

COFFEE SOLD IN CALIFORNIA MUST CARRY A PROPOSITION 65 WARNING

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The coffee industry sustained a significant loss in its ongoing battle over the provision of cancer warnings for coffee sold in California last week when the trial court in *Council for Education and Research on Toxics (CERT) v. Starbucks Corporation (Starbucks)*, No. BC435759 (L.A. Super. Ct.), issued its proposed Statement of Decision on Phase II of the case, finding that the coffee defendants had failed to establish their affirmative defense of "Alternative Significant Risk Level." The trial court had previously ruled for CERT in Phase I of this matter, holding that the coffee retailers failed to prove their affirmative defenses of "no significant risk level," violation of the First Amendment, and federal preemption to avoid the requirement of providing cancer warnings under Proposition 65.

Proposition 65 (California Health & Safety Code, section 25249.6 *et seq.*) requires that consumers receive a warning before exposure to chemicals known to the State of California to cause cancer or reproductive toxicity. The list of chemicals known to cause cancer or reproductive toxicity is regularly updated (at least once per year) by the California's Office of Environmental Health Hazard Assessment (OEHHA)(<https://oehha.ca.gov/proposition-65>)

Acrylamide, listed by the International Agency for Research on Cancer (IARC) as a carcinogen, has been a listed chemical under Proposition 65 since 1990.

Enforcement of Proposition 65 is carried out by civil lawsuits brought by public enforcers (the California Attorney General, city and county prosecutors) and private plaintiff's attorneys (95% of cases). The civil penalties for failure to comply with Proposition 65 are steep – up to \$2,500 per day per violation. Further, private enforcers, such as CERT, retain 25% of any civil penalties and can also recover their attorneys' fees and costs, which strongly encourages private enforcement of the law.

In 2010, Plaintiff (CERT) filed suit against a total of 91 sellers of ready-to-drink coffee, alleging that they failed to provide warnings to consumers that the coffee they sold contained acrylamide, in violation of Proposition 65.

The coffee industry did not dispute that acrylamide is listed by the State of California as a chemical causing cancer, or that brewed coffee contains acrylamide. When coffee beans are roasted a chemical reaction occurs which results in the creation of acrylamide.

At issue in Phase II was the coffee retailers' affirmative defense of Alternative Significant Risk Level (ASRL). The ASRL is an exemption to the cancer hazard warning requirement, which provides that a warning need not be given where "[a]n exposure for which the person responsible can show that the exposure poses on significant risk assuming lifetime-exposure at the level in question for substances known to the state to cause cancer ☐." Health & Safety Code Section 25249.10(c). To avail itself of this exemption, a defendant must put forth scientific evidence to establish that the carcinogen in its product does not exceed an "alternative risk level"

derived by a "quantitative risk assessment" where "sound considerations of public health support an alternative level." Specifically, in this matter, the coffee retailers were required to: a) establish that acrylamide is created by cooking or processing necessary to render the coffee safe or palatable; b) demonstrate that sound considerations of public health justify applying an alternative (less strict) risk level; and c) present persuasive evidence of what would be an appropriate alternative risk level, taking into account the identified public health

considerations. Once they had established the alternative level from a “quantitative risk assessment” they then had to establish that, assuming lifetime exposure to the products, the exposure to acrylamide from their coffee products was below the alternative level.

In its ruling, the trial court rejected the evidence presented by the coffee retailers in establishing its Alternative Significant Risk Level, and found much of it to be inadmissible and scientifically unreliable. Specifically, Los Angeles Superior Court judge Elihu Berle wrote,

Since defendants failed to prove that coffee confers any human health benefits, defendants have failed to satisfy their burden of proving that sound considerations of public health support an alternate risk level for acrylamide in coffee.

Defendants have a short window of time to challenge this ruling before it becomes final, and could also seek to appeal the ruling. The next phase of trial will likely determine the potential civil penalties and attorney fees to which CERT is entitled. The California environmental lawyers at Bick Law LLP will continue to monitor this case as well as other developments surrounding Proposition 65 warnings.