

## Proposition 65 Warnings at 30 – Time for a Different Approach

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# Proposition 65 Warnings at 30 – Time for a Different Approach

## INTRODUCTION

THIS YEAR, 2016, MARKS THE THIRTIETH ANNIVERSARY OF PROPOSITION 65 (“Prop 65”), a voter initiative that passed in California under the more imposing name of the Safe Drinking Water and Toxic Enforcement Act of 1986.<sup>1</sup> Although Prop 65 is touted for its simplicity and fundamental “right to know” underpinnings, it continues to raise the ire of businesses both large and small, many of which are subject to Prop 65’s warning requirements.<sup>2</sup> California is awash in Prop 65 warnings, whether on consumer products or in hotels, restaurants, ballparks, parking garages, office buildings, amusement parks, and pools.<sup>3</sup> Governor Brown’s ambitious legislative efforts to strengthen and restore the original intent of Prop 65<sup>4</sup>

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1. CAL. HEALTH & SAFETY CODE §§ 25249.5–25259.13 (West 2006).

2. See, e.g., Jeffrey B. Margulies, *Court Ruling Reveals Absurdity of California’s Proposition 65*, 19 ANDREWS TOXIC CHEMICALS LITIG. REP., no. 24, Mar. 8, 2002, at 12 (noting the “high cost of performing Prop 65 exposure assessments” to prove chemical exposure levels are safe). In fact, because such assessments pose a huge burden, a business that may be in compliance with Prop 65 will “[s]ettle with the plaintiff, of course. Save the cost of the assessment. Save the legal fees. Get rid of the case.” *Consumer Cause, Inc. v. SmileCare*, 110 Cal. Rptr. 2d 627, 646 (Cal. Ct. App. 2001) (Vogel, J., dissenting)).

3. Michael L. Marlow, *Too Much (Questionable) Information?*, REGULATION, Winter 2013–2014, at 22 (describing the plethora of warnings conveyed “by a typical California hotel.”), <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2014/1/regulation-v36n4-6.pdf>.

4. See Marc Lifsher, *Brown Seeks to Rewrite Toxics Law*, L.A. TIMES (May 8, 2013), <http://articles.latimes.com/2013/may/08/business/la-fi-prop65-overhaul-20130508> (“Proposition 65 is a good law that’s helped many people, but it’s being abused by unscrupulous lawyers.”). Political reality converted Governor Brown’s 2013 ambitious legislative proposals into modest enforcement relief for small businesses, codified in Section 25249.7(k).

yielded only limited improvements,<sup>5</sup> leaving California's Office of Environmental Health Hazard Assessment ("OEHHA") and Office of the Attorney General to propose ostensible improvements through the regulatory process.<sup>6</sup> OEHHA's particular efforts, however, highlight inherent flaws with Prop 65 itself—flaws beyond the ability of OEHHA to cure through regulation.<sup>7</sup>

The first part of this article discusses the impetus for Prop 65 and provides an overview of its crucial, and controversial, features.<sup>8</sup> The second part highlights the fundamental flaws of Prop 65—focusing on consumer product warnings and bounty hunter provisions—that stubbornly persist notwithstanding recent legislative and regulatory efforts to address them.<sup>9</sup> This article concludes by discussing alternative approaches to Prop 65.<sup>10</sup>

## I. THE IMPETUS FOR PROPOSITION 65

Proposition 65<sup>11</sup> was one of over a half-dozen initiatives on the ballot<sup>12</sup> in the November 4, 1986 California general election, and garnered a nearly two-to-one

5. See Melanie Mason, *Brown Signs Law Amending State's Anti-Toxins Law, Proposition 65*, L.A. TIMES (Oct. 5, 2013, 2:59 PM), <http://www.latimes.com/local/political/la-me-ln-brown-california-amend-antitoxins-law-20131005-story.html>; Jack Schatz, *Proposition 65 Reform Legislation Abandoned by Gov. Brown*, PROP65NEWS.COM (Sept. 9, 2013), <http://prop65news.com/Story-Details/ArticleID/7533/Prop-65-Reform-Legislation-Abandoned-by-Gov-Brown>.

6. See Natalie E. Rainer et al., *California Prop 65 Enforcement Amendment Summary re: Office of Environmental Health Hazard Assessment*, NAT'L L. REV. (Oct. 13, 2015), <http://www.natlawreview.com/article/california-prop-65-enforcement-amendment-summary-re-office-environmental-health> ("The California Attorney General's Office recently proposed regulations intended to reform the private enforcement of Proposition 65. . . . Ultimately the Attorney General's proposed regulations will likely increase the costs to defendants in Proposition 65 actions.").

7. See, e.g., CAL. HEALTH & SAFETY CODE § 25249.12(a) (West 2006) (explicitly confining OEHHA's regulatory reach to "conform with" Prop 65 and "to further its purposes").

8. See *infra* Part I. This article does not address or propose to modify Section 25249.5 and related sections of Prop 65 that prohibit toxic discharges into drinking water. The formal title of Prop 65, coupled with Section 25249.5, which precedes the warning provisions, underscore Prop 65's foremost intent to keep businesses from discharging toxic chemicals into drinking water. Section 25249.5 states in full that "[n]o 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 such chemical passes or probably will pass into any source of drinking water. . . ." § 25249.5. This Section garnered the attention of the press. The Los Angeles Times, for example, focused on the drinking water aspect of the provision in recommending that constituents vote against the initiative. See *No on Toxics Initiative*, L.A. TIMES (Oct. 29, 1986), [http://articles.latimes.com/1986-10-29/local/me-7725\\_1\\_drinking-water](http://articles.latimes.com/1986-10-29/local/me-7725_1_drinking-water).

9. See *infra* Part II.

10. See *infra* Part III.

11. Drafted by (former) Environmental Defense Fund attorney David Roe, Sierra Club political director Carl Pope, and Los Angeles Deputy Mayor Tom Houston, Prop 65 was intended to address voter's "growing concerns about exposure to toxic chemicals;" a self-styled "populist cure for government's chronic failures to control toxic chemicals." See Paul Jacobs, *California Elections: Prop. 65: Toxics Calamity or Legal Catalyst?*, L.A. TIMES (Oct. 13, 1986), [http://articles.latimes.com/1986-10-13/news/mn-3020\\_1\\_hazardous-chemicals/2](http://articles.latimes.com/1986-10-13/news/mn-3020_1_hazardous-chemicals/2); OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, PROPOSITION 65 IN PLAIN LANGUAGE (2013) [hereinafter PROP 65 PLAIN LANGUAGE], <http://www.oehha.ca.gov/prop65/background/p65plain.html> (last updated Feb. 2013); David Roe, *Little Labs Lost: An Invisible Success Story*, 15 GREEN BAG 275, 275 (2012).

margin of victory.<sup>13</sup> Its passage ushered in a dramatically different and deceptively straightforward approach to addressing the perceived inadequacies of existing environmental laws.<sup>14</sup> Simply put, Prop 65 proponents argued that existing laws were not “tough enough.”<sup>15</sup> Indeed, section 1 of Prop 65 wags the proverbial finger at “state government agencies” for failing to adequately protect the people of California from hazardous chemicals.<sup>16</sup> Despite vigorous opposition by industry, agriculture, and editorial boards of numerous newspapers, including the Los Angeles Times, this emotive message won out.<sup>17</sup>

In approving Prop 65, voters declared their rights to protect themselves against chemicals that cause cancer or reproductive harm and to be informed about exposures to such chemicals.<sup>18</sup> The specific provisions of Prop 65, including the

12. See MARCH FONG EU, SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOVEMBER 4, 1986 (U.C. Hastings Scholarship Repository) [hereinafter BALLOT PAMPHLET], [http://repository.uchastings.edu/ca\\_ballot\\_props/971/](http://repository.uchastings.edu/ca_ballot_props/971/). To assist California voters in assessing the merits of Prop 65, among other propositions, the Secretary of State assembled and distributed a California Ballot Pamphlet, which “contains the ballot title, a short summary, the Legislative Analyst’s analysis, the pro and con arguments and rebuttals, and the complete text of each proposition.” *Id.* at 2. Each ballot measure is designated as a proposition and assigned a number. *Id.* at 3. More generally, Prop 65 is an example of a ballot statutory initiative, a common legislative vehicle in California, by which the electorate either creates or amends a statute. L.Tobe Liebert, *Researching California Ballot Measures*, 90 LAW LIBR. J. 27, 28–29 (1998). This initiative power is rooted in California’s Constitution. CAL. CONST. art. II, § 8. The arguments for and against a proposition in the ballot pamphlet constitute the “‘intent’ of the electorate.” Liebert, *supra*, at 36.

13. See Kenneth W. Kizer et al., *Sound Science in the Implementation of Public Policy*, 260 JAMA 951, 951 (1988).

14. See BALLOT PAMPHLET, *supra* note 12, at 54.

15. *Id.*

16. *Id.* at 53. But in raising alarm bells, vocal opponents feared that mandating Prop 65 on “millions of ordinary and safe items” would serve no useful purpose. *Id.* at 54. See, e.g., Devin S. Schindler & Tracey Brame, *This Medication May Kill You: Cognitive Overload and Forced Commercial Speech*, 35 WHITTIER L. REV. 27, 55–57 (2013) (rejecting the government notion that cigarette labels are necessary because people who choose to smoke lack enough information to make a “truly rational decision,” especially since the addictive and harmful health effects of cigarettes are so widely disseminated; more information is not always better than less). Ironically, Prop 65 detractors agreed with Prop 65 proponents in arguing that better enforcement of the current plethora of environmental laws was needed. BALLOT PAMPHLET, *supra* note 12, at 55.

