Episode Title: OEHHA and Prop 65 Update -- A Conversation with Lisa R. Burchi

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Lynn L. Bergeson (LLB): Hello, and welcome to All Things Chemical, a podcast produced by Bergeson & Campbell, [P.C. (B&C®)], a Washington, D.C., law firm focusing on chemical law, litigation, and business matters. I'm Lynn Bergeson.

This week, I sat down with Lisa R. Burchi, Of Counsel to B&C and resident expert on Proposition 65 [Prop 65], among many other chemical laws. Few state laws are more notorious or controversial as this 1986 California law that revolutionized the concept of a consumer's or worker's right to know about whether a product or workspace might present exposures to chemicals considered carcinogens or reproductive toxins. Fast forward 36 years, and the familiar label warning on products as diverse as industrial chemicals to coffee and other common food items are found literally everywhere in and outside the state of California. Lisa brings us up to date on some important new Prop 65 developments, reflects a bit on the law's successes and misses, and discusses a few important judicial rulings about which our listeners will want to know. Now, here is my conversation with Lisa Burchi.

Lisa, welcome back to the studio. I'm thrilled to have you here today to talk about one of our favorite subjects, Proposition 65 (Prop 65).

Lisa R. Burchi (LRB): Thanks for having me.

LLB: You betcha. Lisa, you have worked on Prop 65 issues for a while. You are our resident expert. Maybe you could give our listeners just a few general comments and observations on the law's utility, effectiveness, and much announced and publicized weaknesses.

LRB: Sure. Right. Assuming people know a lot about Prop 65, but just as a general background, its utility, its purpose, at its core, is pretty limited. It's a right-to-know statute, and it's intended to set forth warning requirements. The warning requirements can be in different contexts. There are warnings for consumer products, there are warnings for employee exposures, and there are warnings for environmental exposures. And the warnings all relate or are triggered by chemicals that California's Office of Environmental Health Hazard Assessment (or OEHHA) has determined may cause cancer or reproductive toxicity. And I

think it's been effective to some extent because despite the fact that it might seem as if it's limited, it's actually an issue that companies spend a lot of time working to make sure they're compliant with. There are a lot of Prop 65 warnings. I'm here in California. I can tell you, you can see them on a lot of products, a wide range of consumer products -- that term's pretty broad -- and in certain exposure scenarios, so they can be posted in front of certain buildings, hotels or garages, things of that nature. If the trigger, for example, is exhaust or smoking.

So it's effective in the sense that there are a lot of warnings. Some, I think, could argue that those efforts are tied to the provisions within Prop 65 that allow private citizens to bring actions against alleged violators. That's considered in the public interest. Those private citizens, I think, are referred to by many as bounty hunters, and they are very vigilant in testing products and scenarios and sending notices of violations to companies when they find that they think there should be a warning and there is not one, thereby initiating a potential lawsuit that mostly end in settlements.

LLB: Right. And I'm guessing the effectiveness factor that you're focusing on now, I would agree that the warnings have certainly raised the awareness of the pervasiveness of chemicals in everyday life, in the work environment. But as a resident of California, do you suffer from the over-warning effect? I mean, have you been largely lulled into a sense of, well, everything has something in it. There are warnings everywhere. Has that weakened its effectiveness, in your view, Lisa?

LRB: I think that many have made that argument. Sure. If the effectiveness of Prop 65 is measured by consumer understanding to recognize a Prop 65 warning and to make choices based on that, I'm not sure that that's pretty effective, because the warnings are so ubiquitous that they have arguably lost their value. I would say being here in California, I am aware of the Prop 65 warnings. But if I even poll friends, family, colleagues, I'm not sure a lot of people have even noticed them a lot.

LLB: People are indifferent, right? But again, it has served a very important purpose because but for this beginning of the right-to-know movement, we would be certainly less aware of the ubiquity of chemicals in everyday life.

LRB: Right. And we can't say that it hasn't been effective for some entities that are looking for products, that are looking for products that don't have that warning, that companies aren't making efforts to produce products that wouldn't require a warning. So, yes, all of those are elements that are probably tied up in the effectiveness of this.

LLB: Mm hmm.

