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CONSUMER NEWS: PROPOSITION 65: WHY COFFEE IN CALIFORNIA MAY COME WITH A CANCER WARNING

Thomas J.K. Schick, News Editor

California consumers may soon find a new addition to the package of their morning coffee: a warning label. The Safe Drinking Water and Toxic Enforcement Act of 1986,¹ colloquially referred to as “Proposition 65,” is a California law that requires businesses to provide warnings before exposing consumers to certain chemicals known by the state of California to cause cancer or reproductive toxicity.² On March 28, 2018, Judge Elihu M. Berle of the Los Angeles Superior Court issued a tentative ruling holding that several prominent coffee vendors, including Starbucks, may soon have to comply with the warning requirements of Proposition 65.³ The lawsuit, filed by the Council for Education and Research on Toxics (“CERT”), targets acrylamide, a chemical produced during the coffee roasting process and on the Proposition 65 list of chemicals known to cause cancer and reproductive toxicity.⁴ While the ruling in this case does not immediately require the defendants to place a warning on their coffee products, it serves a major blow to the defendants’ case and represents a major victory to CERT and its ultimate goal of removing acrylamide from coffee.⁵

¹ Cal. Health & Safety Code § 25249.5 *et seq.* (West 2018).

² See Cal. Health & Safety Code § 25249.6 (West 2018); *Baxter Healthcare Corp. v. Denton*, 120 Cal. App. 4th 333, 345 (2004).

³ See generally *Council for Education and Research on Toxics v. Starbucks Corp.*, No. BC435759 (Cal. Super. Ct. Mar. 28, 2018) [hereinafter *CERT v. Starbucks*]. In total, 91 defendants have appeared in the case. *Id.* at ¶ 4.

⁴ See *id.* at ¶¶ 5, 32; see also *Acrylamide*, CAL. OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/chemicals/acrylamide> (listing acrylamide as a chemical known to cause cancer and have developmental and male reproductive toxicity).

⁵ See Julie A. Steinberg, *Starbucks Pressed to Remove Carcinogen, Not Just Warn About It*, TOXICS LAW REPORTER (BNA) (Apr. 12, 2018) (In fact,

Passed via ballot proposition in 1986,⁶ the purpose of Proposition 65 is “to facilitate the notification of the public of potentially harmful substances, so informed decisions may be made by consumers on the basis of disclosure.”⁷ In addition to the warning obligations, Proposition 65 allows for injunctive relief and civil damages to be levied against violators.⁸ Proposition 65 is a remedial statute broadly construed by courts to achieve its protective purpose.⁹ When the first list of known cancer carcinogens was published, it contained 29 chemicals.¹⁰ Today, the list contains over 850 chemicals.¹¹

Proposition 65 has not existed without controversy. Critics argue that Proposition 65’s “hazard based approach” is misplaced because “[s]imply containing a chemical is not tantamount to being exposed to a hazardous chemical.”¹² Moreover, the California Attorney General has argued that “it does not serve the public interest to have almost the entirety of the state of California swamped in a sea of generic warning signs.”¹³ Indeed, warning signs appear in

some Starbucks and other California restaurants have begun placing warnings on their coffee products). *See id.*

⁶ Proposition 65 was approved by 62.6% of voters. *See Approval Percentages of Initiatives Voted into Law*, CAL. SEC’Y OF STATE, <http://elections.cdn.sos.ca.gov/ballot-measures/pdf/approval-percentages-initiatives.pdf>.

⁷ *DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150, 183 (2007).

⁸ *See* Cal. Health & Safety Code § 25249.6(a), (b) (West 2018).

⁹ *See People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 314 (1996).

¹⁰ *See* Judith A. DeFranco, *California’s Toxics Initiative: Making it Work*, 39 HASTINGS L.J. 1195, 1202 (1988).

¹¹ *See New Proposition 65 Warnings*, CAL. OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, <https://www.p65warnings.ca.gov/new-proposition-65-warnings>.

¹² Rebecca Trager, *California’s Prop 65 Controversy*, CHEMISTRY WORLD (June 16, 2016), <https://www.chemistryworld.com/news/californias-prop-65-controversy-/1010164.article> (internal quotation marks omitted). Other commenters have noted that “[t]he lawsuits authorized by [Proposition 65], however, have prompted businesses to post prophylactic warnings regardless of the severity of the risk.” *Warning: Too Many Warning Signs are Bad for Your Health*, L.A. TIMES (Sept. 30, 2017), <http://www.latimes.com/opinion/editorials/la-ed-proposition-65-warning-coffee-20170930-story.html>.