17. See *No on Toxics Initiative*, *supra* note 8; Kizer et al., *supra* note 13, at 951. The dire forewarnings predicted by the anti-Proposition 65 critics, however, failed to materialize—Prop 65 has neither led to the banning of ordinary table salt nor warning labels on every apple sold served in California. *No on Toxics Initiative*, *supra* note 8.

18. See BALLOT PAMPHLET, *supra* note 12, at 54. Other rights include the right to strict enforcement of laws controlling hazardous substances and the right to have offenders of illegal hazardous waste disposal bear more of the costs for cleanups than taxpayers. See *id.* “Proposition 65 represents the most ambitious attempt by any state to regulate hazardous chemical exposure through information disclosure rather than by direct mandate.” Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California’s Proposition 65*, 23 ECOLOGY L.Q. 303, 306 (1996).

As with other voter initiatives, however, it is difficult to say whether the electorate fully grasped and understood the contours of Prop 65 in casting their vote. See Kizer, *supra* note 13, at 951.

controversial “right to know” warning requirements discussed throughout this article, purportedly advance those rights.<sup>19</sup>

#### A. Overview of Prop 65’s Warning Mandate

Prop 65’s warning mandate provision is a mere one sentence in length: “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, except as provided in Section 25249.10.”<sup>20</sup> Warnings, however, “need not be provided separately to each exposed individual.”<sup>21</sup> And numerous warning methods, such as the posting of notices, mailings, and labels, may be utilized *if the warning provided is clear and reasonable*.<sup>22</sup>

19. See BALLOT PAMPHLET, *supra* note 12, (“We each have a right to know, and to make our own choices about being exposed to these chemicals [that cause cancer or reproductive disorders]”); see also DiPirro v. Bondo Corp., 62 Cal. Rptr. 3d 722, 747 (Cal. Ct. App. 2007) (referring to Prop 65 as “informational and preventative rather than compensatory in its nature and function.”). The DiPirro court also noted that Proposition 65 “facilitate[s] the notification of the public of potentially harmful substances, so informed decisions may be made by consumers on the basis of disclosure.” *Id.* at 747–48. As argued, Prop 65 warnings communicate very little useful information and thus hamper informed decision-making. Prop 65 was not the only law to embrace right to know provisions. The Emergency Planning and Community Right-to-Know Act (EPCRA), also passed in 1986, contains explicit right to know provisions. See *What is EPCRA?*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/epcra/what-epcra> (last updated Nov. 10, 2015); Carl Cranor, *Information Generation and Use Under Proposition 65: Model Provisions for Other Postmarket Laws?*, 83 IND. L.J. 609, 624 (2008).

20. CAL. HEALTH & SAFETY CODE § 25249.5 (West 2006). Given the brevity of the warning provision, much was left to the state agency tasked with implementing Prop 65 and to the courts to sort out. The term “intentionally” is not defined in the statute or regulation. “Knowingly” is defined in the regulations as referring “only to knowledge of the fact that . . . [an] exposure to a chemical listed . . . is occurring.” CAL. CODE REGS. tit. 27, § 25102(n) (2016). “Person in the course of doing business” does not include any state or federal agency, public water system, or “any person employing fewer than 10 employees . . .” CAL. HEALTH & SAFETY CODE § 25249.11(b) (West 2006).

Section 25249.10 delineates three exemptions from the warning requirement: when a warning for an exposure is preempted by federal law; for an exposure that occurs within 12 months of “the listing of the chemical in question;” and for “[a]n exposure for which the person responsible can show that the exposure poses no significant risk . . .” *Id.* § 25249.10. See also OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, REVISED FINAL STATEMENT OF REASONS 32 (1988) [hereinafter RFSOR], [http://www.oehha.ca.gov/prop65/law/pdf\\_zip/12601FSORNov1988.pdf](http://www.oehha.ca.gov/prop65/law/pdf_zip/12601FSORNov1988.pdf) (“Unless a business has reason to know that the product contains a listed chemical, no testing is needed, and no warning is necessary.”).

21. CAL. HEALTH & SAFETY CODE § 25249.11(f) (West 2006). Prop 65 has prompted some manufacturers to avoid Prop 65 warning requirements through product reformulation—replacing a Prop 65 listed chemical with a non-listed chemical. Rechtschaffen, *supra* note 18, at 307, 313, 318, 320 n.83, 341–45. But despite what the drafters may have intended in drafting Prop 65, the Ballot Pamphlet is devoid of any discussion of product reformulation as a justification. See generally BALLOT PAMPHLET, *supra* note 12.

22. See PROP 65 PLAIN LANGUAGE, *supra* note 11. The term “clear” refers to the warning content—the message itself; the word “reasonable” refers to the method of warning—how a message is presented or transmitted. RFSOR, *supra* note 20, at 2.

To provide businesses with “reasonable certainty that they will not be subjected to an enforcement action over the warning[s] they provide,”<sup>23</sup> the Health and Welfare Agency of California (the predecessor of OEHHA)<sup>24</sup> promulgated both “safe harbor” warning methods and content for exposures related to consumer products, occupational exposures, and environmental exposures.<sup>25</sup>

Exemptions from the warning requirement include a showing that exposure to a listed carcinogen poses “no significant risk assuming lifetime exposure at the level in question,”<sup>26</sup> and for a listed reproductive toxicant, a showing that “the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question.”<sup>27</sup> To assist businesses in determining whether a warning is required, OEHHA promulgated safe harbor levels, known as no significant risk levels (“NSRLs”) for carcinogens and maximum allowable dose levels (“MADLs”) for reproductive toxicants.<sup>28</sup> But OEHHA’s penchant for listing chemicals has far surpassed its ability to promulgate safe harbor levels,<sup>29</sup> despite pronouncements to

23. RFSOR, *supra* note 20, at 8. “Normally, whether a warning is clear and reasonable will be a question of fact to be determined on a case by case basis.” *Id.* at 7.

24. The Health and Welfare Agency of California was the initial lead agency tasked with implementing Prop 65; the Office of Environmental Health Hazard Assessment (OEHHA) is the current lead agency. OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, TITLE 22 CCR § 12000-14000, PROPOSITION 65 – CHANGES WITHOUT REGULATORY EFFECT – TITLE 22, REGULATORY UPDATE PROJECT (2008), <http://oehha.ca.gov/prop65/law/regs032808.html>. Unless otherwise indicated, “OEHHA” is used throughout this article to refer both to OEHHA and the Health and Welfare Agency of California.

25. See CAL. CODE REGS. tit. 27, §§ 25601–25605.2 (2016). For consumer products that contain a carcinogen, for example, the safe harbor provisions specify that the warning must include the following language: “WARNING: This product contains a chemical known to the State of California to cause cancer.” *Id.* § 25603.2(a)(1). The warning may be provided on a product’s label or through other means specified in section 25603.1: (a)–(d).

26. CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 2006). The burden of showing that a warning is not required falls on the individual responsible for the exposure in question. *Id.* For both listed carcinogens and reproductive toxicants, the level in question is the amount of the exposure to a listed chemical for which “the person in the course of doing business is responsible.” See CAL. CODE REGS. tit. 27, §§ 25721(a), 25821(a) (2016). For listed carcinogens, “no significant risk” is defined as the risk level “calculated to result in one excess case of cancer in an exposed population of 100,000, assuming lifetime exposure at the level in question . . .” *Id.* § 25703(b).

27. CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 2006). If the no observable effect level for a chemical is 1 milligram per day (mg/day), the level of the chemical in question to which an individual could be exposed without triggering the warning requirement would be 1 mg/day divided by 1000, or 0.001 mg/day. *Id.*

28. OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, MOST CURRENT PROPOSITION 65 NO SIGNIFICANT RISK LEVELS (NSRLS) MAXIMUM ALLOWABLE DOSE LEVELS (MADLs) (2013), <http://oehha.ca.gov/prop65/getNSRLs.html>. See also Roe, *supra* note 11, at 288 (footnote omitted) (“[D]efendants need a reliable way of showing what the exemption level is. The only sure way is to point to an official determination. Numbers fixed by the regulatory agency don’t create liability, in other words; they create shields against what would otherwise be wider liability.”).