LRB: But I would also say that the way that the statute is written and the regulations, it's meant to be about exposure. And so, they don't really have *de minimis* concentrations; even trace elements of a substance can trigger the need to warn. There are defenses you can have and exposure assessments you can conduct to demonstrate that the amount of the chemical that you would be exposed to would never exceed what are determined as safe harbor levels. But those aren't necessarily easy to conduct. And a bounty hunter, if they see a product without a warning, that would be your defense. But it doesn't eliminate the possibility of having someone contact you with a notice of violation and have you have to defend and explain yourself for not warning. So you know that the warnings are good, but just because you have a warning really doesn't necessarily mean that there is an exposure that is of concern.

LLB: No, I mean, many of our own clients have adopted the warning, largely recognizing there might be a trivial amount of a listed chemical in their product, and presumptively putting the warning on inoculates you from an assertion of noncompliance, whether or not there is a meaningful exposure, I think, in the way the law countenanced, but that's one of the weaknesses, one of the advantages, depending upon what side of the street you're on in that regard.

LRB: And that whole concept of over-warning is one of the main issues with regard to the recent, the original efforts, and now the subsequent provisions, with the so-called short-form warning.

LLB: I was *just* going to ask you about that. There's been a lot of talk of this so-called short form, and maybe you can let our listeners know what that is and what the relevance is of the changes that you're about to talk to us about.

LRB: Sure. So back in 2016, effective in 2018, OEHHA really overhauled the Prop 65 warning requirements. They changed the warning language, the methods of communication, sort of modernized it in some ways from when the regulations were first in effect back in the eighties. And when they did that, they created an option for consumer product exposure warnings that allowed what they called to be the short-form warning. It was developed and discussed with industry because companies were concerned whether they had room on their labels or their packaging to include the full new warning. And so this was intended to be a way to have a more concise warning that would satisfy the warning requirements. The issue then was that the regulations never specified the circumstances when the short-form warning could be used. So what we had might have thought it was intended for circumstances when labels and packages didn't have the size, the space for the warning.

LLB: Yes.

LRB: But as adopted, right? Anyone could use it. One of the main benefits when you'd reduce the size of the warning was that you were no longer required (as you were with the quote, "long form" or regular warning under the amendments) to identify a particular chemical that was triggering the warning. So prior to that, the Prop 65 warning notified you that there was a chemical that OEHHA had determined could cause cancer or reproductive toxicity. But the warning didn't actually include the name of a chemical that was triggering the warning. That is now a requirement, but with the short-form warning, they eliminated that aspect of it.

LLB: I see.

LRB: -- which was a huge benefit for a lot of companies in trying to determine what to list, or in some cases maybe referring before not being sure what to list and so not having to name a specific substance sort of alleviated that requirement.

LLB: So if I have this correct, Lisa, what was originally thought to be kind of an expedient created to address real estate concerns, right? That there's just not enough real estate on a label to put all that stuff on it. The short form was created, but people adopted it in situations that were unrelated to those size constraints. And with that went certain requirements that were unique to the long form. And hence it sounds like commerce kind of gravitated around the short form for reasons that OEHHA never really anticipated.

LRB: Exactly. And, you know, I think over time, now that those regulations have been in effect and companies have made their changes, you know, OEHHA started to express concerns regarding reliance on that short-form warning when space was not an issue. And I think they also were concerned, as we've been referring to, sort of over-warning, that companies were putting labels on products even when they didn't have knowledge of exposure to a listed chemical, which is something that companies may be doing or not. But it definitely eliminates an issue of having to identify what chemical or chemicals you would include on a warning. It just eliminated a -- it eliminated a need to make that decision.

LLB: Right. I'm guessing, again, no dispersions cast on either OEHHA or regulated entities. But there is a certain gamesmanship, competitive advantage, and other concerns that are elicited by having to select the chemical to which a customer or consumer or worker may be exposed. So the reason why these form questions are so consequential is that they force entities that must be compliant with the law to make decisions. And so the elimination of an option or being forced to select listing of chemicals that heretofore you were not required to, those caused some pretty consequential commercial business, legal, and regulatory issues, right?

LRB: Sure. Yes. And there's -- there are questions, too. I mean, these companies are, again, formulating products, getting a lot of materials through the supply chain, being maybe notified of certain substances that may or may not be in their product. So, depending on the information you've collected for the product that you're making, I think that there can be some questions of 100 percent composition of your product and which substances are there. And maybe you don't -- you know they're there, but you don't know what concentrations, so you want to label and provide a warning for a substance that might actually have some exposure potential or to choose something else that's, again, maybe on the more ubiquitous side of things because there are 900 chemicals listed now under Prop 65. So, yes, I think there are sometimes, can be some real decisions to be made about how to warn, what substance to warn, and what business and consumer reaction there might be.

