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# *On* ENVIRONMENTAL LAW

Do you feel it? Like an earthquake, the burden of proof is shifting on environmental issues, particularly chemicals issues. The seismic shift is rumbling both inside and outside the courtroom, both *de jure* and *de facto,* and in the process tilting the balance between businesses and environmental and consumer advocates.

Technology is the trigger, with two converging trends:

First, advances in analytical testing can now tell us with great speed and precision what chemicals are in drinking water or children's toys — and at a very low cost. When a few hundred dollars will rent a device that can quickly detect how much lead is present, it is not surprising that environmentalist groups will use it on every product in reach. When analytical labs can accurately detect pharmaceutical residues at concentrations of one part per 1,000,000,000,000,000, it is not surprising that we are left with the impression that our waterways are coursing with Prozac and Viagra.

Second, as we all know, the Internet is killing traditional journalism. The media no longer mediates between the flood of information and the citizenry. Speed trumps analysis. More and more, we get our news from the cacophonous media.

In combination, these trends yield scary headlines, blog posts, and viral emails with alarmist press releases. We're told there are carcinogens in French fries, breakfast cereal, hamburgers, even baby shampoo, and that baby bottles, telephone cords, vinyl gloves, and rubber duckies contain reproductive toxins. Some of these chemicals are even present in our bodily fluids.

What's missing from these stories is any careful risk assessment. While detection has become cheap and easy, risk assessment remains expensive and time intensive. It costs very little to suspect a chemical of causing cancer; it costs millions to determine whether it in fact does cause cancer, and if so, at what level in humans. And it takes years, since the usual method involves exposing rodents to massive doses for months or years, then looking for tumors or other abnormalities that may be attributable to the suspected toxin. In the end, risks are only identified, not quantified. Combined with decades of declines in science education, as well as human nature's greater anxiety over tiny but uncontrollable risks (think plane crashes versus car crashes), it is not surprising that such stories take hold among even the best educated consumers.

The implications for businesses and their lawyers are obvious: a mere *accusation* can achieve the desired result. A chemical long considered by competent toxicologists as safe for normal use can suddenly be forced out of products by savvy activists wielding modern analytical tools and trumpeting test results in cyberspace. Next, will come emotionally charged, expensive lawsuits. Before you know it, legislators hold hearings and agencies draft regulations. And the accused businesses? Their CEOs and scientists spend whatever it takes to reformulate their products with alternatives that are not (or at least not yet) under scrutiny.

This *de facto* shift in the burden of proof has been stronger in the media, the shopping mall, and the executive suite, and it is definitely tilting juries. But a *de jure* shift is also underway. Europe's REACH program for preapproval of chemicals in consumer products, US EPA's ChAMP program, and California's Green Chemistry Initiative are all examples of governmental responses to consumers' calls for a shift requiring businesses to prove the safety of chemicals before using them.

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Perhaps the oldest example of the de jure burden shift is California's Proposition 65, the first tremor in this groundswell some 20 years ago. Under this law, a plaintiff need only identify the presence of a listed chemical in a product and a route of exposure, and then the burden shifts to the manufacturer or retailer of the product to show that the amount of chemical in the product is safe. The detection of the chemical — at the lowest level science can detect — shifts the burden of proof to the business. As any lawyer knows, this has enormous consequences. Given the expense to a single company of carrying this risk assessment burden, it is no wonder that, of over 25,000 claims, fewer than a dozen cases have gone to trial.

While there are endless arguments about whether this burden shift is good or bad for consumers or businesses, the trend is clear, as are the lessons for manufacturers and retailers of consumer products and their lawyers. Looking forward, you do not want to be the second person to know what chemicals are in your products. Frequent testing, careful product development, tight supplier specifications, and overall quality assurance and supply chain management are critical. And looking backward, you need to be prepared to defend your products and their safety, with sound science, first in the media, and then in the courts.

Just as with earthquakes, it pays to be prepared.

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