29. Safe harbor levels assist businesses in determining whether a warning is required. If the level of exposure does not exceed the safe harbor level, then no warning is required. CAL. HEALTH & SAFETY CODE §§ 25249.6, 25249.10 (West 2006); see, e.g., CAL. CODE REGS. tit. 27, arts. 7–8 (2016). In the late 1980s, OEHHA “provided specific no significant risk levels” and therefore anticipated “that warnings will be necessary in relatively few cases.” RFSOR, *supra* note 20, at 27. As of December 2015, of the over 800 chemicals “known to

“strive to develop . . . a draft safe harbor level within one year of the chemical’s listing.”<sup>30</sup>

The Governor was tasked in a separate Prop 65 provision to create a list, updated at least annually, of chemicals that are known to cause cancer or reproductive toxicity.<sup>31</sup> Various mechanisms for adding chemicals to the list are described in this provision.<sup>32</sup> One mechanism involves a determination rendered by “the state’s qualified experts”<sup>33</sup> who serve on OEHHA’s Science Advisory Board, which is composed of the Carcinogen Identification Committee (“CIC”) and the Developmental and Reproductive Toxicant Identification Committee (“DARTIC”).<sup>34</sup> The warning requirements take effect within 12 months of listing through any of the several mechanisms.<sup>35</sup>

### B. Enforcement and Burden Shifting

Any person violating or threatening to violate Prop 65’s warning requirements may be enjoined;<sup>36</sup> violators also are subject to civil penalties not to exceed \$2,500 per day for each violation.<sup>37</sup> Enforcement of Prop 65’s warning requirements may be pursued by the California Attorney General, any district attorney, certain city attorneys, and city prosecutors.<sup>38</sup> If none of these individuals “has commenced and is diligently prosecuting an action against the violation,” then a “private action” by “any person in the public interest” may be commenced only after 60 days from the date the person has given notice of the alleged violation to the alleged violator, the

the State [of California] to cause cancer or reproductive toxicity,” approximately 30% have safe harbor levels, and most of these levels were published before 2002. Less than 20% of the safe harbor levels were published in the last 10 years. See OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, CHEMICALS KNOWN TO THE STATE TO CAUSE CANCER OR REPRODUCTIVE TOXICITY (2015) [hereinafter CURRENT PROP 65 LIST DECEMBER 2015], [http://www.oehha.ca.gov/prop65/prop65\\_list/files/P65single120415.pdf](http://www.oehha.ca.gov/prop65/prop65_list/files/P65single120415.pdf).

30. OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, NOTICE OF NEW PRACTICE REGARDING THE DEVELOPMENT OF PROPOSITION 65 SAFE HARBOR LEVELS FOR NEWLY LISTED CHEMICALS (2008), [http://oehha.ca.gov/prop65/policy\\_procedure/safeharbor020108.html](http://oehha.ca.gov/prop65/policy_procedure/safeharbor020108.html). In September 2012, OEHHA updated its “Priority List for the Development of Proposition 65 Safe Harbor Levels” and assigned priority levels to numerous chemicals for which safe harbor levels had not been adopted. OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, PRIORITY LIST FOR THE DEVELOPMENT OF PROPOSITION 65 SAFE HARBOR LEVELS NO SIGNIFICANT RISK LEVELS (NSRLs) FOR CARCINOGENS AND MAXIMUM ALLOWABLE DOSE LEVELS (MADLs) FOR CHEMICALS CAUSING REPRODUCTIVE TOXICITY (2012), [http://oehha.ca.gov/prop65/CRNR\\_notices/state\\_listing/prioritization\\_notices/prior083012.html](http://oehha.ca.gov/prop65/CRNR_notices/state_listing/prioritization_notices/prior083012.html). OEHHA anticipated that within two years, safe harbor levels would be proposed for “many of the chemicals in the first priority group.” *Id.* As of December 2015, OEHHA has yet to propose, let alone finalize, safe harbor levels for the vast majority of first priority group chemicals. See CURRENT PROP 65 LIST DECEMBER 2015, *supra* note 29.

31. CAL. HEALTH & SAFETY CODE § 25249.8(a) (West 2006).

32. *Id.* § 25249.8.

33. *Id.* § 25249.8(b).

34. CAL. CODE REGS. tit. 27, § 25302 (2016).

35. CAL. HEALTH & SAFETY CODE § 25249.10(b).

36. *Id.* § 25249.7(a).

37. *Id.* § 25249.7(b) (West 2006).

38. *Id.* § 25249.7(c)–(d).

Attorney General and the prosecutor in whose jurisdiction the violation is alleged to have occurred.<sup>39</sup>

The 60-day notice requirement “was intended to trigger agency enforcement, and to afford the [agency], state, and violator sixty days to resolve the problem without being harassed by a lawsuit.”<sup>40</sup> “[A]ny person” has been euphemized to “bounty hunter,” and describes persons who have fueled the flames of consternation among businesses on the receiving end of bounty hunter suits.<sup>41</sup> And the California code statutorily mandates a portion of the civil penalties collected in these actions be paid to the bounty hunter.<sup>42</sup> “Moreover, [Prop 65] does not have a standing requirement; a plaintiff need not allege or prove damages to maintain an action . . . .”<sup>43</sup>

As noted, Prop 65 exempts an exposure to a listed chemical from attendant warnings if the exposure can be shown to pose no significant risk or observable effect.<sup>44</sup> Prop 65, unlike most environmental and health statutes,<sup>45</sup> distinctively places the “onerous”<sup>46</sup> burden of meeting this exemption squarely on the shoulders of the defendant, not on the party bringing a Prop 65 enforcement action.<sup>47</sup> Thus, the warning exemption serves as “an affirmative defense within that action.”<sup>48</sup>

## II. PROPOSITION 65 AND THE FIRST AMENDMENT

39. *Id.* § 25249.7(d)(1)–(2).

40. *Yeroushalmi v. Miramar Sheraton*, 106 Cal. Rptr. 2d 332, 340 (Cal. Ct. App. 2001).

41. Bounty hunter law suits are “private actions” permitted by Prop 65, which has resulted in a wave of frivolous lawsuits by these bounty hunters, who often file suit in hopes of eliciting quick settlements.

42. CAL. HEALTH & SAFETY CODE § 25249.12(d) (“Twenty-five percent of all civil and criminal penalties . . . shall be paid” to the bounty hunter bringing the suit).

43. *DiPirro v. Bondo Corp.*, 62 Cal. Rptr. 3d 722, 748 (Cal. Ct. App. 2007). *See also* *Nat’l Paint & Coatings Ass’n v. State*, 68 Cal. Rptr. 2d 360, 365 (Cal. Ct. App. 1997) (stating that California’s Constitution, unlike the U.S. Constitution, “contains no ‘case or controversy’ requirement”).

44. CAL. HEALTH & SAFETY CODE § 25249.10(c) (West 2006); *see supra* notes 26–27 and accompanying text (explaining exemptions from the warning requirement where it is shown the “listed carcinogen poses ‘no significant risk’” or in the case of reproductive toxicants, “no observable effect”).

45. Kristen R. Stevens, *Regulating Toxics at the State Level: Proposition 65’s Warning Requirement*, 9 STAN. ENVTL. L. J. 84, 123 (1990) (footnote omitted) (“In most environmental and health statutes, the burden falls on the agency to show that a released chemical is harmful. . . . Proposition 65’s no significant risk exception instead places the burden of proof on the business to show that the amount of the listed substance released is harmless . . . .”).

46. *DiPirro*, 62 Cal. Rptr. 3d at 754. *See also* *Consumer Def. Grp. v. Rental Hous. Indus. Members*, 40 Cal. Rptr. 3d 832, 853 (Cal. Ct. App. 2006) (noting that “the burden shifting provisions make it virtually impossible for a private defendant to defend a warning action . . . short of actual trial”).

47. *See Consumer Def. Grp.*, 40 Cal. Rptr. 3d at 853 (describing the burden shifting provision of section 25249.10 as “[t]he critical part” of Prop 65).

48. *DiPirro*, 62 Cal. Rptr. 3d at 749. “The standard of proof required of the defendant to establish the warning exemption is ‘the preponderance of the evidence standard.’” *Id.* at 751–52.

This section analyzes the framework under which First Amendment protection is afforded to commercial speech and then argues why Prop 65 runs afoul of the First Amendment. This section concludes by describing the key Prop 65 drivers of private enforcement.

## A. *History of Commercial Speech and First Amendment Scrutiny*

### 1. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*

Prop 65's mandated warning disclosures for consumer product exposures impact vast stretches of the business community, from the manufacturer to the retailer and everyone in between. Arrayed against these mandated disclosures, however, are the commercial speech protections guaranteed by the First Amendment that emerged in the landmark case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>49</sup> in which the United States Supreme Court confronted the question of "whether speech which does 'no more than propose a commercial transaction,'"<sup>50</sup> is "wholly outside the protection of the First Amendment."<sup>51</sup>

Under a Virginia statute, a pharmacist who advertised price information on prescription drugs was guilty of unprofessional conduct.<sup>52</sup> The state argued that advertising prescription drug prices would set in motion a host of maladies, including driving some pharmacists out of business and diminishing the professional image of the pharmacist.<sup>53</sup> The Court rejected the "highly paternalistic approach"<sup>54</sup> embodied in the Virginia statute, embracing instead an approach in which "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."<sup>55</sup> Advertisements convey information that benefits the economic interests of the advertiser and the consumer's interest in "who is producing and selling what product, for what reason, and at what price."<sup>56</sup>

49. 425 U.S. 748 (1976).

50. *Id.* at 762.

51. *Id.* at 761 (explaining that commercial speech encompasses advertisements of commercial transactions between the advertiser and the consumer); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"). *But see* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637 (1985) ("More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech . . .").

52. *Va. State Bd. of Pharmacy*, 425 U.S. at 752.

53. *Id.* at 766–68.

54. *Id.* at 770.

55. *Id.*

56. *Id.* at 765.

