California Chamber of Commerce v. Becerra

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An aphorism often misattributed to Mark Twain goes, "It ain't what people don't know that causes trouble, it's what they know that ain't so." Knowing something that isn't so (or, at least, isn't proven) caused trouble for the State of California in its Proposition 65 enforcement campaign against the chemical acrylamide in 2022, courtesy of the California courts, in *California Chamber of Commerce v. Becerra*, 529 F. Supp. 3d 1099 (E.D. Cal. 2021), *aff'd sub nom California Chamber of Commerce v. Council for Education and Research on Toxics*, No. 21-15745 (9th Cir. Mar. 17, 2022).

WHY IT MADE THE LIST

If you have spent any time waiting for your car to be serviced or performing any of countless other errands in the State of California, your bored case will at some point have fallen on a prominent sign advising you, "WARNING: Entering this area can expose you to chemicals known to the State of California to cause [cancer/birth defects/reproductive harm], including [name of one or more chemicals], from [name of one or more sources of exposure]. For more information go to www.P65Warnings.ca.gov."[1] We owe these depressing reminders of the perils of modern life to a 1986 ballot referendum, Proposition 65, which inaugurated a state regulatory regime requiring such warnings whenever a person may be exposed to an annually updated list of more than 900 chemicals, both naturally occurring and synthetic.[2]

Of particular importance to food and beverage practitioners, Prop 65 requires that food and beverage products display similar warnings, a duty that falls not only on the manufacturers of such products but, under certain circumstances, also on downstream distributors and retailers. The warning requirement is triggered whenever the food or beverage product contains one of the over 900 chemicals on an annually updated list maintained by the California Environmental Protection Agency.

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[1] The precise language of the warning is not mandated, but the government issues "model" warnings that are widely followed and considered risky to deviate from. Those who have not spent time in California lately may be more familiar with the previous, slightly less dire formulation: "WARNING. This facility contains one or more chemicals known to the state of California to cause cancer, birth defects, or reproductive harm." This was replaced in 2018 by the current version emphasizing that the hapless reader is being personally exposed and specifically naming at least one disease, chemical, and source of exposure. *See Notice of Adoption of Article 6: Clear and Reasonable Warnings*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT (Dec. 13, 2016), https://oehha.ca.gov/proposition-65/crnr/notice-adoption-article-6-clear-and-reasonable-warnings.

[2] Proposition 65 is also known by its codified name, The Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code ch. 6.6, § 25249.5 to 25249.14.

The Prop 65 warning requirement may be enforced either by the State of California or by private actors. Private plaintiffs need allege only a violation of the law, not any harm, injury, or damage to themselves personally, to the population generally, or to the environment. Defendants have the burden of showing, if one of the listed chemicals is present in their products, that the amount is not significant, does not pose a significant cancer risk, or will have no observable effect on reproductive health in the concentration that exists in the product—a nigh impossible "proving the negative" scientific task. Penalties for non-compliance are up to $2,500 per day, per violation. Sellers of food and beverages generally enter into settlements, rather than having to litigate issues such as what "per violation" means in the context of a mass marketed consumer product. Private enforcers of the statute recover a bounty of 25% of the penalties or settlement amount, plus attorney fees and costs.

With the odds thus stacked against any food or beverage company that doesn't print a frightening warning on its own products, as Joseph Heller might say, "That's some proposition, that Proposition 65." The result has been a burgeoning industry in private enforcement, with bounty-hunting law firms turning out boilerplate enforcement complaints, often in the guise of what appear to be public interest organizations that are actually appendages of the law firms, and capturing over $20 million annually. Indeed, most of the money paid by companies as a result of Prop 65 enforcement lines the pockets of plaintiffs' law firms, and of course the manufacturers also incur the expense of their own counsel.

AT THE DISTRICT COURT

Acrylamide is a naturally occurring chemical that forms when many types of foods are cooked at high temperatures or otherwise heat-processed. It occurs in bread, cereals, coffee, crackers, fried and baked snack foods, grilled or roasted vegetables, fruits, and nuts. If you enjoyed toast this morning, you created acrylamide, and you ingested more acrylamide that was already in the bread before you toasted it and in the coffee you drank with it. Some studies indicate that acrylamide, in massive dosages, causes cancer in animals, and on the basis of these studies, acrylamide was added to the Prop 65 list in 1990, although at that time only high-concentration workplace exposure was contemplated, as the chemical had not yet been detected in food products. Acrylamide in baked and fried processed snack foods has been one of the primary targets of bounty-hunting Prop 65 private enforcement actions in recent years, with several hundred of the required pre-suit sixty-day notices having been issued. Prior to this action, all such cases (whether publicly or privately initiated) resulted in settlements, with the underlying issue of whether acrylamide actually causes cancer never being litigated.

