



The Ninth Circuit Court stayed the Proposition 65 Acrylamide Preliminary Injunction

07 June 2021

We recently became aware of a 27 May 2021 opinion from the Ninth Circuit that “stayed” the preliminary injunction barring private parties from filing new lawsuits against businesses to enforce the Proposition 65 warning requirements for cancer as applied to acrylamide in food and beverage products.¹ As of 27 May 2021, a private party can again start to file or prosecute a new lawsuit to enforce California’s Proposition 65 warning requirements for cancer as applied to acrylamide in food and beverage products.² The stay in the preliminary injunction will remain in effect during the pendency of the case at the Ninth Circuit.

For background, on 29 March 2021, the United States District Court for the Eastern District of California issued a preliminary injunction halting the filing of new lawsuits by the California Attorney General and anyone else related to the enforcement of California’s Proposition 65 against businesses that do not display Proposition 65 acrylamide warnings for food and beverage products.³ The ruling reasoned that “the safe harbor warning is controversial because it elevates one side of a legitimately unresolved scientific debate about whether eating foods and drinks containing acrylamide increases the risk of cancer.”⁴ Further, the court found that “the State has not shown that the safe-harbor acrylamide warning is purely factual and uncontroversial, and Proposition 65’s enforcement system can impose a heavy litigation burden on those who use alternative warnings.”⁵

The Council for Education and Research on Toxics (CERT) appealed the preliminary injunction to the Ninth Circuit and moved for an emergency stay pending appeal. In granting the emergency stay, the Ninth Circuit Court reasoned the motion meets the four-factor test: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”⁶ Notably, the court found that given the preliminary nature of the proceeding in the district court, CERT made a sufficient showing that it is likely to prevail on appeal.⁷ The court stayed the preliminary injunction to the extent it bars any “private enforcer,” including CERT, from “fil[ing] or prosecut[ing] a new lawsuit to enforce the Proposition 65 warning requirement for cancer as applied to acrylamide in food and beverage products.”⁸ This stay shall remain in effect during the pendency of this appeal or until further order of this court.⁹

Next steps

Hogan Lovells will continue to closely follow the CalChamber lawsuit and other Proposition 65 developments related to food and beverages. Please do not hesitate to reach out to us if you have questions regarding this or other matters.

References

1 *California Chamber of Commerce v. Bonta*, No. 2:19-cv-02019-KJM-JDP (9th Cir. 27 May 2021).

2 *Id* at 3-4.

3 *California Chamber of Commerce v. Xavier Becerra*, No. 2:19-cv-02019-KJM-JDP, Doc. 114 (E.D.C.A. 30 Mar. 2021).

4 *Id* at 23.

5 *Id* at 25.

6 See *supra* note 1 at 2.

7 See *id*.

8 See *id* at 3.

9 See *id* at 4.

Authored by Martin Hahn and Xin Tao.

Contacts



Martin Hahn

Partner

Washington, D.C.

martin.hahn@hoganlovells.com



Xin Tao

Senior Associate

Washington, D.C.

xin.tao@hoganlovells.com

© 2021 Hogan Lovells. All rights reserved. "Hogan Lovells" or the "firm" refers to the international legal practice that comprises Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses, each of which is a separate legal entity. Attorney advertising. Prior results do not guarantee a similar outcome. Hogan Lovells (Luxembourg) LLP is a limited liability partnership registered in England and Wales with registered number OC350977 and registered also with the Luxembourg bar. Registered office: Atlantic House, Holborn Viaduct, Holborn Viaduct, London EC1A 2FG.