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Prop. 65 Warnings: Do They Fulfill the Intent of the Law?

11/1/1993

by Cliff Rechtschaffen, Golden Gate University Law School

It is over three years since regulations amending the Proposition 65 warning regulations were first proposed by the Health and Welfare Agency. After a half dozen drafts and innumerable public workshops, the chances of substantial changes being made to the regulations before the 1994 elections now seem virtually nil.

In the meantime, there has been an ongoing debate between the regulated community and public prosecutors and environmental groups over what the regulations require and what type of warnings satisfy them, particularly with respect to warnings for environmental exposures, about which the regulations provide the least guidance. Enforcers of Proposition 65 contend that the mandates in the regulations to provide environmental warnings "conspicuously" and in a manner "likely to be read, seen, or heard and understood by an ordinary individual in the course of normal daily activity" (22 CCR section 12601(d)(2)), impose significant substantive requirements on businesses. Regulated facilities argue that the lack of any specific "safe harbor" language, and the general vagueness of the regulations, gives them broad leeway in fashioning environmental warnings. Thus far, the enforcers seem to be winning the battle but losing the war; in the limited number of enforcement actions filed, most facilities have been unwilling to risk defending their environmental warnings in court and have agreed to modify them. However, the vast majority of businesses continue to regard the regulations as basically standardless.

As a result, and because the statute itself contains no specific guidance about environmental warnings, what has emerged is a system of self-regulation -- one in which businesses design warnings based on their own notions of what Proposition 65's minimum requirements are (or, in many instances, based loosely on what other facilities have done). The product of this system has been warnings which are a far cry from what the proponents of Proposition 65 intended.

Almost no businesses have chosen to provide environmental warnings through the mail to affected persons -- even though there is no serious dispute that a warning that arrives in the mail is far more likely to be seen than even the best-designed newspaper ad.

Some of the warnings have been placed in the classified advertisements section of newspapers, and others in the legal notices section next to bankruptcy notices and foreclosure announcements. The chance of these warnings being seen by the average person is close to zero.

A number of warnings have been published jointly by companies within a single industry -- i.e. members of the Southern California Paint & Coatings Association, the Aggregate Material Producers in San Diego County, or metal platers in Los Angeles. The readers of these notices are expected to glean from a list of 15-100 companies which facilities should be of concern to them. In the case of the oil industry, the joint warning covers, among other facilities, "gas stations, refineries, chemical plants, oil and gas wells, oil and gas treating plants, petroleum and chemical storage tanks, pipeline systems, tank trucks and cars, loading and unloading facilities" for 23 oil companies and their subsidiaries operating throughout California. No address or location is provided for any of these thousands of facilities.

The majority of the warnings contain language disclaiming the need for the company to provide any warning. For example, a warning published by General Dynamics informs the reader that "use of [Proposition 65] chemicals is strictly controlled at all [the listed] locations to prevent atmospheric, water or other means of employee and public exposure." Another typical formulation states that it is "[TRW] policy to comply with all federal and state requirements to ensure the proper use, transportation and storage [of Proposition 65] materials. The company has health and safety programs to minimize potential exposures and to protect the health and welfare of employees and community residents."

In many instances the disclaimers overshadow the message and turn the notice into an exercise in soothing, rather than warning, the public. Allied Signal's ad (see Page 11) states that the company "strives for environmental excellence by making health, safety and the environment, integral components of its everyday business life. We maintain extensive training programs and assurance systems at our facilities worldwide to assure the integrity of the company's operations and products for our employees and the general public." In another ad, five San Diego facilities "independently declare their commitment to an environmentally safe and clean community, and separately, through each company's individual programs, continually strive to insure compliance with local, state and federal environmental, health and safety regulations." A warning published by McDonnell Douglas Corporation (see below) begins with the friendly heading "McDonnell Douglas Corporation Wants You to Know," and states that "as a longtime leader of aerospace manufacturing, McDonnell Douglas Corporation (MDC) has always made safety and a clean environment among our top priorities. What you may not know is that MDC has an equal interest in the health and safety of you -- our neighbors." The notice goes on to applaud the company's environmental and safety practices.

With a few exceptions, the great majority of the notices omit any mention that chemicals are being emitted or released from their facilities. Standard language is that the facility "uses or "contains" chemicals, (see Rohr, Inc. notice, Page 7) or that detectable amounts of chemicals "are present" or "may be found" in or near the facility (see Chem-tronics, Inc. notice, Page 9). In even fewer cases do the warnings state that facility emissions result in human exposures, or specify the areas in which these exposures occur. The notable exceptions are notices published in response to enforcement actions, such as the revised advertisement published by Northop Corporation (see Page 8) after being threatened with a lawsuit by the California Attorney General in 1992.

Perhaps the singular feature of the warnings is their physical contrast with the surrounding commercial advertisements and newspaper headlines that compete with them for the attention of newspaper readers. With minor exceptions, the notices are small, tightly spaced, all text and no graphics, and exceedingly dull. Thus, for example, juxtaposed next to a picture of Heather Locksley flexing her muscles in an ad for a fitness center (as a notice published by Baxter Healthcare Corporation in the Orange County Register was) -- or next to a giant Dixie Lumber sale ad, (as a Rohr notice in the San Diego Union Tribune was - see Page 7) -- the notices cry out to be ignored. If the designers of these warnings were judged by how many people read them -- as professional advertisers are -- they would be out of a job.

Judged against the underlying objectives of Proposition 65, self-regulation has been an unmitigated failure. The warnings which have been published do not effectively communicate information about exposure to toxic chemicals to the affected population. They do not satisfy the public's right to know and to make informed choices about exposures to harmful substances. Moreover, because the notices are essentially invisible, they do not generate any "market" or public pressure to reduce unnecessary toxic emissions and exposures.

The bottom line is that, left on their own, businesses have demonstrated that they are more interested in doing the minimum possible to escape liability than in designing effective warnings. Until the Proposition 65 regulations are changed to reflect this reality, it is unlikely that we will see any improvements in the warnings currently being provided to the public.

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