The California Chamber of Commerce ("CalChamber") in 2019 sued the State of California, in the person of then-Attorney General Xavier Becerra,[3] for a declaratory judgment that the mandated Prop 65 warnings, as applied to acrylamide in foods, are unconstitutional compelled speech under the First Amendment. CalChamber's complaint alleged that no reliable evidence links acrylamide with elevated cancer risk in humans, and that the available evidence appears to show no cancer risk from acrylamide at normal dietary concentrations. Therefore, CalChamber alleged, the

[3] Becerra left the California Attorney General's post in 2021 when appointed Secretary of the Department of Health and Human Services by the Biden Administration.

warnings themselves were "false, misleading, and highly controversial statements" that harm consumers by deterring them from consuming products that have no cancer risk, and that in some instances have even been linked to reduced cancer risk. The warnings were alleged to be false, in short, because they assert that acrylamide is "***known*** to the State of California to cause cancer" in humans, when in fact, CalChamber argued, California knows no such thing. CalChamber sought an injunction of public and private enforcement of the state-mandated warning requirement.

An intervenor–defendant soon stepped in to assist, in the form of the Council for Education and Research on Toxins (CERT), one of those putative public interest organizations actually controlled by a plaintiff's law firm. CERT sought to have the case dismissed not only on the merits, but also because it assertedly violated the Noerr-Pennington doctrine and infringed CERT's right to petition by filing Proposition 65 enforcement actions. The district court denied this motion and on March 30, 2021, granted CalChamber's motion for a preliminary injunction on all new public and private enforcement actions for acrylamide.

The court analyzed CalChamber's likelihood of success on the constitutional merits under the standard of *Zauderer v. Office of Disciplinary Counsel*, which held that "the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial governmental interest."[4] The required disclosure must be "limited to 'purely factual and uncontroversial information.'"[5] The court found that the Prop 65 cancer warning for dietary acrylamide is not purely factual, but "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."[6] In addition, "[b]y asserting vaguely that consuming a product can 'expose' a person to acrylamide—a chemical most people have likely never used in preparing food or even heard of—the warning implies incorrectly that acrylamide is an additive or ingredient," as opposed to a naturally occurring by-product of a cooking process.[7]

Part of CERT's reaction to the district court decision was to attack the judge who issued it. CERT moved to disqualify Judge Kimberly J. Mueller on the grounds of financial conflicts of interest, citing family investments in an almond ranch and indirect ties to the California Chamber of Commerce through family business interests. CERT subpoenaed the judge's family members and exposed personal information in filings, in what the judge called "uncommonly aggressive, scorched earth efforts" that may have sought to put her and her family's safety at risk. Even so, and despite declaring that there was no legitimate basis for her recusal, Judge Mueller recused herself from the case in September 2021.

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[4] California Chamber of Commerce v. Becerra, 529 F. Supp. 3d 1099, 1116–17 (E.D. Cal. 2021), *aff'd sub nom.* California Chamber of Commerce v. Council for Education & Research on Toxics, No. 21-15745 (9th Cir. Mar. 17, 2022) (quoting CTIA—The Wireless Ass'n v. City of Berkeley, Cal., 928 F.3d 832, 845 (9th Cir.), *cert. denied*, _ U.S. _, 140 S. Ct. 658, 205 L.Ed.2d 387 (2019) (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985))).

[5] *Id.* (quoting Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer*, 471 U.S. at 651)).

[6] 529 F. Supp. 3d at 1117–18 (citing *CTIA*, 928 F.3d at 845).

[7] *Id.* at 1117.

AT THE NINTH CIRCUIT

Intervenor–defendant CERT (but not the State of California) appealed the preliminary injunction ruling to the Ninth Circuit. On May 27, 2021, a divided motions panel of the Ninth Circuit granted CERT's motion for an emergency stay of the preliminary injunction pending appeal, but only as to private enforcement. Then, on March 17, 2022, the Ninth Circuit affirmed the district court's preliminary injunction order, finding that the court "used the correct framework for determining whether Prop. 65's warning requirement was a constitutionally compelled disclosure" and "dutifully followed" this legal framework.[8] The Ninth Circuit ruled that "[h]owever controversial is defined, the acrylamide Prop. 65 warning easily meets the definition because of the scientific debate."[9]

