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THIS BLOG POST MAY CAUSE CANCER IN CALIFORNIA

by Jeremy J. Broggi

This blog post is “known to the State of California to cause cancer.” Just kidding. But you probably know many things that California does put into this category—playground equipment, bathing suits, coffee, wooden furniture, umbrellas, shoes, [even Disneyland](#).

California’s ubiquitous warning labels stem from a statute commonly known as Proposition 65. Under Proposition 65, “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer . . . without first giving clear and reasonable warning.”¹ The California state agency charged with enforcing Proposition 65 provides a “safe harbor” warning label for products that include chemicals the agency (or others) believe to be carcinogenic.² Businesses who omit these labels from their products may be subject to significant penalties, including through private-party enforcement actions.

The Ninth Circuit [recently held](#) that the Proposition 65 warning label violates the First Amendment as applied to acrylamide in food and beverage products.³ Acrylamide is a chemical that can form in some foods during high temperature cooking processes, such as frying, roasting, and baking.⁴ California added acrylamide to its Proposition 65 list in 1990 “because studies showed [acrylamide] produced cancer in laboratory rats and mice.”⁵ However, a link to cancer in humans was not clearly shown, and the business organization challenging the warning alleged a First Amendment right to not be compelled to place false and misleading acrylamide warnings on their food products.

There was no dispute in the Ninth Circuit litigation that Proposition 65 compels commercial speech. Thus, the question in the case was whether California could justify the First Amendment burden under the standard articulated by the Supreme Court in *Zauderer*.⁶ Under that test, California was obligated to show that the Proposition 65 warning for acrylamide in food and beverage products was “purely factual,” “noncontroversial,” and “not unjustified or unduly burdensome.”⁷

California failed to meet this burden on all three counts. First, the Ninth Circuit found the Proposition 65 warning “controversial” because it takes sides in a “legitimat[e]” “scientific debate

¹ CAL. HEALTH & SAFETY CODE § 25249.6.

² See California Office of Environmental Health Hazard Assessment, Proposition 65, <https://oehha.ca.gov/proposition-65>.

³ See *Cal. Chamber of Com. v. CERT*, No. 21-15745 (Mar. 17, 2022).

⁴ *Id.* at 8.

⁵ *Id.* at 8.

⁶ See *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626 (1985).

⁷ *Cal. Chamber of Com.* at 16.

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over whether acrylamide in food causes cancer in humans.”⁸ In reviewing that debate, the Ninth Circuit placed great weight on the fact that “reputable scientific sources”—such as the American Cancer Society and the National Cancer Institute—had concluded that acrylamide did *not* pose a significant cancer risk in humans, and that organizations reaching a contrary conclusion had done so only tentatively.⁹

Second, the Ninth Circuit found that the Proposition 65 warning was not “purely factual.” To the contrary, the court found the warning was affirmatively misleading because, “[s]cientific debate aside, Prop. 65’s meaning of the word ‘known’ is not conveyed in the warning” and evidence in the record showed that most consumers did not understand from the warning that California had relied on animal studies and could mistakenly “believe ‘that such products pose a risk of cancer in humans’”—something California “*does not* know.”¹⁰

Third, the Ninth Circuit found that the Proposition 65 enforcement regime “creates a heavy litigation burden on manufacturers who use alternative warnings.”¹¹ Under Proposition 65, businesses that wanted to use alternatives to California’s prescribed warning to explain their own views on the dangers of a acrylamide in food would lose the benefit of the “safe harbor” provision, thus opening themselves up to potential liability in litigation over whether the revised warning is adequate. Furthermore, the record before the Ninth Circuit showed that the necessary proof—“expensive testing and costly expert testimony if the case proceeds to trial—was effectively out of reach for many of the affected businesses.¹² “Thus,” the Ninth Circuit concluded, “in context, the compelled disclosure appears unduly burdensome.”¹³

The Ninth Circuit’s decision is an important victory for advocates of free speech in the marketplace generally. By holding California to its burden of proof, the court limited the extent to which governments and government bureaucrats can force private parties to act as mouthpieces for positions that are unsupported by science or which may be the subject of legitimate scientific dispute.

The Ninth Circuit’s decision is also an important victory in the ongoing battle against some of the particular absurdities that arise under Proposition 65. And that prospect is positive not only for free speech but also for consumers who will be able to focus more clearly on real dangers if silly distractions are swept away.

⁸ *Id.* at 18.

⁹ *Id.*

¹⁰ *Id.* at 18-19.

¹¹ *Id.* at 20.

¹² *Id.* at 20-21.

¹³ *Id.* at 21.