¹³ *Consumer Defense Grp. v. Rental Housing Indus. Members*, 137 Cal. App. 4th 1185, 1208 (2006) (internal quotation marks omitted).

many California areas including parking lots, hotels, office buildings, amusement parks and gas stations, and some of the warning signs do not indicate which chemicals are present.¹⁴ The concern is that the lack of information in necessary context defeats the purpose of Proposition 65, to wit, providing consumers sufficient notice of potential harmful risks.¹⁵

These competing views of Proposition 65 are well-illustrated by CERT's ongoing cases regarding acrylamide in coffee.¹⁶ In the recent decision, Judge Berle specifically held that the defendants failed to meet their burden of proof on their Alternative Significant Risk Level affirmative defense.¹⁷ The Court held that the defendants failed to prove this defense because they did not conduct a quantitative assessment of the risk of cancer from exposure to acrylamide in coffee.¹⁸ The Court further held that "[a]lthough evidence showed that roasting coffee beans is necessary to make coffee palatable and roasting coffee beans reduces microbiological contamination in coffee, Defendants' proffered evidence that coffee itself confers some benefit to human health was not persuasive and was refuted by Plaintiffs' evidence."¹⁹ Interestingly, the Court concluded that the defendants did not "prov[e] that by a preponderance of the evidence that coffee confers a benefit to human health."²⁰ The defendants' counsel has stated that the

¹⁴ See *Warning*, *supra* note 12.

¹⁵ See *id.*; see also *Dow AgroSciences LLC v. Superior Court*, 16 Cal. App. 5th 1067, 1083 (2017) ("Proposition 65 is distinguishable in its fundamentally equitable purpose and remedy: to facilitate the notification of the public of potentially harmful substances, so informed decisions may be made by consumers on the basis of disclosure." (quoting *DiPirro*, 153 Cal. App. 4th at 183)).

¹⁶ See *CERT v. Starbucks*, *supra* note 3.

¹⁷ See *CERT v. Starbucks*, at ¶ 85. Following this stage of the trial, the defendants may still object and appeal the court's decision. See Steinberg, *supra* note 5.

¹⁸ See *CERT v. Starbucks*, at ¶ 80. The Court noted earlier in its opinion that "[t]he fact that Defendants do not intentionally add acrylamide to their products is not a defense to liability under Proposition 65." *Id.* at ¶ 54.

¹⁹ *Id.* at ¶ 76.

²⁰ *Id.* at ¶ 77.

Court's ruling is at ends with the United States government guidelines and those promulgated by the World Health Organization.²¹ Following the ruling, CERT's counsel stated that eliminating acrylamide from coffee completely “would better serve public health than giving warnings, because coffee drinkers are addicted to coffee and will therefore be impelled to drink coffee despite warnings.”²²

While this case appears to be far from complete, Proposition 65 may be closer to affecting its potentially highest profile consumer good since its enactment over 30 years ago. Whether these warnings—if the Court compels the coffee selling defendants to place them on their products—reduce coffee consumption by California consumers is currently unclear. Regardless, this case is an important addition to the long list of legal battles between businesses and advocates of Proposition 65. In the big picture, while all individuals would like to reduce incidence of cancer—the second leading cause of death in the United States—interested parties and

²¹ See Steinberg, *supra* note 5. It is important to note that there are medical publications discussing both the positive and negative health effects of coffee and its potential cancer-causing effects, and the review of such studies in this article is in no way exhaustive, nor is this article medically focused or prescriptive. Compare Robin Poole et al., *Coffee Consumption and Health: Umbrella Review of Meta-Analyses of Multiple Health Outcomes*, BRITISH MED. J., Nov. 22, 2017, at 1, <https://www.bmj.com/content/bmj/359/bmj.j5024.full.pdf> (reviewing 201 meta-analyses of observational research with 67 unique health outcomes and concluding that “[c]offee consumption seems generally safe within usual levels of intake, with summary estimates indicating largest risk reduction for various health outcomes at three to four cups a day, and more likely to benefit health than harm.”), with *Acrylamide and Cancer Risk*, AM. CANCER SOC'Y (Mar. 10, 2016), <https://www.cancer.org/cancer/cancer-causes/acrylamide.html> (noting that acrylamide is found in coffee, and that the International Agency for Research on Cancer, the National Toxicology Program, and the Environmental Protection Agency have recognized acrylamide to be a likely or probable carcinogen based on studies in lab animals, but that it is ultimately “not yet clear if acrylamide affects cancer risk in people.”).

²² Steinberg, *supra* note 5.

commenters disagree whether Proposition 65 and similar measures are effective tools to address this public health concern.²³

²³ See *Statistics for Different Kinds of Cancer*, Ctrs. for Disease Control & Prevention (June 26, 2017), <https://www.cdc.gov/cancer/dcpc/data/types.htm>.