Commercial speech, as the Supreme Court held in *Virginia Pharmacy*, is protected speech, but to a lesser extent than noncommercial speech.<sup>57</sup> “There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ and other varieties.”<sup>58</sup> Commercial speech embodies attributes of “greater objectivity and hardiness” and “durab[ility],” and is therefore more resilient to government regulation.<sup>59</sup>

## 2. *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York*

Drawing on the teachings of *Virginia Pharmacy* and its progeny,<sup>60</sup> the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York*<sup>61</sup> fashioned a four-prong standard to determine whether the government’s regulation of commercial speech runs afoul of the First Amendment:<sup>62</sup> 1) if the commercial speech sought to be regulated is neither misleading nor pertaining to unlawful activity, the court asks,<sup>63</sup> 2) whether the interest asserted by the government is substantial,<sup>64</sup> 3) whether the regulation “directly advances the governmental interest asserted,”<sup>65</sup> and 4) “is not more extensive than is necessary”<sup>66</sup> to serve that interest.”<sup>67</sup>

57. See J. Wesley Earnhardt, *Nike, Inc. v. Kasky: A Golden Opportunity to Define Commercial Speech—Why Wouldn’t the Supreme Court Finally “Just Do It”?*, 82 N.C.L. REV. 797, 801–02 (2004) (explaining that because the Constitution affords less protection to commercial speech than to noncommercial speech, governmental regulation of commercial speech is valid if it passes the *Central Hudson* intermediate scrutiny test).

58. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (citation omitted).

59. *Id.* at 772 n.24; see also *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”).

60. See, e.g., *Ohralik*, 436 U.S. at 453–54 (affirming that a ban on in-person solicitation of non-lawyers does not violate free speech guarantees under the First Amendment); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363–64 (1977) (holding that commercial speech does merit First Amendment protection given the important functions it serves in society, such as providing consumers with information about services and products).

61. 447 U.S. 557 (1980).

62. *Id.* at 566. The Court underscored the vital role of commercial speech in serving not only “the economic interests of the speaker, but also assist[ing] consumers and further[ing] the societal interest in the fullest possible dissemination of information.” *Id.* at 561–62.

63. *Id.* at 566.

64. *Id.*

65. *Id.* A regulation will fail the third prong if “it provides only ineffective or remote support for the government’s purpose.” *Id.* at 564; see also *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (ruling that Florida’s ban on CPA solicitation failed to advance the State’s asserted interests “in any direct and material way” because the restriction in question did not demonstrate “that the harms [the state] recite[d] [we]re real and that [the] restriction will in fact alleviate them to a material degree”).

66. Despite the use of the word “necessary” in the fourth prong, “not more extensive than is necessary to serve that interest” is not synonymous with the “least restrictive means.” See *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476–77 (1989). The Court further elaborated that “[w]hat our decisions require is a

This standard represents an intermediate level of review,<sup>68</sup> commensurate with the subordinate position afforded to commercial speech.<sup>69</sup>

In *Central Hudson*, the Court applied its newly forged four-prong standard to the Public Service Commission's ban on all advertising that promoted the use of electricity.<sup>70</sup> Although the advertising at issue was neither inaccurate nor related to unlawful activity, and advanced the substantial governmental interest in energy conservation, the Court determined that the regulation did not satisfy the fourth prong.<sup>71</sup> The Commission painted with too broad a brush in enacting a comprehensive ban, and failed to demonstrate that its substantial interest in energy conservation could not be adequately protected by a more limited measure.<sup>72</sup>

### 3. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,<sup>73</sup> the Court grappled not only with state prohibitions on commercial speech, to which it applied the *Central Hudson* standard, but also state-mandated disclosures.<sup>74</sup> The court noted that First Amendment protection afforded to commercial speech is predicated “principally by the value to consumers of the information such speech provides.”<sup>75</sup> Thus, mandatory disclosures “trench much more narrowly on an advertiser's interests than do flat prohibitions on speech”<sup>76</sup> and do not violate an advertiser's First Amendment rights if the disclosures are “reasonably related to the State's interest in preventing deception of consumers.”<sup>77</sup>

‘fit’ between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served’ . . . .” *Id.* at 480 (internal citation omitted). See also *In re R. M. J.*, 455 U.S. 191, 203 (1982) (requiring government restrictions to “be narrowly drawn” and not more extensive than reasonably necessary); *Edenfield*, 507 U.S. at 767 (articulating the fourth prong as “whether the extent of the restriction on protected speech is in reasonable proportion to the interests served”).

67. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 557, 566 (1980).

68. *Edenfield*, 507 U.S. at 767.

69. See *supra* text accompanying notes 59–60. See also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (applying intermediate scrutiny—a level “commensurate with the “subordinate position” of commercial speech in the scale of First Amendment values—in upholding the Florida Bar's restrictions on mail solicitation of accident victims).

70. *Cent. Hudson*, 447 U.S. at 566.

71. *Id.* at 569–71.

72. *Id.* at 571.

73. 471 U.S. 626 (1985).

74. See *id.* at 629, 638.

75. *Id.* at 651.

76. *Id.*

77. *Id.* A lesser standard of review than the *Central Hudson* standard is commensurate with the minimal “constitutionally protected interest in not providing any particular factual information in [] advertising.” *Id.* (emphasis in original). The Court also noted in a footnote that disclosure requirements do not need to “get at all facets of the problem it is designed to ameliorate” and can therefore attack a problem piecemeal. *Id.* at 652 n.14.

Applying the “reasonably related” standard, which is less exacting than the intermediate standard of *Central Hudson*, the Court in *Zauderer* upheld the requirement that attorneys disclose to potential clients their liability for costs, even though contingent legal fees are not owed “if there is no recovery.”<sup>78</sup> The State’s disclosure requirements passed constitutional muster because they were reasonably related to the State’s interest in not deceiving potential clients.<sup>79</sup> The disclosure requirements also entailed “purely factual and uncontroversial information,”<sup>80</sup> an “essential feature”<sup>81</sup> in the Court’s analysis.

The Supreme Court has never applied *Zauderer* to disclosure requirements not designed to correct misleading commercial speech.<sup>82</sup> Some lower federal courts, however, have strayed from *Zauderer* in applying its “reasonably related” standard more widely.<sup>83</sup> Thus, while Supreme Court jurisprudence makes clear that commercial speech is afforded less protection than noncommercial speech,<sup>84</sup> the dividing line between these two categories of speech remains unclear.<sup>85</sup> Nonetheless,

In a more recent case involving bankruptcy and debt relief, the Court applied *Zauderer* to uphold the government’s mandated disclosure requirement of accurate statements, which were “intended to combat the problem of inherently misleading commercial advertisements . . .” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

78. *Zauderer*, 471 U.S. at 651–52.

79. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 653 (1985).

80. *Id.* at 651.

81. *Milavetz*, 559 U.S. at 250.

82. *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205, 1213 (D.C. Cir. 2012), *overruled by* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). In *Reynolds*, “the government could not seek review under the lenient *Zauderer* standard absent a showing that the advertisement at issue would mislead consumers.” *Id.* at 1214. Disclosure requirements may also take the form of warnings “in order to dissipate the possibility of consumer confusion or deception.” *Zauderer*, 471 U.S. at 651. *See also Milavetz*, 559 U.S. at 250.

83. *See Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 20, 22 (D.C. Cir. 2014) (*en banc*) (noting that *Zauderer* applies not only to mandates aimed at curing deception but to other purposes as well); *CTIA—The Wireless Ass’n v. City of Berkeley*, No. 15-cv-02529-EMC, 2016 U.S. Dist. LEXIS 10332, at \*4 (N.D. Cal. Jan 27, 2016) (stating that “*Zauderer* was not limited to disclosures designed to prevent consumer deception, but extended to matters of public health and safety”).

84. *See, e.g., Zauderer*, 471 U.S. at 636; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N. Y.*, 447 U.S. 557, 563 n.5 (1980). *See also supra* notes 57–59 and accompanying text.

85. The boundary between commercial and noncommercial speech at times proves challenging to demarcate. Advertisements that propose a commercial transaction readily fall within the bounds of commercial speech as in *Zauderer*. This is the same for advertisements of prices. *See Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012) (describing the “speech” of advertising prices as “quintessentially commercial”). Other speech, however, resists the commercial speech label when “it is inextricably intertwined with otherwise fully protected speech.” *Riley v. Nat’l Fed’n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). Yet, intertwined speech is not necessarily “inextricably intertwined.” In *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989), “there [wa]s nothing what[so]ever ‘inextricable’ about the noncommercial aspects of [Tupperware parties].” Commercial speech “that links a product to a current public debate,” does not convert commercial speech into noncommercial speech, entitled to strict scrutiny. *Cent. Hudson*, 447 U.S. at 557 n.5. Courts may skirt around resolving whether the speech at issue is commercial or noncommercial by assuming the former and applying the appropriate level of scrutiny. *See Int’l Dairy Food Ass’n v. Amestoy*, 92 F.3d 67, 71

in subjecting Prop 65 warning provisions to First Amendment scrutiny, this article focuses on warnings for consumer product exposures and assumes they “relate[] solely to the economic interests of the speaker and its audience” and therefore invoke commercial speech protections.<sup>86</sup>

### B. Warning Requirements Trigger First Amendment Scrutiny

Prop 65 is simply a right to know voter initiative—not a means of preventing deception.<sup>87</sup> “We each have a right to know, and to make our own choices about being exposed to these chemicals.”<sup>88</sup> Armed with the knowledge that a product contains a listed chemical, Californians can then decide for themselves whether or not to purchase the product.<sup>89</sup> Unlike the disclosures in *Zauderer* and *Milavetz*,<sup>90</sup> Prop 65 warnings also “do not impart purely factual, accurate, or uncontroversial information to consumers.”<sup>91</sup>

Identifying a chemical as “known” to cause cancer or reproductive harm<sup>92</sup> is predicated on a complicated process of scientific review and interpretation of available animal and human studies, as well as the application of assumptions,<sup>93</sup> all

(2d Cir. 1996) (“We need not resolve this controversy at this point; even assuming that the compelled disclosure is purely commercial speech, appellants have amply demonstrated that the First Amendment is sufficiently implicated to cause irreparable harm.”).

