

MEMORANDUM

From: Martin J. Hahn
Xin Tao

Date: October 8, 2019

Re: **California Chamber of Commerce Challenges the Proposition 65 Acrylamide Warning for Foods**

We would like to bring to your attention a lawsuit that was filed yesterday by the California Chamber of Commerce challenging the legality of Proposition 65 warnings on foods that contain acrylamide. The Complaint, which named the Attorney General of the State of California as the Defendant and was filed in the United States District Court (Eastern District of California), is seeking declaratory relief asking the court to rule that Proposition 65 warning requirements for cancer as applied to acrylamide in food products violate the First Amendment, and injunctive relief prohibiting the Defendant and private bounty hunters from enforcing Proposition 65 warning requirement for cancer with respect to acrylamide in food products.

Acrylamide is not intentionally added to food products. Rather, the chemical is formed naturally in many types of food during cooking or processing through the Maillard reaction. According to the Complaint, common sources of acrylamide in the human diet include, among others, breakfast cereals, crackers, bread crusts, coffee, grilled or roasted asparagus, French fries, potato chips and other fried and baked snack foods, canned sweet potatoes, canned black olives, prune juice, roasted nuts, and toast. Acrylamide was listed under Proposition 65 in 1990 pursuant to the Authoritative Bodies listing mechanism, based on EPA's determination that acrylamide was a "probable" human carcinogen and IARC's classification of acrylamide as Group 2B ("possibly carcinogenic to humans").

However, the Complaint points out that neither EPA nor IARC classified acrylamide as a probable carcinogen based on studies *in humans*. Further, current scientific evidence does not support a finding that exposure to acrylamide from food products increases the risk of cancers in humans. The Complaint references findings from the National Cancer Institute and the American Cancer Society to support its argument that epidemiologic studies in humans actually demonstrate acrylamide from food products does not increase the risk of cancer in humans. The Complaint also argues that the Proposition 65 cancer warnings are misleading because "neither OEHHA nor any other governmental entity has determined that acrylamide is a known human carcinogen...." As such, the Complaint alleges, the Proposition 65 cancer warning for acrylamide in food products violates the First Amendment.

In addition, the Complaint noted that while businesses may rely on the safe harbor defense, the statutory exemption does not effectively deter a bounty hunter with significant financial incentives from initiating suit in the hopes of collecting a settlement. Indeed, to date there have been more than five hundred 60-day notices filed under Proposition 65 related to acrylamide in food products and the number of challenges has increased exponentially in recent years. The Complaint states that even if businesses successfully conduct assessments indicating that acrylamide exposure levels to their products are below the safe harbor and do not require warnings, they still would need to prepare to defend against likely enforcement actions by private bounty hunters. Thus, the Complaint argues the businesses must either take action to provide false, misleading, and highly controversial warnings about acrylamide, or face potential costly enforcement actions initiated by private bounty hunters.

The current lawsuit represents another development on the application of Proposition 65 to the food industry. Earlier this year, the California Office of Environmental Health Hazard Assessment (OEHHA) finalized its regulation clarifying that exposures to Proposition 65 chemicals in coffee including acrylamide do not pose a significant cancer risk. 1/ In February, 2018, the U.S. District Court for the Eastern District of California (notably, this is the same court where the current Complaint is filed) issued a preliminary injunction prohibiting California from implementing its “false and misleading” Proposition 65 labeling requirement for the herbicide glyphosate. 2/ The court reasoned that it is inherently misleading for a warning to state that a chemical is known to the state of California to cause cancer based on the finding of one organization, when apparently all other regulatory and governmental bodies have found the opposite.

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We will continue to monitor the case and any other Proposition 65 litigation and regulation, as they relate to our clients. Please contact us if you have any questions.

1/ 27 CCR § 25704 “Exposures to Listed Chemicals in Coffee Posing No Significant Risk.”
2/ 309 F.Supp.3d 842 (2018).