON & line (6) for 'MLEMOV' WORKSRV2 printed FAX359A2FAC4DF2 on Jul 01 12:47PM 1998 * Pg 2.
JUL 01 '98 12:45 STATE/FEDERAL&H&ASSOCIATES 614 221 2955 P.2

OHIO

BALLOT LANGUAGE
PROPOSED LAW
STATE ISSUE #5

To enact Section 3752.01 through 3752.99 of the Revised Code.

The proposed law would:

(1) Require businesses to provide labels and/or other warnings in conjunction with the use in consumer products or the environmental release of chemical substances determined on the basis of tests or other evidence to increase the normal risk of cancer or reproductive defects in animals or humans.

(2) Create a new tax on business that release or transfer toxic chemicals of one cent per pound per year on their emissions to be paid into a special fund. That tax and civil fines would pay for implementation, administration and enforcement of the law and would award grants to groups demonstrating a need to study environmental exposures to chemical substances. State and local government officials administer the program. State and local governments and private businesses with nine or fewer employees are exempt from the law.

(3) Provide for criminal penalties and civil fines for violations of the law. Civil penalties of up to $2,500 a day per exposure, and criminal penalties of 2-4 years in jail and up to a $25,000 fine may be imposed. Attorneys fees may be awarded. Persons subject to the law must conduct inventories of chemicals and detailed area assessments under specified circumstances.

If adopted, this law would be effective on December 2, 1992.

(Proposed by initiative petition)
A majority yes vote is necessary for passage

135A

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JUL 01 '98 12:05 STATE/FEDERAL P.3

Title PAGE

HI-BILLS - 1997 HI S.B. 2301 (SN)
1997 Hawaii Senate Bill No. 2301, Hawaii 19th State Legislature (FULL TEXT - STATE NET)

HAWAII BILL TEXT

THE SENATE S.B. NO. 2301
NINETEENTH LEGISLATURE, 1998
STATE OF HAWAII

VERSION: Introduced
January 26, 1998
Levin

A BILL FOR AN ACT

RELATING TO SAFE DRINKING WATER AND TOXIC ENFORCEMENT.

TEXT:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER SAFE DRINKING WATER AND TOXIC ENFORCEMENT

Section -1 Definitions. For the purposes of this chapter:

"Hazardous waste" has the same meaning as defined in chapter 342J.

"Person" means an individual, trust, firm, joint stock company, corporation, company, partnership, limited liability company, and association.

"Person in the course of doing business" does not include:

(1) Any person employing fewer than ten employees in the person's business;

(2) Any county or any department or agency thereof or the State or any department or agency thereof or the federal government or any department or agency thereof; or

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JUL 01 '98 12:26 STATE/FEDERAL P.4

HI-BILLS - 1997 HI S.B. 2301 (SN)

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

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(1) Any person employing fewer than ten employees in the person's business;

(2) Any county or any department or agency thereof or the State or any department or agency thereof or the federal government or any department or agency thereof; or

[redacted]

HI-BILLS - 1997 HI S.B. 2301 (SN)

(3) Any entity in its operation of a public water system as defined in section 340E-1.

"Significant amount" means any detectable amount except an amount that would meet the exemption test in section -7(3) if an individual were exposed to such an amount in drinking water.

"Source of drinking water" means either a present source of drinking water or water that is identified or designated in a plan adopted by a county board of water supply as being suitable for domestic or municipal uses.

"Threaten to violate" means to create a condition in which there is a substantial probability that a violation will occur.

Section -2 Prohibition on contaminating drinking water with chemicals known to cause cancer or reproductive toxicity. No person in the course of doing business shall knowingly discharge or release a chemical known to the State to cause cancer or reproductive toxicity into water or onto or into land where the chemical passes or probably will pass into any source of drinking water, except as provided in section -6.

[redacted]

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JUL 01 '98 12:07 STATE/FEDERAL P.5

Section -3 Required warning before exposure to chemicals known to cause cancer or reproductive toxicity. No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the State to cause cancer or reproductive toxicity without first giving clear and reasonable warning to the individual, except as provided in section -7.

"Warning" within the meaning of this section need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided the warning accomplished is clear and reasonable. To minimize the burden on retail sellers of consumer products, including foods, rules implementing this section, to the extent practicable, shall place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the State to cause cancer or reproductive toxicity into the consumer product in question.

Section -4 Enforcement. (a) Any person who violates or threatens to violate section -2 or section -3 may be enjoined in any court of competent jurisdiction.

(b) Any person who violates section -2 or section -3 shall be liable for a civil penalty not to exceed $2,500 per day for each violation in addition to any other penalty established by law. The civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.

(c) Actions pursuant to this section may be brought by the attorney general in the name of the people of the State or by any prosecuting attorney of a county, or as provided in subsection (d).

(d) Actions pursuant to this section may be brought by any person in the public interest if:

(1) The action is commenced more than sixty days after the person has given notice of the violation, which is the subject of the action, to the attorney general and the prosecuting attorney in whose county the violation is alleged to occur and to the alleged violator; and

(2) Neither the attorney general nor any prosecuting attorney has commenced and is diligently prosecuting an action against the violation.

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HI-BILLS - 1997 HI S.B. 2301 (SN)

Section -5 List of chemicals known to cause cancer or reproductive toxicity. (a) After January 1, 2002, the governor shall cause to be published a list of those chemicals known to the State to cause cancer or reproductive toxicity, and shall cause the list to be revised and republished in light of additional knowledge at least once per year thereafter.

(b) A chemical is known to the State to cause cancer or reproductive toxicity if in the opinion of the State's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by the experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.

(c) After December 31, 2002, and at least once per year thereafter, the governor shall cause to be published a separate list of those chemicals that at the time of publication may be required by state or federal law to have been tested for the potential to cause cancer or reproductive toxicity but that the State's qualified experts have not found to have been adequately tested as required.

HI-BILLS - 1997 HI S.B. 2301 (SN)

(d) The governor shall identify and consult with the State's qualified experts as necessary to carry out the governor's duties under this section.

(e) In carrying out the duties of the governor under this section, the governor and the governor's designates shall not be considered to be adopting a rule within the meaning of chapter 91.

Section -6 Exemptions from discharge prohibition. (a) Section -2 shall not apply to any discharge or release that takes place less than twenty months subsequent to the listing of the chemical in question on the list required to be published under section -5(a).

(b) Section -2 shall not apply to any discharge or release that meets both of the following criteria:

(1) The discharge or release will not cause any significant amount of the discharged or released chemical to enter any source of drinking water; and

(2) The discharge or release is in conformity with all other laws and with

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every applicable regulation, permit, requirement, and order. In any action brought to enforce section -2, the burden of showing that a discharge or release meets the criteria of this subsection shall be on the defendant.

Section -7 Exemptions from warning requirement. Section -3 shall not apply to any or the following exposures:

(1) An exposure for which federal law governs warning in a manner that preempts state authority;

(2) An exposure that takes place less than twelve months subsequent to the listing of the chemical in question on the list required to be published under section -5(a);

(3) An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the State to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand times the level in question for substances known to the State to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards that form the scientific

basis for the listing of the chemical pursuant to section -5(a). In any action brought to enforce section -3, the burden of showing that an exposure meets the criteria of this paragraph shall be on the defendant.

Section -8 Implementation. The governor shall designate a lead agency and such other agencies as may be required to implement this chapter, including this section. Each agency so designated may adopt and modify rules, standards, and permits as necessary to conform with and implement this chapter and to further its purposes.

Section -9 Preservation of existing rights, obligations, and penalties. Nothing in this chapter shall alter or diminish any legal obligation otherwise required in common law or by statute or rule, and nothing in this chapter shall create or enlarge any defense in any action to enforce the legal obligation. Penalties and sanctions imposed under this chapter shall be in addition to any penalties or sanctions otherwise prescribed by law.

Section -10 Duties and responsibilities of designated government employees. (a) Any designated government employee who obtains information in the course of the employee's official duties revealing the illegal discharge or threatened illegal discharge of a hazardous waste within the geographical

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area of the employee's jurisdiction and who knows that the discharge or threatened discharge is likely to cause substantial injury to the public health or safety, within seventy-two hours, shall disclose the information to the attorney general, respective county prosecuting attorney, and director of health. No disclosure of information is required under this subsection when otherwise prohibited by law, or when law enforcement personnel have determined that the disclosure would adversely affect an ongoing criminal investigation, or when the information is already general public knowledge within the locality affected by the discharge or threatened discharge.

(b) Any designated government employee who knowingly and intentionally fails to disclose information required to be disclosed under subsection (a), upon conviction, shall be punished by imprisonment for not more than three years. The court may also impose upon the person a fine of not less than $5,000 or more than $25,000. A felony conviction for violation of this section shall require forfeiture of government employment within thirty days of conviction.

(c) If the director of health receives information pursuant to subsection (a), the director of health shall take appropriate action to notify the local news media and shall make the information available to the public without

delay.

Section -11 Penalties; disposition of fines. (a) All civil and criminal penalties collected pursuant to this chapter shall be apportioned in the following manner:

(1) Fifty per cent shall be deposited in the emergency response revolving fund established in section 128D-2;

(2) Twenty-five per cent shall be paid to the office of the respective county prosecuting attorney or attorney general, whichever office brought the action, or in the case of an action brought by a person under section -4(d) to the person; and

(3) Twenty-five per cent shall be paid to the department of health and used to fund the activity of the director of health to enforce this chapter. If investigation by a county police department or other county agency led to the bringing of the action, the director of health shall pay a total of forty per cent of the director's portion under this subsection to the investigating agency to be used for the same purpose. If more than one agency is eligible for payment under this paragraph, division of payment among the eligible

agencies shall be in the discretion of the director of health.

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[redacted]

(b) If a reward is paid to a person pursuant to subsection (a)(2), the amount of the reward shall be deducted from the amount of the civil penalty before the amount is apportioned pursuant to subsection (a)."

SECTION 2. Nothing in this Act shall be construed as a mandate to the counties to establish a new program or increase the level of service under an existing program.

SECTION 3. This Act shall take effect upon its approval.
1997 HI S.B. 2301 (SN)
END OF DOCUMENT

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A7

State Right-To-Know Regulations

State of New Jersey Labeling Requirements

The New Jersey right-to-know law (NJSA 34:5A-1 et seq.) (NJAC 8:59-5.1 and 5.2) requires covered employers within the state to label:

A. All containers used, stored or manufactured in New Jersey

B. With the chemical name and Chemical Abstracts Service CAS number,

C. Of the five most predominant substances plus any hazardous substances present in the product.

It is required that the five most predominant substances, whether hazardous or not, present at 1.0 percent or greater, be stated. In addition, any other hazardous substances present at a level of 1.0 percent must be listed and any carcinogens, mutagens or teratogens present at a level of 0.1 percent must be listed. There is no required order in listing and the amount present does not need to be listed.

The burden falls on employers in the state who are in the specified SIC codes. SIC codes are listed in the statute, and paint manufacturers are included. Even if you do not have a facility in New Jersey, you may wish to comply to assist customers who do.

There are product exemptions which are the same as those exempted under regulations of the Occupational Safety and Health Administration (OSHA), such as pesticides covered by FIFRA, direct food additives or drugs covered by the Food and Drug Administration (FDA), and tobacco articles. Retail shops, including paint stores, are exempt. Paint sold in these stores to consumers or paint contractors may be exempt. However, if a paint contractor uses such paint at a covered facility, which includes state institutions such as schools, that paint must be labeled.

In addition to containers, labeling is required for in-plant pipelines, storage tanks, waste water treatment tanks, vents, process lines, etc. An exception is process containers that are changed at least once per shift or that contain ten gallons or less of a substance transferred from a labeled container. If you have facilities in New Jersey and wish to claim a trade secret, you must assign a trade secret registry number (TSR) and notify the state of this action. At that time, you must give justification for your claim and provide the trade secret registry number to the New Jersey Department of Health. You may use a generic name on the label and list the trade secret registry number in place of the CAS number. Covered New Jersey employers cannot claim trade secrets for carcinogens, mutagens, or teratogens present at 0.1 percent or greater, or flammables, reactives and corrosives that are on the New Jersey hazardous substance list.

New Jersey employers must be diligent, by making a "good faith effort" to obtain the needed labeling information from out-of-state suppliers who are not covered by the law. New Jersey considers a good faith effort to be two requests by letter and/or documented phone call to your out-of-state supplier to obtain the information. If you have made a good faith effort but cannot find out all the New Jersey information, you should state on your label the appropriate components and CAS numbers you do know and then indicate "Contents Partially Unknown." If you cannot determine any of the components present, your label should state "Contents Unknown."

The New Jersey hazardous substance list is different from other lists and is subject to change. For that reason, it is not practical to be published in this guide. A hard copy or computer disk may be obtained by contacting:

Right-To-Know Project
Division of Occupational and Environmental Health
Department of Health

CN368
Trenton, NJ 08625
(609) 984-2202

State of New Jersey Labeling Procedures

New Jersey requires declaration of all hazardous substances and nonhazardous substances subject to content criteria.

A step-by-step procedure for preparation of New Jersey labels would include the following. There is no special state material safety data sheet (MSDS) requirement.

A. Classify ingredients into the three categories:

   1) Nonhazardous substances
   2) Hazardous substances
   3) Carcinogens, mutagens or teratogens

   It may be helpful to prepare a chart of all current raw materials, listing the three New Jersey categories.

B. Prepare chemical information, listing ingredients in the three categories subject to the following content percentages:

   1) Nonhazardous substances, top five
   2) Hazardous substances, 1 percent or above
   3) Carcinogens, mutagens or teratogens, 0.1 percent or above

C. The label must disclose the following information:

   1) The top five ingredients (hazardous or nonhazardous)
   2) Hazardous substances, 1 percent or more
   3) Carcinogens, mutagens or teratogens, 0.1 percent or more

   Ingredients must be identified by chemical name or common name and CAS number, or identified as trade secrets if protected subject to the provisions of the regulation.

F

UGL®

SAFE GRIP NON-FLAMMABLE

CONTACT CEMENT

FAST DRYING · BONDS INSTANTLY

WARNING!
HARMFUL OR FATAL IF SWALLOWED
VAPOR HARMFUL
SKIN AND EYE IRRITANT
Read Other Cautions and
HEALTH HAZARD INFORMATION on Side Panel

Net: 3 fl. oz. (88.7 mL)

DIRECTIONS

REPARATION: Surfaces to be bonded must be clean, dry and free from oil, wax, paint, varnish or other finishes. SAFE GRIP Cement, surfaces to be bonded and air temperature should be 50°F. or warmer.

APPLICATION: Apply in one direction only, not back and forth. A uniform, glossy film shows surface has been covered properly. One coat is generally sufficient except on extremely porous surfaces.

ASSEMBLY: Contact of parts to be bonded should be made within 30-45 minutes after applying cement.

CLEANING: Naphtha or mineral spirits are recommended for removal of SAFE GRIP from equipment and surfaces on which it has been spilled.

IMPORTANT: Solvents may cause softening of some plastics such as polystyrene. Before using, try SAFE GRIP on scrap or inconspicuous place to test compatibility with surfaces.

UNITED GILSONITE LABORATORIES

Scranton, PA 18501 • Jacksonville, IL • Visalia, CA

ITEM NO. 20 224 902 LR [illegible]

TAINS METHYLENE CHLORIDE, 1 1 1-TRICHLOROETHANE, ND TOLUENE

ylene chloride has been shown use cancer in certain labora- nimals. Risk to your health nds on level and duration of sure.

his product outdoors, if pos- If you must use it indoors, all windows and doors or use means to assure fresh air ment during application and g. If properly used, a respirator offer additional protection. in professional advice before g. A dust mask does not pro- protection against vapors. Do use in basement or other un- llated area.

n container carefully and close each use. Clean up rags, papers, was promptly. Allow solvent vaporate, then dispose of in f container.

p away from heat, sparks and me. Avoid contact with skin or s.

ST AID: If swallowed, immedi- ly give 1 or 2 glasses of water

nt'd. on Other Side Panel.

Cont'd: From Other Side Panel.

nd call a Physician, Hospital Em
ency Room or Poison Contr
Center. In case of eye contact,
mediately flush with water and
Physician. For skin contact, wa
thoroughly

Contact with flame or hot surf
may produce toxic gases.

Use With Adequate Ventilation.

NOTICE: Reports have
repeated and prolonged
tional overexposure to
with permanent brain and
system damage. Intentional
by deliberately concentrat
inhaling the contents may be
ful or fatal

KEEP OUT OF REACH OF CHIL

79941 22441

sunnyside

WATER RINSABLE

NEW IMPROVED FORMULA!

brush cleaner

Fast acting formula.
Effective on all paints and varnishes.
Restores dried hardened brushes.

[illegible] FLAMMABLE VAPOR HARMFUL
HARMFUL OR FATAL IF SWALLOWED
SKIN & EYE IRRITANT
[illegible] all cautions [illegible] on this [illegible]
[illegible]

16 FL. OZ. (1 PT.) ■ .473 LITER

Sunnyside Brush Cleaner will restore dried, hardened brushes and is ideal deep cleaning freshly used brushes and rollers. It works well on all types of paints and varnishes. It is a powerful solvent and may damage some inexpensive synthetic brush materials.

For your safety read all directions and cautions before using this product.

Directions: To clean dried, hardened brushes, suspend in a metal can, allowing only the bristles to contact the cleaner. Work the brush enough to allow deep penetration of the cleaner. When the hardened paint begins to soften, a metal comb or wire brush will help remove the dried paint. Repeat process if necessary. When the brush is sufficiently free of paint, rinse in water and wrap in paper to retain shape while drying. To clean wet brushes, simply work the bristles in the cleaner until they are free of paint, then rinse in water and wrap in paper.

Caution: CONTAINS METHYLENE CHLORIDE, TOLUENE, METHYL ETHYL KETONE, PETROLEUM DISTILLATE AND ETHYL ALCOHOL. Keep away from heat, sparks and flame. Concentrated vapors can cause a flash fire. Contact with flame or hot surfaces will produce toxic gases that could be fatal.

Health Note: Contains Methylene Chloride which has been shown to cause cancer in certain laboratory animals. Possible risk to your health depends on level and duration of exposure.

Other Health Hazards: Repeated or prolonged overexposure to solvent vapor or deliberate misuse by concentrating and inhaling may be harmful or fatal. Avoid breathing vapor by providing plenty of fresh air ventilation. Avoid contact with skin or eyes. Do not transfer contents to unlabeled containers. Close container after each use.

First Aid: If swallowed, do not induce vomiting. CALL PHYSICIAN IMMEDIATELY. In case of eye contact, flush thoroughly with water and get medical attention; for skin contact, wash thoroughly. If overcome by vapors, remove to fresh air and get medical attention.

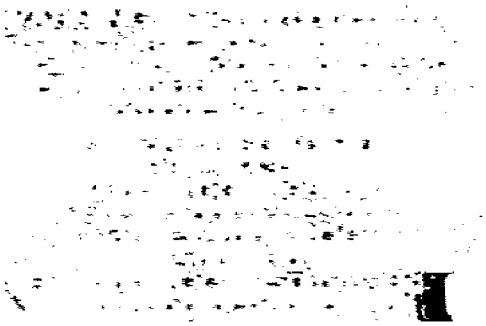
Use only with adequate ventilation.

KEEP OUT OF REACH OF CHILDREN.

0 76542 00052

LIQUID BRUSH CLEANER

Photochemically Reactive



TRU-TEST.

QUALITY PAINTS

Interior/Exterior

HI-Q™ HIGH GLOSS ENAMEL

Dries Faster Lasts Longer

U-47 Toast

IBM No. 340 331

12.0 oz. Net Wt. (340 grams)

DANGER: EXTREMELY FLAMMABLE

CONTENTS UNDER PRESSURE • VAPOR HARMFUL

Read Cautions on Back of Can

NO CFC'S

OUR BEST QUALITY HI-Q™ ALL PURPOSE SPRAY ENAMEL

· Non-toxic when dry · Lead and Mercury free

· Inhibits rust · Fast drying

RECOMMENDED FOR: Wood, metal, furniture, stone, masonry, handcrafts, toys, etc.

DIRECTIONS:

1) Thoroughly clean all grease, oil, dirt, wax and rust scale from surface before painting.
2) New or rusted areas should be primed with metal primer before painting.
3) Shake can until agitator ball begins to rattle and continue to shake for two minutes after. Occassionally shake during use.
4) Hold can 12 to 16 inches from surface to be sprayed and apply several thin coats rather than one heavy coat. **RECOAT WITHIN ONE HOUR.**
5) Surface temperature should be above 50ºF for painting. Do not paint in high winds or excessively high humidity.
6) If nozzle should become clogged, pull sprayhead from container and use a fine wire to clean enamel out of the spray orifice. Also, remove enamel from slit in valve stem. Rinse in solvent. NEVER STICK ANY SHARP OBJECTS INTO OPENING AT TOP OF CAN. After cleaning nozzle, reinsert with gentle twisting motion while holding can away from yourself.
7) After spraying, turn can upside down, depress valve for several seconds. Replace cap after using.