86. *Cent. Hudson*, 447 U.S. at 561. The Supreme Court in *Central Hudson* also noted that commercial speech “not only serves the economic interest of the speaker, but also assists consumers.” *Id.* As argued in this article, Prop 65 warnings do neither.

87. BALLOT PAMPHLET, *supra* note 12, at 52.

88. RFSOR, *supra* note 20, at 43.

89. *See id.* at 5, 33; BALLOT PAMPHLET, *supra* note 12, at 54.

90. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 629, 650 (1985) (requiring attorneys to disclose in their advertising certain information regarding fee arrangements and purely factual and uncontroversial information about terms of service); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 232–34, 250 (2010) (requiring debt relief agencies to identify themselves explicitly as debt relief agencies and disclose that assistance may involve bankruptcy relief).

91. *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

92. *See* CAL. HEALTH & SAFETY CODE § 25249.6 (West 2006).

93. Perhaps the most glaring assumption is embedded within the exemption from Prop 65 warning requirements for reproductive toxicants: If the exposure “will have no observable effect, assuming exposure at one thousand times the level in question,” then no warning is required. CAL. CODE REGS. tit. 27, § 25803(a) (2016). This 1000× factor is applied in all situations whether or not scientific understanding of a particular chemical would support a lower factor (e.g., 100×, 10×). The Prop 65 Review Panel, which convened in the early 1990s, noted that “[t]he mandatory 1,000-fold safety factor for reproductive toxins is scientifically unjustified.” PROPOSITION 65 REVIEW PANEL, CAL. ENVTL. PROT. AGENCY, SUMMARY OF ISSUES (1992), [http://www.edf.org/sites/default/files/EPA\\_5year.pdf](http://www.edf.org/sites/default/files/EPA_5year.pdf).

OEHHA’s regulations also set forth numerous assumptions to be applied in determining whether a chemical should be listed and in calculating NSRLs and MADLs. For example, “[t]he absence of a carcinogenic threshold dose shall be assumed and no-threshold models shall be utilized.” CAL. CODE REGS. tit. 27, § 25703(5). Further, in calculating the level of exposure to chemicals causing cancer, “‘lifetime exposure’ means the reasonably anticipated rate of exposure for an individual to a given medium of exposure measured over a lifetime of seventy years.” *Id.* § 25721(b). Thus, even if consumers only sporadically purchase a consumer good

of which is fraught with scientific uncertainty, disagreement, and controversy. A chemical deemed safe by a federal agency, for example, may still be listed under Prop 65.<sup>94</sup> Ultimately, a determination under Prop 65 that a chemical is “known” to cause cancer or reproductive harm is more akin to a scientific judgment,<sup>95</sup> and not fact. Prop 65 consumer product warnings, therefore, are subject to *Central Hudson’s* intermediate scrutiny standard, not the lesser standard of *Zauderer*.<sup>96</sup>

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bearing a Prop 65 cancer warning, the NSRL for the carcinogen in the consumer good is based on the assumption that consumers are exposed to the carcinogen over a lifetime of 70 years. *See also* RFSOR, *supra* note 20, at 25 (“As a general rule, it is assumed that a chemical which produces an adverse effect by one route will produce adverse effects by other routes as well.”).

94. *See* *Sciortino v. Pepsico*, 108 F.Supp.3d 780, 786, 805-06 (N.D. Cal. 2015) (finding that even though the FDA approved caramel for use as a color additive, the approval did not preempt Proposition 65 from deeming it unsafe). *See also* *Consumer Cause v. SmileCare*, 110 Cal.Rptr.2d 627, 632, 634 (2001) (stating that while federal agencies concluded that “dental amalgam is a safe and effective restorative material[,]” dental providers could still be found liable if they used the amalgam above the levels prohibited in Proposition 65).

In 2015, Dr. Luciana Borio, submitted a letter in response to OEHHA’s request for comments on its pending listing decision of BPA as a reproductive toxicant under Prop 65. The letter highlighted the findings of “an extensive, rigorous, and systematic four-year assessment of more than 300 scientific studies on BPA.” Letter from Dr. Luciana Borio, Acting Chief Scientist for FDA, to Monet Vela, 1 (Apr. 6, 2015), [http://oehha.ca.gov/prop65/hazard\\_ident/pdf\\_zip/BPA\\_FDA2015.pdf](http://oehha.ca.gov/prop65/hazard_ident/pdf_zip/BPA_FDA2015.pdf). Based on this assessment, FDA reaffirmed “that BPA is safe provided it [is] issued in accordance with our regulations.” *Id.* Regarding reproductive toxicity, the FDA pointed out relevant and important differences in humans and rodents – “People process BPA better than rodents; even in rodents, studies have shown that exposure to BPA cannot be measured in the unborn offspring of pregnant rodents exposed to 100 to 1000 times more BPA than people are reasonable expected to ingest.” *Id.*

After receiving public testimony, OEHHA’s Developmental and Reproductive Toxicant Identification Committee “determined that BPA was clearly shown . . . to cause reproductive toxicity.” OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, BISPHEENOL A LISTED AS KNOWN TO THE STATE OF CALIFORNIA TO CAUSE REPRODUCTIVE TOXICITY (2015), [http://www.oehha.ca.gov/prop65/CRNR\\_notices/list\\_changes/051115listBPA.html](http://www.oehha.ca.gov/prop65/CRNR_notices/list_changes/051115listBPA.html). OEHHA subsequently listed BPA as a Prop 65 reproductive toxicant. *Id.*

95. *See* NAT’L RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 48 (Nat’l Acad. Press 1983) (“Risk assessment [of which hazard identification is a part] is an analytic process that is firmly based on scientific considerations, but it also requires judgments to be made when the available information is incomplete. These judgments inevitably draw on both scientific and policy considerations.”). *See also* OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, AVAILABILITY OF THE FINAL GUIDANCE CRITERIA FOR IDENTIFYING CHEMICALS FOR LISTING AS “KNOWN TO THE STATE TO CAUSE CANCER” (2001), [http://oehha.ca.gov/prop65/policy\\_procedure/rev\\_criteria.html](http://oehha.ca.gov/prop65/policy_procedure/rev_criteria.html) (citing OEHHA’s criteria for the Carcinogen Identification Committee, which notes that “[t]he application of causation criteria requires scientific judgment . . .”). Similarly, OEHHA’s criteria for the Developmental and Reproductive Toxicant Identification Committee are “not intended . . . to limit its use of best scientific judgment.” OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CRITERIA FOR RECOMMENDING CHEMICALS FOR LISTING AS “KNOWN TO THE STATE TO CAUSE REPRODUCTIVE TOXICITY” (1993), [http://oehha.ca.gov/prop65/policy\\_procedure/pdf\\_zip/dartCriteriaNov1993.pdf](http://oehha.ca.gov/prop65/policy_procedure/pdf_zip/dartCriteriaNov1993.pdf).

96. *But see* Proposed Statement of Decision on Trial (Phase One) at 16, Council for Educ. and Research on Toxics v. Starbucks Corp., No. BC435759 (Cal. Super. Ct. L.A. County June 25, 2015) (applying *Zauderer* and concluding that “[a] Proposition 65 warning requirement for the presence of acrylamide passes this ‘reasonably related’ test for several reasons”). One of the terse reasons for the court’s finding—the warning “that a chemical known to the state *may cause cancer* is not false or misleading”—is an inaccurate statement of the warning language. *Id.* (emphasis added). The verb “may” does not precede the verb “cause” in any Prop 65 consumer product warning. As discussed *infra*, Prop 65 safe harbor warnings misinform rather than inform.

*Central Hudson's* first prong is met because Prop 65 regulates neither misleading nor unlawful activity.<sup>97</sup> Satisfying the second prong hinges on whether the public's right to know about potential exposures to certain chemicals in products represents a substantial interest.<sup>98</sup> Prop 65's right to know interests resemble those of Vermont in *International Dairy Foods Association v. Amestoy*,<sup>99</sup> in which Vermont attempted to mandate the labeling of products from cows treated with growth hormone in response to "strong consumer interest and the public's 'right to know.'"<sup>100</sup> Concluding that Vermont "could not justify the statute on the basis of 'real' harms,"<sup>101</sup> the Second Circuit reversed the lower court's decision not to grant the plaintiff's preliminary injunctive relief.<sup>102</sup> "[C]onsumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement."<sup>103</sup> If that were not the case, the Court continued, "there is no end to the information that states could require manufacturers to disclose."<sup>104</sup>

Assuming *arguendo* that the right to know represents a substantial state interest, notwithstanding *Amestoy*, the State of California falters in meeting *Central Hudson's* third prong by not providing "a shred of evidence—much less the 'substantial evidence' required by the [Administrative Procedure Act]"<sup>105</sup> that mandated consumer product warnings directly advance the state's asserted interest in a

97. See *supra* text accompanying note 63.

98. See *supra* text accompanying note 64.

99. 92 F.3d 67 (2d Cir. 1996).

100. *Id.* at 73.

101. *Id.* at 73. In *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, the D.C. Circuit assumed the "FDA's interest in reducing smoking rates is substantial," but in a footnote, the Court voiced skepticism "that the government can assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences." 696 F.3d 1205, 1218, 1218 n.13 (D.C. Cir. 2012), *overruled by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). The Court acknowledged, however, that "the Supreme Court has at least implied that the government could have a substantial interest in reducing smoking rates because smoking poses 'perhaps the single most significant threat to public health in the United States.'" *Id.* at 1218 n.13.

102. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

103. See *id.* (applying the *Central Hudson* test). Yet, in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, the same Court applied the *Zauderer* "reasonably related" test to a Vermont statute "that requires manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury . . ." 272 F.3d 104, 107 (2d Cir. 2001). Although both cases involved mandatory disclosures, the Second Circuit attempted, albeit unpersuasively, to reconcile the two cases by asserting that the decision in *Amestoy* "was expressly limited to cases in which a state disclosure requirement is supported by . . . 'consumer curiosity.'" *Id.* at 115 n.6. The Vermont statute in *Nat'l Elec. Mfrs. Ass'n*, however, is related to the state's interest in reducing mercury pollution. *Id.* at 116. The Court also feared that striking down the Vermont statute would expose a myriad of federal and state disclosure requirements, including those of Prop 65 "to searching scrutiny by unelected courts." *Id.*

104. *Amestoy*, 92 F.3d at 74.

105. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1219 (D.C. Cir. 2012), *overruled by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). Both the federal and California Administrative Procedure Acts require "substantial evidence." 5 U.S.C. § 706(2)(E) (2012); CAL. GOV'T CODE § 11350(b)(1) (West 2006).

material way, or “that the harms . . . recite[d] are real and that . . . restriction [of commercial speech] will in fact alleviate them to a material degree.”<sup>106</sup>

The mandated consumer product warnings—“which must be used in order to provide a warning deemed clear without further proof”<sup>107</sup>—confuse rather than inform<sup>108</sup> and “mislead[] consumers and distort[] their consumption decisions.”<sup>109</sup> The warnings lack the specificity necessary to ensure that the public receives useful information about potential exposures and encourage businesses to provide a warning even when none is required.<sup>110</sup> They “focus more on the identification of potential hazards than on helping consumers develop an understanding of the magnitude and probability of a potential hazard than can be used for informed decision making.”<sup>111</sup> For listed carcinogens, the safe harbor warnings fail to convey “that the risk levels involved might be as small as 1 chance in 100,000 [over a lifetime of exposure].”<sup>112</sup> Instead, “the risks are portrayed as being entirely nonstochastic.”<sup>113</sup>

Despite assurances that the original 1988 safe harbor warnings would enable informed choices,<sup>114</sup> and “that no alternative considered would be more effective,”<sup>115</sup> OEHHA relented in a January 2015 regulatory proposal to revamp the warning

106. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Mere speculation or conjecture will not suffice. *Id.* at 770. Without *Central Hudson’s* third prong, California or any other state, “could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.” *Id.* at 771.

107. RFSOR, *supra* note 20, at 24. Safe harbor warning content and method of transmission “provide the businesses choosing to use them reasonable certainty that they will not be subjected to an enforcement action over the warning they provide.” *Id.* at 33. “It is not intended to be a warning straight-jacket.” *Id.*

108. Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U.L. REV. 653, 667 (1993).

109. W. Kip Viscusi, *Predicting the Effects of Food Cancer Risk Warnings on Consumers*, 43 FOOD, DRUG, COSM. L.J. 283, 289 (1988).

110. Rechtschaffen, *supra* note 18, at 356–57.

111. David W. Stewart & Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research*, 13 J. PUB. POL’Y & MARKETING 1, 15 (1994).

112. Viscusi, *supra* note 109, at 291.

113. *Id.*

114. RFSOR, *supra* note 20, at 5.

115. *Id.* at 46.

requirements.<sup>116</sup> “[T]he existing safe harbor warnings lack the specificity necessary to ensure that the public receives useful information about potential exposures.”<sup>117</sup>

In November 2015, OEHHA issued a revised regulatory proposal to “further the ‘right-to-know’ purposes” of Prop 65, based on voluminous public comments on the January 2015 proposal.<sup>118</sup> Once again, OEHHA noted that current safe harbor warnings, rather than advancing the state’s purported right to know interests, “generate confusion and encourage businesses to provide a warning when none is

116. See OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, INITIAL STATEMENT OF REASONS: TITLE 27, CAL. CODE OF REGULATIONS, PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6, REGULATIONS FOR CLEAR AND REASONABLE WARNINGS JANUARY 16, 2015 (2015), [http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/Article6\\_ISOR.pdf](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/Article6_ISOR.pdf). OEHHA acknowledged that “[t]he public currently has no simple process for obtaining information about the chemical(s) that are present, whether or how they are actually being exposed to a significant amount of the chemical, how the chemical(s) may cause harm . . . or ways they can reduce or eliminate these exposures.” *Id.* at 3.

117. *Id.* at 1. In January 2015, OEHHA also proposed to create a website that would house supplemental information on Prop 65 listed chemicals not contained on the safe harbor warnings. The website would serve as a “one-stop shop for supplemental information concerning the warnings” such that individuals are able “to make informed decisions about . . . exposures.” OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, INITIAL STATEMENT OF REASONS: TITLE 27, CALIFORNIA CODE OF REGULATIONS, PROPOSED ADOPTION OF ARTICLE 2, SECTION 25205, LEAD AGENCY WEBSITE JANUARY 16, 2015, at 2, 4 (2015), [http://oehha.ca.gov/prop65/CRNR\\_notices/pdf\\_zip/ISOR\\_P65WebsiteJan2015.pdf](http://oehha.ca.gov/prop65/CRNR_notices/pdf_zip/ISOR_P65WebsiteJan2015.pdf). The website proposal generated a plethora of public comment, as did the proposed changes to the warning provisions. See OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, NOTICE OF PROPOSED RULEMAKING AND ANNOUNCEMENT OF PUBLIC HEARING TITLE 27, CAL. CODE OF REG. PROPOSED ADOPTION OF SECTION 25205 PROPOSITION 65 LEAD AGENCY WEBSITE (2015), [http://oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/NPR\\_P65WarningWeb.html](http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/NPR_P65WarningWeb.html).

118. See OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, PROPOSED RULEMAKING AND ANNOUNCEMENT OF PUBLIC HEARING TITLE 27, CAL. CODE OF REG. PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6 – CLEAR AND REASONABLE WARNINGS (2015), [http://www.oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/2NPRArticle112715.html](http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/2NPRArticle112715.html). In support of the November 2015 proposal, OEHHA contracted with the U.C. Davis Extension Collaboration Center to conduct a survey of California residents “to assess the effectiveness [defined as helpfulness] of the existing and proposed warnings.” U.C. DAVIS EXTENSION COLLABORATION CTR., PROPOSITION 65 CLEAR AND REASONABLE WARNING REGULATIONS STUDY 1 (2015) [hereinafter PROP 65 WARNINGS SURVEY RESULTS], [http://www.oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/112715ISORAppendixA.pdf](http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715ISORAppendixA.pdf).

When asked whether the “old” generic safe harbor warning or the “new” generic safe harbor warning was more helpful, over 75% of survey respondents chose the “new” warning. *Id.* at 1, 10. Participants were not asked to define the term “helpful” or identify those attributes of the “new” warning that they found more helpful. Unlike the “old” warning, the “new” warning included a warning symbol, the signal word “WARNING,” and the URL for a website to obtain more information. *Id.* app. C, at 80–117. But the “new” warning did not “clearly communicate the risk of exposure to chemical(s).” *Id.* at 4. The survey did include questions on proposed specific consumer product warnings, which offered suggestions on how to minimize exposures. E.g., for passenger vehicles, the warning urges individuals to “avoid breathing exhaust, service your vehicle in a well-ventilated area and wear gloves or wash your hands frequently when servicing your vehicle.” *Id.* at 85. OEHHA did not involve consumers in designing the proposed warnings, even though involving consumers would “likely . . . increase the probability that a given warning will have its intended effect.” Stewart & Martin, *supra* note 111, at 14. OEHHA also failed to “assess potential unintended consequences both within the target population and other individuals who may be exposed to the warning message.” *Id.* And in another survey question, less than 25% of respondents indicated that they were “very likely” to visit the website. PROP 65 WARNINGS SURVEY RESULTS, *supra*, at 45. Whether they would visit the website before or after purchasing a product was not discerned. *Id.* at 71–72. Visiting the website *after* a product purchase would obviously disenable individuals from making informed decisions *during* product purchases.

required,<sup>119</sup> precisely because they are so vague and meaningless.”<sup>120</sup> And the “benefits” of even the proposed safe harbor warnings remain “intangible” and unquantifiable “in monetary terms.”<sup>121</sup> This is not unexpected. After all, Prop 65 is grounded in providing information to individuals, not in prohibiting or preventing chemical exposures to curb health effects.<sup>122</sup>

OEHHA insists that safe harbor warnings are not “a straight-jacket”<sup>123</sup> and that “[b]usinesses may provide whatever warnings they choose” as long as they are clear and reasonable.<sup>124</sup> But OEHHA also acknowledged “reasonable men can differ on what is clear, and what is reasonable.”<sup>125</sup> “Whether a warning is clear and reasonable will be a question of fact to be determined on a case-by-case basis.”<sup>126</sup> Only safe harbor warnings are “clear without further proof.”<sup>127</sup>

Ironically, OEHHA discourages businesses from expounding on the content of the safe harbor warnings, fearing that additional verbiage on routes of exposure or degree of risk, for example, “could potentially confuse or mislead the intended recipients of the warning.”<sup>128</sup> Businesses thus find themselves between Scylla and

119. Issuing warnings when none are required constitutes overwarning. See Chris Locke & Sandra A. Edwards, *Proposition 65: The Law that Continues to Cry Wolf*, LAW360.com (Mar. 9, 2015, 11:23 AM), <http://www.law360.com/articles/628706/proposition-65-the-law-that-continues-to-cry-wolf>.

120. OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, INITIAL STATEMENT OF REASONS: TITLE 27, CAL. CODE OF REG., PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6 REGULATIONS FOR CLEAR AND REASONABLE WARNINGS NOVEMBER 27, 2015, 30 (2015) [hereinafter NOVEMBER 2015 ISOR], [http://www.oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/112715WarningReg%20ISOR.pdf](http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715WarningReg%20ISOR.pdf).

121. OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, ECONOMIC IMPACT STATEMENT – 11/17/2015, at 15 (2015), [http://www.oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/112715ISORAppendixB.pdf](http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715ISORAppendixB.pdf) [hereinafter Economic Impact Statement]. The costs of the proposal were quantifiable and estimated to range annually from \$15 million to \$30 million. *Id.* at 1. These cost estimates, however, did not include “defending lawsuits, paying attorney’s fees and penalties, determining the chemical exposures from products, and reformulating products to avoid the need to provide warnings.” *Id.* at 3.

122. HIGHLANDS CONSULTING GRP. LLC, OFF. OF ENVTL. HEALTH HAZARD ASSESSMENT, PROPOSITION 65 WARNINGS WEBSITE FEASIBILITY STUDY REPORT 18 (2014), [http://www.cio.ca.gov/Government/IT\\_Policy/IT\\_Projects/pdf/3980-003\\_3980-003\\_OEHHA\\_P65\\_FSR.pdf](http://www.cio.ca.gov/Government/IT_Policy/IT_Projects/pdf/3980-003_3980-003_OEHHA_P65_FSR.pdf) [hereinafter Prop 65 Warnings Website Feasibility Study Report]. See also Marlow, *supra* note 3, at 1 (concluding that “[i]ittle to no evidence is found indicating that Proposition 65 significantly influences cancer incidence in California”). According to Marlow, no comprehensive study has been conducted on whether Prop 65 has improved public health. *Id.* at 22.

123. RFSOR, *supra* note 20, at 8, 33, 39.

124. *Id.* at 8. See also CAL. CODE REGS. tit. 27, § 25601 (2016).

125. RFSOR, *supra* note 20, at 7.

126. *Id.* at 39.

127. *Id.* at 24. “Since all warnings cannot be clear and reasonable, it is essential for the [safe harbor] regulations[s] to describe with some specificity the warning methods and messages.” *Id.* at 26.

128. *Id.* at 45. Advertisements with Prop 65 warnings therefore stand in stark contrast to the advertisements in *Zauderer* and *Milavetz*, in which the advertisers were not prevented from conveying additional information. See *Milavetz*, Gallop & *Milavetz*, P.A. v. United States, 559 U.S. 229, 250 (2010); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985). In its November 2015 proposal, OEHHA forbids any additional information in a warning that would “contradict” the warning message. NOVEMBER 2015 ISOR, *supra* note 120, at 12. OEHHA does not define the term “contradict” or provide any

Charybdis;<sup>129</sup> convey meaningless safe harbor warnings that alarm rather than inform, or embellish them by providing more useful information but risk litigation. Most businesses opt for Scylla.<sup>130</sup> Failing to pass the four-prong *Central Hudson* standard, Prop 65 safe harbor warnings for consumer product exposures run afoul of First Amendment commercial speech protection.

C. “As Easy as Shooting the Side of a Barn”<sup>131</sup>

The burden shifting provision of Prop 65, Section 25249.10(c) “make[s] the instigation of Proposition 65 litigation easy— . . . almost absurdly easy.”<sup>132</sup> And “the burden shifting provisions make it virtually impossible for a private defendant to defend a warning action . . . short of actual trial.”<sup>133</sup> Unsurprisingly, many businesses elect “the most prudent business decision” and settle with bounty hunters by paying “any demanded attorney fees and penalties . . . rather than contesting the case in court.”<sup>134</sup>

But the pièce de résistance of litigation drivers is another provision of Prop 65—a portion of the civil penalties collected in bounty hunter actions is to be paid to the bounty hunters themselves.<sup>135</sup> And these penalties are in addition to attorney fees.<sup>136</sup> Bounty hunters may also extract payment in lieu of penalties.<sup>137</sup> Thus, for many, the

examples of what might constitute contradictory language. *Id.* at 14–17. Prop 65 bounty hunter consent judgments may provide for additional warning information. *Id.* at 35–36, nn.38–40, 42.

129. *Scylla and Charybdis*, 10 NEW ENCYCLOPEDIA BRITANNICA 576 (15th ed. 1993). In essence, caught between two equally unpleasant alternatives.

130. See RFSOR, *supra* note 20, at 7, 33; Rechtschaffen, *supra* note 18, at 325.

131. Consumer Def. Grp. v. Rental Hous. Indus. Members, 40 Cal. Rptr. 3d 832, 857 (Cal. Ct. App. 2006).

132. *Id.* at 853. The court illustrated via an example of “just how simple it is for a hypothetical unemployed lawyer, eager to cash in on Proposition 65, to extract money from business using the [Prop 65] initiative.” *Id.* at 854.

133. *Id.* at 853.

134. Anthony T. Caso, *Bounty Hunters and the Public Interest—A Study of California Proposition 65*, 13 J. FEDERALIST SOC’Y PRAC. GROUPS 68, 69 (2012).

135. *Id.*

136. *Id.*

137. See CAL. CODE REGS. tit. 11, §§ 3200–3204 (2016). “In many private-party cases the parties allocate all or nearly all of the penalty payment as a ‘payment in lieu of penalties’ – often to the group bringing the case – instead of treating it as a civil penalty.” Letter from Harrison M. Pollak, Deputy Attorney Gen., Office of Attorney Gen., State of Cal. Dep’t of Justice, to Proposition 65 Private Plaintiffs and Counsel 1 (Dec. 22, 2010), [http://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/payment\\_letter.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/payment_letter.pdf).

Section 25249.12(c) specifies that the state is to receive 75% of all civil and criminal penalties, as a means of supporting Prop 65 implementation. CAL. HEALTH & SAFETY CODE § 25249.12(c) (West 2006). “Payment in lieu of penalties” – not explicitly authorized by Prop 65 – therefore siphons off monies to private parties or organizations that would otherwise be allocated to the state. Caso, *supra* note 134, at 72–74. From 2000 to 2010, Mateel Environmental Justice Foundation collected nearly \$7 million in payments in lieu of penalties. *Id.* at 71. The Center for Environmental Health, another bounty hunter, fared comparably. *Id.*

“bonanza for private lawyers” foreseen by those arguing against Prop 65 in 1986 has come to fruition.<sup>138</sup>

In 2001, the California legislature, “prompted by a concern that private enforcers were abusing Proposition 65 by filing meritless lawsuits,”<sup>139</sup> amended the statute requiring bounty hunters to include, along with the 60-day notice, a certificate of merit (“CoM”). The CoM affirms that “the person executing the certificate believes there is a reasonable and meritorious case for private action” only after “consult[ing] with one or more persons with relevant and appropriate experience or expertise who has reviewed the facts . . . regarding the exposure to the listed chemical.”<sup>140</sup> The CoM may have been engineered to “operate[] as a brake on improvident citizen enforcement.”<sup>141</sup> In reality, however, filing a CoM may be as easy as a “phone call to your friendly professor.”<sup>142</sup> The brakes may be applied by a court only after litigation has commenced and after the defendant has expended significant resources.<sup>143</sup>

### III. TIME FOR PROPOSITION 65 TO GIVE WAY TO A DIFFERENT APPROACH

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On September 25, 2015, California’s Office of the Attorney General proposed amendments to the regulations that govern Prop 65 private enforcement actions. OFF. OF ATT’Y GEN., STATE OF CAL. DEP’T OF JUSTICE, NOTICE OF PROPOSED AMENDMENTS TO TITLE 11, DIVISION 4, CHAPTER 1, at 1 (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/prop-65-nopr.pdf>. One of the objectives of the proposed rulemaking is “to ensure that the State in fact receives the civil penalty funds contemplated by the Proposition 65 statute.” *Id.* at 3.

Instead of eliminating payments in lieu of penalties altogether, the Attorney General proposed only to cap the amount, despite acknowledging that the private bar is diverting “large amounts of what should be statutory penalty payments to Additional Settlement Payments.” OFF. OF ATT’Y GEN., STATE OF CAL. DEP’T OF JUSTICE, INITIAL STATEMENT OF REASONS, DIVISION 4-PROPOSITION 65 PRIVATE ENFORCEMENT, REVISION OF CHAPTERS 1 AND 3, TITLE 11, CAL. CODE OF REG. 1–2 (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/prop-65-isor.pdf>. “[A]ny agreement to forgo all or a portion of this penalty runs the risk of defeating the voters’ intention that penalty funds be used ‘to implement and administer’ Proposition 65.” *Id.* at 5.

