

Coffee and Cancer Warnings in California

April 10, 2018

Thirty-two years ago, a major California newspaper urged Californians to vote "no" on a ballot initiative commonly referred to as "Prop 65," which would require certain businesses to include warning labels on products that contained a compound known to the State of California to cause cancer, birth defects or reproductive harm. However, the editorial board dismissed what it viewed as "exaggerated" claims by other opponents of Prop 65, reassuring voters that even if the measure passed, it would "not lead to the banning of ordinary table salt or require warning labels on every apple sold or cup of coffee served in California." But last month, a California Superior Court judge ruled that businesses may have to do just that - require warning labels on cups of coffee served in California.

The complaint in the case, *Council for Education and Research on Toxics v. Starbucks Corporation, et al.*, alleges that dozens of companies in the coffee business violated Prop 65 in failing to warn consumers that brewed coffee contains acrylamide, a substance believed to be a carcinogen by the State of California. Defendants in the case were previously unsuccessful in persuading the court that Prop 65's warning requirements were unnecessary because the alleged acrylamide exposure posed "no significant risk."

On March 28, the court rejected defendants' remaining defense, namely, that Prop 65 provides an exemption to liability where considerations of public health justify applying an "alternative risk level," one that is less strict than the "no significant risk" level, and exposure to acrylamide in coffee falls below that alternative level. In its proposed statement of decision, which is not a final judgment of the court but which many anticipate will be the court's ultimate decision, the court ruled that defendants' expert evidence that consuming coffee confers human health benefits was inadmissible and thus defendants had not proven that considerations of public health justify applying an alternative risk level for acrylamide in coffee.

Whether the court's statement of decision will become its final decision in the matter, and whether any challenges to that decision are successful on appeal, remain to be seen. This case could ultimately turn on technical legal questions involving evidentiary issues, but broader questions lurk as well. Manufacturers and retailers of certain garden or power tools have posted Prop 65 warnings - not necessarily because the device itself contains carcinogens, but because use of those tools might expose consumers to such compounds. Could the March 28 decision lead to an interpretation of Prop 65 that would require manufacturers and retailers of coffee machines or coffee bean grinders to post warning labels? What are



the implications for other food and beverage products that contain acrylamide? We've already seen extensive Prop 65 litigation involving other food products such as French fries and potato chips.

Some companies are not waiting for answers to these questions. At least two defendants in the case settled last year, agreeing to post warning labels, and it would not be surprising to see other companies that were not targets of the lawsuit prophylactically posting warning labels as well.

We'll continue to monitor this case and keep you posted on any significant developments and their broader implications for doing business in California. Stay tuned.
