Prop 65 Clearinghouse Conference 2020: The Chair's Opening Address

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Bob Falk's Long Strange Prop 65 Trip

Enters Practice ; Begins to Learn the Ropes the Hard Way

Retires to Become Specialized Strategic Consultant/Mediator

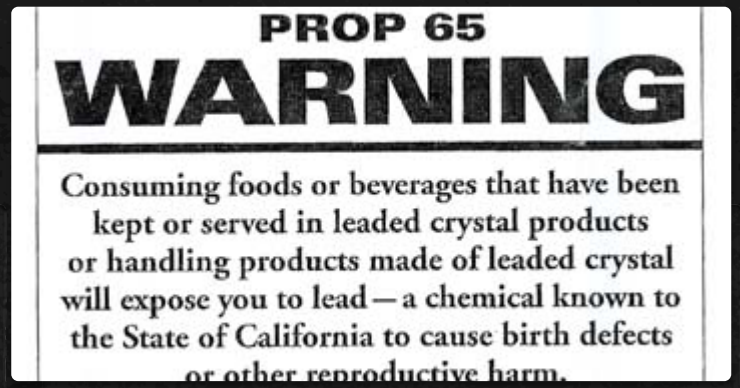
Stakes Out His Reputation in the Field; Makes Partner

Bob's Early Cases & Lessons Learned

Michael Freund & Associates

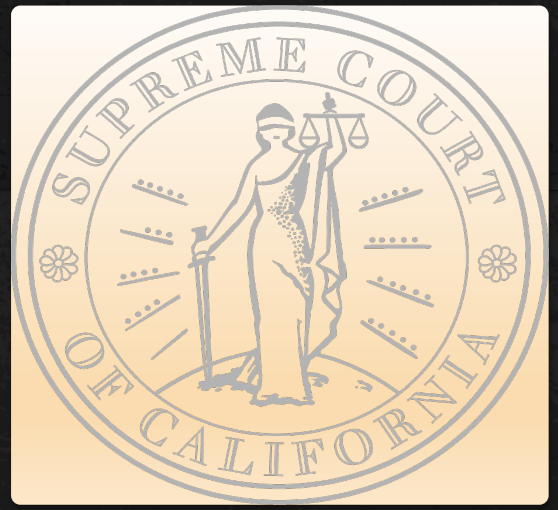
Toxic Air Emissions

In 1989, the AG used its subpoena power to investigate dioxin emissions from the state's pulp and papermills, but no cases resulted. In the first air toxics settlement , CBE got an aerospace company to cease exposing residents in a nearby trailer park to methylene chloride and chloroform



The Crystal and (Fine) China Cases

In the early 1990s , the AG, EDF and Alan Caplan brought cases against ceramic tableware and leaded crystal manufacturers and retailers. The cases eventually settled, largely based retail warning signs. Later cases were brought by Mateel and others against those failing to use or maintain the signs and by Cliff Chanler on exterior decorations on mugs and glassware



Faucet (and Other Brass Parts) Wars

In the mid-90s, the AG, NRDC and ELF claimed lead from brass faucets and water dispensers and meters violated the statute's discharge prohibition. A demurrer in the faucet case was initially upheld on appeal, but the Supreme Court reversed based on the dictionary definition of "source"

Some Mid-Career Cases & Lessons

The Tobacco Cases

Cigar Manufacturers has settled with the AG back in 1991 but competing plaintiffs later brought claims in SF and LA for failing to warn for ETS. Defendants coordinated the cases into larger tobacco proceedings in SD and prevailed on a res judicata theory

PVC Reformulation

Cases were brought on lead exposures from PVC products such as miniblinds, electrical cords and, later, various household products and fashion accessories. All were creatively settled, often with incentives for reformulation. Later cases on phthalates followed the same general pattern

Safer Children's Products and Toys

Years before Lumber Liquidators ran into its problems, AYS and the AG brought cases on formaldehyde exposures from portable classrooms and baby furniture. In the wake of Mattel's troubles from Chinese factories, the AG took over lead in toy claims. Later, CEH and Cliff Chanler took on fire retardants in baby mats, foam cushions and furniture. All combined with media and legislative pressure to produce reformulation settlements

More Cases & Lessons from Bob's Career

Nicotine Patches

Dowhal contended that Prop 65 warnings were required for OTC smoking cessation products, but manufacturers contended they were preempted by FDA's pregnancy warning requirements. The AG went back and forth on the issue, which ended up in the CA Supreme Court

Fruit/Juice

ELF sued for warnings on lead in fruit, 100% juice and baby food – defendants prevailed at trial by proving exposures levels were below the MADL. The Court of Appeal upheld the trial court's decision to allow averaging of testing and consumption data based on the substantial evidence rule, but that part of the controversy lingers on

Chocolate (Parts I & II)

Roger Carrick turned plaintiff and tried to sue chocolate companies for lead and cadmium exposures, but his expert case fell apart in discovery and he quit on the eve of trial. A decade later AYS took up the gauntlet, but looked to engage the industry through mediation leading to a settlement with the industry based on feasibility and a further expert investigation

Take Away's from the Big Guy

- You got to know when to hold 'em, and know when to fold 'em – if you are going to settle, settling early is almost always better than settling later
- Be aware of who surrounds you and treat them respectfully – depending on the circumstances, experts or co-counsel can help or hurt you, and your opponents can sometimes turn out to be your allies, if not your friends
- They who have the government on their side usually wins, but they that have the angels on their side always win (even if the government is not on their side)
- The statute may be flawed and subject to legitimate criticism, but practical approaches and skilled practitioners can produce meaningful results
- Litigating-out Prop 65 cases is a crapshoot, with outcomes usually dependent on the predilections of the judges assigned to decide the case
- When parties can't resolve Prop 65 disputes themselves, involving an intermediary can help, but the parties must be sincere and the mediator skilled and knowledgeable