



## Preliminary injunction granted in Cal Chamber lawsuit concerning acrylamide Prop 65 warning

### Product Liability Alert

1 April 2021

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A recent decision in the Eastern District of California has potentially major implications for Proposition 65 litigation regarding acrylamide, which has been among the largest sources of Proposition 65 liability risk for food and beverage companies in recent years. Acting on a motion from the California Chamber of Commerce, the Eastern District federal court found<sup>[1]</sup> that Prop 65's acrylamide warning requirement was likely unconstitutional and preliminarily enjoined new lawsuits alleging failure to warn for acrylamide exposure in food and beverages. The court's order this week follows a similar court ruling from 2018 finding that California cannot compel a Prop 65 warning for products containing glyphosate.<sup>[2]</sup> This week's ruling has obvious significance for food and beverage businesses in California. Moreover, the pair of rulings suggest federal courts may be open to additional challenges to scientifically unsound listings under Prop 65.

In arguing that a Prop 65 warning for acrylamide exposure was misleading and unconstitutionally compelled, Cal Chamber and its experts explained that the science linking toxicological effects in rodents with effects in humans is murky, at best. "Animal experiments have limitations," as the federal court put it. For one, animal experiments use very large doses that do not approximate real world consumption by people (has anyone eaten ninety large bags of potato chips in a day?). Further, some science suggests rodents react much more acutely to acrylamide exposure than humans. Pointing to these problems, and the onslaught of acrylamide litigation facing businesses in California,

Cal Chamber asked the federal court to enjoin new lawsuits (not 60-Day Notices),

Ruling in favor of Cal Chamber, Judge Mueller saw danger in the fundamental problems with acrylamide science. Although she acknowledged “some evidence” supporting an inference of carcinogenicity in humans, she found that “dozens of epidemiological studies have failed to tie human cancer to a diet of food containing acrylamide.” And public health authorities have, at most, voiced concern. “In short,” the Court found, “the [Prop 65] safe harbor warning 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.” In that light, the Court ruled that a requirement to provide a Prop 65 warning for acrylamide in food does not disclose “purely factual and uncontroversial information only,” meaning the State’s actions in listing acrylamide do not enjoy the highly deferential standard under *Zauderer v Office of Disciplinary Counsel*, and Cal Chamber was likely to succeed in proving a violation of the First Amendment.

Notably, the Court rejected the idea that businesses could realistically deviate from the “safe harbor” warning, which provides statutory protection against liability, to add explanatory language to their acrylamide warnings. As a practical matter, that would be no protection from litigious Prop 65 enforcers, the Court found—“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 district court specifically enjoined – through the pendency of the action or until a future court order – all persons from filing or prosecuting any new lawsuit to enforce Prop 65’s warning requirement for cancer allegedly caused by the ingestion of acrylamide through food and beverage products. The injunction is purely prospective and does not immediately impact any existing consent decrees, settlement, or other agreements related to Prop 65. The district court’s findings, however, if upheld on appeal, may ultimately be grounds for modification of existing consent judgments requiring warnings on food and beverages containing acrylamide.

Prop 65 litigation is notoriously difficult for defendants, reassigning burdens of proof to provide unique advantages to plaintiffs. The glyphosate ruling, and now this acrylamide ruling, may suggest a path for relief in some circumstances where businesses face litigation over chemicals that were Prop 65-listed based on suspect science. Although it is unclear at this time whether the Attorney General will seek to appeal the ruling or request a stay of the injunction, which could re-open the floodgates of acrylamide litigation, the district court’s holding should, for now, provide food and beverage manufacturers some respite from the ever-present threat of acrylamide-based Prop 65 litigation.

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[1] *California Chamber of Commerce v Becerra*, no. 2:19-cv-02019-KJM-EFB, slip op. (E.D.Cal., Mar. 30, 2021).

[2] *National Association of Wheat Growers v Zeise*, 309 F.Supp.3d 842, 852 (E.D.Cal., 2018).

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