

NINTH CIRCUIT UPHOLDS THE INJUNCTION AGAINST NEW CAL. PROP. 65 ACRYLAMIDE CASES

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The Ninth Circuit has upheld a preliminary injunction stopping the filing or prosecution of new Prop. 65 lawsuits concerning acrylamide pending the outcome of a lawsuit by the California Chamber of Commerce challenging the Prop. 65 warning for acrylamide as violating the First Amendment.

The lawsuit by CalChamber asserts that scientific studies show that exposure to acrylamide in food does not increase the risk of cancer in humans, and requiring cancer warnings for acrylamide therefore compels false and misleading speech in violation of the First Amendment.

Finding that CalChamber had demonstrated a likelihood of prevailing in its lawsuit, in March 2021, U.S. District Judge Kimberly Mueller issued a preliminary injunction stopping both the attorney general and private enforcers from filing or prosecuting new acrylamide cases, stating: “the State has not shown that the safe-harbor acrylamide warning is purely factual and uncontroversial, and Proposition 65’s enforcement system can impose a heavy litigation burden on those who use alternate warnings.” *Cal. Chamber of Commerce v. Becerra*, 529 F. Supp. 3d 1099, 1119 (March 30, 2021).

The Council for Education and Research on Toxics, also known as CERT, intervened in the lawsuit, filed an appeal from the preliminary injunction, and moved for an emergency stay of the preliminary injunction pending the outcome of the appeal. CERT argued that, as a private enforcer of Prop. 65, an injunction would place an unconstitutional prior restraint on its First Amendment rights.

Although the Ninth Circuit granted CERT’s request for a stay in April 2021, allowing acrylamide lawsuits to briefly continue, the decision issued on March 17, 2022, halts new acrylamide lawsuits until a final decision in *CalChamber*.

In the published, 28-page unanimous opinion, the three-judge panel held that given the robust disagreement by reputable scientific sources over whether acrylamide in food causes cancer in humans, Judge Mueller did not abuse her discretion in concluding that the warning was controversial and misleading. The record also demonstrates, the court stated, that using an alternate warning could create a heavy litigation burden for defendants.

The panel rejected CERT's argument that the injunction was a prior restraint that violated its First Amendment right to petition, holding that the serious constitutional issue raised by CalChamber gave the district court sufficient reason to enjoin Prop. 65 acrylamide litigation until the case is finally decided on the merits.

"The record supports the district court's findings," wrote Circuit Judge Mark J. Bennett for the panel. "First, the district court found that the safe harbor warning is controversial because of the scientific debate over whether acrylamide in food causes cancer in humans." *Cal. Chamber of Commerce v. Council for Education and Research on Toxics*, No. 21-15745, D.C. No. 2:19-cv-02019-KJM-JDP (March 17, 2022).

The record in the case includes declarations from groups such as the National Cancer Institute and American Cancer Society, which declared that dietary acrylamide has not been shown to increase the risk of cancer. However, other organizations, including the International Agency for Research On Cancer, the U.S. National Toxicology Program and the U.S. Environmental Protection Agency, contended that acrylamide is likely carcinogenic to humans.

"Given this robust disagreement by reputable scientific sources, the court did not abuse its discretion in concluding that the warning is controversial," the opinion stated. *Id.*

The Ninth Circuit's decision stops the filing or prosecution of new acrylamide cases pending the outcome of the CalChamber case. Other acrylamide cases are likely to be stayed by stipulation or court order pending the outcome of CalChamber's case.

For questions or more information, contact the authors listed.

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MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

+1 415 675 3435



Thomas S. Lee

San Francisco

tom.lee@bclplaw.com

+1 415 675 3447

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