CONTAINS TOLUENE, XYLENE AND ACETONE

Vapors may ignite explosively. Prevent buildup of vapors. Keep from heat, sparks, flame or other heat sources. Do not smoke. Turn off pilot lights, stoves, heaters, electric motors and other sources of ignition during use and until all vapors are gone. Do not puncture or incinerate (burn) container. Exposure to heat or prolonged exposure to sun may cause bursting. Do not expose to heat or store at temperatures above 120ºF.

DISPOSAL: For disposal guidance of unused amount, contact your local household refuse collection service, or your local or state or Government Environmental Control Agency. For additional information, call **1-800-922-0061**

To avoid breathing vapors or spray mist, open windows and doors or use other means to ensure fresh air entry during application and drying. If you experience eye watering, headaches or dizziness, increase fresh air or wear respiratory protection (NIOSH/MSHA TC23C or equivalent) or leave the area. Avoid contact with skin or eyes.

USE WITH ADEQUATE VENTILATION

NOTICE: Reports have associated repeated and prolonged occupational overexposure to solvents with permanent brain and nervous system damage. Intentional misuse by deliberately concentrating and inhaling the contents may be harmful or fatal.

KEEP OUT OF REACH OF CHILDREN.

CONTAINS NO OZONE DEPLETING CHEMICALS

For Emergency Medical Information Call
TOLL FREE 1-800-228-5635 EXT. 017

PAINTING HELP SPOKEN HERE!
If you have a question call us
TOLL FREE 1-800-922-0061

0 42909 34033 7 1

6 DIGIT IBM MANUAL REORDERING NUMBER

7/92

TRU-TEST.
MANUFACTURING COMPANY
291 JANOUS ROAD CARY, IL 60013-2888

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TruBond®

0 78143 46460 7

Rubber Adhesive

FLEXIBLE WATERPROOF RUBBER REPAIR COMPOUND. Makes waterproof repairs on any flexible material. Just apply to worn area and let dry. When used with a patch, TruBond Rubber seals as it bonds. Dries quickly to a semi-transparent, amber color. Repairs rubbers, boots, rainwear, leather bags and shoes, inflatables and tents. Use it whenever you need a flexible, waterproof repair.

DANGER: EXTREMELY FLAMMABLE. VAPORS HARMFUL. DO NOT USE NEAR FIRE OR FLAME. NEW YORK FIRE DEPT. C OF A 2590. CONTAINS TOLUENE AND PETROLEUM DISTILLATES. AVOID PROLONGED BREATHING OF VAPORS. USE WITH ADEQUATE VENTILATION. HARMFUL OR FATAL IF SWALLOWED. IF SWALLOWED, DO NOT INDUCE VOMITING. CALL PHYSICIAN IMMEDIATELY. **KEEP OUT OF REACH OF CHILDREN.**
WARNING: THIS PRODUCT CONTAINS A CHEMICAL KNOWN TO THE STATE OF CALIFORNIA TO CAUSE BIRTH DEFECTS OR OTHER REPRODUCTIVE HARM.

DIRECTIONS:

1. Thoroughly clean and dry the surfaces to be bonded. For best adhesion, roughen surface to be repaired.
2. Pierce nozzle end of tube, removing seal entirely.
3. Always squeeze tube from bottom.
4. Apply to both surfaces and allow to cure for 5 minutes or until tacky. Join surfaces together and allow to dry.
5. Sets in 15 minutes. Item can be handled in 1 hour. Full bond strength in 6 hours.

NOTE: To store, clean cap and tube nozzle. Replace cap securely.

ADHESIVE TYPE	RECOMMENDED FOR BONDING MATERIALS AS SHOWN					KEY ADHESIVE FEATURE		
	Wood	Metal	China & Ceramics	Glass	Hard Plastics	Rubber	High Bond Strength	Fills Gaps	Water Resistant Bond
5-Minute® Epoxy	●	●	●				●	●	
All Other Epoxies	●	●	●				●	●	●
Super Adhesives	●	●	●		●		●	●	●
Hobbyists Cement			●	●					●
Super Glues		●	●			●	●		
Rubber Adhesive Contact Cement						●			●
Silicone Adhesive-Sealant		●		●				●	●
Repair Products	Select product for specific repair problem as indicated by product name.								

● Best Adhesives will not bond to most polyethylene or polypropylene products.

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Rubber Adhesive

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San Francisco County Superior Court
OCT 29 1992
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BY Deputy Clerk

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER TEN

ENVIRONMENTAL DEFENSE FUND, Plaintiff, vs. THOMPSON & FORMBY, INC., Defendant.	NO. 941-282 ORDER DENYING SUMMARY JUDGMENT AND GRANTING SUMMARY ADJUDICATION IN PART AND DENYING SUMMARY ADJUDICATION IN PART

Defendant's motions for Summary Adjudication and Summary Judgment came on regularly at 2:30 p.m. on September 25, 1992, in Department 10 of San Francisco Superior Court, the Honorable William J. Cahill presiding. Defendant and moving party, THOMPSON & FORMBY appeared through Robert L. Kaufman of Haight, Brown & Bonesteel; plaintiff and opposing party, ENVIRONMENTAL DEFENSE FUND appeared through Joseph Sandoval, Jr., of Rogers, Joseph, O'Donnell & Quinn.

The Court, having considered the pleadings, arguments of counsel and all evidence properly before it, hereby DENIES SUMMARY

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JUDGMENT and GRANTS SUMMARY ADJUDICATION IN PART AND DENIES SUMMARY ADJUDICATION IN PART, as follows:

1) The Court denies summary judgment on the issue of a clear and reasonable warning, concluding, as a matter of law, that products containing significant amounts (Health & Saf. Code § 25249.11(c)) of methylene chloride that bear warning labels which are in compliance with the minimum standards of the Federal Hazardous Substances Act, 15 U.S.C. section 1261, et seq., and regulations in support thereof, do not comply with the "clear and reasonable warning" standard of California Health & Safety Code section 25249.6. The Court finds that federally approved language referring to chemicals which have "been shown to cause cancer in certain laboratory animals" does not clearly communicate that methylene chloride is known to the State of California to cause cancer.

2) The Court denies summary judgment on the issue of preemption, concluding, as a matter of law, that the warning requirements of Health & Safety Code section 25249.6, and 22 California Code of Regulations 12601 et seq. are not pre-empted on their face by the Federal Hazardous Substances Act ("FHSA") and regulations in support thereof. Chemical Specialties Manufacturers Assoc. v. Allenby (9th Cir. 1992) 958 F.2d 941, 949.

Moreover, as to the issue of whether the FHSA pre-empts Health & Safety Code section 25249.5 et seq. and 22 California Code of Regulations section 12601 et seq., as applied to defendant

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herein, the Court finds that there remains a question of whether the state act "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (People v. Conklin (1974) 12 Cal. 3d 259, 269, quoting Hines v. Davidowitz (1941) 312 U.S. 52, 67.) As the Allenby court noted, there is labelling language that complies with both the federal and state statutes. 958 F.2d at 950. Defendant has failed to persuade the Court, as a matter of law, that use of such dually acceptable language would obstruct the purposes of the FHSA. In addition, defendant has made no showing of efforts to employ alternative warning methods, authorized by the state regulations (22 CCR 12601(a) and (b)(1)), that would address the concerns both of the defendant manufacturer and of its California retailers.

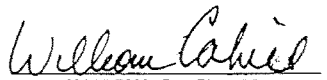
3) (a) The Court declines to summarily adjudicate that Defendant owes no duty under Health & Safety Code sections 25249.6 and 25249.10(b) to provide warnings for products it caused to enter interstate commerce prior to April 1, 1989, the date when the provisions of Proposition 65 (Health & Saf. Code §§ 25249.5 - 25249.13) began applying to products containing methylene chloride. The Court concludes, as a matter of law, that a manufacturer's duty to provide a clear and reasonable warning continues after shipment and extends to the time when the manufacturer knows that a consumer will be exposed to the carcinogenic chemical. (Health & Saf. Code § 25249.6.)

(b) The Court grants defendant's Motion for Summary Adjudication that defendant owes no duty under Health & Saf. Code § 25249.6 to provide warnings for products which defendant did not know would be and intend to be offered for retail sale in California. The Court concludes that, absent some specific showing of knowledge, e. g., an intentional effort to circumvent Proposition 65 by deliberately shipping products to other states for the purpose of retransmission to California, a manufacturer does not knowingly or intentionally expose a California consumer to carcinogenic products shipped to other states.

IT IS THEREFORE ORDERED that defendant's motions for summary judgment be, and hereby are, DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary adjudication is DENIED in part, and GRANTED in part, as set forth in paragraphs 3(a) and (b) above.

DATED: October 28, 1992



WILLIAM J. CAHILL
Judge of the Superior Court

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GRACE

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National Paint & Coatings Association

May 19, 1997

Honorable James M. Talent
Chairman, Committee on Small Business
United States House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

The following are the comments of W.R. Grace & Co. - Conn. (Grace) submitted for the record in response to the hearing announcement for information pertaining to the effect of "bounty-hunter" lawsuits filed under the California Safe Drinking Water and Toxic Enforcement Act ("Proposition 65").

While the Committee hearing is directed at the impact of such "bounty hunter" lawsuits on small business, the problem and issues involved adversely affect large business as well. In either case, the public interest is not served and substantial business resources are wasted by the litigation or threat of litigation generated pursuant to the bounty hunter provisions of Proposition 65.

By letter dated December 9, 1994, a subsidiary of Grace, received a 60-Day Notice of Proposition 65 violation sent by Chanler & Associates, counsel for a California organization called "As You Sow". This notice of purported violation came as a shock to our product regulatory compliance and legal staffs as the labels on and material safety data sheets for the products at issue were fully compliant with the OSHA Hazard Communications Standard; the subsidiary had no facilities in the State of California, and all of the product sales in the state were to industrial users. The 60 Day Notice contained no details whatsoever concerning the purchaser(s) of the subsidiary's products within the State of California or the manner, means or location(s) of any possible exposure of any consumer to the products. The only reference in the Notice to the time of the alleged violations was a general statement that it "may have been occurring since February 27, 1988."

As with the rest of the national industrial chemical manufacturing community, the subsidiary had in good faith relied on the safe harbor provisions of Proposition 65 which provide that the method employed to transmit the warning must include one of the following alternative methods: "a warning to the exposed employee about the chemical in question which fully complies with all information, training and labeling requirements of the Federal Hazard Communication Standard (29 CFR Section 1910.1200...)." Regardless of the subsidiary's compliance with the hazard communications standard, As You Sow followed the 60 Day Notice with a civil complaint filed on June 23, 1995. Among the prayers for relief sought by As You Sow were civil penalties in the amount of $2,500 per day, attorneys' fees, costs and an injunction prohibiting the company from selling product in the State of California without including As You Sow prescribed wording on product labels and material safety data sheets.

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National Paint & Coatings Association

The company initially intended to vigorously defend the As You Sow suit. Business [illegible] set in when California Counsel hired by the company to handle the suit estimated th[illegible] alone would cost in the range of $300,000; would most likely require disclosure of high[illegible] confidential customer lists and could require disclosure of protected trade secret product formulas. The cost of defending the suit through trial and possible appeals was practically inestimable. Fully litigating but losing the suit could have exposed the company to a verdict in the range of $6,000,000.

With a great reluctance and a sense of injustice, the company finally agreed to settle the As You Sow action. Faced with the litigation estimates summarized above, management could not justify fighting for the sake of principle when offered a settlement figure of approximately $30,000 plus a demand that the bounty hunter's preferred Proposition 65 warning be included in the product label and data sheet.

It should be noted that the bulk of the cash settlement of $30,000 was paid to As You Sow for administrative costs, court costs and attorneys' fees and not to the direct benefit of the people of California. Further, this sum does not represent the total costs incurred by the company in extracting itself from the law suit. The company's costs also included payment of its own attorney's fees, internal staff time which ran into hundreds of hours, and the cost of changing labels and material safety data sheet wording for numerous products. Although the total of internal and external costs incurred has not been calculated it is estimated to be easily in the six figures.

The change of OSHA compliant labels and data sheets to include the Proposition 65 warning required by the settlement with As You Sow is particularly troublesome. As was stated above, the subsidiary's products are sold only to an industrial market. Industrial purchasers have had years of experience with the OSHA Hazard Communications standard labels and data sheets and are required by law to implement safe work practices, including protective equipment and worker training, appropriate to the hazard information transmitted by the industrial chemical manufacturer. In fact, the primary chemicals at issue in the As You Sow lawsuit were already identified in the Grace subsidiary's product data sheets. Therefore, inclusion of Proposition 65 warnings on the product information provided no additional useful information to customers within the State of California, had the capacity to confuse customers outside the State and, by adding to the verbiage on already crowded labels, could detract readers from important health and safety information. By requiring OSHA to promulgate the Hazard Communication Standard, Congress intended that chemical hazard information transmitted from manufacturers be standardized and understandable by both large and small businesses. Proliferation of Proposition 65 type laws or labeling resulting from the settlement of bounty hunter law suits defeats this intent and dilutes the warnings which should follow a hazardous chemical in commerce.

In summary, the experience with the As You Sow suit and the bounty hunting provision of Proposition 65 resulted in the expenditure of a great amount of money in order to prevent the expenditure of an astronomical amount of money. More importantly, the settlement of the suit resulted in no added protections for the industrial employees in California working with the products at issue and, in fact, resulted in the diversion of professional staff from their normal product health and safety functions for major periods of time throughout the episode. The bounty hunting provision and the abuse of process occurring pursuant to the provision perverts the system of justice which should be upheld in this country and should not be tolerated by your committee.

Respectfully submitted by,

/S/ PJH

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The Proposition 65 Handbook

Second Edition

The Deskbook Reference for
Compliance Planning and Litigation Strategies
Under California's Proposition 65

By Roger Lane Carrick
Preston Gates & Ellis LLP

A *Prop 65 News* Publication

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The Handbook is designed to provide the reader with a basic introduction as well as advanced instruction on key compliance issues posed by Proposition 65. However, **The Handbook** is not legal advice nor is it intended to substitute for consultation with an attorney or scientific consultant regarding the facts and issues of a reader's specific situation.

Chapter 1.

An Introduction To California's Proposition 65

I. Proposition 65's National And International Impact On the Regulation Of Chemical Carcinogens And Reproductive Toxins

Proposition 65, or "Prop. 65" as it is now widely known, is a California state law that regulates chemical carcinogens and reproductive toxins in order to protect public and environmental health. Prop. 65 was adopted as the "Safe Drinking Water and Toxic Enforcement Act of 1986" in November of 1986 by roughly a two-thirds vote of the people under California's famous initiative process. What this means is that this law was not considered or adopted by the California Legislature. Rather, Prop. 65 was written by citizens and adopted by a vote of the People of California in a statewide election. Prop. 65 is codified in the California Health and Safety Code as Sections 25249.5 through 25249.12.

In its most simple construction, Prop. 65 requires the Governor of the State of California to supervise the scientific determination of which chemicals cause cancer or reproductive toxicity (*e.g.*, chemicals that cause or other reproductive harm), and then to list them in the California Code of Regulations. Prop. 65 then creates two legal duties regarding those listed chemicals' uses and imposes them on private sector businesses with more than ten employees. First, Prop. 65 bans the discharge of a listed chemical determined to cause cancer or reproductive toxicity into sources of drinking water. Second, Prop. 65 requires in addition that a warning be given for exposures of people to such listed chemicals above certain risk levels in occupational, environmental or consumer products. Of course there are exemptions, detailed rules and judicial interpretations that now refine these otherwise broad requirements. That's the purpose of this **Handbook** -- to explain a complex, unique and every-evolving law which has become the haven of lawyers and the bane of scientists around the world.

Indeed, unlike **all** of the other public health and environmental statutes in California or under federal law, which generally have a government regulatory agency charged with their enforcement, Prop. 65 is enforced **exclusively through lawsuits** brought either by public prosecutors or private citizens. With a lawsuit-slinging style that is coupled with a unique set of financial incentives designed to promote a virtual bounty-hunter ambiance in its enforcement, Prop. 65 infuses a piquant flavor of vigilante justice from the old American Wild West into the dynamic economy of ultra-modern California.

By the end of 1997, a careful analysis of the published data from the California Environmental Protection Agency ("Cal/EPA"), especially its Office of Environmental Health Hazard Assessment ("OEHHA"-the "lead agency" in the implementation of Prop. 65); the California Attorney General's public records; journalistic reports in *Prop 65 News*, and the public

litigation reported in the *Prop 65 Litigation Reporter* provide sufficient information to glean the following conclusions about Prop. 65's impact from 1987 to the beginning of 1998:[1]

- Prop. 65 now regulates 648 chemicals, including 436 as carcinogens and 212 as reproductive toxins;
- More than 290 scientific standards (known as No Significant Risk Levels or NSRLs in Prop. 65 nomenclature) of quantitative risk have been established by OEHHA for Prop. 65-regulated chemical carcinogens, and 10 similar standards have been set for Prop. 65-regulated chemicals that cause reproductive toxicity;
- More than 950 Prop. 65 sixty-day notice letters (which initiates all private Prop. 65 enforcement) affecting 6,710 separate businesses have been filed with the California Attorney General since 1988;
- More than 200 Prop. 65-related lawsuits have been formally litigated, including more than 175 enforcement actions (the California Attorney General leads in all public prosecutions, while the private group As You Sow has clearly been the most active citizen enforcer);
- At least another 500 Prop. 65 cases have been resolved through either court-approved or out-of-court settlements, most with citizen enforcers of Prop. 65;
- More than $25 million has been obtained by public and private plaintiffs in various types of Prop. 65 enforcement payments (primarily through settlements of lawsuits), with citizen enforcers' share estimated to be more than two-thirds of that figure;
- More than $50 million in attorneys fees, expert costs and direct outlays have been expended by plaintiffs and defendants in Prop. 65-related disputes; and
- More than $250 million in product reformulations, process changes and other business expenses have been incurred to achieve Prop. 65 compliance.

Informed observers estimate that Prop. 65 now competes with older, more established California environmental or public health enforcement statutes in terms of compliance and litigation-related costs. Prop. 65 is clearly no trifling matter.

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[1] *Prop 65 News*, originally published monthly by the California Council for Environmental and Economic Balance ("CCEEB") and Capitol Reports/Toxics News, is now published, along with the *Prop 65 Litigation Reporter*, by the American Environmental Institute. From its inception, *Prop 65 News* has been the trade newsletter of record with regard to Prop. 65.

As a state law, Prop. 65 nominally applies only to violations of its terms that are subject to California's legal jurisdiction. However, because California is effectively the seventh largest economy in the world, virtually every company in the United States, as well as many from around the world, does sufficient business in or through California to make that company subject to Prop. 65's reach. Any form of business occurring within California, including the activities conducted by domestic companies, importers and exporters, is affected by Prop. 65. As a result, careful consideration of (and compliance with) Prop. 65 is a requirement for every company making and/or selling products or services in (or into) California.

Beyond its literal terms, however, the policy, legal, and scientific decisions made by state officials and California's courts under Prop. 65 now impact public health and environmental laws across America, including federal law as well as international standards. Prop. 65 is an active topic of debate in other states, in the U.S. Congress, and even within the World Trade Organization ("WTO") and the North American Free Trade Agreement ("NAFTA"). Prop. 65 is arguably one of the most far-reaching state laws ever created.

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Statement of Dr. Peter A. Valberg, Harvard School of Public Health and Gradient Corporation

I am a public health professional specializing in environmental health, human health risk assessment, and evaluation of carcinogenic risks. I am a faculty member in the Department of Environmental Health of the Harvard School of Public Health in Boston, Massachusetts. I joined the Harvard School of Public Health in 1975 and was appointed to the faculty in 1977 and have remained on the faculty in the Department of Environmental Health to the present. My current appointment is Adjunct Associate Professor of Physiology. Since 1990 I have also been Principal at Gradient Corporation, a human-health risk assessment consulting firm with offices in Cambridge, Massachusetts.

At the Harvard School of Public Health, I have directed inhalation toxicology research programs funded by the National Institutes of Health and have supervised the thesis research of graduate students. As a faculty member in the Department of Environmental Health, I have participated in and taught a variety of graduate and undergraduate courses on human physiology, cell biology, and environmental health. In addition to Harvard School of Public Health courses, some of these courses were at Harvard College, Harvard Medical School, Massachusetts Institute of Technology, and Tufts University.

At Gradient Corporation, I am a risk assessment expert in human toxicology and in biological modeling of human exposure to environmental chemicals, airborne organics, and airborne particles. I am the author of 68 articles in peer-reviewed journals, plus many additional reports and abstracts dealing with lung biology, toxicology, risk assessment, and non-ionizing radiation.

Introduction

I have been asked by the Retailers Association of Massachusetts to evaluate the scientific bases of the proposed legislation, Senate Bill No. 488, entitled "The Massachusetts Citizens' Right to Know Act" (the Act). I considered whether the Act is consistent with known principles of toxicology and forms a rational basis for improving the health of consumers purchasing products. My many years of scientific experience and training qualify me to offer a perspective on whether the proposed Act will enable consumers to make meaningful decisions on protecting their health and that of their children. In reaching my opinion, I studied the text of the Act itself and compared the scientific statements in the Act to generally accepted risk assessment principles.

