

Environment & Energy

# California Chamber's Prop 65 Win Seen to Spur More Challenges

By Pat Rizzuto and Zach Bright

March 23, 2022, 11:30 AM

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- Chamber seeking permanent injunction
  - PFOA, PFOS said to be vulnerable to challenge
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Lawsuits challenging California's consumer warning requirement for products with certain hazardous chemicals are likely if a recently granted temporary injunction against warnings becomes permanent, according to attorneys tracking the case.

The U.S. Court of Appeals for the Ninth Circuit ruled on March 17 that the California Chamber of Commerce was entitled to an injunction that temporarily bars the state and any private litigants from enforcing Proposition 65 against businesses that don't warn consumers that acrylamide in food is known to the state of California to cause cancer. Acrylamide is used in certain industrial processes, and also naturally occurs in some foods when fried, roasted, or baked at high temperatures.

The case, *California Chamber of Commerce v. CERT*, now returns to the U.S. District Court Eastern District of California, which concluded last year that "the Chamber of Commerce is likely to show the acrylamide warning required by Proposition 65 is controversial and not purely factual."

"The 9th Circuit's ruling does not have broader implications for acrylamide notices yet; the Chamber will have to be successful in the underlying action," said Vineet Dubey, a co-founder of Custodio and Dubey LLP, who sues companies for failing to warn California residents when their products contain toxic chemicals.

But "it's really only a matter of time before the Chamber is successful," he said. The 9th Circuit found that there was a high likelihood of success in the underlying action in order to keep the preliminary injunction in place, Dubey said.

## PFOA, PFOS

The ruling has the potential for broader implications even though "acrylamide is in a league of its own when it comes to Prop 65 chemicals," said Corrie L. Plant, a partner focusing on environmental law at Bick Law LLP. Acrylamide can't be eliminated entirely from products, she said.

Companies, and especially manufacturers, have invested time and money in fighting these Prop 65 cases, Plant said.

"I don't think that desire to fight is likely to spread to other chemicals, such as phthalates, where the chemicals can be eliminated from the products and are not consumed," she said.

Nor are warnings for chemicals like lead likely to be challenged, because its health risks are well established, Plant said. Dubey, whose cases often involve products containing lead and cadmium, agreed.

But warnings for chemicals lacking broad scientific consensus about their effects could be challenged, said Plant and Gregory S. Berlin, a senior associate in Alston and Bird LLP's Environment, Land Use & Natural Resources Group.

For example, the state's recent requirement that companies selling products with perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) warn consumers of their potential to cause cancer and harm development could be challenged, Berlin said. The evidence for such claims is disputed and comes largely from animal studies that aren't always predictive of effects chemicals have on people, he said.

PFOA and PFOS are the most well-known and studied members of a huge group of substances dubbed "forever chemicals," because neither sun, weather, microbes, nor time seem to eliminate them from the environment.

The federal Environmental Protection Agency concluded in 2016 that animal studies, which it assumes predict potential effects on people, show both chemicals can harm development. But there's only "suggestive" of potential carcinogenicity, the EPA said. A World Health Organization agency that determines the potential for chemicals, viruses, and other exposures to cause cancer said PFOA is "possibly carcinogenic to humans."

### **Acrylamide and Glyphosate**

Questions have arisen about potential links between the acrylamide ruling and impacts on California's required warnings for glyphosate, which is used in pesticides. Earlier this year, Bayer AG agreed to spend between \$23 million and \$45 million to settle class claims that Roundup weedkiller purchasers overpaid because the product lacked cancer warnings, and the deal merits preliminary approval, consumers told a federal court in California.

"Clearly there are going to be repercussions of this beyond acrylamide. Obviously, glyphosate is the one obvious next issue, but where it goes beyond that, I'm not sure yet," said Jeffrey Margulies, partner at Norton Rose Fulbright.

In 2019, the EPA sent a letter on labeling requirements for glyphosate saying it isn't likely to be carcinogenic and warning language saying so is "false or misleading."

Margulies said it is hard to predict the exact ripple effects of the preliminary injunction. However, the First Amendment principle that Prop 65 was challenged, alleging that it compelled speech that was “not purely factual or controversial” could mean similar challenges on that basis for some Prop 65 chemicals.

“I can’t see the 9th Circuit coming back on glyphosate and saying, ‘Oh gee, we disagree with what we said in the acrylamide case,’” Margulies said.

The California Chamber won’t telegraph which chemicals it might challenge, said Adam Regele, a chamber attorney specializing in environmental policy and product regulation issues. But, like the other attorneys, he said a district court victory would lead to future litigation challenging warnings where the science is dubious.

For now, “we’re focusing on acrylamide,” Regele said. “We’ll be seeking a permanent injunction.”

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