



Free markets. Real solutions.

R SHEET ON

CALIFORNIA'S PROPOSITION 65

The Safe Drinking Water And Toxic Enforcement Act Of 1986

December 2019

BACKGROUND

Anyone who has spent time in California has seen labels on products that they buy in stores, such as “WARNING: This product contains a chemical known to the State of California to cause cancer.” Similar signs are placed in public places, including airports and even Disneyland.

In 1986, California voters approved, by a 63 percent to 37 percent margin, a statewide initiative known as the Safe Drinking Water and Toxic Enforcement Act, or Proposition 65. The measure declared that the people of California “find that hazardous chemicals pose a serious potential threat to their health and well-being” and that “state agencies have failed to provide them with adequate protection.”

As a result, the state now maintains a database of potentially dangerous chemicals, which companies can use to determine if something requires the aforementioned warning label. The act is enforced not just by the state attorney general and district attorneys, but by private law firms that can file a “right of action” on behalf of consumers. Companies that are found in violation of Prop. 65 for lacking the requisite warning label on their product are subject to fines as high as \$2,500 a day, with these private attorneys receiving as much as 25 percent of any civil penalties.

That has led to one of the proposition’s major controversies, as attorneys seek multimillion-dollar settlements by reviewing products for possible violations of the law. Advocates see it as a means to reduce the number of chemicals used in their products. “The ideal number of warnings is no warnings,” Prop. 65 author David Roe told Vox, “because the ideal reaction is that businesses get rid of exposures to toxic chemicals.”

SUMMARY

- California’s Prop. 65 mandated labels on common products to warn the public of potential risks of cancer and birth defects.
- Private attorneys are now targeting coffee and food manufacturers because of a chemical known as acrylamide.
- The California Chamber of Commerce has filed a suit against the state attorney general, enjoining him to stop enforcing “a false, misleading and highly controversial cancer warning.”

Critics say the measure has done little to boost public health, but has instead piled new layers of regulation on businesses, which must place warnings on virtually everything. Because the exposure thresholds are low, warnings must be placed on common items such as cat litter, shampoo and household cleaners.

CURRENT DEBATE

The latest Prop. 65-related fracas highlights the dubious nature of the required warnings because it involves a product most of us enjoy: coffee. In 2018, a Los Angeles Superior Court judge ruled that coffee retailers need to place warning labels on coffee cups and coffee products because of a chemical known as acrylamide. It is a naturally occurring byproduct of coffee roasting, but some studies found that animals subjected to high doses of it could develop cancer. The Council for Education and Research on Toxics (CERT) filed a lawsuit in 2008 demanding the warning signs.

“Defendants failed to satisfy their burden of proving by a preponderance of evidence that consumption of coffee confers a benefit to human health,” according to the

ruling.¹ That subjected the 90 coffee retailers targeted by the lawsuit to fines of “\$2,500 per person for every exposure to the chemical since 2002 at the defendants’ shops in California,” as Reuters noted. The case highlighted the open-ended liability that companies face for selling products that are legal and even deemed by the federal government to be healthy.

In August, the California Office of Environmental Health Hazard Assessment, which oversees regulations related to Prop. 65, gave these companies some good news. “Exposures to chemicals in coffee ... that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer,” it determined.² Despite the agency’s ruling, the legal actions have continued.

ACTION ITEMS

In the latest news, the California Chamber of Commerce on Oct. 7 filed a lawsuit against California Attorney General Xavier Becerra, who is responsible for enforcing the proposition, to stop any enforcement of a “false, misleading and highly controversial cancer warning for food and beverage products that contain the chemical acrylamide.”³ More than 250 companies that sell various acrylamide-containing food products including potato chips, peanut butter, almonds, cereals, snack foods, prune juice and olives have been targeted with pre-litigation notices.

Requiring such notices not only creates enormous labeling and testing costs, the group argues, but also undermines the free-speech rights of these companies by compelling them to provide warnings they believe to be false and misleading. Prop. 65 has been part of the state’s business climate for 33 years, but it continues to generate lawsuits and controversy. Business groups should consider addressing reforms through a ballot initiative.

CONTACT US

For more information on this subject, contact the R Street Institute, 1212 New York Ave. N.W., Washington, D.C. 20005, 202-525-5717.



Steven Greenhut
Western Region Director
sgreenhut@rstreet.org
909-260-9836



Jarrett Dieterle
Director, Commercial Freedom
jdieterle@rstreet.org
202-900-8246

1. *Council for Education and Research on Toxics v. Starbucks Corp., et al.* (Super. Ct. L.A. County, No. BC435759) http://cdn.cnn.com/cnn/2018/images/03/29/coffee_proposed.stmt.of.decision.after.trial.pdf.

2. California Code of Regulations Section 25704, Oct. 1, 2019. Section 25704. <https://oehha.ca.gov/media/downloads/cnr/regtextcoffee060719.pdf>.

3. *Cal. Chamber of Commerce v. Becerra*. (U.S. District Court, Eastern District of California, No. 19-0962). <https://advocacy.calchamber.com/wp-content/uploads/2019/10/CalChamber-v.-Becerra-Complaint.pdf>.