Flaws in the Logic of Senate Bill No. 488

Although the goal of improving health is laudable, the proposed Act is flawed in several ways, and will <u>not</u> provide consumers with information that is effective in making rational choices about health risks. In the discussion below I comment on text in the Act (*cited text is shown in italics*) and explain why the reasoning used in the Act will likely result in consumers being provided confusing and counterproductive information.

(1) The Act will not provide <u>useful</u> information about *"toxic chemicals contained in consumer products."* This statement rests on the erroneous presumption chemicals can be divided into those that are "toxic" and others that are "non-toxic." However, toxicologists are fully aware that the <u>dose</u> determines toxicity. As already recognized in the 16th century by Paracelsus, the Swiss physician, "the dose makes the poison." All substances are chemicals and all substances are potentially toxic; it is the dose that differentiates a health-promoting dose, from a safe dose, or from a toxic dose.

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For any chemical, mere exposure does not automatically lead to an adverse effect. For example, a small daily dose of aspirin can be safe, or lead to long-term beneficial effects (prevention of heart disease), whereas an entire bottle taken at once can lead to life-threatening gastrointestinal bleeding. Likewise, several hours of sunbathing in the summertime can lead to severe sunburn and skin cancer, but a continuous lifetime of "moon-bathing" in the light of the full moon, which is just reflected sunlight, cannot produce sunburn or cancer. Hence the mere identity of a chemical cannot be equated with "dangerous" or "harmful."

Providing consumers with information that a chemical is present in a product will not allow them to make rational choices about how much of a given product might possibly lead to toxic effects. At worst, the "toxic" warning on one product or device may invite the purchase of more dangerous (untested) substitutes. Without careful thought, regulations can produce unintended outcomes that are a hazard to public health.

The avoidance of toxic levels of chemicals in consumer products and people's environment is already overseen by state and federal agencies; not only is the Massachusetts Department of Public Health active in this area, but also, federal agencies active in this area include the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), the Consumer Product Safety Commission (CPSC), the Occupational Health and Safety Administration (OSHA), the Agency for Toxic Substances and Disease Registry (ATSDR), and the Centers for Disease Control (CDC).

(2) The Act also requires that the warning *"disclose the potential health risks associated with the substance(s)."* This stipulation, in theory, excludes nothing, since all chemicals have adverse health effects at high at high doses. Yet, for the vast majority of consumer products (the most notable exceptions being cigarettes, alcohol, and firearms) no adverse health effects are expected when the products are used as intended. Consumers are not well served by information advising them that, if they were to extract, pool, and concentrate a particular chemical from a particular product, and then administer it in a single dose, they might achieve a toxic threshold.

(3) The Act specifies action levels of *"one excess [lifetime] cancer in one million"* and *"exposure at one thousand times [lower] than levels known to cause reproductive toxicity or neurotoxicity."* These decision points make no sense for individual consumers.

For the U.S. population, our normal, background risk of developing cancer sometime in our lifetime is about 1 in 3 (or 0.33). For all of us, the chance of dying from cancer is about 1 in 4 (0.25). A one-percent increase in this background cancer incidence would be an additional lifetime risk of about 1 in 330, which would be difficult to detect because of the random variability in background cancer rates. The Act's threshold for separating lifetime risk levels of "no consequence" from those "requiring labelling" are many orders of magnitude lower than our background levels of risk for cancer or virtually any other cause of illness. That is, the Act focuses on changes in the background risk level from 0.33 to 0.330001. The Table below provides an overall perspective on risks in our lives, and we can immediately appreciate that the Act's risk levels bear no relation to risk decisions we all encounter every day.

We can see that the risks of "ordinary" causes of death such as falls in the home, being struck by a car when a pedestrian, fires in the home, and so forth, are quite high. The chances of our lives ending in this way are 1 in a few hundred. More unusual causes of death range in risk from one in a few thousand to one in tens of thousands. For example, in every 30,000 deaths there is likely to be one due to lightning strike. In fact, the highly improbable (but real) possibility of being struck by a crashing airplane is four times more likely than the (hypothetical) tumor risk from which the Act

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purports to protect the consumers. The Table focuses on mortality because the best statistics are available in this area, however, the underlying idea of "comparative risk" applies to any adverse health effect.

Table
Examples of Lifetime Mortality Risks for Everyone

Death from any cause	1 in 1
Dying from heart disease	1 in 2
Dying from cancer	1 in 4
All unintentional accidents	1 in 25
Motor vehicle fatality	1 in 50
Homicide victim	1 in 80
Falls in the home	1 in 270
Pedestrian struck by a motor vehicle	1 in 400
Fires in the home	1 in 600
Electrocution	1 in 5,000
Death from animal bite or insect sting	1 in 12,000
Mother dies in child birth (per birth)	1 in 13,000
Death from a natural disaster	1 in 20,000
Death due to lightning stroke	1 in 30,000
Death of pupil in school bus accident	1 in 50,000
Struck on ground by crashing airplane	1 in 250,000

It is clear that the *"one in one million"* level is not rational decision point for individual consumers. Suppose *"lifetime exposure"* to a particular substance resulted in a calculated "1 in 1,000,000" lifetime cancer risk. How can this numerical value be given context? In addition to comparison with values on the above Table, the lifetime risk estimate of 1 in 1,000,000 can be expressed in a variety of ways that can help understand its meaning:

- If 1,000,000 people were continuously exposed (each day, 24 hrs/day) over a lifetime to the consumer product, then, out of those 1,000,000 lifetimes, one individual might develop a tumor.

- The probability for any one person of developing a product-related tumor over a lifetime of 70 years of exposure to the assumed necessary dose would be, at most, one chance in 1,000,000. For the approximately 6,000,000 population of the Commonwealth of Massachusetts, this would be about one cancer case every 10 years, superimposed on a background diagnosis rate of about 30,000 cancer cases per year.

- If human lifetime were not limited, an exposed individual might expect that the likelihood of developing a product-related tumor would approach 100% after 70,000,000 years of exposure (*i.e.*, after 1,000,000 70-year lifetimes). 70,000,000 years brings us back to the ear when dinosaurs roamed the earth.

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Clearly, given a vast array of risk, as shown in the above Table, where we could all devote time and energy, making consumer product choices at the one-in-a-million level makes no sense.

(4) The Act excludes the need for notification for exposure to *"naturally occurring substances."* This exclusion completely undermines the health-promotion goals of the act. Public opinion polls may indeed show that "natural" is associated with healthy, wholesome, and safe, whereas "man-made chemicals" are perceived as hazardous, damaging to the environment, and carcinogenic. The truth of the matter differs from perception, however. For example, food consists of chemicals (both natural and synthetic), and natural toxins are generally present in greater quantity than synthetic chemicals. Public concern and consumer choice should be based on the bioactivity of the chemical rather than on whether it is man made or "natural." Natural chemicals not only include a wide variety of toxins and poisons (*e.g.*, cyanide, botulism toxin, histamine, atropine, formic acid), but also include many that are beneficial at low doses yet toxic at high doses (*e.g.*, niacin, acetylsalicylic acid (aspirin), vitamin A, oxygen). Fruits and vegetables, which are believed to have anti-cancer properties, also contain chemicals which have been shown to cause cancer in laboratory animals. The following are examples of carcinogens "naturally" present in food:

cooked bacon (dimethylnitrosamine)	peanut butter sandwich (aflatoxin)
mushroom (hydrazine)	basil seasoning (estragole)
comfrey herb tea (symphytine)	natural root beer [now banned] (safrole)
cup of coffee (caffeic acid)	bruised apple (patulin)

Conclusions

As instrumentation for detecting chemicals at lower and lower concentrations improves, we will likely find trace amounts of every known chemical in both food and consumer products. It does not serve the public interest to have these analyses displayed on the items we purchase. The vast majority of consumer products are known to be safe, and the mere presence of a chemical, which may be toxic at high doses, does not make the product unsafe. In merely being alive, we all navigate through a multitude of risks, which we seek to minimize but cannot eliminate. Should I drive farther to the theater showing the movie I really want to see? How many smoke alarms, carbon monoxide alarms, radon alarms should I buy for my home? Should I eat charcoal-broiled food? If we trade-off lifetime risks in the vicinity of 1 in 500 (which we would expect to die of once in 500 lifetimes or once in 35,000 years), then does it make sense to devote time, energy, and resources to avoiding lifetime risks in the vicinity of 1 in 1,000,000? A one-in-a-million lifetime risk would become significant in a million lifetimes (or over about 70 million years), which would be the time span between the present and the time when dinosaurs roamed the earth. Providing this kind of information on consumer products only adds confusion, and will likely interfere with rational, healthy consumer choices. The Act, as written, will not materially help consumers improve their health.

Peter A. Valberg, Ph.D.

March 24, 1997
Cambridge, MA

Aggressive Litigator Raises Ire of Plaintiffs, Defense Bar

By Nina Martin
Special to the Daily Journal

SAN FRANCISCO — Ten years after Californians passed Proposition 65, the safe drinking water and toxics-warning initiative, business groups and their lawyers finally have found a poster boy for everything they loathe about the far-reaching law: an environmental litigator here named Clifford Chanler, who has settled more than 500 suits against companies alleged to have violated state chemical-warning rules.

Problem is, his colleagues in the Proposition 65 plaintiffs bar dislike the sometimes charming, sometimes hot-headed — and often strategically brilliant — Chanler perhaps even more than defense lawyers do. Now some business interests hope that in these tort-reform-minded times, Chanler, and what they say he symbolizes, could help make Proposition 65 — with its unusual private-enforcer provision and "bounty hunter" awards for successful plaintiffs — vulnerable to legal and legislative attack as never before.

The latest case in point: Earlier this year Assemblyman Keith Olberg, R-Victorville, introduced AB3160, which would limit Proposition 65 enforcement suits by private citizens, including As You Sow, a little-known Oakland group on whose behalf Chanler has filed all his Proposition 65 cases for more than three years. Although the bill makes no mention of Chanler and As You Sow, they are by far the most aggressive private enforcers of Proposition 65; by Chanler's estimate, his firm has filed hundreds of Proposition 65 "notices to sue," while the attorney general's office — using a different method of calculation — puts the number above 1,000.

The Olberg bill was introduced barely a month after business groups filed an amicus brief in a Proposition 65 case before the state Supreme Court, *People v. American Standard*, 902 P.2d 224 (

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CRISTINA TACCONE / Daily Journal

CLIFFORD CHANLER — "I believe so deeply in what I do and how the chemical industry is screwing up human health and the environment that it was only natural for ... emotion to be shown."

LOS ANGELES DAILY JOURNAL

Prop. 65

Continued from Page 1

1995), which contained just one exhibit — news articles primarily about Chanler and As You Sow. In arguing that the law is penal in nature and thus should be narrowly construed, the brief — though it never mentions Chanler by name — implicitly tags him as a prime example of "the burdens that just a few of these private enforcers have placed on those doing business in California ... Encouraging more litigation on an already overburdened court system is hardly in the public interest and would be another consequence of limiting the narrow construction principle."

"I was stunned to see a firm as sophisticated as Morrison & Foerster [which prepared the brief] attach a news article to an amicus brief to the California Supreme Court," Chanler responded. "I don't consider that evidence ... It reminds me of that old saying ... 'If you can't argue the law or the facts, attack the attorney.'"

Proposition 65, one of the proudest achievements of the California environmental movement and the only law of its kind in the nation, requires warnings on all products sold in California that contain carcinogens or reproductive toxics and bans these substances from sources of drinking water. In addition to the attorney general's office, private parties may sue to enforce the law; winners collect what defenders derisively call a "bounty": 25 percent of any penalties (up to $2,500 a day for each person exposed), as well as legal fees and costs. The bounties are meant to be distributed to groups working to improve public health and safety.

The striping against Chanler — most of it off the record — focuses on almost everything about his strategies as a private enforcer. Some critics question his firm's strategy of targeting numerous companies within an industry, instead of the industry as a whole, contending that small players often get sued for minor violations of the warning laws.

Some insist Chanler's settlements often have little benefit for the public, and in certain instances — by forcing companies to add a Proposition 65 warning to a label that already contains multiple other warnings — actually dilute the value of Proposition 65. Some believe Chanler's firm and As You Sow are too closely linked, and that too much of the money As You Sow collects goes toward legal fees and costs. The group did not respond to a request to comment on this article.

The attorney's general office, the main public enforcer of Proposition 65, also contends that many of Chanler's notices of intent to sue are so vague as to be virtually meaningless. Partly as a result, new state rules have been drafted requiring the notices to be more specific.

Chanler and Eric Somers, his partner in Chanler & Somers, vociferously dispute these criticisms, noting that the settlements are all approved by judges and arbitrators, that As You Sow is an entirely separate group, and that As You Sow has given more than $500,000 in Proposition 65 settlement money to benefit other environmental groups. They say the attacks are merely a reflection of their success, pointing out that the firm has never lost a Proposition 65 case. "The quality of our work is unparalleled," Chanler said.

But the complaints — echoed equally by defense and plaintiffs lawyers — have sometimes provoked an emotional response from Chanler that only makes matters worse. Perhaps the most striking example of this occurred in late January at a Proposition 65 conference in Sacramento where Chanler — in his first public speech in four years, before scores of people he had never met — delivered an impassioned, rambling and personal exposition that one listener described as "a paranoid rant" and another as "the strangest thing I have ever heard."

Audience members said Chanler's remarks — a defense of his litigation strategy and a denunciation of past comments by two occasional detractors, the Environmental Defense Fund's David Roe and Deputy Attorney General Ed Weil — only provided his critics with new fodder and deepened his isolation. "The more he rambled, the more you could see him being split off from his own plaintiffs bar," said a defense lawyer who, like many people interviewed for this article, spoke on condition of anonymity.

"If he had been there in one of his charming and articulate moods, maybe a lot of people would have walked out saying, 'Hey, he's not so bad,'" said Weil, who was in the audience. "Instead, it only confirmed and exacerbated what they already felt."

Chanler says he gave the speech after staying up all night after an international flight and missing a plane connection. "When your resistance is low, you tend to get a little more emotional," he conceded. "[But] I believe so deeply in what I do and how the chemical industry is screwing up human health and the environment that it was only natural for that emotion to be shown."

Does he regret the speech? "Not at all ... It was cathartic."

From the beginning, businesses have warned that Proposition 65 would invite waves of litigation by plaintiffs attorneys and organizations less interested in protecting consumers than in making a buck.

But the surge in litigation has occurred only recently, as the 10-year-old law has matured and environmental attorneys have found new, sometimes creative ways to use it to suit their purposes. The main players in the plaintiffs bar include established environmental groups such as the Environmental Defense Fund and the Natural Resources Defense Council, which have led the fights to eliminate lead from ceramic dishware and brass parts in water pumps, among many other cases. The plaintiffs bar also includes lesser-known organizations such as Oakland's Environmental Law Foundation, which employs Proposition 65 in conjunction with other statutes to force the cleanup of lead and other chemicals; and a few big plaintiffs firms, notably San Diego's Milberg Weiss Bersiad Hynes & Lerach.

A more recent — and controversial — entrant is the Pacific Justice Center in Redway, known for its novelty suits. For example, the group filed suit against gun makers for lead emissions from just-fired weapons and against garage companies for exhaust fumes in enclosed parking areas. The settlements have been used to further a wide range of environmental goals, including battles against timber companies.

> 'I think the plaintiffs bar is probably of mixed minds [regarding Chanler's work].'
>
> Roger Carrick
> Attorney,
> Publisher, Prop. 65 News

Then there's Chanler, a 35-year-old alumnus of such big-league firms as Brobeck, Phleger & Harrison and Wilson, Sonsini, Goodrich & Rosati, who first made a name in the Proposition 65 arena by representing the EDF as outside counsel in the lead-ceramics and other cases. The two soon parted company, and Chanler later sued the group for $247,000 in fees. "We simply didn't feel he could represent our interests or what we felt was the public interest," said Roe, the EDF's senior attorney.

Since 1992, Chanler's firm has exclusively represented As You Sow, formed that year by an old friend of Chanler's, Thomas van Dyck. Of the $12.9 million Chanler's firm has collected in Proposition 65 settlements in the past four years — $7.1 million in assessed penalties, $3.1 million in funds distributed by As You Sow to environmental groups, and $2.7 million in legal fees and costs — about two-thirds was on behalf of As You Sow, Chanler says, and the rest was on behalf of the EDF.

Van Dyck has been quoted as saying he sees As You Sow as "kind of a joint venture" with Chanler. "I don't see it that way," Chanler responded, insisting that the organization sets its own policies and picks the environmental groups that benefit from the settlements. "It's a normal attorney-client relationship," Somers said.

Chanler and Somers say the criticisms come from people who know little about how the firm actually works or, in the case of defense lawyers, by people who are trying to inflame clients — and increase their own legal business. "It's client-pleasing rhetoric," Somers said.

They describe the firm's litigation strategy this way: Lawyers and As You Sow identify a product containing a Proposition 65-listed chemical: say, toluene in fingernail polish. They sue the leading manufacturers — in this case, Revlon — aided by substantial scientific research (in the nail polish example, they say they conducted two separate tests on more than 200 women to determine the average amount of toluene inhaled during a manicure or pedicure).

When they settle, in addition to financial penalties, the firm says it also tries to force industries to reformulate their products to eliminate the dangerous chemicals, as happened with nail polish. Then, if necessary, they go after smaller companies.

Somers and Chanler say the criticisms about their fees — undoubtedly heightened by their very public fee dispute with the EDF — are unfair. They note, for example, that in a recent settlement, National Resources Defense Council collected $1.45 million in legal fees and costs from faucet maker Price Pfister and $150,000 to distribute for good works. They insist they've had a major role in protecting consumers and workers, and point to suits against printing companies over chemicals used in the workplace and an agreement from a large janitorial company for a line of "green" cleaning products.

Chanler contends that some of the practices for which he is often criticized — filing multiple small suits against many companies in one industry rather than one action against an entire industry, for one — are necessary to prevent companies from ganging up. Coordinated defense also means judge shopping, a higher-profile media campaign and costly delays for the plaintiffs, he says. "When you sue a whole industry, it is a lot easier ... to persuade an industry trade group to resource the litigation," he said in remarks on the second day of the Sacramento conference. "I certainly don't want to make life easy for them by bringing down their costs for litigating the case."

Lawyers say Chanler makes some plaintiffs lawyers uneasy because he symbolizes a generation gap within the Proposition 65 bar between the more decorous mainstream environmental groups, which have spent a decade emphasizing broad social goals, and newer groups and lawyers, some of which are more blatantly profit-oriented.

It doesn't improve Chanler's standing with some colleagues that he has achieved his high profile just as GOP control of Congress and the state Assembly have left the environmental and consumer movements battered on a number of fronts — and more protective than ever of their moral-crusader image.

"I think the plaintiffs bar is probably of mixed minds," said Roger Carrick, a partner at Preston, Gates & Ellis in Los Angeles and publisher of Prop. 65 News, which sponsored the conference where Chanler made his notorious remarks. "I don't care what they tell you, they are very happy he is out there doing what he's doing — he is stirring things up and testing ideas, and if he succeeds, you can be sure the other plaintiffs lawyers will follow ... If people are genuinely honest, they see Cliff as helping to create a market."

Moreover, Carrick said, "It's always useful to have someone who's farther out than you are, because you can exploit that. He's not just cutting-edge, he's bleeding edge, and [this] makes [the rest of] them look reasonable. It's a great marketing and negotiating tool. If they've got a brain, they're glad he's out there because they don't have to be the attacking edge."

Perhaps ironically, Chanler may have more admirers — albeit grudgingly so — in the defense bar. Carrick cites his strategy of identifying a particular chemical — such as toluene — and targeting all users. "I think Cliff has refined a model that others can and will follow."

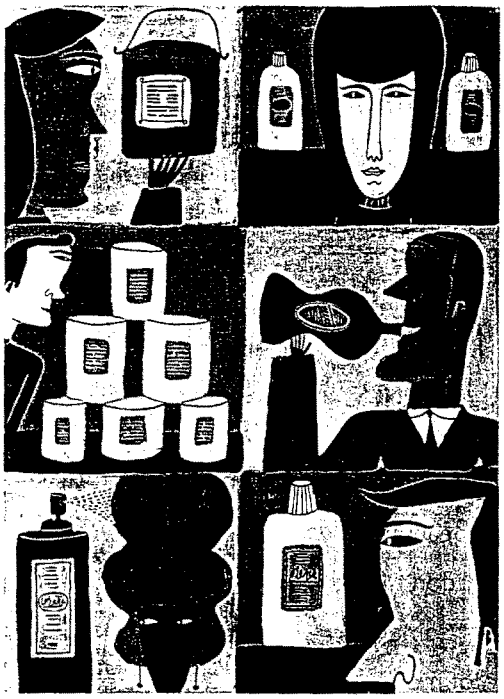
Defense lawyers also were more sympathetic to the complaints Chanler raised in his Sacramento tirade. "I don't see what he's doing as any different from the rest of them," one defense attorney said. "When it comes to the cases, Cliff is no less reasonable or unreasonable than many of the plaintiffs we deal with in this area. It's just his style that is different."