Part of the Ninth Circuit's consideration of the case involved what it means for something to be "known" in the language of the warning. California had argued at the district court level that "known" as used in the warning is effectively a legal term of art, referencing the statutory procedure for how a chemical gets added to the Prop 65 list, and not necessarily "known" as used in common parlance. The Ninth Circuit held, "use of the word 'known' is misleading . . . . Even the State of California has stipulated that it 'does not know that acrylamide causes cancer in humans, and is not required to make any finding to that effect in order to list the chemical under Proposition 65.'"[10]

CERT filed a petition for rehearing *en banc*, which is pending. It also has sought to have Judge Mueller's injunction vacated, notwithstanding that it was affirmed by the Ninth Circuit, on the grounds that she was "disqualified" and her prior rulings should now be nullified. CalChamber has opposed the motion on several grounds, including that (1) it is not the law that all rulings of a disqualified judge must be nullified, and in any event, (2) the judge, having been doxxed and harassed into recusing herself, is not quite the same as being "disqualified." Given the Ninth Circuit panel's unanimous and unequivocal endorsement of Judge Mueller's reasoning, the motion to vacate seems unlikely to succeed.

IMPACT

This is not the first successful constitutional challenge to a Prop 65 warning requirement. In 2020, an Eastern District of California court enjoined the enforcement of Prop 65 as to another chemical, glyphosate as used in fertilizers, on the same grounds as in the acrylamide case.[11] This injunction was a major contributor to the rise of acrylamide cases, as Prop 65 plaintiffs' firms pivoted to a new target to sustain their bounty-hunting operations. The state's response, while simultaneously appealing to the Ninth Circuit, was to rewrite the Prop 65 regulations specifically as to glyphosate. The special glyphosate warning would require, in an effort to pass constitutional muster, that manufacturers disclose that while the International Agency for Research on Cancer classifies glyphosate as "probably carcinogenic to humans," other

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[8] California Chamber of Commerce v. Council for Education & Research on Toxics, No. 21-15745, _ F.4th _ (9th Cir. Mar. 17, 2022), slip op. at 16, 21.

[9] *Id.* at 18–19 n. 10.

[10] *Id.* at 19.

[11] Nat'l Ass'n of Wheat Growers v. Becerra, 468 F. Supp. 3d 1247 (E.D. Cal. 2020).

authorities, including the Environmental Protection Agency, have determined that glyphosate is unlikely to cause cancer, or that the evidence is inconclusive. The new warning would add, "A wide variety of factors affect your personal cancer risk, including the level and duration of exposure to the chemical."[12] The appeal of the case is held in abeyance pending this rulemaking process.

Would California employ this same chemical-specific warning for acrylamide—or for any other Prop 65-listed chemical that courts have found are not really "known" to California to cause cancer, birth defects, or other reproductive harm? They might, but there is no guarantee that such warnings would pass constitutional muster, either. The currently proposed alternative glyphosate warning is seventy-seven words long, must still meet an "undue burden" prong under *Zauderer*, and may still imply more risks to consumers than are justified by the evidence, or may simply confuse them. And as shown by the 2018 amendment to the general required disclosure, California's initiative over the years has been to make the Prop 65 warnings more direct, specific, and disturbing, not less so.

Entities like the California Chamber of Commerce advocate for reform of Prop 65, which would include, at a minimum, reevaluation of its listed chemicals to include only those actually known by the State of California to pose the types of hazards stated or implied by the required warning. Such reform might also entail making the law less of a Plaintiff's Lawyer Full Employment Act by adjusting burdens of proof such that a plaintiff challenging the presence of a chemical in a food or beverage should have to furnish at least minimal evidence that it is harmful in the concentrations detected. Advocates of Prop 65 reform contend that relaxing the law as to chemicals not shown to be harmful will increase its effectiveness in warning consumers against the risks posed by chemicals that actually do pose a health hazard. The question is how many times will this "knowing what ain't so" objection have to be litigated as to individual chemicals before California follows a piece of advice that Twain actually *did* say: "Always do right. This will gratify some people and astonish the rest."[13]

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[12] *See Extension of Comment Period for Proposed Modification of Text and Addition of Documents to Rulemaking File for Glyphosate Warning Regulation*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT (Apr. 22, 2022), https://oehha.ca.gov/proposition-65/crnr/extension-comment-period-proposed-modification-text-and-addition-documents.

[13] Mark Twain, Note to the Young People's Society, Greenpoint Presbyterian Church, 1901.