

Ninth Circuit Provides Companies New Guidance and Much Needed Potential Relief in Prop 65 Litigation

WRITTEN BY

Jeffrey M. Goldman | Victoria Phan

For decades, companies have faced lawsuits for violation of the California Safe Drinking Water and Toxic Enforcement Act, also known as “Prop 65.” Some of these actions are legitimate, while others often bear resemblance to a shakedown. Earlier this month, the Ninth Circuit may have provided some much needed relief and guidance vis-à-vis the latter type of litigation, when it upheld a preliminary injunction against private enforcement of an alleged chemical exposure that would trigger a Prop 65 warning duty where there was conflicting science regarding the chemical’s carcinogenicity, as well as where a reasonable consumer would think a product’s Prop 65 warning meant that the product contained a chemical known to the state of California to cause cancer in *humans* when, in reality, the scientific data reflected a cancer link in mice.

In particular, on March 17, the Ninth Circuit issued its 28-page unanimous opinion in *California Chamber of Commerce v. Council for Education and Research on Toxics*, No. 21-15745 (9th Cir. Mar. 17, 2022) and affirmed a district court’s order for a preliminary injunction against new lawsuits challenging Prop 65 warnings for acrylamide in food and beverages.

The California Chamber of Commerce (CalChamber) — a nonprofit business association with over 13,000 members, many of whom sell or produce food products that contain acrylamide — filed suit for declaratory and injunctive relief against the attorney general of California, seeking to halt acrylamide litigation brought under Prop 65. CalChamber’s lawsuit asserts that scientific studies demonstrate 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.

The U.S. District Court for the Eastern District of California granted CalChamber’s request for the preliminary injunction, prohibiting “the Attorney General and his officers, employees, or agents, and all those in privity or acting in concert with those entities or individuals, including private enforcers” from filing or prosecuting “new lawsuit[s] to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products.” *Cal. Chamber of Com. v. Becerra*, 529 F. Supp. 3d 1099, 1123 (E.D. Cal. 2021).

Applying the three-factor test from *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the District Court held that (1) the state of California had not shown that the safe-harbor acrylamide warning was purely factual and uncontroversial; (2) the warning was likely misleading; and (3) Prop 65’s enforcement system can impose a heavy litigation burden on those who use alternatives to the safe-harbor warning.

The Council for Education and Research on Toxics (CERT), an intervening defendant, filed an appeal from the

preliminary injunction and moved for an emergency stay pending the outcome of the appeal, arguing that, as a private enforcer of Prop 65, an injunction would impose an unconstitutional prior restraint on its First Amendment rights.

The Ninth Circuit affirmed the District Court's order and held that given the "robust disagreement by reputable scientific sources" over whether acrylamide in food causes cancer in humans, the District Court did not abuse its discretion in finding that the warning is controversial.

Similarly, the Ninth Circuit agreed with the District Court's determination that a warning for acrylamide is misleading. Under Prop 65, a "known" carcinogen carries a complex legal meaning that customers would not glean from the warning without context. Thus, a reasonable person, who might think that they are consuming a product "known" to increase their risk for cancer, would be misled by the warning because the state of California does not actually know if acrylamide causes cancer in humans.

Furthermore, the Ninth Circuit agreed with the District Court's finding that the warning requirement disproportionately affects small businesses. The court noted the District Court's finding that businesses cannot add information to the required warning at their discretion. Even if businesses were able to do so, or to otherwise convey their position about the listed chemical, adding explanatory or qualifying information to the prescribed warning language can significantly increase the likelihood of private enforcement; private bounty-hunters could then claim the additional information dilutes the warning such that it no longer meets the "clear and reasonable" standard attached to safe-harbor warnings. Consequently, upon receipt of a notice of violation, "a business must communicate to consumers a disparaging health warning about food containing acrylamide that is unsupported by science, or face the significant risk of an enforcement action under Proposition 65." Additionally, the court found that many small businesses simply could not afford the costs foisted on a small business to litigate Prop 65 claims. Thus, the District Court did not err in its determination that the warning requirement appears unduly burdensome.

Finally, the Ninth Circuit concluded that an injunction would not impose a prior restraint on CERT's First Amendment rights because Prop 65 acrylamide lawsuits are likely unconstitutional. For these reasons, the Ninth Circuit found that the preliminary injunction was warranted and removed the emergency stay against its enforcement. This decision halts new acrylamide lawsuits until a final decision on the merits is reached in the District Court case.

While the immediate impact of the Ninth Circuit's ruling is limited to new lawsuits regarding Prop 65 warning requirements for acrylamide, it will have significant implications for pending Prop 65 acrylamide litigation and settlements, and likely for other listed chemicals for which there is a significant scientific debate about their carcinogenicity or reproductive toxicity in humans. The ruling could also set important precedents on industry groups' growing use of First Amendment defenses against state and local environmental, health, and safety warning requirements.