LLB: Maybe you could add a temporal element here. Are the short-form requirements in effect now? Was there a phase-in period? Because it seems like, to the involved but somewhat detached observer -- that would be me, unlike you, Lisa -- the short-form decisions and regulatory initiatives seem to be going on for quite a while now. Are they in effect now, or is it -- are we in a phase-in mode?

LRB: So they are in effect now. They have been in effect, without restriction on size and without the need to include a chemical substance, since the regulations were overhauled in 2016, 2018. What OEHHA has recently done, based on the concerns that we were just discussing, was proposed amendments to that short-form warning. And so now there have been a few iterations of that proposal, but at its core, they are establishing label size requirements so that you can only use the short-form warning in particular situations, where they have determined space is limited. And they also are now going to require the identification of at least one Prop 65 listed substance, even for the short-form warning. So that will no longer be a distinguishing factor between the regular and the short form.

LLB: The short form. Are there options for entities that have nominally the size that would take them out of the short-form option, but you really want to make the case that you deserve the short form for reasons? Is there that option under the rules? A waiver, as it were.

LRB: Not that I'm aware of.

LLB: So it really is a one size fits all.

LRB: Yes.

LLB: Whether you like it or not.

LRB: I will have to addendum this thing if there's something I'm not remembering. But they've tried, I think, to -- they have -- there have been some debates, and there have now been three different proposals for these amendments. And so the size of the label has increased so that the -- OEHHA, to the extent that you could argue that they have been accommodating -- have listened to some of the comments that have been submitted about the need for the label size to be expanded for the requirement to apply. So there is that. But other than that, I'm not sure that there is another option.

LLB: Well, now that these differences have been essentially eliminated, it sounds like there's very little difference between what used to be called the short form and the long form, or regular and short form. They've been equalized, as it were. Correct?

LRB: Agreed. Agreed. Meaning that where a lot of companies might have been relying upon the short-form warning, now, the impact of this regulation, assuming it goes -- that it is adopted -- which it had not yet been. But assuming this latest version was adopted, yes, the impact will be very significant. A lot of companies are going to need to start putting in the, start making the effort to change the short-form warnings. Regardless, they'll need to change the short-form warnings, and whether it stays the short form or whether you use the full regular language, that could just be a matter of real estate, label real estate, as you say, because otherwise the real requirements there are very similar now.

LLB: But many of our listeners are very sophisticated chemical stakeholders, and they appreciate that whenever there is a label change, you're talking months of product design, getting it into the supply chain, making sure that your customers are not thrown off by optical changes to the products that they're used to purchasing. So we don't mean to scare anyone, but we really wish to emphasize that these changes are not trivial. Correct?

LRB: Oh, absolutely. And that's one of the major complaints, I think, that has been made regarding this change is, number one, it's so close in time to when the past changes were made, and the efforts that companies made to make those changes, less than five years ago or about five years ago. To have to go through that whole process again is, it's expensive, and it's time consuming, and it's challenging. And there are a lot of products, a lot of [stock-keeping units] SKUs. This is a broad range of -- when you say consumer product, it just encompasses an enormous number of the possible products. So, yes, it sounds like it's a very big deal and very difficult on a company level to implement. And again, one concession I think that OEHHA has made from when they first proposed these amendments to now is providing a longer phase-in period.

LLB: I was just going to ask about that.

LRB: Right. So now I think it's up to two years. So, I think it had been shorter, and OEHHA had agreed to extend it.

LLB: That's a good thing.

LRB: That is a very good thing. So there's, like, a two-year phase-in period. So if you're manufacturing the product and you have the old warning even after these regulations are adopted, they won't become officially effective for another two years. You have time and you would just need to, for products that are manufactured before that, just as long as you can demonstrate they were manufactured before the official phase-in date, you would be compliant with the warning requirements to label.

LLB: I know it's a cliché now, but supply chain disruption is just such an intensely important and debilitating factor of the life in which we live these days as a consequence of COVID and other world disturbances. So adding another wrinkle onto the supply chain, like labeling restrictions for products that, as you suggest, Lisa, are broadly subjected to the requirements of this rule, is no small feat. So it's good that OEHHA -- which is traditionally very cognizant of business and commercial sensitivities -- so it's good that they pushed out that phase-in period.

