CLIENT ALERTS & INSIGHTS

Federal Judge Enjoins New Prop 65 Lawsuits for Acrylamide in Food: Requiring A Cancer Warning In the Face of Scientific Uncertainly May Violate the First Amendment

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Authors: Rachel Chatman

Last Monday, a California federal district court issued a preliminary injunction prohibiting anyone—including the California Attorney General—from filing or prosecuting any new lawsuit to enforce the Proposition 65 cancer warning requirement for acrylamide in food and beverage products. The order is a significant victory for food and beverage manufacturers and sellers.

The ruling came in a lawsuit brought by the California Chamber of Commerce on behalf of its affected members, where the Chamber sued under the first amendment, arguing that the Proposition 65 "safe harbor" cancer warnings for acrylamide in food and beverages is unconstitutional compelled commercial speech. In the March 29, 2021 order, the judge found that the Chamber was likely to win this argument in the lawsuit and granted the motion for a preliminary injunction stating:

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. This injunction applies to the requirement that any "person in the course of doing business" provide a "clear and reasonable warning" for cancer before "expos[ing] any individual to" acrylamide in food and beverage products under California Health & Safety Code § 25249.6. It applies to 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 under section 25249.7(d) of the California Health & Safety Code.

This order does not alter any existing consent decrees, settlements, or other agreements related to Proposition 65 warning requirements."

Order 31:6-15.

Looking behind the headline, the decision-though ground breaking-in many ways does not immediately change the landscape for businesses. Specifically:

- The order is very clear that it does not undue previous consent decrees or settlements. If a business has already agreed to display a certain warning, it may not now take that warning down. Likewise, if a business has agreed to reformulate its products to reduce acrylamide content, it is not now permitted to disregard that agreement.

- The order does not explicitly halt pending litigation. Courts will have to decide if it applies to lawsuits filed but not served at the time of the ruling, as the order is explicitly prospective, prohibiting "new" lawsuits.
- The order does not prohibit sending pre-suit demand letters or notices of violation.
- The order is in effect only for the pendency of the litigation or until dissolved by another order of the court. In fact, in the order the judge notes that the state can petition to have the injunction dissolved to enforce alternative safe harbor warnings that eliminate inaccuracies and controversial statements.
- Although it is a defense to a newly filed state case, the decision that the safe harbor warning is unconstitutional compelled commercial speech is not binding precedent on any other courts. However, it does provide a roadmap for companies to challenge the safe harbor warning in pending litigation. The logic and much of the evidence can be used to make the same arguments in pending litigation in a demurrer, motion for judgment on the pleadings or for summary judgment, or to seek a stay pending the outcome of the federal action.

The question before the court was whether the safe harbor warning met the standard for government compelled commercial speech established by the U.S. Supreme Court in Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985). That standard requires that the government has the burden to show the compelled commercial speech (1) contains only purely factual and uncontroversial information, (2) is justified and not unduly burdensome, and (3) is reasonably related to a substantial government interest. Zauderer v. Office of Disciplinary Counsel, 471 U.S. at 651 and Am. Beverage Ass'n v. City & Cty. of San Francisco, 916 F.3d 749, 756 (9th Cir. 2019) (en banc).

The judge found the safe harbor warning was not purely factual and uncontroversial for several reasons. ***First***, "the warning implies incorrectly that acrylamide is an additive" whereas in fact it is naturally created in the process of cooking. Order 22:16. ***Second,*** the language is only "factual" if consumers understand its underlying assumptions, namely that (a) animals develop cancer when consuming doses of acrylamide "many hundreds of times larger than the amounts" found in food, (2) that, absent evidence to the contrary, toxicologists make the presumption that a chemical causing cancer in experimental animals at high doses may also cause cancer in people at much lower doses, and (3) as a result, based on "self-referential state and federal regulations, the chemical is, by definition, 'known' to cause cancer in humans." Order 22:18-25. The court found it unlikely that consumers would understand such nuance from the language and instead, "[p]eople who read the safe harbor warning will probably believe that eating the food increases their personal risk of cancer." Order 22:26-27. ***Third***, noting the lack of epidemiological studies tying human cancer to consuming food containing acrylamide, the court concluded 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." Order 23:8-10.

Next, the judge discussed the fact that straying from the safe harbor language-even to language that had been previously approved in a consent decree-included incurring the risk of expensive and lengthy litigation as a heavy burden. The judge concluded, "[i]f 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." Order 25:3-5.

The Court determined that a first amendment harm is irreparable injury and that an injunction would still leave many avenues open for the state to pursue its public interest the warning was intended to advance. The court also dismissed the argument that the Chamber had waited too long to make this argument by noting the recent significant increase in pre-litigation notices regarding acrylamide in food and beverage projects, as well as resulting litigation (147 notices in 2018, 205 in 2019 and at the time of their reply brief, over 400 in 2020). Order 29:13-15.

The Order can be found here.

Finally, on April 6, 2021, an intervenor-defendant in the case, Council for Education and Research on Toxics (CERT), applied for an ex parte application to stay the preliminary injunction arguing that "enjoining CERT from filing Proposition 65 cases regarding acrylamide in food constitutes an unlawful prior restraint on CERT's First Amendment rights." Ex Parte Application 1:13-14. In light of the court's prior ruling on the subject, CERT's ex parte application is unlikely to be successful. In denying CERT's motion for summary judgment, the court expressly considered-and ***rejected***-CERT's arguments that the Chamber's lawsuit impermissibly burdened CERT's First Amendment rights. The court noted it was "aware of no authority interpreting the First Amendment as preserving a person's right to enforce a state law that contradicts the Constitution, which is the effect of CERT's argument here." Order Denying CERT's Motion for Summary Judgment 15:15-17.

For more information, please contact a member of Benesh's Litigation Practice Group.

Rachel Chatman at rchatman@beneschlaw.com or 628.600.2240.

Eric L. Zalud at ezalud@beneschlaw.com or 216.363.4178.