On the record, at least, plaintiffs lawyers doubt that the defense bar will have much success using Chanler to tar the entire Proposition 65 bar. Chanler "really is sui generis," Roe said.

"The defense bar for 10 years has been saying this [law is a problem] because it can be abused, and they've had essentially no evidence whatsoever ... it simply hasn't happened ... If you look at the full range of enforcement actions, the full range of product improvements, it's an astonishingly good track record, but also it's got a lot of good done without causing harm."

"Cliff Chanler is the closest thing to a poster boy that the defense bar can find, but he's not much of a poster boy [because] he's unique," Roe said. "Even if you agree with defense bar critics about what he's done, he's the only one doing it. It's easy to argue about how much good he's done, but hard to argue that he's done harm."

Chanler also doubts the latest efforts to attack the law will succeed. But he also thinks his own days as a Proposition 65 attorney may be coming to an end. The firm plans to begin diversifying its practice, including suits under the False Claims Act against Medicare fraud. After more than five years in the field, the intellectual challenges have dimmed, but not the stress, he says. "This work is very hard."



TOXIC SHOCK

PLAINTIFFS ATTORNEYS AND "BOUNTY HUNTERS" ARE TAKING THE INITIATIVE IN ENFORCING PROPOSITION 65

By Dennis Pfaff

The lead in bullets, it may not surprise you to learn, is hazardous to your health.

"When you fire a gun, you're exposed to a cloud of lead-laden gas," says Melvin Pearlston, a lawyer with the Pacific Justice Center in Redway. "It's caused by the friction of the bullet going through the barrel of the firearm."

Only a Proposition 65 plaintiffs lawyer would make that claim with a straight face—and that's exactly what Pearlston did in May, in a little-noticed Alameda County lawsuit against dozens of U.S. companies that make, distribute, or sell pistols, rifles, and their ammunition. The National Rifle Association may think it's a nuisance case, but Pearlston says his public-interest, for-profit firm spent months researching lead toxicology and the

economic structure of the gun industry, not to mention the complexities of Prop. 65, the Safe Drinking Water and Toxics Enforcement Act of 1986. (The law prohibits businesses from marketing products containing a host of substances determined by the state to cause cancer or birth defects, unless they are labeled with a "clear and reasonable" warning to consumers. It also flatly bans introduction of toxins into sources of drinking water.) "It's not an antigun suit," Pearlston insists. "It's a consumer-protection suit." But hey, if the case happens to further goals like gun control....

Nearly a decade after businesses predicted that the toxics-warning initiative would choke the courts with lawsuits, "a genuine Prop. 65 plaintiffs bar is starting to emerge," says Roger Carrick, a partner at Cadwalader, Wickersham & Taft in Los Angeles and author of *The Proposition 65 Handbook*. Deputy Attorney General Ed Weil, one of the California Department of Justice's main prosecutors on Prop. 65 cases, estimates that 1,500 to 2,000 companies have received notices in the past two or three years that they face suits, most of these issued under a "private attorney general" provision [illegible] and private individuals to enforce the law, and though critics try to trivialize the litigation as a money-driven crusade against nonproblems, there have been some startling results: Major portions of Southern California are no longer being subjected to emissions of the toxic air-pollutant ethylene oxide. There's less lead in many brands of china plates. Nail polish has been reformulated to be less toxic.

> A decade after businesses predicted the initiative would choke the courts with lawsuits, a Prop. 65 bar is emerging.

What took plaintiffs lawyers so long? "The violations aren't as easy to research and bring as some people thought," Weil says. This begs a second question: Why now? One reason, Carrick suspects, is that California is in its 13th year under a Republican governor. "Republicans don't enforce environmental laws very often.... If you don't think cops are going to enforce the law, you turn to vigilantes." Another is the prospect of big returns. Prop. 65 allows fines of up to $2,500 per day for each item found in violation. In a 1994 case against Parks Corporation, a paint-stripper manufacturer, one of only two Prop. 65 cases ever to come to trial, a San Francisco jury assessed more than $100,000 in fines against the company for only 45 cans with no warning labels, plus lesser fines against cans with inadequate warnings. In addition, the private enforcement (or "bounty hunter") provision gives successful plaintiffs 25 percent of the penalties assessed, plus costs and fees (which came to more than $370,000 in the paint-stripper case).

The most controversial of the Prop. 65 "vigilantes" is Clifford Chanler, whose San Francisco law firm, Chanler & Associates, has filed fully half the notices to sue, Weil says. (Chanler says the figure is only 575.) Virtually all Chanler's cases are brought on behalf of the Oakland nonprofit group As You Sow—formed, its mission statement says, "to hold corporate manufacturers accountable for their actions." So far, this has meant suing companies under Prop. 65. Chanler estimates his small, aggressive firm has reached more than $2.4 million in settlements on Prop. 65 cases since last October, of which $1.1 million went for fees and costs. He says As You Sow distributed another $300,000 to other environmental groups. "Pretty good for a bunch of young people running around in shorts and doing yoga in the middle of the day," he says. (Chanler's firm has contracted with the yoga master for the band the Grateful Dead to lead sessions at the office as a way of reducing stress.)

Chanler and As You Sow first made an impact pursuing scores of nail polish makers that used toluene, a chemical linked to birth defects. Within six months they were boasting that they'd forced the $20-billion cosmetics industry to change its nail polish formula. Chanler has won settlements from other corporate giants, including BASF, DuPont, and Chiquita. But he can't shake accusations that [illegible] pounces small companies with notices to sue in hopes of extracting quick settlements or goes after minor, technical violations (what Weil calls "56-mile-per-hour speeding tickets"). "I think if you look at the cases, they look at cases where they could get relatively easy recovery and very little public benefit," Weil says—like an 11th warning on cans that already contain 10. He also worries about a backlash that "might make judges more reluctant to apply the law."

So critical is Weil of Chanler's approach that, in April, he filed an amicus brief on behalf of a Prop. 65 defendant, Ashland Oil, to which Chanler had sent a notice to sue over its sales of toluene and other chemicals. Weil said Chanler's notices are legally "inadequate" and "virtually useless."

Chanler's reaction to this, or any, criticism is incensed—and loud. He say his firm's foes include not just *Fortune* 100 companies, but also the attorney general's office, rival environmentalists, and the media. "Ed Weil's sole goal in life, instead of enforcing Prop. 65, is to criticize As You Sow," Chanler says. He denies targeting small companies and says it's good policy to settle "low-priority" cases fast. But in response to the Ashland Oil amicus, Chanler has moved to let Weil's office take over the litigation. "I'm not fighting any more battles with Ed," he says.

Chanler's success is inspiring other private enforcers. Rogers, Joseph, O'Donnell & Quinn of San Francisco handled the action against Parks for the Environmental Defense Fund. And Milberg, Weiss, Bershad, Hynes & Lerach, one of the

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Dennis Troff covers environmental law for the San Francisco Daily Journal. *Additional research by Nina Martin.*

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By Charles G. Warner, a member of The American Board of Trial Advocates; California & Richard W. [illegible], Assistant Professor of Law; Chicago-Kent.

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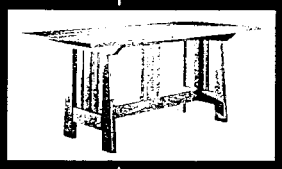

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Toxic Shock

Continued from page 43

state's premier plaintiffs outfits, has dabbled in Prop. 65 for several years. "When defendants see their name on the papers, they get very nervous," Weil says.

Pearlston says he became interested in Prop. 65 a couple of years ago, when the Pacific Justice Center was considering a lawsuit over school children's exposure to Dursban, an insecticide used to kill termites that is not on the Prop. 65 list. But the costs of proving causation were prohibitive. Then attorneys discovered that the method of applying the chemical also released a Prop. 65 substance, asbestos (because holes were drilled in floor tiles containing asbestos). Bingo. "It was an easier case to bring under Prop. 65 because you don't have to use causation," Pearlston says. "It's a statute that can be used as a gap-filler" when other laws don't work, he adds.

"Vigilante" attorney Clifford Chanler

The increasing activity of Prop. 65 plaintiffs has, inevitably, touched off a reaction by defense attorneys. They argue that chemical exposures are nonexistent or too small to worry about and, increasingly, that plaintiffs' claims are preempted by federal law.

Defendants won a big victory in June, when a state Court of Appeal in San Francisco ruled that Prop. 65's protections from drinking water apply only to the "origins of drinking water"—such as lakes, rivers, streams, and aqueducts—and not water faucets that allegedly leach hazardous amounts of lead into tap water.

But Prop. 65 plaintiffs won't give up easily. Says David Roe, an Environmental Defense Fund attorney and coauthor of the initiative, "There are all sorts of possible uses of this law that have yet to be explored." ❖

CHRISTINA TASCONE

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WEDNESDAY, MAY 11, 1994

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Feud Spawns Unusual Alliance

A fight for control of a Prop 65 case has the AG siding with a defendant in an effort to push out an environmental group

By TODD WOODY

A struggle between the California attorney general's office and an upstart consumer group for control of a Proposition 65 case has taken a nasty turn in the wake of the AG's new bid to take over the litigation.

The squabbling between the state and As You Sow attorney Clifford Chanler has gotten so bad that the AG has for now allied himself with the defendant. At stake is who will prosecute Prop 65 litigation with potential multimillion-dollar penalties.

Last year, the AG and the San Francisco activist group filed separate suits against Cotter & Co., a spray paint manufacturer, for allegedly exposing consumers to the reproductive toxin toluene without providing warnings as required by Prop 65.

But disagreements between the AG and As You Sow over strategy, settlements and attorneys fees prompted the state to support Cotter's attempt to kick the group off the case last month.

San Francisco Superior Court Judge Stuart Pollak rejected the move. Now the AG has urged Pollak to reconsider his ruling, arguing that As You Sow misled the state into believing that it would not file a Prop 65 suit against the company.

In response, Chanler said he'll move for sanctions against the AG for its litigation tactics, including the partial disclosure of a confidential letter discussing his fees.

"Their motive in this whole thing is to destroy AYS because we're a more efficient Prop 65 litigator than the state," said Chanler of Chanler & Associates.

The tiff threatens to rupture the relationship between the private firm and the AG, which until recently had worked together to prosecute cases under California's toxics control law.

"I don't like to say never, but what I've

See FIGHT page 11

MEDHI SCHERKHOT

CLIFFORD CHANLER: "Their motive in this whole thing is to destroy AYS because we're a more efficient Prop 65 litigator than the state," the environmental lawyer said about the AG's office.

New Deputy Has Justice Department On the March

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Fight Over Control of Prop 65 Case Gets Nasty

Continued from page 1

seen in this case doesn't make it likely that I'd like to see the AG's credibility intertwined with their credibility," said Deputy Attorney General Edward Weil.

California's toxics control law, passed by voters in 1986, allows private citizens to sue for alleged violations after giving the state the opportunity to sue first. Since 1992, court records show that As You Sow has issued more than 500 intent-to-sue notices — making it the most active private Prop 65 litigant.

The feud has left the defendant on the sidelines.

"It's making it very difficult to address the case in any kind of a rational way," said Cotter attorney Jeffrey Margulies, a partner at Santa Monica's Haight, Brown & Bonesteel.

AG SAYS CHANLER MISLED STATE

Weil asked Pollak in March to throw As You Sow off the case because the AG filed its Prop 65 suit first. In an unusual attack on a one-time ally, Weil emphasized that Chanler's client had collected more than $1 million in attorneys fees "but not a single penny in penalties" against scores of companies over the past two years.

Pollak, however, ruled that As You Sow could proceed, even though the group had added its Prop 65 cause of action to an unfair business practice complaint against Cotter after the AG sued. The judge permitted As You Sow's action because the Prop 65 complaint "related-back" to the facts of its original suit, which had been filed before the AG's case.

Under Prop 65, a private plaintiff can sue if a public prosecutor fails to act after receiving a 60-day notice.

In a motion filed last week asking Pollak to reconsider his ruling, Weil and Deputy AG Susan Fiering accused As You Sow of breaking a promise to leave Prop 65 prosecutions of major defendants to the AG while the consumer group pursued minor violators.

MARK ALLEN/ZZO

EDWARD WEIL: "I don't like to say never, but what I've seen in this case doesn't make it likely that I'd like to see the AG's credibility intertwined with their credibility," the deputy AG said about the environmental group As You Sow.

"The theory and representations asserted by As You Sow to the court in opposing the demurrer are after-the-fact rationalizations developed after As You Sow became dissatisfied with the attorney general's office over issues concerning attorneys fees," Fiering wrote.

Moreover, Pollak's ruling would undermine the AG's enforcement authority, Fiering argued. In the future, the state would be forced to sue before the 60-day notice period expired to prevent private plaintiffs from later hijacking the litigation, she wrote.

Chanler acknowledged that the AG and his client agreed to divide the cases. But he said the failure of the AG to aggressively prosecute cases against Cotter and other manufacturers, not the fee dispute, prompted As You Sow to file its Prop 65 claim.

"AYS initially believed that enlisting the enforcement power of the AG in a cooperative enforcement effort would serve this goal [of Prop 65 compliance]," Chanler wrote in a draft reply to the motion for reconsideration. "However, as months passed with successive requests for delay by the attorney general, and AYS was bringing less egregious violators into compliance through settlement, AYS began to question whether cooperation was in the best interests of the public."

Pollak has scheduled a May 19 hearing in the case, *People v. The Sherwin-Williams Co.*, 952A33.

INITIAL INVESTIGATION

It was As You Sow that brought the toluene cases to the AG's attention, turning over the results of its investigations in 1992, according to court records.

Correspondence between Chanler's office and the AG indicates that As You Sow became increasingly disenchanted with the pace of the prosecutions, the settlements proposed by the AG and fees for As You Sow.

"[T]he defendants are just coming into compliance, almost one year after violations were identified," Chanler associate Suzanne Bevash wrote Weil and Fiering in a Nov. 22, 1993 letter. "Had AYS not cooperated with your office, and immediately sought a preliminary injunction, there is little doubt it would have fared better financially, and compliance certainly may have been secured more quickly."

In the same letter, Bevash wrote that As You Sow believed that reasonable attorneys fees, including a 1.5 multiplier, in settlements with five toluene defendants would be $665,027, with costs of $75,151.

Weil objected to the fees as excessive. He wrote in a Nov. 30 letter that only $100,000 could be attributed to the five defendants involved in settlement negotiations.

The fee dispute has incensed Chanler. He's particularly angry that Weil filed a copy of the Nov. 22 letter in court papers. Weil redacted the references to specific fees but Chanler contends the submission of the letter violated a confidentiality agreement.

Chanler said he has now released the fee information to "right the public misperception concerning the revealed confidential information."

But Weil, who objected to the terms of that agreement, said he did nothing wrong.

"I think we had adequate grounds to submit the information," he said. "We left out of it everything that wasn't directly relevant to previous representations they made."

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THE RECORDER

119TH YEAR No. 145 $1 THE BAY AREA'S LEGAL NEWSPAPER SINCE 1877 MONDAY, JULY 31, 1995

As You Sow, Lawyers Reap

In less than three years, Clifford Chanler and his nonprofit client have become the most aggressive enforcers of Proposition 65. Are they protecting the public from toxics or generating needless litigation?

By TODD WOODY

For an environmental group with a name plucked from the Bible, As You Sow brings out the devil in some people.

"We do not need a state-licensed pirate . . . blackmailing companies," fumed Los Angeles executive Robert Wilkinson in a Jan. 12 letter urging California Attorney General Dan Lungren to stop the "money vultures."

Like nearly a thousand companies nationwide, Wilkinson's Sinclair Paint Co. had been targeted by California's most aggressive enforcer of Proposition 65, the state's nine-year-old toxics control law.

The Bay Area nonprofit that describes itself as "a foundation planting seeds for social change" sprung into being three years ago, the brainstorm of two thirtysomething college buddies: a onetime corporate attorney and a left-leaning stock broker.

As You Sow has provided a bountiful harvest for San Francisco lawyer Clifford Chanler: Since October 1992, his firm has collected more than $2.5 million in legal fees and costs, according to state records and information provided by As You Sow. As You Sow, which does not maintain its own office or staff, has in turn handed out some $320,000

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CLIFFORD CHANLER: "Should I make as much as a Brobeck partner when I represent the public interest? Hell, yes."

Lots of Smoke, Not Much Fire In Case Against Broadman

By BILL KISLIUK

After two weeks of trial in the Fresno County Courthouse, the fundamental question in the case against Judge Howard Broadman remains unanswered: Can the Commission on Judicial Performance punish a judge for being too big for his britches?

The judge's unusual rulings and near-rulings have veered toward violating defendants' constitutional rights of privacy. His outspokenness with reporters and lawyers has exceeded that of the average man or woman wearing a black robe.

But after two weeks of plodding questioning by Commission on Judicial Performance lawyers, the "prosecution" has rested without a convincing showing that Broadman has done anything more serious than raise a lot of eyebrows.

Unfortunately for Broadman, 45, that could be enough for the commission, which has been trying to crack down on the judge for years.

The hearing is the first since the commission was revamped by California voters last fall, and judges who share Broadman's concern that the new commission may be taking discipline into uncharted waters are watching carefully.

Constance Dove, director of the California Judges Association, said the judges she's spoken with would prefer to see sentencing and discipline kept separate. "If the two spheres are circles,

See BROADMAN page 10

JUDGE HOWARD BROADMAN: The commission rested Friday without a convincing showing that he has done anything more serious than raise a lot of eyebrows.

State's Share of Trial Court Costs Likely to Dip

By BILL AINSWORTH

SACRAMENTO — For the third time in three years, plans to boost state funding for trial courts have been lost in a legislative stalemate over reorganizing the duties of local and state governments.

As a result, the Big Six budget negotiators, including Gov. Pete Wilson and five legislative leaders, have struck a deal under which the state will reduce its share of the bill for operating California's trial courts from 36 percent to 35 percent.

As of Friday, the overall budget deal was awaiting legislative approval. But even if it's rejected, the trial court funding portion of the budget should not change.

Under the plan, the state would pay $608 million of the estimated $1.73 billion cost of operating trial courts this year. That amounts to $13 million more than

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California Daily Opinion Service

Civil Litigation and Procedure

■ COHEN v. RESOLUTION TRUST CORP.: No abuse of discretion in approving class settlement under which funds payable to two class members to be held in escrow accounts pending resolution of separate action. 9th Cir.

Criminal Law and Procedure

■ IN RE ALEJANDRO G.: Fighting words directed toward police officer inherently likely to provoke immediate violent reaction under totality of circumstances. CA. 1st

■ PEOPLE v. PLAYO: "Arming" and [illegible] applies when gun and [illegible] are [illegible] residence together during period of possession. Cal.Sup.Ct.

■ PEOPLE v. CHACON: Aggravated kidnapping conviction supported by substantial evidence where victim suffered serious bodily injury from gratuitous physical violence. CA. 2d

Individual Rights

■ KELLEY v. BORG: Qualified immunity defense not applicable in prisoner's action against state prison officials arising out of exposure to fumes while in cell. 9th Cir.

Securities

■ WEST PARK ASSOCS. v. BOTSFORD SAVINGS & LOAN ASSOC.: Error in concluding that issuer of stock was sole "seller" under Oregon law. 9th Cir.

Torts

■ LUDWIG v. SUPERIOR COURT: Defendant electing to settle lawsuit may not later claim action was meritless based on extortion settlement was made under duress. CA. 4th

■ SKINNER v. VACAVILLE UNIFIED SCHOOL DISTRICT: School's failure to warn teacher of student's propensity for fighting not substantial factor in causing another student's injury. CA. 1st

Summaries continue on page 3

Inside

Settlement In Toxic Cloud Case

Despite the objections of a half-dozen lawyers, a Contra Costa County superior court judge granted preliminary approval Friday to a $180 million settlement of a class action over the release of a toxic acid cloud from General Chemical Corp. in Richmond.

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... Harve[illegible] Benefits Lawyer

Continued from page 1

to California environmental and pu... health advocates and plans to grant at least $84,000 more by year's end.

Under Prop 65's citizen enforcement provision, anyone can sue a company for failing to warn consumers about products that contain certain amounts of carcinogens or reproductive toxins after giving public prosecutors the opportunity to do so first.

Chanler, 35, has capitalized on that option and the threat of $2,500 a day in potential fines per violation to create a profitable legal machine. Employing a staff of young attorneys, Chanler & Associates has sent out as many as 25 intent-to-sue notices a day on behalf of As You Sow, to mom-and-pop operations from Minneapolis to Muskogee, Okla., as well as Fortune 500 companies.

Such efforts have won some significant victories: the nail polish industry, for instance, agreed in 1993 to remove toluene, a chemical linked to birth defects, from its products. And in February, PPG Industries Inc. and other chemical industry giants settled suits by pledging to stop making paint containing heavy metals.

But As You Sow's daily bread also comes from scores of cases that settle before reaching the courts, public records show.