LRB: Right. If they're going to force this on companies so soon after the last ring of changes.

LLB: The last go-around. Right.

LRB: Yes. At least provide -- and I believe from the old amendments, there also was, like, a two-year phase-in period. So they're matching that timeframe. And I think companies say that they need every minute of it.

LLB: Let's transition to another topic that we in the chemical space find intensely interesting. Not something that I would admit to anybody, but the interface between Prop 65 and the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA] labeling requirements has been the source of intense debate, and litigation, I might add, for a long time. What are the newest developments in that space in your neck of the woods, Lisa?

LRB: There has been a very interesting development. I think, with all of the Prop 65 efforts sort of expanding warnings and changing warnings and listing substances, there has been a little bit of pushback by some in the industry about the warning requirements. And one of those involved, glyphosate -- which is an active ingredient in pesticide products that are registered by EPA under FIFRA. And glyphosate's listing, the glyphosate was then sought to be listed under Prop 65, and it was very controversial. And the glyphosate producers challenged OEHHA's decision that would have required a Prop 65 warning that glyphosate can -- exposure can cause cancer.

And that lawsuit was filed in the Eastern District of California, and the court found -- agreed with the plaintiffs and determined that the safe harbor warning was false and misleading commercial speech under the First Amendment, and they enjoined enforcement of the warning requirement. So that was a big success, I think, for those in industry about just challenging the nature of the listing of chemicals on Prop 65. And when that lawsuit was brought, part of the challenge, as to whether this should have been listed in the first place, was the fact that EPA has made statements during its registration review of glyphosate that they did not think glyphosate caused cancer. And so in addition to the lawsuit that was being brought, EPA issued a letter stating that it would not approve any labeling that included the Prop 65 warning statement for glyphosate-containing products. And so that would mean that any warnings of that nature they would consider false and misleading, and that's misbranding violations under FIFRA.

So that put glyphosate producers in a very tough position. If the California case had not been decided yet and the Prop 65 requirement was in place, if you didn't have the warning, you would be in violation of Prop 65. On the other hand, if you *did* put the Prop 65 warning on a product, EPA would consider you in violation of FIFRA.

LLB: A big catch-22.

LRB: A big catch-22. So the court case I guess eliminated that conflict to some extent. The EPA letter emphasized the fact that the Prop 65 -- that that warning was not going to be permitted on the label. EPA would not approve any amendments if you even tried to have that warning added. EPA just wouldn't do it. There has still been some back and forth. And I think most recently, a couple of months ago, OEHHA is trying to propose some warning language that's very specific for glyphosate and acknowledges that the International Agency for Research in Cancer (IARC) has classified glyphosate as probably carcinogenic to humans, and that is the basis for OEHHA listing it, but that EPA and other authorities have determined that glyphosate is *not* likely to be carcinogenic to humans.

EPA has stated that that language is okay with them, but industry remains vehemently opposed, that it still is including a warning about glyphosate causing cancer, which continues to violate their First Amendment rights, and is -- should still be preempted by FIFRA, which doesn't allow state law labeling requirements that are different from those that would be required by EPA. So it's not -- that's not over. I think they're still trying to figure out from OEHHA's perspective if there is a type of warning that can be used. Meanwhile, the court case continues to be challenged to see whether that Prop 65 listing will, whether that preliminary injunction will become permanent or not.

LLB: So it sounds like that's kind of simmering in the background there, that, as is usually the case on all controversial issues, no one is happy. So more to follow. And we'll catch up on that in our next podcast. There's another decision that I caught in reading the trade press out of the United States Court of Appeals for the Ninth Circuit out there in California that addresses acrylamide. Maybe you can tell our listeners about that important decision.

LRB: Sure. So acrylamide is a substance that is not intentionally added to food products, but can form in a wide variety of food and beverages when cooked or processed at high temperatures. Coffee is a famous example, where acrylamide can form, and OEHHA listed acrylamide on the Prop 65 list, and it would have prompted warnings, again, on a wide variety of food and beverages and would have required warnings maybe in coffee shops and things of that nature that the coffee you're about to drink contains a substance that can cause cancer. So this ended up being another instance, like glyphosate, where manufacturers challenged OEHHA's decision to list acrylamide under Prop 65 as it applied to the food and beverage industry.

