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## **Unrealistic Approach to Risk Renders Prop. 65 Ineffective, Paper Argues**

In theory, the idea behind the voter-approved law Proposition 65 (“Prop. 65”) was sound: provide California consumers with information about health risks in “products and settings” so they could make informed purchasing and other choices. But as a new Washington Legal Foundation WORKING PAPER argues, the law in reality is deeply flawed, and has created an environment where the pursuit of warnings of every possible risk, no matter how small, through Prop 65 litigation and enforcement has disserved consumers.

The publication, **AN EXAGGERATED AND ILL-CONCEIVED SENSE OF RISK: THE EPHEMERAL NATURE OF CALIFORNIA’S PROPOSITION 65**, was authored for WLF by **Thomas H. Clarke, Jr.** of the law firm *Ropers, Majeski, Kohn, & Bentley*. Mr. Clarke is a senior partner with the firm, where he represents both plaintiffs and defendants in Proposition 65 cases. The paper is the latest installment in WLF’s educational WORKING PAPER series.

Mr. Clarke sets the tone for his paper from the outset, writing “In California you see them everywhere: In hotel lobbies and parking garages; in gas stations and automobile repair facilities; in hardware stores and liquor stores. Hollywood celebrities? Local politicians? If only. They are Proposition 65 warnings.” The balance of the paper is devoted to why these warnings show up everywhere on everything and why that state of affairs does little to protect consumers.

In the first section of the paper, the author discusses the list of carcinogenic chemicals and reproductive toxins on which Prop. 65 turns, and the flaws that exist in the maintenance and use of this list. The list includes chemicals from entities that don’t profess to be regulatory agencies, and which identify substances as hazardous as merely a first step in assessing their toxicity. Another problem, Mr. Clarke notes, is that the listing process is entirely immune from public comment and public participation. What results from the listing process are chemicals which, despite their varying levels of toxicity, are all treated as equally dangerous for Prop. 65 purposes.

In the second section, Mr. Clarke examines the “safe harbor” mechanism of Prop. 65, which allows businesses or manufacturers to be free from enforcement if they provide a warning of the presence of a listed chemical. The warning are so vague and indefinite as to be useless at times, since there is no information in them about what type of risk the product poses, or whether the chemical is on the list due to definitive

human studies, or wildly extrapolated animal tests. It also fails to warn of what amount of exposure is necessary for the product to pose harm. Further, it fails to offer information about countervailing benefits certain products may offer. Worst of all, Mr. Clarke states, the explosion of warnings create the impression that everything is hazardous, and thus consumers will simply tune all warnings out.

The third section focuses on the risk assessment methodology that regulatory officials in California use to determine if a warning is needed. “Theoretically,” the author writes, “there has to be an exposure to a listed chemical in an amount greater than the ‘no significant risk’ level set for carcinogens or greater than the “no observable effect level” set for reproductive toxicants.” However, that methodology, he states, “is skewed to an absurd degree.” First, it is the *defendant’s* burden, not the plaintiffs’, to disprove that their product or setting contains a listed chemical. Second, the law wildly exaggerates the level of risk required to trigger the safe harbor. As Mr. Clarke notes “The result is that warnings are required for products whose usage in the real world does not pose even a fraction of the risk the theoretical number crunching yields.”

In a perfect world, the author concludes “Proposition 65 would be tossed in the proverbial wastebasket and redrafted.” Understanding that California politics make such a resolution improbable, Mr. Clarke notes two changes which could remedy many of the problems with Prop. 65. First, he suggests that the burden of proof be shifted to plaintiffs to have to prove the exposures meet the law’s requirements. Second, he urges policy makers to somehow bring reality into the chemical risk assessment process.

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Copies of this educational paper, WLF WORKING PAPER, Number 137 (April 2006), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.