As the group's cases have multiplied, so have complaints from defense attorneys and the California attorney general's office about sloppy investigations and a fixation on securing attorneys fees.

"They have a very long history of weak settlements. They say, 'If you settle we'll go away'," says Deputy AG Edward Weil, whom Chanler accuses of being an "industry lobbyist."

With anti-regulatory fervor at a fever pitch, some corporate attorneys question whether As You Sow will reap the repeal of Prop 65 in a backlash at the ballot box. In the meantime, Chanler presses forward. He recently opened a Mill Valley office and says he's interviewing attorneys to staff a Los Angeles outpost.

"We don't write the law, we don't list the chemicals," he says. "We're enforcing the law the AG won't enforce. If there weren't violations, there wouldn't be settlements."

PINK CAPITALISTS

You won't find As You Sow chairman Thomas Van Dyck at the Oakland address listed on the group's letterhead — 408-13th St., Suite 260 is a Mailboxes and More letter drop.

Rather, Van Dyck and other members of As You Sow's board of directors work a few blocks away at Progressive Asset Management, a brokerage house specializing in socially responsible investments that Van Dyck co-founded in the late 1980s.

Morgan Stanley it is not. Scattered among *Forbes, Inc.* and other business magazines is *Terrain*, which features anti-corporate agitprop by Earth First! organizer Judi Bari and other environmental stories.

PAM's pink capitalists include a former Greenpeace activist and its brokers have come from the ranks of a leftist U.S. group that backed the Marxist rebels during the El Salvadoran civil war. Van Dyck, who earned $149,538 at PAM in 1993, according to state Department of Corporation records, himself did a stint as a fund-raiser for an East Coast anti-nuclear group before becoming a broker in 1983 with Dean Witter.

THOMAS VAN DYCK: "We're proud we're the biggest [Prop 65] litigator out there," says the stockbroker and As You Sow founder.

"We're proud we're the biggest litigator out there," says Van Dyck, who at 37 resembles a younger version of rock singer Roger Daltry. "We just filed [intent-to-sue] notices against Shell and Exxon. We're going after major industry, and in that sweep we will pick up the small guys. We're going after everybody and not excluding anybody."

"I think there's a number of ways to create social change," he adds from his downtown Oakland office with a Bay view. "One, by using capital you can dictate investments; two, by voting. The third way is regulations and fines on corporations. ... Companies will not change, especially old industrial companies ... unless you go ahead and sue them."

Prop 65 offered the perfect vehicle to pursue option three, and Chanler, a friend from Van Dyck's days at Duke University, a convenient driver.

"It was kind of a joint venture," Van Dyck says of As You Sow and Chanler. "Cliff was working at [the Environmental Defense Fund] and said, 'Hey, I have an idea' and I said let's kick it around."

The arrangement suited both sides. By giving Chanler the responsibility to find and litigate Prop 65 violations, As You Sow keeps its overhead to a minimum, with no paid staff, except for a part-time executive director, and no office or other expenses. As Chanler is compensated through settlements, As You Sow is not dependent on outside funding — or any restrictions that often accompany grants from foundations.

As You Sow's formation in October 1992 came at a propitious time for Chanler.

Three months earlier, he had lost his bread-and-butter client, the Environmental Defense Fund, and he was still emerging from a bankruptcy he filed in San Jose in 1990 at the age of 30.

Young, cocky and charming, Chanler, like his buddy Tom Van Dyck, had left the corporate world for the for-profit pursuit of the public interest. After stints at Brobeck, Phleger & Harrison and Wilson, Sonsini, Goodrich & Rosati, Chanler set up shop in his Pacific Heights flat in 1991. He quickly made a name for himself as EDF's attorney in a successful high-profile Prop 65 prosecution with the AG's office against the makers of lead-contaminated tableware. Also on EDF's behalf, he persuaded manufacturers of carcinogen-containing paint strippers to remove their products from California.

But the month before he began representing EDF in September 1991, Chanler made another bankruptcy filing to once again restructure his debts.

Chanler's cash crunch hit in 1990 while he was an $85,000-a-year associate at Brobeck, court records for his original bankruptcy filings show. Chanler's Saab was repossessed and he had more than $150,000 in bank loans and credit lines outstanding.

By the time Chanler reached a settlement with his creditors in February 1991, he had jumped to Wilson, Sonsini in Palo Alto. After eight months he quit, started his own practice and filed the second bankruptcy petition in San Francisco.

"More than five years ago, I borrowed money for personal reasons," Chanler says. "Unfortunately, I was unable to meet my debts as they became due and was forced to make this extremely difficult decision."

Chanler says he'll have completed his $75,000 repayment plan early next year.

"Cliff is a risk-taker, whether ... with the firm or whatever," says one person familiar with Chanler who asked not to be identified.

That attitude was apparent early on: He initially christened his new one-lawyer firm Chanler & Lazlo, telling Deputy AG Weil and a client, EDF staff attorney David Roe, that his erstwhile partner was a ghost, named after Victor Lazlo, a character from the movie *Casablanca*.

EDF hired Chanler as outside counsel in 1991 to litigate Prop 65 cases but fired him 10 months later. "[D]espite repeated explanations of EDF's role as a public interest organization, Chanler was unwilling or unable to conduct EDF cases in a manner consistent with that role," Roe wrote in an affidavit filed in connection with a $247,000 breach-of-contract suit Chanler filed against EDF last December.

Says Chanler: "The people of the state of California continue to reap the benefit of [the lead ceramic ware and paint stripper] actions. It's unfortunate that EDF does not share my view of these issues."

Chanler soon recovered from his firing, however. Three months after he was dismissed, his future client, As You Sow, filed its incorporation papers on Oct. 15, 1992. Two weeks later, Chanler mailed the new nonprofit's first batch of intent-to-sue notices.

A little more than a year later, As You Sow reported revenues of $1.2 million, $1.1 million of which it paid in legal fees and costs, with nearly all going to Chanler's firm. The group was well on its way to becoming California's most aggressive enforcer of Prop 65.

'NO ONE OWNS PROP 65'

Environmental Defense Fund staff attorney and Prop 65 co-author David Roe chooses his words carefully when discussing As You Sow and Chanler.

After all, Roe hired Chanler, praised him to the press, fired him and now is embroiled in a nasty fight in Oakland federal court over nearly a quarter million dollars in fees the attorney contends he's owed.

Both sides have traded allegations of deceit and double-dealing and the battle is sure to be watched with some glee by corporate attorneys. From the day Prop 65 qualified for the ballot a decade ago, they have raised the specter of the bounty hunter — unscrupulous individuals filing worthless claims to profit off a provision allowing private plaintiffs to keep 25 percent of penalties collected. Not to mention the attorneys fees available under the citizen suit provision.

"The citizen suit enforcement aspect of Prop 65 does not depend on the motive or the character of the enforcer," Roe says. "[The defense bar] invested a great deal in arguments that there would be bounty hunters and I'm sure it's frustrating that by and large it hasn't come true. It's understandable that they would jump on the closest thing they could find."

Another Prop 65 litigator, Albert Meyerhoff of the Natural Resources Defense Council, also treads lightly on the subject of As You Sow.

"No one owns Prop 65, neither the attorney general's office nor environmental groups nor anyone else," says Meyerhoff, an NRDC staff attorney whose organization has received $30,000 in grants from As You Sow.

The attorney general's office and defense attorneys are not so demure.

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RICHARD CARRABINE: "I said enough is enough," said the president of Mentor, Ohio's Airserco Manufacturing, shown holding a can of the allegedly offending "Liqui-Vac" sealant.

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"In the early years we were able to say that that hasn't happened," says Deputy AG Weil, referring to bounty hunter fears. "But now everybody has their story about As You Sow."

Weil's own tale about As You Sow caused a stir last year: In a fight for control of Prop 65 cases against paint manufacturers, he charged that the group had collected more than $1 million in attorneys fees but not a penny in penalties that would go to the state for enforcement. The two sides later agreed the AG would take the lead in the litigation.

The accusations enraged Chanler and As You Sow, who fired back that the AG ignored the group's early work on the cases, which eventually brought in $1.3 million for the state.

Internal Revenue Service disclosure forms submitted by As You Sow show that in 1993 out of $1.2 million the nonprofit collected, $1.1 million went to legal fees, with only $49,157 given out in grants.

Van Dyck says his group's first priority was securing the removal of toluene, a reproductive toxin, from nail polish — something he says is "not going to be showing up on our tax form."

After the dispute with Weil, As You Sow began seeking settlements with penalties and upped the amount of money it distributes to environmental groups.

A complete picture of As You Sow's finances is unavailable, however. The group has yet to file its 1994 disclosure forms and has requested an extension until the end of this year. As You Sow executive director Conrad MacKerron said he could not provide financial information for the period between January and October 1994.

But the group says that between October 1994 and July 1995, it negotiated about $3 million in settlements. That includes $1.4 million for legal fees and costs; $383,535 to be distributed to public interest groups, including its own enforcement fund; and $1.3 million in potential penalties, about half of which will be waived if companies reformulate their products or fulfill other commitments.

To counter suspicions that he has grown rich off Prop 65, Chanler allowed *The Recorder* to review his firm's tax returns from 1991 to 1993. The forms show the sole proprietorship lost nearly $31,000 its first year and broke even in the second. But Chanler took home $290,362 on $1 million in revenues in 1993, the first full year of As You Sow's existence. He says he has not filed his 1994 statement but estimates the income to be around $300,000.

"Should I make as much as a Brobeck partner when I represent the public interest? Hell, yes," Chanler says.

"I find it incredible that [corporate attorneys] criticize my claim to fees, while collecting greater fees representing polluters and manufacturers of highly toxic products."

Despite As You Sow's efforts to balance its settlements, criticism from Weil and the defense bar has not faded.

Says Michele Corash, a Morrison & Foerster partner and leading defense expert: "The advice we have to give our clients is no longer what is required to comply with Prop 65 but whether there is anything they can do so that they will be assured not to be sued by an outfit that has absolutely no interest in compliance with Prop 65 but is interested in the legal fees available to those that file and settle Prop 65 lawsuits."

"Typically, they will send you a proposed payment amount and a proposed settlement without ever bearing whether the company has . . . any information that is relevant or any defense," she adds, noting, "It's cheaper to pay him than to beat him."

Retorts Chanler: "No one settles with us unless they're doing something wrong. A majority of people have no warnings program or a defective program that needs to be in compliance."

"If they violate the law, they pay penalties," he says flatly. "If they want to make a good business judgment to come into compliance and pay fees, that's their business."

RUNNING A BUSINESS

Chanler and his dozen associates work in a spacious if bare-bones office near the San Francisco waterfront, and in a recently opened Mill Valley office. Attorney attire runs toward jeans and T-shirts and shorts.

There's not a gray hair to be seen, and first-year associates can be found negotiating and filing their own cases.

DAVID ROE: The Environmental Defense Fund lawyer is embroiled in a bitter battle with Chanler over $247,000 in fees Chanler claims EDF owes him for Prop 65 work.

Chanler takes pains to emphasize that his firm only serves as As You Sow's legal staff and has no role in the group's operation.

Yet he concedes that As You Sow is his sole Prop 65 client. And As You Sow president Van Dyck said in an interview that, "We're at his direction to some extent."

"We don't come up with [cases] on our own, let's face it," Van Dyck says. "Cliff knows where the violations are, he gets it done. Some of the benefits of his attorneys fees is to build a situation where he can find where the violators are."

> 'In every single case that we have sent a notice [there is] a violation of the law. Absolutely. We have never lost a case and we will never lose a case.'
>
> — *Clifford Chanler*

A hyperactive Grateful Deadhead — he says he's seen 437 shows — Chanler singers easily and is quick to go on the attack. Following the boss's lead, Chanler's attorneys pursue their targets aggressively, prompting complaints from business owners that they're being "shaken down."

Just how many cases As You Sow is juggling is, like most other things involving the group, in dispute. So polarized are relations between Chanler and Deputy AG Weil that they can't even agree on the number of intent-to-sue notices the group has sent out. Chanler insists it's about 550; the AG, which receives a copy of each notice, has tracked nearly 1,000. Whatever the number, between 100 and 200 have resulted in suits, according to Chanler.

Some companies targeted by Chanler and As You Sow liken their efforts to nuisance suits.

When Varn Industries was hit with an intent-to-sue notice from Chanler's firm, company attorney Andre Tolpegin insisted on seeing copies of product labels allegedly in violation of the law. The first-year associate handling the case complied but also sent a letter requesting "Varn [sales figures] as to enable AYS 'to set a figure' for the amount of 'appropriate penalties, restitution and . . . AYS's fees and costs,'" according to a declaration Tolpegin filed in San Francisco Superior Court last month.

Later, another Chanler attorney agreed to meet with Tolpegin. But only if Varn would "provide its sales figures and information so that AYS could calculate their fees," wrote Tolpegin, of counsel with Leland, Parachini, Steinberg, Flinn, Matzger & Melnick.

According to the declaration, when Tolpegin asked to see As You Sow's evidence in return, the attorney told him the information was " 'not relevant' " and that Varn should settle because " 'As You Sow is the biggest enforcement agency in California' " and will " 'subject your client to protracted litigation.' "

"I'm not going to give our adversary our evidence. I'm not going to slash our bellies open," Chanler says about the Varn dispute. "We do run a business just like everyone else," Chanler says. "We do have an interest in not flooding the courts with litigation. This seems to be a very reasonable way of settling cases and not making defense lawyers rich."

"In every single case that we have sent a notice [there is] a violation of the law. Absolutely. We have never lost a case and we will never lose a case," he insists.

But Chanler has been forced to back down occasionally.

SEARCHING THE HEARTLAND

When you call Airserco Manufacturing Co. in Mentor, Ohio, the president of the company is likely to pick up the phone.

So when a fax arrived addressed to the company's "general counsel" from Chanler & Associates, president Richard Carrabine handled the matter himself.

Airserco, according to the standard As You Sow form letter, was violating Prop 65 by selling a sealant to refrigerator repair people in California without a warning that one of its ingredients, toluene, can cause birth defects.

When Carrabine called Chanler & Associates in January, he was put in touch with the attorney handling the case, who had been admitted to the bar the month before.

If Airserco agreed to provide the requisite warnings and pay $950 for "penalties, restitution and costs" litigation would not be necessary, Wilson wrote in a Feb. 17 letter.

Carrabine says he had immediately complied with the warning requirement but he balked at paying the $950. After all, he said, he only made $3,000 on the 200 cans of his product sold in California over the past two years.

"I called them and said this doesn't exactly sound fair to us. . . . I told them that we're a small company with seven or eight employees and couldn't afford to pay lawyers $200 an hour," Carrabine said in an interview.

When he called his congressman's office, a staffer put him in touch with the California AG's office. Only then did Carrabine learn that businesses with fewer than 10 employees are exempt from Prop 65.

"[Wilson] asked me to send them a letter confirming that — I said enough is enough," says Carrabine, who adds that no one from Chanler's office asked him how many people he employed.

Airserco's travails later made the editorial pages of the Cleveland *Plain Dealer*.

Chanler claims that after the negative editorial was published in April, he spent thousands of dollars to find out that Airserco in fact had 14 employees.

Chanler says his staff conducts thorough investigations before contacting companies they believe to be violating Prop 65.

But last July, an attorney sent an intent-to-sue notice to Nationwide Industries, even though it had been out of business for more than a year, according to a letter from the company's attorney.

And another Chanler attorney threatened to sue LHB Industries — until she learned that LHB was an acronym for the charity Lighthouse for the Blind and that the company did not actually manufacture the products allegedly in violation of Prop 65.

"I'm sure there's cases where mistakes have been made," says As You Sow executive director MacKerron. "But I don't think it's a fair criticism across the board [given the volume of claims]."

Deputy AG Weil says, however, that he worries about a backlash.

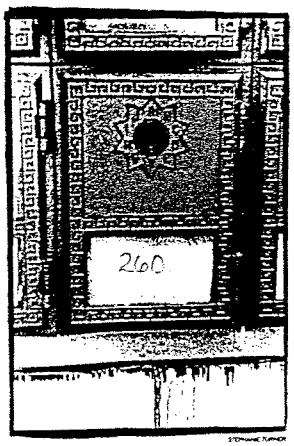
"I have to spend a lot of time on public relations and try to assure people that Prop 65 is not so bad," he says.

"At this point, I'm not as concerned about settlements being weak as I am about them picking off small targets with minor violations," Weil adds. "You ask business and they say Prop 65 has become a way of making a lot of money shaking down business."

That's a bum rap, says Chanler and As You Sow officials. More than 60 percent of the group's settlements since last October have come from companies with more than 100 employees or $10 million in sales, they maintain.

Conflicts are sure to continue as As You Sow turns its focus from consumer products to whether corporations are properly warning their workers and suppliers about Prop 65 chemicals.

Says As You Sow president Van Dyck: "You're not going to make everybody happy. If that means the attorney general is pissed off that we're too aggressively enforcing the law, so be it."



LOW OVERHEAD: The address on As You Sow's letterhead is a Mailboxes and More letter drop.

AMENDED IN ASSEMBLY APRIL 15, 1996

CALIFORNIA LEGISLATURE—1995–96 REGULAR SESSION

ASSEMBLY BILL No. 3160

Introduced by Assembly Member Olberg

February 23, 1996

An act to amend Sections 25249.7 and 25249.13 of the Health and Safety Code, relating to toxic chemicals.

LEGISLATIVE COUNSEL'S DIGEST

AB 3160, as amended, Olberg. Toxic chemicals: enforcement: private actions.

Existing law, part of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, ~~or from~~ discharging or releasing such a chemical into any source of drinking water, except as specified.

The act imposes civil penalties upon persons who violate those prohibitions and allows an enforcement action under the act to be brought by the Attorney General, a district attorney, ~~or specified city~~ attorneys or prosecu~~tors~~, and by any person in the public interest if that private action is commenced more than 60 days after the person has given notice of the violation which is the subject of the action to the Attorney General, ~~the district~~ attorney, ~~and any city attorney~~ in whose jurisdiction the violation is alleged to have occurred,

and to the alleged violator, and the violation is not being prosecuted, as specified.

This bill would ~~additionally require, as a condition of bringing a private action in the public interest to enforce the act, that~~ *allow* the Attorney General ~~provide written certification~~, *to determine,* pursuant to a specified procedure, ~~that~~ *whether* bringing the private action, based on the alleged violation specified in the notice, would not be ~~contrary to~~ *in* the public interest, ~~except as specified~~ *and would provide that, if the Attorney General has made that finding, there is a rebuttable presumption that the action is not in the public interest. The bill would require a court to find that a plaintiff has rebutted that presumption only under specified circumstances.*

The bill would allow the Attorney General to intervene in a private action brought to enforce the act. The bill would allow the Attorney General, a district attorney, or city attorney or prosecutor bringing an action to enforce the act to seek and recover costs and attorneys' fees on behalf of any private party who has rendered assistance in the case.

The bill would prohibit a private party from bringing an action in the interest of the general public for specified unlawful business practices, if the unlawful practices consist of violations of the act, unless the person complies with the notice requirements.

The bill would make legislative findings and declarations in that regard, including that the bill would further the purposes of the act.

Vote: $^{2}/_{3}$. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature hereby finds and
2 declares all of the following:
3 (a) The proper enforcement of the Safe Drinking
4 Water and Toxic Enforcement Act of 1986 (Chapter 6.6
5 (commencing with Section 25249.5) of the Health and
6 Safety Code) has yielded substantial benefit to the public

1 by reducing human exposure to toxic chemicals and
2 informing the citizenry of those exposures.
3 (b) In addition to prosecution of civil actions under the
4 act by the Attorney General and district attorneys,
5 supplemental private actions under the act have in many
6 instances been in the public interest, and should
7 continue.
8 (c) In some instances, irresponsible private groups or
9 individuals have brought actions under the act that were
10 not meritorious, that involved de minimus violations, or
11 were pursued primarily in the financial interest of the
12 private plaintiff, or some combination of all three.
13 (d) The actions described in subdivision (c) have
14 undermined the purposes of the act as a whole because
15 they have resulted in an inaccurate perception of the
16 requirements of the act and have resulted in businesses
17 providing warnings that are not actually required by the
18 act so as to prevent being subjected to unfounded
19 litigation, thereby generating needless warnings that
20 confuse the public and reduce the effectiveness of
21 necessary warnings.
22 (e) The costs of defending the actions, or the
23 threatened actions, described in subdivision (c), have
24 been a burden to businesses, even where those actions
25 would be ultimately determined to have no merit, and in
26 those cases, no countervailing benefit from appropriate
27 enforcement of the act is created.
28 (f) Some form of review and certification by the
29 Attorney General of a proposed private action to enforce
30 the act is needed as a precondition to the bringing of those
31 private actions to enforce the act "in the public interest."
32 (g) That review and certification by the Attorney
33 General will not prevent the bringing of those private
34 actions that would further the purposes of the act.
35 (h) The law should be clarified to specify the existing
36 right of the Attorney General to intervene in, and control
37 any action under the act, to ensure that the purposes of
38 the act are pursued in any litigation to enforce the act.
39 (i) Limitations on actions in the public interest under
40 the act should not be rendered meaningless by private

use of the unlawful business practice prohibitions of Section 17204 of the Business and Professions Code.