And, as with glyphosate, the Ninth Circuit, they actually recently upheld the district court's decision granting a preliminary injunction. So no person, no bounty hunter or private citizen, can file or prosecute a lawsuit to enforce Prop 65 warning requirements for cancer as applied to acrylamide in food and beverage products. So this paralleled or was similar to glyphosate, because it was also a First Amendment commercial speech case. And in granting the preliminary injunction, the court thought it was likely that acrylamide should not have been listed under Prop 65 in the first place, and that the plaintiffs would succeed on the merits of their First Amendment claim that to force these companies to warn about acrylamide in food products would violate their First Amendment right not to be compelled to place false and misleading statements on their products.

LLB: That *is* a big decision.

LRB: Both cases are, I think, examples of companies finding a way to push back a little because everything --

LLB: Well, it created --

LRB: Everything is expanding the Prop 65 requirements. And there isn't a lot of opportunity to sort of challenge. But these are two very interesting, successful cases.

LLB: Mm hmm. No, again, we can talk about this stuff for hours because at its root, Prop 65 is about notification and warning and a consumer or worker's right to know. And you say that, but you have to immediately pivot to other constitutional rights, First Amendment rights. What about FIFRA? What about other products and other governing systems that might have conflicting requirements? And the court ultimately is there to sort out these challenges and these ambiguities. But how they are resolved and the fact that Prop 65 was voted into law by California residents 36 years ago. And here we are in 2022 talking about litigations that happened months ago over the last several years. So it's just a fascinating statute. And these issues are not going to stop evolving.

LRB: No, and you know, the listing mechanisms and in some instances, it's a list of lists, to some extent. So once you're listed, like by IARC, OEHHA will automatically -- can automatically list you, but yes, it's a complicated world with a lot of science for a lot of these substances. So the listings are not always so clear cut, and there can be some inflexibility in evaluating some of those chemicals for which there might be evidence for and against listing.

LLB: Before we pivot to probably one of the most important aspects of Prop 65, and that's compliance areas, because this really is a kind of a gotcha statute, right? There are so many opportunities for not getting it right and paying dearly for the consequences of noncompliance or alleged noncompliance. But the topic that I wish to pivot to now, Lisa, relates to Prop 65 in e-commerce. If products are marketed on Internet platforms, Amazon, or just being sold directly to consumers via the Internet, should not all marketers' products be labeled accordingly? I mean, how do you sort that out if you're a product marketer? You're not based in California, but your products sure as heck are going to find their way there. What is your advice?

LRB: Sure. So, right. The Prop 65 regulations did not contemplate e-commerce back in the eighties, but those 2016 amendments do have some provisions addressing that. So it is a requirement to provide a Prop 65 warning for consumer products when they're sold on the Internet. So if there is a consumer product that's -- is being made for sale on the Internet, you need to provide the warning. There are options to provide maybe a clearly marked hyperlink using the word "warning" on the product display page, and then you could click on that and you could get the full warning. Or you could devise another way to display that warning with the main factor consideration to be that you want that warning to be viewed by the purchaser prior to completing that purchase, right? So it's a right to warn. So putting it on the receipt after you've purchased it is ineffective, right? It has to be able to be viewed prior to purchase.

And if you -- if a label has a product warning, you can provide a hyperlink to that actual warning or the photograph of the warning. And if you are not the seller, if you're not the manufacturer, but you are a seller or a distributor, those requirements can apply to you as well. And even the regulations now have some retail seller obligations, which permit a

consumer product manufacturer to inform a retail seller of its requirement to provide a warning. And in those cases, the manufacturer needs to provide that retail seller with all the information it needs to provide the warning. So the actual warning language, if you -- to provide the label, there are other options for consumer product warnings, like a shelf sign or things of that nature. You could provide the actual -- you could provide the -- you would provide the actual tag or shelf sign to provide. So that happens in stores, and it happens on online. And so you just -- It is a requirement across the board to include that warning when it's being sold on the Internet.

LLB: And in characteristic fashion, OEHHA has provided a wide variety of options: shelf talkers, pictures, hyperlinks, you name, all that stuff -- which is good. But the important takeaway point is that if you're marketing on the Internet, you need to be mindful of the Prop 65 warning requirements.

LRB: Yes. And I think that that applies, even if it is not your product. If you're aware of the requirements, if that information has been passed along to you, it can then become your responsibility.

LLB: Exactly.

