

Prop 65 Developments Relevant to the Food & Beverage Industry: *Changes On Three Important Fronts*

by Kent J. Schmidt and Mark R. Kaster

A. Introduction

The perils of Prop 65 claims are well-known to most food and beverage companies around the world.¹ Through its one-of-a-kind labeling law, California regulates thousands of businesses that sell consumer goods to Californians, whether through e-commerce or retail outlets in the state.² A product, including a food or beverage, that contains a chemical or carcinogen known to the State of California to cause cancer or reproductive toxicity must be accompanied by a written warning informing the consumer of the putative risks.³ Each year, hundreds of Prop 65 “60-day notice letters” arise from a cottage industry of private (“bounty hunter”) enforcers. The vast majority of these claims result in court-approved settlements that include penalties and substantial attorney fee awards.

This year marks a period of seismic shifts in the Prop 65 landscape, perhaps the most significant changes since the amendments to the law in 2001. The changes will impact many food and beverage companies in particular, as well as other industries and sectors. Regulators and courts are making a series of adjustments as to how this unique regulatory scheme applies to the food and beverage industry.

In the long-term, these changes may bring greater clarity to the law, enhancing companies’ ability to achieve compliance and avoid claims. But in the near term, there are many unanswered questions. Three primary areas of development are of particular importance to the food and beverage industry.

B. A Break for the Coffee Industry

The first Prop 65 development for the food and beverage industry is product specific—dark roast coffee. As has been widely publicized and watched, a lawsuit was brought in Los Angeles Superior Court to require a Prop 65 warning for the presence of acrylamide in dark roast coffee. The resulting ruling, issued by the court in February, sent a jolt to the coffee industry by agreeing with plaintiffs that a Prop 65 warning is required to inform

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consumers of traces of acrylamide in coffee.

The litigation was significant because, unlike most claims that are settled early on, the coffee industry pressed their defenses, pitting a common sense theory against what they contended was an unreasonable application of the regulation. They pointed to the fact that acrylamide is a naturally-occurring chemical reaction stemming from the process of roasting coffee beans. There is no way to eliminate this chemical reaction in the coffee roasting process. They further advanced the argument that coffee consumption is, on the whole, healthy, with many benefits to the body and these benefits outweigh the minimal and unsubstantiated risk that the smallest traces of acrylamide might present.

Judge Elihu Berle rejected each of these arguments, sending the industry reeling with how to address this new regulatory reality. Although many coffee shops in California had for years placed a small warning label at the point of sale, most in the industry are not keen on the idea of placing a warning label on coffee shipped to any consumer in California, to indicate that the product contains acrylamide, a chemical known to the State of California to cause cancer.

To the surprise of many, the California regulators intervened and agreed with the coffee industry. Although it still lists acrylamide as a carcinogen,⁴ OEHHA, the agency that promulgates regulations implementing Prop 65, announced on June 15, 2018, its intent to modify the regulations to clarify that Prop 65 warnings are not required for coffee despite the acrylamide that results from the roasting process: The proposed regulation states that “drinking coffee does not pose a significant cancer risk, despite the presence of chemicals created during the roasting and brewing process that are listed under Proposition 65 as known carcinogens . . . is based on extensive scientific evidence that drinking coffee has not been shown to increase the risk of cancer and may reduce the risk of some types of cancer.”⁵ This intervention is a refreshing change; as regulators do not typically side with industry, particularly after an unsuccessful challenge in the courts.

The sensibility of OEHHA's rare move on acrylamide and coffee is apparent. Prop 65 is designed to cause industries to re-formulate products because the alternative of placing a warning label is not an attractive option. But naturally occurring chemicals such as acrylamide cannot be eliminated and the exposure levels are so small that an increased risk of cancer has not been shown. In other words, it is simply not possible to make a safer cup of coffee.

It remains to be seen whether this intervention represents a more sensible approach to the impact of Prop 65 regulations and whether this same course of action may be taken for naturally occurring chemicals in other types of food products.

C. Federal Court Intervention in Prop 65 Enforcement

While California regulators were overriding Judge Berle's coffee decision, the California Attorney General was seeking to defend new Prop 65 regulations applicable to glyphosate actions in federal court. Glyphosate is a chemical used in certain herbicides. Effective July 7, 2017, California added glyphosate to its list of chemicals deemed to

create a risk of cancer. The ramifications of adding glyphosate to Prop 65's list were far reaching. Arguably, if a food product is made from crops treated with glyphosate, a warning label would be required.