SEC. 2. Section 25249.7 of the Health and Safety Code is amended to read:

25249.7. (a) Any person violating or threatening to violate Section 25249.5 or 25249.6 may be enjoined in any court of competent jurisdiction.

(b) Any person who has violated Section 25249.5 or 25249.6 shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per day for each violation in addition to any other penalty established by law. That civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California, by any district attorney or by any city attorney of a city having a population in excess of 750,000, or with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) *(1)* Actions pursuant to this section may be brought by any person in the public interest if ~~all~~ *both* of the following requirements are met:

~~(1)~~

(A) The private action is commenced more than 60 days from the date that the person has given ~~notice of an alleged violation of Section 25249.5 or 25249.6 which is the subject of the private~~ *notice of the violation which is the subject of the private* action to the Attorney General, the district attorney, and any city attorney or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator.

~~(2)~~

(B) Neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against ~~the alleged violator~~ *the violation*.

~~(3) The Attorney General has certified in writing, pursuant to subdivision (c), that bringing the private action, based on the alleged violation specified in the notice received pursuant to paragraph (1), would not be contrary to the public interest, or 120 days have passed since the date that the Attorney General received that notice, and the conditions specified in subparagraph (B) of paragraph (2) of subdivision (c) have been met.~~

~~(c) (1) Except as provided in subparagraph (B) of paragraph (2), if the Attorney General receives a 60/day notice, pursuant to paragraph (1) of subdivision (d) specifying an alleged violation of Section 25249.5 or 25249.6, the Attorney General shall provide the person giving the notice with a written certification that bringing the private action, based on the alleged violation specified in the notice, would not be contrary to the public interest, unless the Attorney General makes one of the following written findings:~~

~~(A) The private action would be plainly frivolous.~~

~~(B) The de minimus nature of the violation does not warrant the private action.~~

~~(C) The nature of past violations and the steps taken to prevent any future violations render the private action unwarranted.~~

~~(D) The notice is inadequate in form, content, or manner of service.~~

~~(2) (A) The Attorney General's determination made pursuant to paragraph (1) shall be based on the information that is submitted by the person giving the notice, by the alleged violator identified in the notice, and upon any other information that the Attorney General may determine to be appropriate for consideration. The information may include information showing that the alleged violator has ceased, or will remedy, the violation. The Attorney General may provide certification with respect to only some of the alleged violations specified in the notice and not as to others.~~

~~(B) If the Attorney General does not provide the certification within 60 days of receipt of the notice, and the Attorney General has not made one of the findings~~

~~specified in paragraph (1) within 120 days from the date of receipt of the notice, the private action may proceed as if the certification had been made.~~

~~(3) The Attorney General's determination pursuant to this subdivision, and the procedure by which the determination is reached, shall be deemed to be an exercise of the Attorney General's prosecutorial discretion and shall not be subject to any action, proceeding, or any discovery process in any action or proceeding, or to any disclosure pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code. The Attorney General's determination shall not be admissible for any purpose in any action or proceeding, except to show that the person bringing the private action is in compliance with this section.~~

~~(f)~~

(2) Notwithstanding paragraph (1), if the Attorney General has found that the action would not be in the public interest pursuant to subdivision (e), there shall be a rebuttable presumption that the action is not in the public interest, and the action may proceed only in accordance with subdivision (f).

(e) (1) If the Attorney General receives a 60-day notice pursuant to subdivision (d) alleging a violation of Section 25249.5 or 25249.6, the Attorney General may determine that commencement of a civil action based on the violations alleged in the notice would not be in the public interest if the Attorney General finds in writing any of the following:

(A) The action would be plainly frivolous or have no merit.

(B) The de minimis nature of the violations does not warrant a civil action.

(C) The notice of violation is inadequate in form, content, or manner of service.

(2) The Attorney General's determination made pursuant to paragraph (1) shall be based on the information that is submitted by the party giving the

notice and the alleged violator identified in the notice, and any other information that the Attorney General may determine to be appropriate to consider. The information may include information showing that the alleged violator has ceased or will remedy the violation. The determination may be made with respect to only some of the violations alleged in the notice. If the Attorney General determines that an action would not be in the public interest, the Attorney General shall prepare a record of decision, which shall consist of the determination, the written findings, and all documents and evidence upon which the findings are based. The determination, findings, and record of decision shall be provided to the noticing party and the alleged violator.

(3) The Attorney General's determination pursuant to this subdivision, and the procedure by which it is reached shall be deemed an exercise of the Attorney General's prosecutorial discretion and shall not be subject to any suit, proceeding, discovery in any private action, including a motion pursuant to subsection (f), or disclosure pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). The Attorney General's determination shall not be admissible for any purpose in any action, except as part of a motion for authorization to proceed as set forth in subdivision (f). The failure of the Attorney General to make a determination pursuant to this section, or to commence an action based on a 60-day notice, shall not be admissible for any purpose except to show compliance with this section.

(4) If the Attorney General determines that additional time is necessary to determine whether an action would be in the public interest, the Attorney General may extend the 60-day time period provided in subdivision (d) by an additional period of up to 60 days by serving notice of the extension on the noticing party and the alleged violator.

(f) A court shall find that a plaintiff has rebutted the presumption that an action brought pursuant to this

section is not in the public interest only under all of the following circumstances:

(1) The plaintiff establishes to the satisfaction of the court, through a motion for authorization to proceed in the public interest pursuant to subdivision (e), that all of the following conditions are met:

(A) The action would not be plainly frivolous or have no merit.

(B) The alleged violations are not of a de minimis nature that would render a civil action unwarranted.

(C) The notice of violation is inadequate in form, content, or manner of service.

(2) The motion specified in paragraph (1) shall be served with the summons and complaint in the action, and shall include the Attorney General's determination, findings, and record of decision, which shall be admitted without further foundation. The court's review of evidence shall be limited to the Attorney General's record of decision prepared pursuant to paragraph (2) of subdivision (e), and any other admissible evidence that the offering party establishes could not have been provided to the Attorney General in the exercise of due diligence. The Attorney General shall not be subject to any discovery or other process to compel disclosure of any information other than the record of decision.

(3) The time to respond to the summons and complaint shall not commence until the defendant receives notice of entry of an order granting authorization to proceed in the public interest pursuant to subdivision (d). Any appearance by a defendant to contest the motion shall constitute a special appearance only and accordingly does not waive any jurisdictional or other defenses. Even in the absence of an appearance by a defendant, the court shall not grant the motion unless the plaintiff establishes that the conditions prescribed in paragraph (1) have been met. No discovery shall be served, nor shall any other orders of the court for injunctions or temporary retraining orders be applied for, or issued, until the motion has been granted and notice of entry of the order served. Where the motion is granted,

that fact shall not be used for any further purpose in the litigation.

(4) Notwithstanding Section 1021.5 of the Code of Civil Procedure, no party shall be required to pay the attorney's fees of a plaintiff expended on a motion for authorization to proceed under this subdivision.

(5) If the motion is denied, the action shall be dismissed without prejudice. The person filing the action shall not file another action based on the same 60-day notice.

(g) (1) In any private action brought pursuant to subdivision (d), the Attorney General may intervene in the private action, for any purpose as requested by the Attorney General, and, if requested by the Attorney General, the prosecution of the private action shall proceed under the Attorney General's control and direction.

(2) In any action brought by the Attorney General after receipt of the 60-day notice specified in subdivision (d), the person that gave the notice may intervene, subject to the prosecution of the action under the Attorney General's control and direction.

~~(g)~~

(h) In any action brought by the Attorney General, a district attorney, or a city attorney or prosecutor under this chapter, the Attorney General, district attorney, or city attorney or prosecutor may seek and recover costs and attorney's fees on behalf of any private party who has rendered assistance in the case, which shall be awarded to the same extent and in the same manner as provided under Section 1021.5 of the Code of Civil Procedure, as if the person rendering the assistance had been the plaintiff in the action.

SEC. 3. Section 25249.13 of the Health and Safety Code is amended to read:

25249.13. (a) Nothing in this chapter shall alter or diminish any legal obligation otherwise required in common law or by statute or regulation, and nothing in this chapter shall create or enlarge any defense in any action to enforce that legal obligation. Penalties and

1 sanctions imposed under this chapter shall be in addition
2 to any penalties or sanctions otherwise prescribed by law.
3 (b) Notwithstanding subdivision (a), a private party
4 shall not bring an action in the interest of the general
5 public, pursuant to Section 17204 of the Business and
6 Professions Code, for unlawful business practices, as
7 defined in Section 17200 of the Business and Professions
8 Code, if the unlawful practices consist of violations of this
9 chapter, unless the person complies with subdivision (d)
10 of Section 25249.7. This subdivision does not affect the
11 ability of any person to bring an action pursuant to
12 Section 17204 of the Business and Professions Code in the
13 person's own interest or for unlawful or unfair acts other
14 than violations of this chapter.
15 SEC. 4. The Legislature hereby finds and declares
16 that this act furthers the purposes of the Safe Drinking
17 Water and Toxic Enforcement Act of 1986.

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CALIFORNIA LEGISLATURE—1995-96 REGULAR SESSION

ASSEMBLY BILL No. 3160

Introduced by Assembly Member Olberg

February 23, 1996

An act to amend Sections 25249.7 and 25249.13 of the Health and Safety Code, relating to toxic chemicals.

LEGISLATIVE COUNSEL'S DIGEST

AB 3160, as introduced, Olberg. Toxic chemicals: enforcement: private actions.

Existing law, part of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from discharging or releasing such a chemical into any source of drinking water, except as specified.

The act imposes civil penalties upon persons who violate those prohibitions and allows an enforcement action under the act to be brought by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest if that private action is commenced more than 60 days after the person has given notice of the violation which is the subject of the action to the Attorney General, the district attorney, and any city attorney in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator, and the violation is not being prosecuted, as specified.

This bill would additionally require, as a condition of bringing a private action in the public interest to enforce the act, that the Attorney General provide written certification, pursuant to a specified procedure, that bringing the private action, based on the alleged violation specified in the notice, would not be contrary to the public interest, except as specified.

The bill would allow the Attorney General to intervene in a private action brought to enforce the act. The bill would allow the Attorney General, a district attorney, or city attorney or prosecutor bringing an action to enforce the act to seek and recover costs and attorneys' fees on behalf of any private party who has rendered assistance in the case.

The bill would prohibit a private party from bringing an action in the interest of the general public for specified unlawful business practices, if the unlawful practices consist of violations of the act, unless the person complies with the notice requirements.

The bill would make legislative findings and declarations in that regard, including that the bill would further the purposes of the act.

Vote: $^{2}/_{3}$. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature hereby finds and
2 declares all of the following:
3 (a) The proper enforcement of the Safe Drinking
4 Water and Toxic Enforcement Act of 1986 (Chapter 6.6
5 (commencing with Section 25249.5) of the Health and
6 Safety Code) has yielded substantial benefit to the public
7 by reducing human exposure to toxic chemicals and
8 informing the citizenry of those exposures.
9 (b) In addition to prosecution of civil actions under the
10 act by the Attorney General and district attorneys,
11 supplemental private actions under the act have in many
12 instances been in the public interest, and should
13 continue.

(c) In some instances, irresponsible private groups or individuals have brought actions under the act that were not meritorious, that involved de minimus violations, or were pursued primarily in the financial interest of the private plaintiff, or some combination of all three.

(d) The actions described in subdivision (c) have undermined the purposes of the act as a whole because they have resulted in an inaccurate perception of the requirements of the act and have resulted in businesses providing warnings that are not actually required by the act so as to prevent being subjected to unfounded litigation, thereby generating needless warnings that confuse the public and reduce the effectiveness of necessary warnings.

(e) The costs of defending the actions, or the threatened actions, described in subdivision (c), have been a burden to businesses, even where those actions would be ultimately determined to have no merit, and in those cases, no countervailing benefit from appropriate enforcement of the act is created.

(f) Some form of review and certification by the Attorney General of a proposed private action to enforce the act is needed as a precondition to the bringing of those private actions to enforce the act "in the public interest."

(g) That review and certification by the Attorney General will not prevent the bringing of those private actions that would further the purposes of the act.

(h) The law should be clarified to specify the existing right of the Attorney General to intervene in, and control any action under the act, to ensure that the purposes of the act are pursued in any litigation to enforce the act.

(i) Limitations on actions in the public interest under the act should not be rendered meaningless by private use of the unlawful business practice prohibitions of Section 17204 of the Business and Professions Code.

SEC. 2. Section 25249.7 of the Health and Safety Code is amended to read:

25249.7. ~~Enforcement.~~ (a) Any person violating or threatening to violate Section 25249.5 or ~~Section~~ 25249.6 may be enjoined in any court of competent jurisdiction.

(b) Any person who has violated Section 25249.5 or ~~Section~~ 25249.6 shall be liable for a civil penalty not to exceed ~~$2500~~ *two thousand five hundred dollars ($2,500)* per day for each ~~such~~ violation in addition to any other penalty established by law. ~~Such~~ *That* civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California ~~or~~, by any district attorney or by any city attorney of a city having a population in excess of 750,000, or with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by any person in the public interest if ~~(1)~~ ~~the~~ *all of the following requirements are met:*

(1) The private action is commenced more than ~~sixty~~ *60* days ~~after~~ *from the date that* the person has given notice of ~~the violation~~ *an alleged violation of Section 25249.5 or 25249.6* which is the subject of the *private* action to the Attorney General ~~and~~, the district attorney, and any city attorney *or prosecutor* in whose jurisdiction the violation is alleged to ~~occur~~ *have occurred,* and to the alleged violator~~; and (2) neither~~.

(2) Neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against ~~such violation~~ *the alleged violator.*

(3) The Attorney General has certified in writing, pursuant to subdivision (e), that bringing the private action, based on the alleged violation specified in the notice received pursuant to paragraph (1), would not be contrary to the public interest, or 120 days have passed since the date that the Attorney General received that notice, and the conditions specified in subparagraph (B) of paragraph (2) of subdivision (e) have been met.

(e) (1) Except as provided in subparagraph (B) of paragraph (2), if the Attorney General receives a 60-day

notice, pursuant to paragraph (1) of subdivision (d) specifying an alleged violation of Section 25249.5 or 25249.6, the Attorney General shall provide the person giving the notice with a written certification that bringing the private action, based on the alleged violation specified in the notice, would not be contrary to the public interest, unless the Attorney General makes one of the following written findings:

(A) The private action would be plainly frivolous.

(B) The de minimus nature of the violation does not warrant the private action.

(C) The nature of past violations and the steps taken to prevent any future violations render the private action unwarranted.

(D) The notice is inadequate in form, content, or manner of service.

(2) (A) The Attorney General's determination made pursuant to paragraph (1) shall be based on the information that is submitted by the person giving the notice, by the alleged violator identified in the notice, and upon any other information that the Attorney General may determine to be appropriate for consideration. The information may include information showing that the alleged violator has ceased, or will remedy, the violation. The Attorney General may provide certification with respect to only some of the alleged violations specified in the notice and not as to others.

(B) If the Attorney General does not provide the certification within 60 days of receipt of the notice, and the Attorney General has not made one of the findings specified in paragraph (1) within 120 days from the date of receipt of the notice, the private action may proceed as if the certification had been made.

(3) The Attorney General's determination pursuant to this subdivision, and the procedure by which the determination is reached, shall be deemed to be an exercise of the Attorney General's prosecutorial discretion and shall not be subject to any action. proceeding, or any discovery process in any action or proceeding, or to any disclosure pursuant to the

California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code. The Attorney General's determination shall not be admissible for any purpose in any action or proceeding, except to show that the person bringing the private action is in compliance with this section.

(f) (1) In any private action brought pursuant to subdivision (d), the Attorney General may intervene in the private action, for any purpose as requested by the Attorney General, and, if requested by the Attorney General, the prosecution of the private action shall proceed under the Attorney General's control and direction.

(2) In any action brought by the Attorney General after receipt of the 60-day notice specified in subdivision (d), the person that gave the notice may intervene, subject to the prosecution of the action under the Attorney General's control and direction.

(g) In any action brought by the Attorney General, a district attorney, or a city attorney or prosecutor under this chapter, the Attorney General, district attorney, or city attorney or prosecutor may seek and recover costs and attorney's fees on behalf of any private party who has rendered assistance in the case, which shall be awarded to the same extent and in the same manner as provided under Section 1021.5 of the Code of Civil Procedure, as if the person rendering the assistance had been the plaintiff in the action.

SEC. 3. Section 25249.13 of the Health and Safety Code is amended to read:

25249.13. ~~Preservation Of Existing Rights, Obligations, and Penalties.~~ *(a)* Nothing in this chapter shall alter or diminish any legal obligation otherwise required in common law or by statute or regulation, and nothing in this chapter shall create or enlarge any defense in any action to enforce ~~such~~ *that* legal obligation. Penalties and sanctions imposed under this chapter shall be in addition to any penalties or sanctions otherwise prescribed by law.

1 *(b) Notwithstanding subdivision (a), a private party*
2 *shall not bring an action in the interest of the general*
3 *public, pursuant to Section 17204 of the Business and*
4 *Professions Code, for unlawful business practices, as*
5 *defined in Section 17200 of the Business and Professions*
6 *Code, if the unlawful practices consist of violations of this*
7 *chapter, unless the person complies with subdivision (d)*
8 *of Section 25249.7. This subdivision does not affect the*
9 *ability of any person to bring an action pursuant to*
10 *Section 17204 of the Business and Professions Code in the*
11 *person's own interest or for unlawful or unfair acts other*
12 *than violations of this chapter.*
13 SEC. 4. The Legislature hereby finds and declares
14 that this act furthers the purposes of the Safe Drinking
15 Water and Toxic Enforcement Act of 1986.

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Date of Hearing: April . . 1996

ASSEMBLY COMMITTEE ON ENVIRONMENTAL SAFETY AND TOXIC MATERIALS
Bernie Richter, Chair

AB 3160 (Olberg) - As Amended: April 15, 1996

Proposition 65. 2/3 vote required.

SUBJECT: Proposition 65: enforcement; private action

SUMMARY: Clarifies the authority of the Attorney General to intervene in a private action brought to enforce the provisions of Proposition 65 and creates a rebuttable presumption that the action being brought is not in the public interest. Adds the requirement, as a condition of bringing a private action in the public interest to enforce the act, that the Attorney General provide written certification pursuant to a specified procedure, that bringing the private action specified in the notice of alleged violation would not be contrary to the public interest except as specified. Permits the Attorney General and others as specified to seek and recover costs and attorney fees on behalf of any private party who has rendered assistance as specified. Prohibits a private party from bringing an action under Proposition 65 for unlawful business practices as specified. Makes legislative finding and declarations including that the bill would further the purposes of the act.

FISCAL EFFECT: Unknown. The Attorney General has projected a potential need for three PY to thoroughly review all notices and determine whether findings should be made. Significant cost saving to business and industry by minimizing frivolous lawsuits and the cost of responding and defending to such suits.

EXISTING LAW:

Proposition 65--Prohibition on contaminating drinking water with chemicals known to cause cancer or reproductive toxicity--requires that in the course of doing business, no one shall discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water and requires anyone doing business as specified from knowingly and intentionally exposing any individual to a chemical, as specified, without first giving clear and reasonable warning to such individual as specified.

Proposition 65's enforcement provisions provide that any person violating or threatening to violate the provisions of the chapter may be enjoined in any court of competent jurisdiction and persons in violation shall be liable for a civil penalty not to exceed $2500 per day for each such violation in addition to any other penalty established by law as provided. Permits actions pursuant to this section to be brought by the Attorney General in the name of the people or by any district or city attorney as specified. Permits action to be brought by any person in the public interest as specified.

Established procedures and requires regulations for the listing of chemicals. Specifies noticing and compliance requirements.

BACKGROUND: Proposition 65 has raised the level of information available to the public regarding the presence of specific chemicals artificially made available in their environment. There has been much debate regarding the listing of specific chemicals, the timing and level of distribution of the notices, and the physical and technical characteristics of the labels. These debates have resulted in beneficial regulation and a fairly consistent application of the law to the greater benefit of the citizens of the state. HOWEVER, the "public interest," private party provisions of Proposition 65 has generated unintended consequences, namely, egregious abuses by "litigation mills." Several organizations, including "not-for-profit public interest foundations" have raised the Proposition 65 "public interest" suit to an art form by pursuing, unrelentlessly and unabashedly, small businesses with bogus legal action or threats of legal action for the single purpose of extorting money from them i.e., bounty hunting.

Current law provides that if the Attorney General or district or city attorney fail to initiate legal action within 60 days of the issuance of a "notice of violation," any person can bring such action if it is in the "public interest." There is no mechanism in existing law that requires the Attorney General or other specified attorney to make a determination on the merits of the alleged violation; the corollary, of course, is that if no action is brought by the designated public authority, then private civil action is unfounded.

