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California Court Issues Preliminary Injunction Against New Proposition 65 Lawsuits for Acrylamide in Food and Beverage Products

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Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, better known as “Proposition 65,” the Governor of California published a list of chemicals “known” to the State of California to cause cancer or reproductive toxicity. A chemical is “known” to cause cancer or reproductive toxicity if it meets one of three statutory criteria:

- “[I]n the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity”;
- “[A] body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity”;
- “[A]n agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.”[1]

Businesses are required to provide “clear and reasonable” warnings before knowingly and intentionally exposing anyone in California to a listed chemical “known” to the State to cause cancer or reproductive toxicity.[2] California regulations promulgated by the California Office of Environmental Health Hazards Assessment (“OEHHA”) provide a model warning that serves as a safe harbor against liability for food warnings. The safe harbor warning states: “**WARNING:** Consuming this product can expose you to [name of one or more chemicals], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65warnings.ca.gov/food.”[3]

Proposition 65 warning requirements can be enforced by the California Attorney General (California AG), and/or private enforcers using lawsuits to enforce the warning requirements on behalf of the State of California. Private enforcers must notify the potential defendant and the State of any alleged violation and of the intent to sue 60 days before a lawsuit may be filed.[4]

Acrylamide is a chemical that can naturally form in some foods, particularly starchy foods, during high-temperature cooking, including frying, baking, and roasting.[5] Acrylamide has been listed as a cancer-causing chemical since 1990 and a reproductive toxicity-causing chemical since 2011.[6]

In 2019, The California Chamber of Commerce (the “CCC”) filed a lawsuit against the California Attorney General, Xavier Becerra (“AG”) challenging the constitutionality of Proposition 65’s warning requirement for food products containing acrylamide under the First Amendment. The CCC argued that Proposition 65 currently requires warnings related to chemicals “known” to cause cancer or reproductive toxicity even when the scientific evidence to support this contention is unclear. The warning language provided by California regulation provides, without qualification, that the acrylamide in a particular food product is “known” to cause cancer, but does not permit businesses to add language explaining the actual dangers, or lack thereof, from acrylamide in food. The CCC argued that acrylamide is not conclusively “known” to cause cancer or reproductive toxicity, and thus, the required warning language is an unconstitutional infringement on commercial speech because it compels speech that may not be true. As a note, the CCC only sought prospective relief, asking the court to enjoin only “new lawsuits.”[7]

On March 30, 2021, the court granted the CCC’s motion for a preliminary injunction barring the California AG and any other individual from filing new Proposition 65 lawsuits for acrylamide in food and beverages while the CCC’s case is pending.[8] Under the First Amendment, the government may compel “commercial speech,” or expression related solely to “economic interests,” as long as the compelled disclosure is “reasonably related” to a substantial governmental interest.[9] The required disclosure must also be “limited to “purely factual and uncontroversial information.”[10] Noting that scientific studies have failed to tie human cancer to a diet of food containing acrylamide, Chief Judge Kimberly Mueller writes that the warning language required by Proposition 65, however, “is controversial because it elevates one side of a legitimately unresolved scientific debate about whether eating foods and drinks containing acrylamide increases the risk of cancer.”[11] The court continued that the state of California “could allow businesses to explain that acrylamide forms naturally when some foods are prepared.” This would permit businesses to say that although “California has listed acrylamide as a chemical that ‘probably’ causes cancer or is a ‘likely’ carcinogen[,] that acrylamide is also “commonly found in many foods and that neither the federal government nor California has advised people to cut acrylamide from their diets.”[12] However, the safe harbor warning as currently required “is incorrect, and . . . implies misleadingly that the science about the risks of food-borne acrylamide is settled.”[13] The court found that the CCC was likely to succeed on the merits of its First Amendment claim that the acrylamide warning required by Proposition 65 was impermissible because the required disclosure is not “purely factual and uncontroversial[.]”

[1] Cal. Health & Safety Code § 25249.8.

[2] Cal. Health & Safety Code § 25249.6.

[3] Cal. Code Regs. tit. 27, § 25607.2.

[4] Cal. Health & Safety Code § 25249.7.

[5] <https://oehha.ca.gov/chemicals/acrylamide>.

[6] *Id.*

[7] *California Chamber of Com., Plaintiff, v. Xavier Becerra in his official capacity as Att'y Gen. of the State of California, Defendant.*, No. 219CV02019KJMEFB, 2021 WL 1193829, at *10 (E.D. Cal. Mar. 30, 2021).

[8] *Id.* at *18.

[9] *Id.* at *12 (citing CTIA—*The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 845 (9th Cir. 2019)).

[10] *Id.* (quoting *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

[11] *Id.* at *13.

[12] *Id.* at *14.

[13] *Id.* at *16.