A number of organizations in the industry launched an attack on the glyphosate listing, advancing a creative legal argument.⁶ The legal theory was that, given the unsubstantiated claims relating to the risks of glyphosate, the addition of this chemical violated those companies' constitutional rights by constituting "forced speech" on a matter that was not purely factual and controversial under the First Amendment.⁷

U.S. District Court Judge William Shubb agreed, issuing an order earlier this year enjoining the addition of glyphosate. On June 12, 2018, he denied a motion for reconsideration, stating: "Given the evidence in the record, the court questions whether California has shown that requiring a Proposition 65 warning for glyphosate directly advances the law's stated interest in informing Californians about exposures to chemicals that cause cancer."⁸

Judge Shubb's ruling is a significant win for the food and beverage industry. It leaves open the possibility that other Prop 65 regulations, as applied, may be challenged if the risk is truly unsubstantiated by the government.

D. New Food and Beverage Regulations Relating to Notice

Against this backdrop of judicial developments for the food and beverage industry, a new dawn is breaking on the Prop 65 regulatory landscape. As of September 1, 2018, a series of regulations will be fully implemented, impacting business in general, but having particular application to the food and beverage product labels.

In 2016, California regulators enacted sweeping changes to the nature of the Prop 65 regulations. Up to this point, Prop 65 warnings could be general and non-specific, simply informing the consumer that the product contains a chemical or other substance known to the State of California to cause cancer or reproductive toxicity.⁹ For many products, the new regulations require greater specificity, identifying at least one of the Prop 65 listed chemicals or carcinogens. In addition, warnings labels must include reference to OEHHA's website (www.P65Warnings.ca.gov) as a resource for further information. Some warnings require a triangular warning symbol (a yellow triangle with an exclamation mark) to draw the attention of the consumer.

Additionally, the new regulations provide specially tailored warnings for particular types of exposures and products. There are new clarifications as to duties, as between manufacturers and retailers, and how parties in the chain of distribution can be insulated from risks by transferring responsibilities to others. There are also new regulations relating to when warnings must be provided in a language other than English.

It is important to understand that the new warning regulations are not mandatory but constitute a safe harbor. Businesses may comply with the statute by providing a warning that does not precisely match the safe-harbor language but should be prepared to

defend that method of informing consumers of the risk. A business may argue that, in light of all relevant circumstances, the warning was reasonable and complied with the law.

In addition to the series of new generally-applicable regulations, there are a number of industry or product specific regulations. The following apply to the food and beverage industry:

- Food Exposure Warnings – Methods of Transmission (Section 25607.1)
- Food Exposure Warnings – Content (Section 25607.2)
- Alcoholic Beverage Exposure Warnings – Methods of Transmission (Section 25607.3)
- Alcoholic Beverage Exposure Warnings – Content (Section 25607.4)
- Food and Beverage Exposure Warnings for Restaurants – Methods of Transmission (Section 25607.5)
- Food and Beverage Exposure Warnings for Restaurants – Content (Section 25607.6)
- Warnings for Exposure to Bisphenol A from Canned and Bottled Foods and Beverages (25607.31)

In conclusion, now is a good time to re-examine Prop 65 compliance, best practices, and litigation avoidance strategies. A few steps are worth considering:

- Replacing general label warnings with language that satisfies the specificity required by the new regulations;
- Addressing upstream suppliers to ensure that they are complying with the requirements of Prop 65 and negotiating appropriate indemnity language in supply contracts;
- Analyzing downstream retailers and others in the chain of distribution which may have the ability to provide notice to consumers at the point of sale; and
- Testing products and addressing other exposure scenarios including environmental.

Even with the positive developments for the coffee industry on the acrylamide front and the win on the glyphosate warning, Prop 65 claims will continue to present a substantial regulatory and litigation risk for the food and beverage industry in the foreseeable future.

¹ The Safe Drinking Water and Toxic Enforcement Act of 1986, better known as Prop 65 is codified at Cal. Health & Safety Code § 25249.5 et seq.

² For an overview of the law, see LeftCoast Law Blog Post, *What is Prop 65?*

³ The current Prop 65 List of regulated substances is available on Cal OEHHA's website.

⁴ See OEHHA's Fact Sheet on Acrylamide.

⁵ Proposed OEHHA regulation clarifies that cancer warnings are not required for coffee under Proposition 65.

⁶ *National Association of Wheat Growers et al v. Lauren Zeise, director of OEHHA, et al*, U.S. District Court, Eastern District of California, No. 17-at-01224.

⁷ The Court cited *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

⁸ June 12, Order, page 8.

⁹ OEHHA has published a side-by-side comparison of the old and new regulatory texts.

