

# Court Injunction Hints at Prop 65 Relief for Acrylamide in Foods

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In the latest of a string of potentially ground-altering developments under California's Proposition 65, a federal judge has temporarily enjoined plaintiffs from initiating new cases alleging failure to warn for foods and beverages that expose consumers to acrylamide, a Prop 65-listed carcinogen that has been the subject of hundreds of actions in the past several years.

*While 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.*

In a March 30th order granting the California Chamber of Commerce motion for a preliminary injunction, Chief Judge Kimberly Mueller of the Eastern District of California held that "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 alternative warnings." The judge further explained that "the 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."

The court ruling signals that the Chamber has a strong likelihood of prevailing on the merits of its First Amendment argument that California is compelling speech that is not purely factual and uncontroversial.

Under Prop 65, businesses are required to post a warning prior to exposing consumers to a chemical listed by the State as known to cause cancer or reproductive harm. Regulations issued by the California Office of Environmental Health Hazard Assessment (OEHHA) provide "safe harbor" warning language that businesses may rely on to provide the required "clear and reasonable" warnings, but those regulations also prohibit companies from providing additional context or explanation of the actual risks posed by acrylamide in food. Accordingly, the Chamber contends that the regulations are an unconstitutional infringement on commercial speech by compelling warnings that may not be factually accurate. (Query whether the "safe harbor" warning regulations -- which provide *de facto* compliant "clear and reasonable" warning text and methods but are not mandated -- qualify as "compelled" speech given that other warning text/methods may be utilized. In practice, as the court alludes, failure to utilize the "safe harbor" warning text/methods is an invitation to being sued by plaintiffs and being forced to defend in litigation whether a warning that includes additional context or explanatory language is "clear and reasonable.")

Acrylamide is not naturally present in food or beverage products but is created by the Maillard reaction, which occurs between amino acids and sugars at high temperatures. A wide variety of food

products, including, most prominently, baked and fried starches, contain acrylamide at relatively low levels, but nevertheless in amounts that numerous plaintiff actions have asserted require a Prop 65 warning. (In 2020 alone, over 450 Prop 65 Notices of Violation were by plaintiffs, with over 100 new actions filed to date in 2021.) Acrylamide, formed during brewing, also is at the heart of the (absurd) controversy over whether coffee should be served with a side of Prop 65 warning. (For further details on the coffee imbroglio, see my prior blog posts [here](#), [here](#) and especially [here](#)).

Critically, while acrylamide has been shown to cause cancer in laboratory animals, acrylamide in foods and beverages has not been associated with increased cancer risk.

The court's injunction provides a temporary reprieve for companies from plaintiffs, including the Attorney General and private groups, initiating new lawsuits related to acrylamide in food. The terms of the injunction, however, do not apply to previously initiated lawsuits or completed settlements, and does not necessarily prevent a plaintiff from sending a company a Prop 65 Notice of Violation (though the plaintiff could not bring a complaint 60 days after service of such a notice, as the system typically provides).

KelleyGreenLaw will continue to closely monitor developments in this landmark case (*California Chamber of Commerce v. Xavier Becerra*, Eastern District of California Case No. 2:19-cv-02019). For further details on related Prop 65 matters, see my prior posts on [proposed regulatory limits for acrylamide in foods](#) and discussion of First Amendment and other [defenses related to warnings for glyphosate](#).