

CALIFORNIA COURT HALTS NEW PROP. 65 ACTIONS FOR ACRYLAMIDE AS A CARCINOGEN

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A California district court has granted the California Chamber of Commerce's preliminary injunction motion and prohibited the filing of new Proposition 65 lawsuits alleging exposure to acrylamide in food, pending the outcome of the case filed by the Chamber against the Attorney General's office challenging enforcement of the cancer warning for acrylamide.

The order by Judge Kimberly J. Mueller states that "[w]hile this action is pending and until a further order of this court, no person may file or prosecute a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products." The injunction applies to the Attorney General as well as private enforcers.

Although not a final prohibition on such enforcement actions, the ruling is expected to bring welcome relief to food manufacturers and retailers who have been hit hard by a wave of lawsuits. There have been more than 1,000 60-day notices alleging exposure to acrylamide in food, and more than one-third of those were served in the past year.

The issue before Judge Mueller was whether the safe harbor warning language set out in the Proposition 65 regulations, which includes the use of the statement that the product is "known" to cause cancer, constitutes compelled speech which is not "purely factual and uncontroversial." After weighing competing factors of prior restraint, free speech, and conflicting scientific evidence, Judge Mueller concluded that the Chamber had demonstrated a likelihood of success in its argument that the warning is not "purely factual and uncontroversial." Although acrylamide has been shown to cause cancer in mice and rats, there is debate on whether studies actually show that greater consumption of acrylamide in food increases the risk of cancer in humans. The Chamber's lawsuit therefore argues that compelling businesses to provide a warning that acrylamide is "known" to the State of California to cause cancer violates their First Amendment rights, because consuming food with acrylamide is not "known" to cause cancer in people.

Acrylamide is formed by cooking or heating starchy foods. It was added to the Proposition 65 list in 1990, before the publication of research in 2002 showing acrylamide was present in food, the judge said. Acrylamide was also listed in 2011 as causing reproductive harm, but most enforcement actions are based on its listing as a carcinogen, since the minimum level of exposure requiring a

warning, or safe harbor level, is much lower for cancer, at .2 ug/day, than for reproductive toxicity, at 140 ug/day.

Violations of Proposition 65 can result in civil penalties of up to \$2,500 per day of violation, and an award of attorneys' fees for the enforcement group. In order to comply with the statute and regulations, products that contain one of the over 900 listed chemicals at a level which results in an exposure over a certain level must be labelled with a "clear and reasonable" warning. The regulations set out specific examples of what constitutes a clear and reasonable warning, which all include the phrase "This product can expose you to chemicals including acrylamide, which is known to the State of California to cause cancer." (Emphasis added). Although this is just model language, and some settlements and consent judgments allow more nuanced warnings, most require the language above.

Judge Mueller said the state could have avoided the legal issues arising over its "safe harbor" warning, or language that has been approved as being "clear and reasonable," by allowing use of the word "may" instead of "known" in the safe harbor warning. "If the seas beyond the safe harbor are so perilous that no one risks a voyage, then the state has either compelled speech that is not purely factual, or its regulations impose an undue burden," the judge said.

In her ruling, Judge Mueller also denied a summary judgment motion by intervenor defendant the Council for Education and Research on Toxics, a private enforcer known for litigating an acrylamide case against the coffee industry, that would have limited the preliminary injunction to the Attorney General, and not private enforcers.

The practical effect of the ruling is that both the Attorney General and private enforcers will be prohibited from filing new lawsuits to enforce the Prop. 65 cancer warning for acrylamide, at least until there is a final ruling in the Chamber's lawsuit. Although the reproductive harm warning for acrylamide can still be enforced, business are more likely to be able to produce compliant products that do not require any Prop. 65 warning.

For questions or additional information, please contact the authors.

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