

With all the attention being paid to proposals to [reform the California Environmental Quality Act in the state legislature](#), there is another landmark California environmental law that the legislature and Governor Brown are thinking of changing. In 1986, the voters of California [enacted Proposition 65](#). The law requires notification to consumers and the public about possible exposures to carcinogenic substances in consumer products and in public spaces (such as hotels, restaurants, and airports).

At the time of its enactment, some legal scholars and environmentalists hailed it because of two main features: First, Prop 65 is primarily an informational statute. It doesn't prohibit exposures to carcinogenic substances in most circumstances, so long as notice is provided. Second, Prop 65 flips the burden of proof. For chemicals listed under the act as potentially carcinogenic, the statute requires the defendant who wishes to avoid providing a warning to demonstrate that any exposure is below the safe limit. This reverses the usual burden of proof in U.S. toxic substance regulation where the burden is on regulatory agencies or plaintiffs to show that a chemical is toxic at a given level of exposure.

Proposition 65 produced some [dramatic examples of major corporations changing the composition of their products to reduce exposure to carcinogens in order to avoid having to label the product as potentially toxic](#). This was seen as evidence of the power and promise of the informational, burden-switching approach in the statute.

But like any human endeavor, Proposition 65 is not perfect. In part due to a proliferation of lawsuits by plaintiffs' attorneys in the state (the statute allows for citizen suit enforcement and attorneys fees), Proposition 65 warnings are now omnipresent in the state. Most every airport jetway (because of airplane emissions carrying various carcinogens), parking garage (because of car emissions), restaurant (because of alcoholic beverages or carcinogens present in various common food preparation techniques), hotel (same), or bar (same, plus people smoke outside, producing carcinogenic smoke) has a Prop 65 warning at its entrance. It's likely that this proliferation of warnings has reduced the effectiveness of the warnings - both in terms of alerting consumers so they can make informed choices (if every restaurant has the warning, what's the point?) and in terms of imposing some sort of deterrence on businesses to avoid the warning (for the same reason). Plus, businesses complain about "nuisance" Prop 65 suits that (they claim) are just about shakedowns for attorneys fees.

So various proposals are now floating around the state capitol to change Prop 65. One bill [currently in the State Assembly](#) would allow businesses that have failed to provide adequate warnings because of alcoholic beverages, smoking, or common food preparation techniques to be exempt from lawsuits – so long as those businesses put up an adequate warning within 14 days of the notice of a lawsuit and pay a small civil fine. The governor’s administration [has proposed other changes](#): capping attorneys fees; increasing the evidence that plaintiffs have to provide in order to initiate a lawsuit; and providing more informative warnings.

In general, these seem to be sensible – or at least, not very harmful – changes. It seems fine to limit the penalties for violations that relate to practices that Prop 65 is unlikely to affect (are people really going to stop grilling food because charbroiling meat produces carcinogens?). Capping attorneys fees or increasing the evidence needed to file suit is a little more problematic – this will necessarily result in somewhat less Prop 65 enforcement, as it will reduce the incentives or increase the costs for filing cases. But if the changes are relatively marginal, it’s plausible to me that the reduction in litigation costs might outweigh the costs in terms of reduced enforcement.

The part I’m actually excited to see discussed is more informative warnings. Right now, the warnings are generic – just that some sort of potentially carcinogenic substance is present on site. That’s not very helpful to the average consumer – and as warnings proliferate for all sorts of everyday exposures, it’s arguably counterproductive. If you see the same warning in your favorite restaurant as you see on your kid’s toy, you might disregard both, since the former seems inconsequential (after all, you eat there all the time and you’re okay!). But the warnings might involve very different exposures. And we also might want to impose very different deterrents on the business actors in those different circumstances. More informative, nuanced warnings might help accomplish that.

I just hope the Assembly doesn’t try to rush through a bunch of last-minute, ill-thought-out changes (as it sometimes seems to have a habit of doing) right before the session ends, and instead looks to come up with some helpful fixes on the topic.