



## Chamber of Commerce's First Amendment Challenge to Proposition 65 Acrylamide Warnings Dismissed

FIRST AMENDMENT, PROPOSITION 65, LITIGATION, CHEMICALS OF INTEREST

By LUCAS WILLIAMS, March 23, 2020

In October 2019, the California Chamber of Commerce (the Chamber) filed a lawsuit, **California Chamber of Commerce v. Becerra**<sup>1)</sup>, in federal court against the State of California challenging Proposition 65 insofar as it requires businesses to provide warnings about the presence of acrylamide, a cancer-causing chemical, in food and beverages. The Chamber's suit contends that Prop. 65 warnings for acrylamide run afoul of the First Amendment [see **Cal Chamber Sues Over Prop. 65 Acrylamide Warnings**<sup>2)</sup>, November 15, 2019].

On March 3, 2020, Judge Kimberly J. Mueller, Chief Judge of the U.S. District Court for the Eastern District of California, rejected the Chamber's First Amendment challenge to Prop. 65 and dismissed the lawsuit. However, the Chamber will have an opportunity to amend its complaint.

The Chamber's lawsuit is one of a new wave of attacks by business interests against Prop. 65 on First Amendment grounds. For instance, agricultural interests have challenged Prop. 65 warnings for glyphosate, the active chemical in Monsanto's cancer-causing weed-killer Roundup [see **Ag Groups and Monsanto Ask for Summary Judgment Invalidating OEHHA's Warning Requirement for Glyphosate**<sup>3)</sup>, October 19, 2019]. These challenges are based on the First Amendment's protection from "compelled speech"—i.e., the government cannot punish members of the public for refusing to convey government endorsed messages. However, there is an important exception to this compelled speech doctrine—it does not apply to government-mandated consumer protection or health and safety warnings that are "purely factual" and convey "uncontroversial information." *National Institute of Family & Life Advocates v. Becerra* [138 S.Ct. 236]

The Chamber's central argument is that there is no scientific consensus that acrylamide in food causes cancer. Thus, according to the Chamber, requiring businesses to provide acrylamide warnings violates the First Amendment by "compelling" businesses to "make false, misleading, and highly controversial statements about their products."

In response to the Chamber's allegations, California Attorney General Becerra filed a motion to dismiss the lawsuit. The AG's motion argues that the Court need not even reach the merits of the Chamber's claim that acrylamide warnings are misleading and controversial. Instead, the AG contends that the Chamber's lawsuit constitutes improper "forum shopping" and thus the Court should exercise its discretion to dismiss the case. More specifically, the AG argues that the Chamber—by seeking to have its First Amendment claim adjudicated in federal court—is unfairly attempting to sidestep the dozens of Proposition 65 acrylamide lawsuits pending in state courts where defendants' have

raised identical First Amendment compelled speech defenses. According to the AG, allowing the Chamber's suit to proceed in federal court would "waste limited judicial resources and infringe on the comity between the state and federal court systems . . . ." The AG's arguments are based on several related legal doctrines (e.g., the Declaratory Judgments Act (28 U.S.C. § 2201)) that allow a federal court to abstain from deciding a federal action when there is a duplicative action already proceeding in state court.

The Court agreed with the AG and dismissed the lawsuit. The Court found that the Chamber is improperly "forum-shopping" by attempting to "proceed in this federal action as a result of the unfavorable decision of the state court in **CERT v. Starbucks**<sup>4)</sup>"—a case in which the Los Angeles Superior Court found that acrylamide warnings must be provided by businesses selling coffee. The Court also held that the Chamber's case is "duplicative of claims in the roughly 38 ongoing state court proceedings involving acrylamide and Proposition 65 . . . ." Finally, the Court held that the relief sought by the Chamber—an injunction prohibiting California from enforcing Proposition 65 as to acrylamide—would have the effect of enjoining a state action in violation of the Anti-Injunction Act (28 U.S.C. § 2283). Nevertheless, the Court allowed the Chamber to amend its complaint to clarify that the Chamber does not seek to enjoin any pending state actions (as opposed to cases not yet filed), which may ameliorate the Anti-Injunction Act issue. Accordingly, on March 16, 2020, the Chamber amended its complaint to clarify that it does not seek to enjoin cases that are currently pending in state court. While the Court's ruling is a major blow to the Chamber's First Amendment argument, the case is far from over.

Trenton Norris of Arnold & Porter is the lead attorney for the Chamber. Supervising Deputy Attorney General Harrison Pollak is the lead attorney for the State of California.

## Resources for this article

### 1. California Chamber of Commerce v. Becerra

<https://prop65clearinghouse.com/cases/5923>

### 2. Cal Chamber Sues Over Prop. 65 Acrylamide Warnings

<https://prop65clearinghouse.com/articles/14018>

### 3. Ag Groups and Monsanto Ask for Summary Judgment Invalidating OEHHA's Warning Requirement for Glyphosate

<https://prop65clearinghouse.com/articles/13989>

### 4. CERT v. Starbucks

<https://prop65clearinghouse.com/cases/1478>