138. See BALLOT PAMPHLET, *supra* note 12, at 55. “Proposition 65 creates a lawyer’s paradise: anyone can sue; almost anyone can be sued. People who sue will get a reward from penalties collected.” *Id.*

139. DiPirro v. Am. Isuzu Motors, Inc., 14 Cal. Rptr. 3d 787, 789 (Cal. Ct. App. 2004).

140. CAL. HEALTH & SAFETY CODE § 25249.7(d)(1) (West 2006). See also CAL. CODE REGS. tit. 11, §§ 3100–3103 (2016).

141. Sciortino v. Pepsico, Inc., 108 F. Supp. 3d 780, 788 (N.D. Cal. 2015).

142. Consumer Def. Grp. v. Rental Hous. Indus. Members, 40 Cal. Rptr. 3d 832, 854 (Cal. Ct. App. 2006).

143. See, e.g., Motion for Summary Judgment/Adjudication Granted, Pub. Interest All. LLC v. Access Bus. Grp., LLC, No. RG13697992 (Cal. Super. Ct. Alameda County July 10, 2015) (dismissing the case against defendants because “Plaintiff’s COM was based upon . . . ‘probabilistic conjecture’” and “not supported by a credible factual basis”); Physicians Comm. for Responsible Med. v. Applebee’s Int’l, Inc., 168 Cal. Rptr. 3d 334, 346 (Cal. Ct. App. 2014) (concluding the plaintiff’s “notice and certificate of merit were not supported by facts”).

The inherent flaws of Prop 65, discussed in Part II, linger, unfettered by legislative and regulatory reform efforts. If “[m]any Californians dismiss the warnings as silly and trivial,”<sup>144</sup> then Prop 65 has failed to “enable Californians to make informed decisions about products they purchase.”<sup>145</sup> After 30 years, it is time to ask whether the ubiquitous Prop 65 consumer warnings should remain a steadfast feature of California law, or whether they should be sunset to give way to a different approach.<sup>146</sup>

Mandatory Prop 65 warnings are not the only means of dispensing information to consumers, nor are warnings necessarily “the optimal or even appropriate means for ensuring an informed consumer.”<sup>147</sup> Manufacturers increasingly offer “green” products with ecolabels and environmental claims<sup>148</sup> in response to consumers’ burgeoning demand for “green” products.<sup>149</sup> Indeed, the shift toward “green” has been described as the “new normal” for the majority of American adult consumers.<sup>150</sup>

144. PROPOSITION 65 WARNINGS WEBSITE FEASIBILITY STUDY REPORT, *supra* note 122, at 13.

145. ECONOMIC IMPACT STATEMENT – 11/17/2015, *supra* note 121, at 14.

146. See Mark Snyder, *Proposition 65 Can Spell Bankruptcy for Many California Small Businesses*, SACRAMENTO BEE (Nov. 16, 2014 4:00 PM), <http://www.sacbee.com/opinion/oped/soapbox/article3941246.html>. Rather than focusing only on the warning requirements for consumer products exposures, a more comprehensive approach could entail eliminating: the mandatory 1000 fold factor in section 25249.10(c); bounty hunter provisions (or at least the ability to obtain bounty hunter penalties); payments in lieu of penalties; and the burden shifting provision. A revised Prop 65 also would not list any chemical that has been deemed safe by a federal agency. Warnings, (including those for consumer products exposures) would be used sparingly and only if warranted by the level of risk that constitutes a legitimate public health concern. But both approaches assume there is still a need for Prop 65-type legislation. Prop 65 emerged out of a climate of frustration that state agencies were not doing enough to enforce environmental laws and protect the citizenry from hazardous substances. It is unclear whether this climate persists or if Prop 65, as currently drafted, would overwhelmingly pass again. A voter initiative—a formidable endeavor—to proffer these or similar approaches may be the only remaining option, given the lack of legislative success in amending Prop 65.

147. Stewart & Martin, *supra* note 111, at 15. In the absence of mandatory Prop 65 warnings, product liability law still requires that manufacturers warn consumers about risks of injury from products (unless those risks are obvious). RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY ch. 1 § 2 cmt. i. (AM. LAW INST. 1998). If mandatory state warnings of the Prop 65 ilk were the preferred modality, it is reasonable to expect that other jurisdictions would have adopted similar approaches. But in 30 years, “no comparable federal law or law in any other state . . . requires businesses to proactively warn individuals of exposures to substances appearing on a large chemical list.” PROP 65 WARNINGS WEBSITE FEASIBILITY STUDY REPORT, *supra* note 122 at 16.

148. The Federal Trade Commission (FTC) has issued “Guides for the use of Environmental Marketing Claims” which “help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45.” 16 C.F.R. § 260.1 (2012). See also UL, UNDERSTANDING THE EFFECTIVE USE OF GREEN PRODUCT LABELS (2013), [http://library.ul.com/wp-content/uploads/sites/40/2015/02/UL\\_Final\\_Looking-Behind-Product-Environmental-Claims\\_v8-HR.pdf](http://library.ul.com/wp-content/uploads/sites/40/2015/02/UL_Final_Looking-Behind-Product-Environmental-Claims_v8-HR.pdf).

149. UNDERSTANDING THE EFFECTIVE USE OF GREEN PRODUCT LABELS, *supra* note 148, at 8. The term “green” as used in Understanding the Effective Use of Green Product Labels, “includes all types of product marketing, ranging from a manufacturer’s own label to claims of third-party certifications and verifications.” *Id.* at 9 n.2.

150. *Id.* at 2.

Manufacturers, consequently, face increased pressure from retailers to use chemical assessment tools to analyze the chemical ingredients of their products.<sup>151</sup> The application of these tools “directly translate[s] into the availability of the products on shelves and, by extension, the ultimate viability of those products in the marketplace.”<sup>152</sup>

Chemical assessment tools also play a role in fostering the development of voluntary ecolabels,<sup>153</sup> which number in the hundreds.<sup>154</sup> Ecolabels inform consumers’ purchasing decisions by distinguishing environmental attributes of a myriad of consumer products.<sup>155</sup> Through the use of ecolabels, businesses seek to obtain “a market advantage for taking environmental factors into consideration throughout their supply chains. [Businesses] know their customers want this and they seek to provide it for them.”<sup>156</sup>

Voluntary ingredient disclosures offer another approach to informing consumers.<sup>157</sup> In 2010, for example, the American Cleaning Institute, Consumer Specialty Products Association, and the Canadian Consumer Specialty Products Association launched a disclosure initiative for intentionally added ingredients in air care products, automotive products, cleaning products, and polishes and floor maintenance products.<sup>158</sup> The U.S. Environmental Protection Agency’s Design for the Environment program (“Safer Choice”) began requiring full ingredient disclosure as an element of its cleaning product certification in 2011.<sup>159</sup> Over 2000 products carry the Safer Choice label.<sup>160</sup> Recently, Wal-Mart announced that it will

151. See Alison M Gauthier et al., *Chemical Assessment State of the Science: Evaluation of 32 Decision-Support Tools Used to Screen and Prioritize Chemicals*, 11 INTEGRATED ENVTL. ASSESSMENT & MGMT. 242, 242 (2015) (examining 32 chemical characterization tools out of 100 identified, and noting there is room for improvement if the ultimate goal is to accurately reflect potential chemical risk). Only a few of the tools characterized risk. *Id.*

152. *Id.* at 254.

153. See *id.* at 253; CORP. SUSTAINABILITY INITIATIVE, NICHOLAS INST. FOR ENVTL. POL’Y SOLS., DUKE UNIV., AN OVERVIEW OF ECOLABELS AND SUSTAINABILITY CERTIFICATIONS IN THE GLOBAL MARKETPLACE, at 14 (2010), <https://center.sustainability.duke.edu/sites/default/files/documents/ecolabelsreport.pdf>.

154. AN OVERVIEW OF ECOLABELS AND SUSTAINABILITY CERTIFICATIONS IN THE GLOBAL MARKETPLACE, *supra* note 153, at 10.

155. *Id.* at 14. In contrast to “green” symbols or claims, an ecolabel is given to products that have met specific environmental criteria. *Id.* at 14.

156. *Id.* at 10.

157. Ingredient disclosure alone does not convey health or safety information and thus does not enable informed risk based decision making. Disclosing generic chemical names rather than chemical specific names can serve as a means of protecting trade secrets.

158. *Ingredient Communication FAQs*, AM. CLEANING INST., [http://www.cleaninginstitute.org/policy/ingredient\\_communication\\_faqs.aspx](http://www.cleaninginstitute.org/policy/ingredient_communication_faqs.aspx) (last visited Feb. 8, 2016).

159. ENVTL. PROT. AGENCY, EPA’S SAFER CHOICE STANDARD 7 (2015), <http://www.epa.gov/sites/production/files/2013-12/documents/standard-for-safer-products.pdf>.

160. ENVTL. PROT. AGENCY, LEARN ABOUT THE SAFER CHOICE LABEL (2016), <http://www.epa.gov/saferchoice/learn-about-safer-choice-label>.

require online ingredient disclosure for household cleaning, personal care, and beauty and cosmetic products as of 2015.<sup>161</sup>

#### IV. CONCLUSION

There are undoubtedly other approaches that could serve to redress Prop 65's warnings and its other infirmities. Until that occurs, Prop 65's fundamental flaws remain unaltered, bounty hunters continue to thrive, benefits remain elusive, and the costs on businesses, consumers, and taxpayers continue to mount.<sup>162</sup>

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161. *Policy on Sustainable Chemistry in Consumables*, WALMART, <http://cdn.corporate.walmart.com/0b/84/abcc4b9d43449714cee2c15abbe2/policy-on-sustainable-chemistry-in-consumables.pdf> (last updated Feb. 21, 2014).

162. Marlow, *supra* note 3, at 28.