LRB: And I guess I would just also note that going back to that short-form warning quickly, when OEHHA first proposed changes to the short-form warning, it was going to entirely eliminate that option for Internet and catalog warnings because they didn't think that there was a space limitation on a website or catalog. But OEHHA, when it modified its changes, it reverted back. So now if you are going to continue to use the short-form warning on your product labels, you can also use the short-form warnings for your Internet warnings.

LLB: Lisa, in your view, given your very significant experience in this space, what are the two or three or one major critical compliance areas that our clients most often overlook for one reason or another?

LRB: Well, I think in some cases, it is significant to know 100 percent composition of your products. So, compliance areas, I think, involve ensuring that you have the information that you need to make any Prop 65 determinations for your own company and for your own consumer product. I think a lot of information about the existence of a Prop 65 substance in a particular raw material, that information can get sort of passed down through the supply chain. And maybe companies then have the information that they need to make their own warning label decisions for their consumer product that incorporates this raw material.

In some cases, it isn't entirely clear what all those substances and chemicals are. So, to some extent, if a supplier or manufacturer doesn't tell you that one of its raw materials contains a Prop 65 substance, if you're looking at an enforcement case, you can trace that back and try and find the company that really was the entity that was responsible for providing that information in the first place. But it would serve a lot of companies a lot less headaches to sort of know what all the ingredients in their products are and what all the possible Prop 65 substances there may be. So definitely understanding that.

And I also think, from a Prop 65 perspective, it's a California state law. It is only intended for a warning on products that are intended to enter California. But I don't think that that's the way the world works. So as challenging as it is -- as challenging as it is to get your labels together and modify them, it can be even harder, I think, to manage multiple versions of the same label. So while some might try to distinguish -- if you're looking at a critical

compliance area -- I think sometimes it's important to know whether you think your product could be sold in California or not, whether you can try to distinguish those products that can't be sold in California or if you have the Prop 65 label on or not, it's possible but challenging. So definitely something that requires some effort and procedures, I think, to ensure that there isn't a consumer product without the Prop 65 warning if needed, that enters California.

LLB: But to your first point, and to the extent that Prop 65 has been somewhat prescient in a lot of respects, today more than ever, as a consequence of a lot of our newer TSCA reporting obligations and restrictions. Compositional integrity and knowing every single chemical component of a product that you are ultimately importing, manufacturing, or distributing in commerce is just the way of the world today, right? You've got the [per- and polyfluoroalkyl substance] (PFAS) reporting obligations that will be kicking in in the not-too-distant future. Look at the experience we had with the [persistent, bioaccumulative, or toxic] (PBT) rules that kicked in last year with regard to [phenol, isopropylated phosphate (3:1)] (PIP (3:1)) and the other PBT chemicals for which there were hard-stop import, distribution, and labeling requirements. So to the extent that Prop 65 has prepared marketers for being much more keenly aware of the compositional elements of their products, it's a good thing. And it's not going to change. We're never going to go back to "Doesn't matter what's in that black box. People want it." People want to know what's in the black box. And as manufacturers and distributors and formulators of products, you need to know, and you should know -- both from a legal perspective and a product stewardship perspective -- what all those chemical components are. And the argument, "Well, it's [confidential business information] (CBI), and I just can't pry it out of my supplier," that's not working very much these days. So you need to try harder.

LRB: And articles as well, right? I think to some extent under TSCA, if you're just dealing with a particular chemical substance or some sort of mixture, people are familiar with identifying the compositions of those types of raw materials. But when you start getting into some articles and some of these consumer products that have all these different pieces, those don't always have safety data sheets or information about their composition. So it's a whole other area that's been exposed maybe for lack of knowledge, because there weren't requirements applicable to them and they were more difficult. But the way of the world, right? It is, They are now capable of identification at that level and being required on state, federal, international levels.

LLB: One question that I know we field quite a lot (and I routinely refer to you, Lisa) is, what can clients do? What can regulated entities consider doing to minimize the possibility of a citizen action under Prop 65? Either brought by a bounty hunter group that is well-established and well intentioned, or that cohort of entities that just blanket product areas, because perhaps a chemical component in the product is one of the five or six or seven chemicals that are most often targeted for Prop 65 enforcement action in California. But is there anything you really *can* do to avert such an action?

LRB: You can provide a warning.

LLB: Okay. *Touché*.

