


## Proposition 65

Many California residents are familiar with a law known as Proposition 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986 or Prop 65. This law mandates that warnings be given to consumers in various circumstances. California residents see these warnings nearly everywhere — at gas stations, in parking garages, in hotel lobbies and on various consumer products.

The original concept of Prop 65 was to keep chemicals out of drinking water and to warn consumers before they are exposed to chemicals that may cause cancer, birth defects, or other reproductive harm. The California Office of Environmental Health Hazard Assessment (OEHHA) is responsible for publishing this list of chemicals and establishing the exposure levels that require warning statements. There are over 800 chemicals on the Prop 65 list. For example, under Prop 65 an exposure to an amount of lead over 15 micrograms per day requires a cancer warning, while an exposure to an amount of lead over 0.5 micrograms per day would require a reproductive toxicity warning. The level requiring a reproductive toxicity warning is set at a level 1000 times less than the level of exposure where there is no observable effect of harm, a level which is far lower than that set by the EPA or any federal agency. The vast majority of Prop 65 cases involving dietary supplements concern allegations of lead exposure.

### WARNING STATEMENTS

When a warning statement is required on a consumer product, including a dietary supplement, it usually reads as follows:

For a carcinogen:  **WARNING:** Cancer — [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

For a reproductive toxin:  **WARNING:** Reproductive Harm — [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

### ENFORCEMENT OF PROP 65

Violations of Prop 65 are enforced by the California Attorney General, District Attorneys or by private party “bounty hunters” who are authorized to recover and keep part of the civil penalties recovered through a trial or settlement. As a result of the financial incentive offered to private parties to pursue these cases, lawyers and law firms have become “bounty hunters” and devoted their practices to pursuing settlements and recoveries. In a Prop 65 case, the only allegation is that the company failed to provide a warning – there is no claim that anyone has been harmed by the product at issue. There have been numerous Prop 65 cases and settlements involving dietary supplements.

Most Prop 65 cases settle prior to trial because the company bears the burden of proof to establish that a warning is not required on its products. In 2011, settlements with private party

“bounty hunters” totaled over \$15 million dollars – of which over \$11 million was paid to the lawyers for the “bounty hunters.”

## PROBLEMS WITH PROP 65

There have been several critiques leveled against Prop 65. Here are a few:

- **Prop 65 Unfairly Impacts Natural Products:** Products with synthetic ingredients or which are heavily processed can more easily avoid introducing or remove natural contaminants. This unfairly impacts natural products. According to the [Alliance for Natural Health](#), a grass-roots consumer group that seeks to promote health freedom in the United States,

“Some Prop 65 Chemicals are prevalent in the natural environment, and they unavoidably end up in supplements that contain natural ingredients. While there are certain allowable “safe harbor” levels for Prop 65 chemicals in a product, these levels are often either extremely low or must be established through complicated and expensive lab testing at the expense of the supplement company. Prop 65 does provide an exemption for “naturally occurring” chemicals – but it is up to the supplement company to prove that this is the case, which is both very difficult and expensive. In the end, supplement companies have the unfortunate choice of providing a prominent warning on what might in actuality be a very safe supplement, or not provide warning at all and risk noncompliance with Prop 65.” (A Guide to California’s Proposition 65, 2012).

- **The Prop 65 Bounty Hunter System is Broken:** An article by Jim Conran, former director of the California Department of Consumer Affairs, claims that [It’s Time to Tame Prop 65 Bounty Hunters](#), pointing out that what started out as an environmental protection law has turned into a system that mainly seems to enrich private lawyers. A March 2012 law journal article entitled [Bounty Hunters and the Public Interest – A Study of Proposition 65](#) reviews Prop 65 actions and settlements and argues that the law has been abused by private bounty hunters and the California Attorney General should more actively oversee enforcement of the law.
- **Prop 65 Hurts Small Businesses:** The group [Citizens Against Lawsuit Abuse](#) believes prop 65 enforcement actions are an abusive practice hurting small businesses.

## MORE INFORMATION ON PROP 65

For more information on Prop 65, please see the following links:

<https://oehha.ca.gov/proposition-65> – The California Office of Environmental Health Hazard Assessment publishes an overview of Prop 65 on the website. OEHHA also is responsible for publishing the list of Prop 65 chemicals. These lists are available at the foregoing link.

Office of the Attorney General – The Attorney General’s website contains a database of Prop 65 notices of violation and settlements at <http://oag.ca.gov/prop65>.