The Committee files are littered with discussions of abuses. There is sufficient information to identify a definitive pattern of activity that follows the basic scenario: A manufacturer or a retailer receives a 60-day notice from a "group" alleging that the manufacturer or retailer has failed to warn the public about the presence of a listed chemical contained in a specified product. The notice is followed by an offer to engage in settlement negotiations in advance of litigation. Committee staff review of individual incidents show that there is no consorted attempt by the "public interest group" to persuade the appropriate legal authority to bring the appropriate action, thereby reinforcing the "bounty hunter" scenario.

ARGUMENTS IN SUPPORT: Frivolous Proposition 65 lawsuits which provide no benefit to the public should not be allowed to continue and companies should not have to view Proposition 65 settlement costs over nonexistent Proposition 65 violations as "a cost of doing business in California."

1) This bill will ensure that legitimate private enforcement actions dealing with violations of Proposition 65 continue, but it will make it more difficult for the bounty hunter and litigation mills which bring costly suits against businesses involving non-meritorious claims and de minimus violations of the statute.

2) The recent amendments to this bill provide a rebuttable presumption to the findings that the proposed action is not in the public interest. The

amendments provide assurances that all parties have the opportunity to revisit the determination.

3) The amendments serve several purposes including minimizing the amount of money that must be spent by targets of alleged violations until a finding has been made that the proposed action is in the public interest and prohibits discovery action until the appropriate finding is made.

4) The bill establishes how the certification process would further the purposes of the act; identifies standards for lawsuits that should go forward; closes an existing loophole in the law by preventing lawsuits from being brought under the Business and Professions code when these suits cannot meet the clear standards of Proposition 65; and provides for cost recovery on behalf of a private party who has been helpful in a case brought by the Attorney General or district attorney or city attorney.

ARGUMENTS IN OPPOSITION: According to one of the "not-for-profit public interest foundations," Proposition 65 was created because "the people of California found that hazardous chemicals posed a serious potential threat to their health and well being" and the state government agencies failed to provide them with adequate protection. According to this group, one of the rights the people declared in the initiative is "to secure strict enforcement" and another is to limit amendments to the act only to action which furthers the purposes of the initiative. This group contends that this bill violates both provisions. The group raises technical questions regarding the viability of measures based on the group's interpretation of case law.

REGISTERED SUPPORT / OPPOSITION:

Support

Chemical Industry Council of California
California Paint Council
The Environmental Working Group
California Manufacturers Association
Western Growers Association
California Chamber of Commerce

Opposition

As You Sow

Analysis prepared by: David C. Nunenkamp / aestm / 445-0991
13-Apr-1996 Sat 14:57

PROOF OF SERVICE BY FEDERAL EXPRESS

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1620 26th Street, Suite 4000 North, Santa Monica, California 90404-4038.

On August 9, 1996, I served on interested parties in said action the within:

PLAINTIFFS NATIONAL PAINT & COATINGS ASSOCIATION AND CALIFORNIA PAINT COUNCIL'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER TO COMPLAINT; DECLARATION OF JEFFREY B. MARGULIES

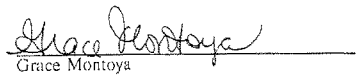
by placing true copies thereof enclosed in sealed envelopes designated by the express service carrier with delivery fees provided for addressed as follows:

DANIEL E. LUNGREN — Attorneys for All Defendants
Attorney General
of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
THEODORA BERGER
Assistant Attorney General
CRAIG C. THOMPSON
EDWARD G. WEIL
SUSAN S. FIERING
Deputy Attorneys General
2101 Webster Street
Oakland, CA 94612-3049

and depositing such envelopes in a box or other facility regularly maintained by the express service carrier.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 9th day of August, 1996, at Santa Monica, California.



Grace Montoya

ter transferred to the Consumer Product Safety Commission, see § 2079 of this title.

Separability of Provisions

Pub.L. 86-613, § 16, formerly § 15, July 12, 1960, 74 Stat. 380, renumbered Pub.L. 91-113, § 4(a), Nov. 6, 1969, 83 Stat. 189, provided that: "If any provision of this Act [enacting this chapter and repealing sections 401 to 411 of this title] is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby."

Short Title

1994 Amendments. Pub.L. 103-267, § 1, June 16, 1994, 108 Stat. 722, provided that: "This Act [enacting sections 1278 and 6001 to 6006 of this title and provisions set out as notes under this section and sections 1278, 2064, and 6001 of this title] may be cited as the 'Child Safety Protection Act'."

1984 Amendments. Pub.L. 98-491, § 1, Oct. 17, 1984, 98 Stat. 2269, provided: "That this Act [amending section 1274 of this title] may be cited as the 'Toy Safety Act of 1984'."

1969 Amendments. Section 1 of Pub.L. 91-113 provided that: "This Act [enacting section 1274 of this title, amending this section and section 1262 of this title, enacting provisions set out as notes under this section, and amending provisions set out as notes under this section and section 401 of this title] may be cited as the 'Child Protection and Toy Safety Act of 1969'."

1966 Amendments. Section 1 of Pub.L. 89-756 provided that: "This title [amending this section, sections 1262, 1263, 1264, 1265, 1273 of this title, and provisions set out as a note under this section] may be cited as the 'Child Protection Act of 1966'."

1960 Acts. Section 1 of Pub.L. 86-613, as amended by § 5 of Pub.L. 89-756, provided: "This Act [enacting this chapter, repealing §§ 401 to 411 of this title, and enacting notes set out under this section], may be cited as the 'Federal Hazardous Substances Act' ".

Effect upon Federal and State Law

Pub.L. 86-613, § 18, formerly § 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, § 4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, § 4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, § 17(a), May 11, 1976, 90 Stat. 510, provided that:

"**(a)** Nothing in this Act [enacting this chapter and repealing sections 401 to 411 of this title] shall be construed to modify or affect the provisions of the Flammable Fabrics Act, as amended (15 U.S.C. 1191 to 1200) [sections 1191 to 1204 of this title], or any regulations promulgated thereunder; or of chapter 39, title 18, United States Code, as amended (18 U.S.C. 831 et seq.), or any regulations promulgated thereunder or under sections 204(a)(2) and 204(a)(3) of the Interstate Commerce Act, as amended [section 3102 of Title 49, Transportation] (relating to the transportation of dangerous substances and explosives by surface carriers); or of section 1716, title 18, United States Code, or any regulations promulgated thereunder (relating to mailing of dangerous substances); or of section 902 [section 1472 of former Title 49] or regulations promulgated under section 601 of the Federal Aviation Act of 1958 [section 1421 of former Title 49] (relating to transportation of dangerous substances and explosives in aircraft); or of the Federal Food, Drug, and Cosmetic Act [chapter 9 of Title 21, Food and Drugs]; or of the Public Health Service Act [chapter 6A of Title 42, The Public Health and Welfare]; or of the Federal Insecticide, Fungicide, and Rodenticide Act [section 136 et seq. of Title 7, Agriculture]; or of the Dangerous Drug Act for the District of Columbia (70 Stat. 612), or the Act entitled 'An Act to regulate the practice of pharmacy and the sale of poisons in the District of Columbia, and for other purposes', approved May 7, 1906 (34 Stat. 175), as amended; or of any other Act of Congress, except as specified in section 19 [set out as a note under sections 401 to 411 of this title].

"**(b)(1)(A)** Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title] designed to protect against a risk of illness or injury associated with the sub-

stance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title].

"(B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) [subsec. (q) of this section] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

"(2) The Federal Government and the government of any State or political subdivision of a State may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the Federal, State, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).

"(3)(A) Upon application of a State or political subdivision of a State, the Commission may, by regulation promulgated in accordance with subparagraph (B), exempt from paragraph (1), under such conditions as may be prescribed in such regulation, any requirement of such State or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if—

"(i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and

"(ii) the State or political subdivision requirement (I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and (II) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision requirement on interstate commerce the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other States or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act [this chapter] for such substance (or its packaging).

"(B) A regulation under subparagraph (A) granting an exemption for a requirement of a State or political subdivision of a State may be promulgated by the Commission only after it has provided, in accordance with section 553(b) of title 5, United States Code, notice with respect to the promulgation of the regulation and has provided opportunity for the oral presentation of views respecting its promulgation.

"(4) Paragraph (1)(B) does not prohibit a State or a political subdivision of a State from establishing or continuing in effect a requirement which is designed to protect against a risk of illness or injury associated with fireworks devices or components thereof and which provides a higher degree of protection from such risk of illness or injury than a requirement in effect under a regulation of the Commission described in such paragraph.

"(5) As used in this subsection, the term 'Commission' means the Consumer Product Safety Commission."

Federal Policy Regarding Export of Banned or Significantly Restricted Substances

For provisions relating to the applicability of the term "banned or significantly restricted substance", as defined, and the Federal policy regarding the export of banned or significantly restricted substances, see § 1-101 of Ex. Ord. No.

granted in rulemaking under that section. In addition, section 27(a) of the Consumer Product Safety Act, 15 U.S.C. 2076(a), authorizes informal proceedings that can be conducted in nonrulemaking investigatory situations.

(b) This part sets forth rules of procedure for the oral presentation of data, views or arguments in the informal rulemaking or investigatory situations described in subsection (a) of this section. In situations where the opportunity for an oral presentation is not required by statute, the Commission will determine whether to provide the opportunity on a case-by-case basis.

§ 1052.2 Notice of opportunity for oral presentation.

The Commission will publish in the FEDERAL REGISTER notice of opportunity for an oral presentation in each instance. The notice shall be sufficiently in advance of the oral presentation to allow interested persons to participate. If the oral presentation involves a proposed rule, the notice of opportunity may be in the notice proposing the rule or in a later, separate FEDERAL REGISTER notice.

§ 1052.3 Conduct of oral presentation.

(a) The purpose of the oral presentation is to afford interested persons an opportunity to participate in person in the Commission's rulemaking or other proceedings and to help inform the Commission of relevant data, views and arguments.

(b) The oral presentation, which shall be taped or transcribed, shall be an informal, non-adversarial legislative-type proceeding at which there will be no formal pleadings or adverse parties.

(c) The proceedings for the oral presentation shall be conducted impartially, thoroughly, and expeditiously to allow interested persons an opportunity for oral presentation of data, views or arguments.

§ 1052.4 Presiding officer; appointment, duties, powers.

(a) For oral presentations, the presiding officer shall either be the Chairman of the Commission or a presiding officer shall be appointed by the Chairman with the concurrence of the Commission.

(b) The presiding officer shall chair the proceedings, shall make appropriate provision for testimony, comments and questions, and shall be responsible for the orderly conduct of the proceedings. The presiding officer shall have all the powers necessary or appropriate to contribute to the equitable and efficient conduct of the oral proceedings including the following:

(1) The right to apportion the time of persons making presentations in an equitable manner in order to complete the presentations within the time period allotted for the proceedings.

(2) The right to terminate or shorten the presentation of any party when, in the view of the presiding officer, such presentation is repetitive or is not relevant to the purpose of the proceedings.

(3) The right to confine the presentations to the issues specified in the notice of oral proceeding or, where no issues are specified, to matters pertinent to the proposed rule or other proceeding.

(4) The right to require a single representative to present the views of two or more persons or groups who have the same or similar interests. The presiding officer shall have the authority to identify groups or persons with the same or similar interests in the proceedings.

(c) The presiding officer and Commission representatives shall have the right to question persons making an oral presentation as to their testimony and any other relevant matter.

PART 1061—APPLICATIONS FOR EXEMPTION FROM PREEMPTION

Sec.
1061.1 Scope and purpose.
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1061.3 Statutory considerations.
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AUTHORITY: 15 U.S.C. 2075; 15 U.S.C. 1261n; 15 U.S.C. 1203; 15 U.S.C. 1476.

SOURCE: 56 FR 3416, Jan. 30, 1991, unless otherwise noted.

§ 1061.1 Scope and purpose.

(a) This part applies to the submission and consideration of applications by State and local governments for exemption from preemption by statutes, standards, and regulations of the Consumer Product Safety Commission.

(b) This part implements section 26 of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2075), section 18 of the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261n), section 16 of the Flammable Fabrics Act (FFA) (15 U.S.C. 1203), and section 7 of the Poison Prevention Packaging Act (PPPA) (15 U.S.C. 1476), all as amended.

§ 1061.2 Definitions.

For the purposes of this part:

(a) *Commission* means the Consumer Product Safety Commission.

(b) *Commission's statutory preemption provisions* and *statutory preemption provisions* means section 26 of the CPSA (15 U.S.C. 2075), section 18 of the FHSA (15 U.S.C. 1261n), section 16 of the FFA (15 U.S.C. 1203) and section 7 of the PPPA (15 U.S.C. 1476).

(c) *Commission statute, standard, or regulation* means a statute, standard, regulation, or requirement that is designated as having a preemptive effect by the Commission's statutory preemption provisions.

(d) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Wake Island, Midway Island, Kingman Reef, Johnston Island, the Canal Zone, American Samoa, or the Trust Territory of the Pacific Islands.

(e) *Local government* means any political subdivision of a State having the authority to establish or continue in effect any standard, regulation, or requirement that has the force of law and is applicable to a consumer product.

(f) *State or local requirement* means any statute, standard, regulation, ordinance, or other requirement that applies to a product regulated by the Commission, that is issued by a State or local government, and that is intended to have the force of law when in effect.

§ 1061.3 Statutory considerations.

(a) The Commission's statutory preemption provisions provide, generally, that whenever consumer products are subject to certain Commission statutes, standards, or regulations, a State or local requirement applicable to the same product is preempted, i.e., superseded and made unenforceable, if both are designed to protect against the same risk of injury or illness, unless the State or local requirement is identical to the Commission's statutory requirement, standard, or regulation. A State or local requirement is not preempted if the product it is applicable to is for the State or local government's own use and the requirement provides a higher degree of protection than the Commission's statutory requirement, standard, or regulation.

(b) The Commission's statutory preemption provisions provide, generally, that if a State or local government wants to enforce its own requirement that is preempted, the State or local government must seek an exemption from the Commission before any such enforcement. The Commission may, by regulation, exempt a State or local requirement from preemption if it finds that the State or local requirement affords a significantly higher degree of protection than the Commission's statute, standard, or regulation, and that it does not unduly burden interstate commerce. Such findings must be included in any exemption regulation.

§ 1061.4 Threshold requirements for applications for exemption.

(a) The Commission will consider an application for preemption on its merits, only if the application demonstrates all of the following:

(1) The State or local requirement has been enacted or issued in final form by an authorized official or instrumentality of the State or local government. For purposes of this section, a State or local requirement may be considered to have been enacted or issued

in final form even though it is preempted by a Commission standard or regulation.

(2) The applicant is an official or instrumentality of a State or local government having authority to act for, or on behalf of, that government in applying for an exemption from preemption for the safety requirement referred to in the application.

(3) The State or local requirement is preempted under a Commission statutory preemption provision by a Commission statute, standard, or regulation. A State or local requirement is preempted if the following tests are met:

(i) There is a Commission statute, standard, or regulation in effect that is applicable to the product covered by the State or local requirement.

(ii) The Commission statute, standard, or regulation is designated as having a preemptive effect under a statutory preemption provision.

(iii) The State or local requirement is designed to protect against the same risk of injury or illness as that addressed by the Commission statute, standard, or regulation.

(iv) The State or local requirement is not identical to the Commission statute, standard, or regulation.

(b) State and local governments may contact the Commission's Office of the General Counsel to obtain informal advice on whether a State or local requirement meets the threshold requirements of paragraph (a) of this section.

§ 1061.5 Form of applications for exemption.

An application for exemption shall:

(a) Be written in the English language.

(b) Clearly indicate that it is an application for an exemption from preemption by a Commission statute, standard, or regulation.

(c) Identify the State or local requirement that is the subject of the application and give the date it was enacted or issued in final form.

(d) Identify the specific Commission statute, standard, or regulation that is believed to preempt the State or local requirement.

(e) Contain the name and address of the person, branch, department, agency, or other instrumentality of the State or local government that should be notified of the Commission's actions concerning the application.

(f) Document the applicant's authority to act for, or on behalf of, the State or local government in applying for an exemption from preemption for the particular safety requirement in question.

(g) Be signed by an individual having authority to apply for the exemption from federal preemption on behalf of the applicant.

(h) Be submitted, in five copies, to the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

§ 1061.6 Contents of applications for exemption.

Applications for exemption shall include the information specified in §§ 1061.7 through 1061.10. More generally, a State or local government seeking an exemption should provide the Commission with the most complete information possible in support of the findings the Commission is required to make in issuing an exemption regulation. If any of the specified information is omitted because it is unavailable or not relevent, such omission should be explained in the application.

§ 1061.7 Documentation of the State or local requirement.

An application for an exemption from preemption shall contain the following information:

(a) A copy of the State or local requirement that is the subject of the application. Where available, the application shall also include copies of any legislative history or background materials used in issuing the requirement, including hearing reports or studies concerning the development or consideration of the requirement.

(b) A written explanation of why compliance with the State or local requirement would not cause the product to be in violation of the applicable Commission statute, standard, or regulation.

§ 1061.8 Information on the heightened degree of protection afforded.

An application for an exemption from preemption shall also contain information demonstrating that the State or local requirement provides a significantly higher degree of protection from the risk of injury or illness than the preempting Commission statute, standard, or regulation. More specifically, an application shall contain:

(a) A description of the risk of injury or illness addressed by the State or local requirement.

(b) A detailed explanation of the State or local requirement and its rationale.

(c) An analysis of differences between the State or local requirement and the Commission statute, standard, or regulation.

(d) A detailed explanation of the State or local test method and its rationale.

(e) Information comparing available test results for the Commission statute, standard, or regulation and the State or local requirement.

(f) Information to show hazard reduction as a result of the State or local requirement, including injury data and results of accident simulation.

(g) Any other information that is relevant to applicant's contention that the State or local requirement provides a significantly higher degree of protection than does the Commission statute, standard, or regulation.

(h) Information regarding enforcement of the State or local requirement and sanctions that could be imposed for noncompliance.

§ 1061.9 Information about the effect on interstate commerce.

An application for exemption from preemption shall provide information on the effect on interstate commerce a granting of the requested exemption would be expected to cause, including the extent of the burden and the benefit to public health and safety that would be provided by the State or local requirement. More specifically, applications for exemption shall include, where available, information showing:

(a) That it is technologically feasible to comply with the State or local requirement. Evidence of technological feasibility could take the form of:

(1) Statements by affected persons indicating ability to comply with the State or local government requirement.

(2) Statements indicating that other jurisdictions have established similar requirements that have been, or could be, met by persons affected by the requirement that is the subject of the application.

(3) Information as to technological product or process modifications necessary to achieve compliance with the State or local requirement.

(4) Any other information indicating the technological feasibility of compliance with the State or local requirement.

(b) That it is economically feasible to comply with the State or local requirement, i.e., that there would not be significant adverse effects on the production and distribution of the regulated products. Evidence of economic feasibility could take the form of:

(1) Information showing that the State or local requirement would not result in the unavailability (or result in a significant decline in the availability) of the product, either in the interstate market or within the geographic boundary of the State or local government imposing the requirement.

(2) Statements from persons likely to be affected by the State or local requirement concerning the anticipated effect of the requirement on the availability or continued marketing of the product.

(3) Any other information indicating the economic impact of compliance with the State or local requirement, such as projections of the anticipated effect of the State or local requirement on the sales and prices of the product, both in interstate commerce and within the geographic area of the State or local government.

(c) The present geographic distribution of the product to which the State or local requirement would apply, and projections of future geographic distribution. Evidence of the geographic distribution could take the form of governmental or private information or data (including statements from

manufacturers, distributors, or retailers of the product) showing advertising in the interstate market, interstate retailing, or interstate distribution.

(d) The probability of other States or local governments applying for an exemption for a similar requirement. Evidence of the probability that other States or local governments would apply for an exemption could take the form of statements from other States or local governments indicating their intentions.

(e) That specified local conditions require the State or local government to apply with the exemption in order to adequately protect the public health or safety of the State or local area.

§ 1061.10 Information on affected parties.

An application for an exemption from preemption shall include a statement which identifies in general terms, parties potentially affected by the State or local requirement, especially small businesses, including manufacturers, distributors, retailers, consumers, and consumer groups.

§ 1061.11 Incomplete or insufficient applications.

(a) If an application fails to meet the threshold requirements of § 1061.4(a) of this part, the Office of General Counsel will inform the applicant and return the application without prejudice to its being resubmitted.

(b) If an application fails to provide all the information specified in §§ 1061.5 through 1061.10 of this part, and fails to fully explain why it has not been provided, the Office of General Counsel will either:

(1) Return it to the applicant without prejudice to its being resubmitted,

(2) Notify the applicant and allow it to provide the missing information, or

(3) If the deficiencies are minor and the applicant concurs, forward it to the Commission for consideration on its merits.

(c) If the Commission or the Commission staff believes that additional information is necessary or useful for a proper evaluation of the application, the Commission or Commission staff will promptly request the applicant to furnish such additional information.

(d) If an application is not returned under paragraphs (a) or (b) of this section, the Commission will consider it on its merits.

§ 1061.12 Commission consideration on merits.