LRB: I mean, I do think that it goes back to the beginning of the conversation. The reason that so many companies put the warning on, even if they think that there is an argument to be made that your exposure to any substances is so minimal that it would never exceed any of these

safe harbor levels that have been established, putting the warning on does eliminate the ability or interest of a bounty hunter to file a suit, say, that you *didn't* provide the warning.

But I also think that there are a lot of circumstances where warnings are *not* justified, where companies *have* had exposure assessments conducted, either by themselves or part of consortia, and companies have developed their own safe harbor levels where -- because OEHHA has not established those levels for every substance, I think, maybe a third or something like that -- I can't remember the exact number, but there's a significant number of Prop 65 listed substances that do not have OEHHA established safe harbor levels. So I think that there are some very strong cases for when exposure is not exceeded. And if you have those exposure assessments conducted, and you have those documents available to demonstrate, and you have your defense prepared, should a plaintiff attorney, bounty hunter come knocking on your door, that obviously doesn't minimize the possibility of a Prop 65 citizen action being initiated, but it could very much help sort of nip it in the bud.

LLB: Mm hmm. Good thoughts.

LRB: And then obviously, I think just documenting the information you have as to if you haven't warned or you have, what have your suppliers told you? It is a supply chain issue, and it should stretch back as far as it needs to, to whatever entity it is that is selling the component or the raw material or whatever it is that contained the Prop 65 substance in the first place. So again, just that supply chain understanding and knowing the Prop 65 status of what you purchase and formulate is still just critically important.

LLB: Well, last question. In looking down that proverbial road, are you aware of, or is there any chatter out there in the California state government level, including the California Assembly and CalEPA [California Environmental Protection Agency], considering any new efforts to address some of the deficiencies and weaknesses that you've articulated and improve Prop 65's effectiveness and perhaps return it to its roots of consumer awareness and perhaps prompting changes in product formulation and all that stuff? Is there anything in the works to your knowledge?

LRB: I would say that there are certainly opportunities for some pretty important reform, but I'm not aware of any such activities that are either initiated or having any traction. There's always been a lot of talk about trying to reduce some of these frivolous enforcement lawsuits. And there was one instance back in 2013, where a law was passed that provided businesses an opportunity to cure any Prop 65 warning deficiencies after receiving a notice of violation. So again, you can be approached by a bounty hunter, but you have 14 days to fix the problem. So instead of initiating a whole settlement and penalties, you can cure and fix it and move on.

But that law is very limited, and it just covers exposures to alcohol- or food-related chemicals, or in vehicle exhaust, and tobacco smoke. So it was really intended to help bars and restaurants and parking garages and things of that nature. And there just hasn't been any effort, I don't believe, to expand this law. I mean, I think industry might be seeking to expand it, but I don't know that I'm aware of anything or that has been extended, but that -- I think that was a very welcome reform for that particular sector. And I could certainly see how it could be very valuable and worthwhile in other contexts as well. And I know we've talked too, now, a few times about this sort of over-warning problem.

And OEHHA knows -- has addressed it as an issue. It's one of the reasons it's revising the short-form warning. But really I think that the over-warning is, again, companies trying to protect themselves from frivolous lawsuits.

LLB: Exactly.

LRB: Yeah. And these -- the bounty hunters, they post information every year about the number of cases and the number of penalties that have been collected and the proportion of those penalties that are capped by these private law firms, as opposed to the money that actually goes to California. And the attorneys get 75 percent or more of all penalties paid. So it's very lucrative. And it's not going to stop them bringing any suits as long as they can obtain such large penalties, such large proportions of these penalties awarded.

LLB: Yeah. I mean, that's unheard of. That is a -- the lion's share of the penalty goes to the bounty -- or the entity bringing the suit. Which is -- that incentivizes actions for sure.

LRB: Yes.

LLB: And it should incentivize compliance, right?

LRB: Yes, but it also -- if you're looking to cure the problem of over-warning, I'm not sure that attacking the short-form warning is the best way to accomplish that goal.

LLB: Well, Lisa, I very much enjoyed our conversation. I really find it kind of astonishing that 36 years after this law went into effect or was signed or ushered into action by the people of California, we continue to talk about really interesting judicial cases, regulatory tweaks, and compliance strategies for the growing cohort of entities subject to Prop 65. So thank you for being here today.

LLB: Thank you for having me.

LLB: Thanks again to Lisa Burchi for speaking with me today about Proposition 65, the law synonymous with right to know. Whether or not you are a fan, Prop 65 has changed the commercial landscape and continues to evolve.

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