(a) If the Commission proposes to grant an application for exemption it will, in accordance with 5 U.S.C. 553, publish a notice of that fact in the FEDERAL REGISTER, including a proposed exemption regulation, and provide an opportunity for written and oral comments on the proposed exemption by any interested party.

(b) The Commission will evaluate all timely written and oral submissions received from interested parties, as well as any other available and relevant information on the proposal.

(c) The Commission's evaluation will focus on:

(1) Whether the State or local requirement provides a significantly higher degree of protection than the Commission statute or regulation from the risk of injury or illness that they both address.

(2) Whether the State or local requirement would unduly burden interstate commerce if the grant of the exemption from preemption allows it to go into effect. The Commission will evaluate these factors in accordance with the Commission's statutory preemption provisions and their legislative history.

(3) Whether compliance with the State or local requirements would not cause the product to be in violation of the applicable Commission statute, standard, or regulation.

(d) If, after evaluating the record, the Commission determines to grant an exemption, it will publish a final exemption regulation, including the findings required by the statutory preemption provisions, in the FEDERAL REGISTER.

(e) If the Commission denies an application, whether or not published for comment, it will publish its reasons for doing so in the FEDERAL REGISTER.

Airserco Manufacturing Company

7555 Tyler Boulevard • Mentor, OH 44060 • (440) 946-2700 • Fax (440) 946-8188

October 19, 1999

Mr. Roger Keller
Committee On Small Business
2163 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Keller,

I wanted to follow up our conversation regarding Airserco Manufacturing Companies experience with California Proposition 65.

Early in 1995, Airserco received a violation notice (copy attached) from Chanler & Associates, a law firm representing As You Sow. Because the original letter was not addressed properly, we received it via fax after a phone call from Chanler & Associates. I called Chanler's Patrick Wilson and followed up with a letter indicating that we wanted to comply, the product in question had very limited sales, and we would happy to stop shipping to California.

What followed was a demand for a payment of $950 as restitution. After several conversations with Chanler & Associates, we were not sure if we could be legally bound for the fine. I attempted to call authorities in California to get more information without much success. Out of frustration, I called the local office of our Congressman, Steve LaTourette. Deborah Winston in Congressman LaTourette's office was very helpful in suggesting what government agencies in California to contact.

After several calls to the California State Attorney Generals Office, I made contact with Ed Weil who was very helpful, and in fact, told me that Airserco was exempt from the law because we employed less than ten people. In addition, Mr. Weil sent us a copy of Proposition 65. During this period of time, we received letters and phone calls from Chanler & Associates imploring us to pay the fine because As You Sow had the legal right to collect the fine and delaying payment may result in a larger fine and further difficulties.

Ultimately we refused to pay the fine and sent a final letter to Chanler & Associates explaining our refusal to do so. Since that time, we have received no other correspondence from Chanler & Associates, but we read with interest a July 31, 1995 article in the San Francisco Recorder that mentioned our experience as well as the experience of other small businesses with them.

I hope this information is helpful in your consideration of the impact of Proposition 65 on small business.

Sincerely,

Richard P. Carrabine

Richard P.Carrabine
President

www.airserco.com • e-mail: airserco@airserco.com

CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, THIRD FLOOR
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122 FAX: (415) 391-11

September 2, 1994

General Counsel's Office
AIRSERCO MFG. CO.
755 Tyler Boulevard, Unit #7
Mentor, OH 44060

Re: 60-Day Notice of Proposition 65 Violation

Dear Counsel:

This firm has been retained as counsel for As You Sow ("AYS") in the above-referenced matter.

Enclosed is a 60-Day Notice of Proposition 65 violation which was sent to the appropriate public enforcement agencies as required by California's Health & Safety Code §25249.6 et seq. This notice is to inform you that AYS intends to initiate a citizen's suit following the expiration of the 60-day period unless a resolution can be reached.

If you would like to discuss this matter with AYS, please feel free to contact me at the address or telephone number provided above.

Very Truly Yours,

Clifford A. Chanler

cc: Thomas Van Dyck, Chairman As You Sow

AS YOU SOW
ays ... a foundation planting seeds for social chan

106 Clifford Ter
San Francisco, CA
Tel. (415) 512-5

September 2, 1994

Dear Public Enforcement Agencies:

As You Sow ("AYS") is a non-profit foundation organized under the California Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among other things, the protection of the environment and the improvement of consumer rights.

AYS has become aware of violations of Health & Safety Code §25249.6 et seq. This letter serves to notify you of these violations. As required, notice is also being provided to the violator. AYS plans to bring an enforcement action sixty days from now if diligent prosecution against the violations has not occurred.

The violations consist of exposures to certain listed carcinogens and/or toluene (CAS 108-88-3), a listed reproductive toxin, from various aerosol, paint, adhesive and/or automotive products, including but not limited to "P/N4036 Liqui-Vac Sealant" without clear and reasonable warning. The violations may have been occurring since January 1, 1992. The violator covered by this notice is as follows:

AIRSERCO MFG. CO., Mentor, OH 44060

Please direct all questions concerning the above-referenced Proposition 65 violations to counsel for AYS, at Chanler & Associates, 1700 Montgomery Street, Third Floor, San Francisco, CA 94111, (415) 391-1122.

Very Truly Yours,

for Thomas Van Dyck
Chairman, As You Sow

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CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, SUITE 110
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122 FAX: (415) 391-1157

February 17, 1995

Via Facsimile & U.S. Mail
(216) 946-8188

Richard P. Carrabine
President
Airserco Manufacturing Company, Inc.
7555 Tyler Boulevard, Unit 7
Mentor, OH 44060

Re: Airserco: Proposition 65 Warning Violations

Dear Rick:

I have received your February 6 letter and thank you for your prompt response to As You Sow's ("AYS") enforcement inquiry. This letter is to provide your company with guidance on how to prospectively comply with Proposition 65's warning requirement, and to propose a settlement for past violations.

First, the "Liqui-Vac Sealant" contains two Proposition 65-listed chemicals. One, Toluene (CAS #108-88-3) is listed as a known reproductive toxin, while the other, Di(2-ethylhexyl) phthalate (CAS #117-81-7) is listed as known carcinogen. The Proposition 65 warning that should be provided to "Liqui-Vac Sealant" users is:

> **"WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm."**

The warning shall be placed directly on the container label of the product so that it is prominent and displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual.

Conformance with the above, AYS believes, will ensure that Airserco is in compliance with the "clear and reasonable warning" standard of Proposition 65.

Second, because AYS has assumed a public enforcement role in instituting this action, it must account for past violations of the statute. In order to accomplish this in a quick and efficient manner, AYS often settles with manufacturers

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who have been in violation without having to proceed with litigation.

AYS, therefore, has authorized me to release Airserco from any claims AYS may have brought against Airserco on account of its failure to provide warnings prior to individuals' exposures to "Liqui-Vac Sealant" on the following terms:

(1) Before Airserco ships or causes to be shipped any "Liqui-Vac Sealant" to California, it will change the labels on the product so as to reflect the "clear and reasonable warning" standard described above.

(2) Airserco will pay to AYS on March 15, 1995, $950.00 to cover all penalties, restitution, and costs for all past violations of the law.

Please let me know if this very reasonable settlement offer is acceptable to you. If so, I will draft and send for your signature a final settlement agreement.

Do not hesitate to call me if you have any questions or concerns regarding this offer.

Sincerely,

Patrick Wilson

printed on recycled paper

airserco manufacturing company, inc.
7555 Tyler Boulevard • Unit 7 • Mentor, OH 44060 • (216) 946-2700 • FAX (216) 946-8188

February 6, 1995

Mr. Patrick Wilson
Chanler & Associates
1700 Montgomery St. Suite 110
San Francisco, CA 94111

Dear Pat,

As we discussed on the telephone, we searched our sales history of our No. 4036 Liqui-Vac Sealant. Because our records begin with the sale of Airserco and move to our current location, we can only trace back to March 1, 1993. In that period we have shipped thirty-one (31) cases of Liqui-Vac into the State of California. Although we had to manually scroll our invoices to research the sales and may be subject to some error, we are confident that this count is representative.

Until such time as we understand your Proposition 65 and can print stickers to comply, we will not ship any of this product to California. We hope this action meets with your approval and thank you for calling this matter to our attention.

I have enclosed the Material Safety Data sheets for the oil and leak detector we offer for sale.

I look forward to hearing from you and seeing the format for the labeling sticker we should use to comply. Thanks in advance for your consideration.

Sincerely,

Rich Carrabine

Richard P. Carrabine
President

Encl.

CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, SUITE 110
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122 FAX: (415) 391-1157

January 23, 1995

General Counsel
Airserco Manufacturing Co.
755 Tyler Boulevard, Unit #7
Mentor, OH 44060

Re: Proposition 65 Warning Violations

To whom it may concern:

This law firm represents As You Sow ("AYS"), a non-profit organization that enforces California Health & Safety Code § 25249.5 et seq., otherwise know as Proposition 65.

AYS investigators have discovered California sales of Airserco products which contain chemical(s) listed under Proposition 65. These products are being offered for sale without the required Proposition 65 warning.

AYS sent 60-Day Notices of Violations to the appropriate public enforcement agencies and to Airserco on September 2, 1994. AYS is now authorized to bring a civil action against Airserco to enforce Proposition 65 and will do so shortly unless some other resolution can be achieved.

AYS's primary goal is to reach prompt and complete Proposition 65 compliance in the most efficient manner possible. While AYS would prefer to work in a cooperative fashion with Airserco to reach a settlement, it is also prepared to litigate the matter in order to achieve this goal.

Please call me at your earliest convenience so that we can discuss this matter more fully.

Sincerely,

Patrick Wilson

printed on recycled paper

CHANLER & ASSOCIATES
ATTORNEYS AT LAW
1700 MONTGOMERY STREET, SUITE 110
SAN FRANCISCO, CA 94111

TEL: (415) 391-1122 FAX: (415) 391-1157

March 1, 1995

FOR SETTLEMENT PURPOSES ONLY

Via Facsimile
(216) 946-8188

Richard P. Carrabine
President
Airserco Manufacturing Company, Inc.
7555 Tyler Boulevard, Unit 7
Mentor, OH 44060

Re: Airserco: Proposition 65 Warning Violations

Dear Rick:

As a follow-up to our conversation this morning, enclosed please find a copy of the September 2, 1994 notice to the "public enforcement agencies" and the accompanying notice of representation letter. Also enclosed is a recent newspaper article regarding As You Sow ("AYS") for your information.

Your attorney's reference to AYS' enforcement efforts as "extortion", I believe, is quite inappropriate. AYS enforces the law in a consistent and even-handed manner, and this means that penalties are assessed for past violations of the law based on the extent of exposures for which no warning was provided.

AYS' current offer of $950.00 is quite reasonable in light of the fact that Airserco had no Proposition 65 warnings on either their MSDS or their product labels. It is only due to Airserco's relatively small sales in California and your expressed willingness to add warning stickers (or stop selling the toluene-containing product in California), that such an offer can be made.

If significant further resources are expended by AYS in enforcing Health & Safety Code §25249.5 against Airserco, this offer of settlement will be rescinded.

I look forward to hearing from you or your attorney next week.

Sincerely,

Patrick Wilson

printed on recycled paper

airserco manufacturing company, inc.
7555 Tyler Boulevard • Unit 7 • Mentor, OH 44060 • (216) 946-2700 • FAX (216) 946-6188

March 13, 1995

Via Facsimile (415 391-1157) and U.S. Mail

Mr. Patrick Wilson
Chanler & Associates
1700 Montgomery Street, Suite 110
San Francisco, CA 94111

Dear Pat,

I wanted to respond to your letter of March 1, prior to your deadline of March 15. There are several key points I would like to emphasize:

1.) Your letter and 60-Day Notice of Proposition 65 Violation dated September 2, 1994 was addressed incorrectly and was not delivered to us. We received only faxed copies of these documents on March 1, 1995.

2.) After receiving your January 23, 1995 letter and calling you regarding Proposition 65, we immediately ceased shipping the product in question to California. We also sent you a recap of our 2 year sales history in California with our assurances to do whatever necessary to comply with the law. We guaranteed we would not make any shipments until we were positive we would be in compliance.

3.) Our total sales of the product in question in California are less than $3000 yet you are asking us for a settlement payment of $950

4.) We believe we may be exempt from this law.

Because we believe we have acted in a responsible manner and in good faith, we will not pay the $950. you requested in your letter of February 17. I will assure that we have made no shipments since your letter January 23, 1995. Further, we will not ship any product in the future unless it carries the appropriate warning label.

Please feel free to call me if you have any questions regarding this matter which we are considering closed. Again, I would like to thank you for calling it to our attention.

Sincerely,

Richard P. Carrabine

Richard P. Carrabine
President

Quality Lawn And Garden Tools

4324-36 Fyler Avenue
Saint Louis, Missouri
63116-1802

314-772-6505
FAX 314-772-6508
email:gardex@earthlink.net

October 7, 1999

Honorable James M. Talent, Chairman
House Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

Subject: California Prop 65

Dear Chairman Talent:

Our family operated company first became aware of California Prop 65 when we received the attached (exhibit #1) letter from our customer Do-It Best Corp. dated Sept. 22, 1999. We understand this law has been in existence for several years, but being located 2,000 miles from California and the fact we have no California resident customers, we had no prior knowledge such a law existed.

Most amazing is the fact Prop 65 has provided for what are called "Bounty Hunter Plaintiffs", citizen groups or individuals to my understanding who can bring legal action against companies they "suspect" violating this law. Said "bounty hunter" provision can create great "mischief" if our competitors could induce them to deal our business a fatal blow through excessive lawsuits. Instead of qualified government inspectors, the inclusion of "Bounty Hunters" take on a historical hint of the gestapo and "Crystal Nacht".

As the attached letter from Do-It Best Corp. denotes, we are required to hire counsel to provide an opinion, perhaps label all our products just for California customers, and then sign a "hold harmless" agreement to indemnify them - even if "Do-it Best Corp. may be at fault" (i.e. careless handling accidently knocking label off product). Otherwise, our products will be banned by this very important customer. It is only a matter of time until all of our customers selling in California will demand the same.

Most importantly I would ask members of the committee, and for that matter the entire Congress, what has happened to article 1, section 8, #3 (often referred to as the "commerce clause") of the Constitution? It grants regulation of interstate commerce to Congress - not the states. Can all of you imagine that if a small business such as our's had to make 50 or more different versions of each of our products to meet each individual states requirements, we would starve when our banks shut off our operating loans to support such a monster. Obviously Congress has not forfeited safety regulation with its creation of EPA, OSHA, and Consumer Products Safety Commission, which affords all a single set of rules to work by. We small businesses feel U.S. Government inspectors are above "mischief", better trained and more qualified to assess safety issues than citizen groups, or individuals. Congress should seek redress at the Supreme Court to strike down state laws trying to regulate interstate commerce, as does Prop 65.

Prop 65 has all the appearance of a death sentence to small manufacturing companies who will be driven from business by lawsuit, after lawsuit, as these suits are passed up the food chain (by some people with an axe to grind) to whomever manufactures anything. I can not think of a worse time period for such legislation, as most small manufacturers are under assault and hanging on by their fingernails due to cheap imports flooding our markets.

The tradition in America of "family operated small businesses" appears about to follow along with the demise of family farms. It may not be proper to scold Congress, but shame on you for failing family farmers, and now small family businesses in what is referred to as the "greatest business consolidation" in U.S. history. Success in business (and farming) no longer has anything to do with service, price or quality - it has to do with how big you are, how much money you have in the bank to withstand legal assaults or to buy or kill competitors.

In closing my son Jim (our President) and I wish to thank the House Committee on Small Business for accepting our comments on the matter of California Prop 65. We would be most interested in receiving a copy of the report and testimony to take place on October 28, 1999.

Cordially,

Gardex, Div. Keller Mfg. Co.

William A. Keller
Exec. V-P Sales & Marketing & Owner
WAK/sb
enclosure

Exhibit #1

Do it Best Corp.

Products
Services
Solutions

P.O. Box 868
Fort Wayne, IN
46801-0868
Ph: 219-748-5300
Fax: 219-493-1245
mail@doitbest.com

September 22, 1999

Attn: Sales Manager
Gardex #3180
4324 Fyler Ave
St Louis MO 63116

Re: California Proposition 65 ("Prop 65")

Do it Best Corp. continues to be concerned about the potential for liability under Prop 65 arising from the sale in California of products containing toxic substances and other regulated substances. There are significant penalties for non-compliance with Prop 65, including statutory penalties of $2,500 per day per violation, and, to the extent a "bounty hunter plaintiff" brings suit, payment of the plaintiff's attorneys' fees. Prop 65 litigation also causes other hidden costs which impact productivity and profitability.

We need to ensure that all products offered for sale to Do it Best Corp. members in California comply with Prop 65. Inasmuch as we do not control the content of the label on your product, Do it Best Corp. should not bear any liability if the warning label is alleged to be or is in fact non-compliant.

One of the ways in which you may comply with Prop 65 is through the affixation of a warning label on the product. To qualify for this "safe harbor" exception, the product must bear a warning label that complies with Prop 65. Please review the products you are presently supplying to Do it Best Corp. for compliance with Prop 65. Please provide me with a written opinion of counsel that demonstrates an examination of Prop 65 and either (i) represents that your product is not regulated under Prop 65, or (ii) represents that that your product bears a warning label that complies with the "safe harbor" exemption under Prop 65. To the extent that your product is regulated under Prop 65, we also request that you provide us with a copy of your warning label. Time is of the essence and, therefore, we request a response to this request by October 15, 1999. If we do not receive a written opinion of counsel that establishes compliance with Prop 65 and a copy of the warning label (if your product is regulated), we will begin banning the sale of all potentially non-compliant products commencing not later than January 1, 2000.

Please execute and return a copy of this letter to me on or before October 15, 1999. Also, please provide me with an opinion from counsel as to whether your product is subject to and compliant with Prop 65 and, if your product is regulated, with a copy of the warning label that complies with the "safe harbor" exemption. We need to receive your counsel's opinion by October 15, 1999.

Please be assured that we understand the inconvenience and expense this request might generate. However, we much prefer to resolve the issue **before** attorneys get involved and it costs us each a much greater sum to resolve the problem. We will work with you to the extent we can do so and will endeavor to resolve this matter quickly so that our attention and energies can be redirected to our core business activities.

Very truly yours,

Randy Kipfer Retail Product Manager	Andy Lehman Retail Product Manager	Jeff Frazier Retail Product Manager

I HAVE REVIEWED THE FOREGOING LETTER AND WILL PROVIDE THE ITEMS REQUESTED THEREIN. I AM DULY AUTHORIZED TO EXECUTE THIS LETTER ON MY COMPANY'S BEHALF. AS A VENDOR TO DO IT BEST CORP., WE AGREE TO INDEMNIFY AND HOLD DO IT BEST CORP., ITS EMPLOYEES AND ALL PERSONS TO WHOM THE GOODS PROVIDED BY US MAY BE TRANSFERRED BY DO IT BEST CORP. HARMLESS FROM ALL CLAIMS, LOSSES, EXPENSES AND DAMAGES INCLUDING (BUT NOT LIMITED TO) ATTORNEYS' FEES AND COURT COSTS WHICH MAY BE INCURRED BY ANY ONE OR MORE OF THEM IN THE EVENT (i) ANY PRODUCT CLAIM OR ACTION IS BROUGHT AGAINST ANY ONE OR MORE OF THEM, OR (ii) ANY CLAIM IS BROUGHT RESULTING FROM THE FAILURE TO MANUFACTURE, PRODUCE, PACKAGE, LABEL, SHIP AND, IF REQUIRED, TO REGISTER ALL PRODUCTS IN ACCORDANCE WITH AND IN CONFORMITY TO ALL APPLICABLE STATE AND FEDERAL LAWS. VENDOR'S OBLIGATION TO DEFEND AND INDEMNIFY DO IT BEST CORP. SHALL EXIST WHETHER ANY CLAIM ARISES, IN WHOLE OR IN PART, OUT OF THE FAULT, NEGLIGENCE, MISCONDUCT, OR OTHER ACT OR OMISSION OF DO IT BEST CORP. OR VENDOR, OR BOTH.

Gardex #3180

By: _____

Printed: _____

Title: _____

Date: _____

CHANLER LAW GROUP
ATTORNEYS AT LAW

MAGNOLIA LANE (OFF HUCKLEBERRY HILL)
NEW CANAAN, CT 06840-3801

TELEPHONE: (203) 966-9911
FACSIMILE: (203) 801-5222

September 16, 1999

Via Facsimile

Roger Keller, General Counsel
U.S. House of Representatives
Committee on Small Businesses
2361 Rayburn HOB
Washington, D.C. 20515

Re: **Proposition 65**

Dear Mr. Keller:

Thank you for your recent telephone call in which your Committee invited me to join a panel relating to a discussion concerning California's Safe Drinking and Toxic Enforcement Act of 1986. While I intend to submit written comments on one or more of the issues before the Committee and/or the CPSC, I respectfully decline to appear as a participant on the panel. If you would like the names of other potential participants, please feel free to contact me.

Very truly yours,

Clifford A. Chanler

Clifford A. Chanler

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