



Coffee Rule Finalized But Challenges Remain

PROPOSITION 65, OEHHA, LITIGATION, FIRST AMENDMENT

By ROGER PEARSON, July 5, 2019

A regulation that will shield purveyors of brewed coffee from Proposition 65 liability will become effective on October 1 of this year. However, the validity of the regulation remains the subject of ongoing litigation, which has yet to be resolved nearly ten years after its commencement.

Background

In 2010 an organization known Council for Education and Research on Toxics (CERT) sued several purveyors of brewed coffee arguing that they failed to warn consumers of the presence of acrylamide, a Prop. 65 listed carcinogen, in their products. After several preliminary rulings in **CERT v. Starbucks**¹⁾, Los Angeles County Superior Court Judge Elihu Berle in March 2018 rejected the defendants' final affirmative defense leaving them potentially liable for millions of dollars in penalties [see **Judge Refuses to Halt Coffee Prop. 65 Warning Trial Pending Finalization of OEHHA Rule**²⁾, September 23, 2018]. In the meantime, however, the Office of Environmental Health Hazard Assessment (OEHHA) proposed a regulation that would shield the CERT defendants and any other purveyor of brewed coffee from Proposition 65 liability.

That regulation was finalized by OEHHA and **approved by the Office of Administrative Law on June 3**³⁾, with an October 1 effective date [see **OEHHA Amends Proposal to Exempt Coffee From Proposition 65**⁴⁾, April 4, 2019].

The approved regulation reads as follows: "Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer." Because the acrylamide in coffee results from the roasting of coffee beans or the coffee brewing process, the new regulation will effectively shield coffee purveyors from Prop. 65 liability.

Fate of Ongoing Litigation

Despite the finalization of the OEHHA regulation, the CERT litigation has yet to be completely resolved. The status of that litigation has been recently **summarized by long time Prop. 65 litigator Jeff Margulies**⁵⁾ of the Norton Rose & Fulbright firm.

Margulies notes that Judge Berle originally established a trial date for October 15, 2018 for the penalty phase of the CERT litigation. However, on October 12, 2018 the California Court of Appeal granted the defendants' request to stay the litigation. That stay remains in effect.

In the meantime in September of 2018 CERT filed a separate action against OEHHA seeking to have the agency's proposed regulation declared invalid. At OEHHA's request that litigation was assigned to Los Angeles Superior Court Judge Carolyn Kuhl, instead of Judge Berle. Judge Kuhl initially stayed the new litigation pending finalization of the regulation and then decided to stay the litigation entirely to allow Judge Berle to complete the original case. On June 5 of this year, OEHHA asked the Court of Appeal to order Judge Kuhl to lift the stay and to determine the validity of the regulation. CERT has asked the Court of Appeal to allow Judge Berle to make that determination while the defendants have asked the court to maintain that stay to allow Judge Kuhl to decide the case.

Given all of this, Attorney Margulies notes that the following issues need to be resolved:

- Which Superior Court Judge—Berle or Kuhl—will decide whether the regulation is valid? OEHHA argues that it is not a party to the litigation before Judge Berle and that it should not be required to argue the validity of the regulation before a judge who it has challenged.
- Is the regulation valid? In its lawsuit CERT has raised a number of challenges to the regulation including, most provocatively, that former Governor Jerry Brown wrongfully ordered OEHHA to adopt a regulation to reverse Judge Berle's decision.
- Does the regulation apply to the existing litigation? CERT argues that because the regulation was not adopted until after the court found liability, it cannot be applied retroactively. The coffee defendants argue that any regulatory changes adopted before the final judgment are applicable to pending litigation pursuant to the "statutory repeal" rule. The defendants also argue that their answers all raised the no significant risk defense and that this new regulation is simply a specific implementation of that defense.
- Does the regulation violate the defendants first amendment rights? As part of his preliminary rulemakings, Judge Berle rejected the coffee defendants' argument that they should not be forced to make what they consider to be an untrue statement; i.e., that coffee causes cancer. After that ruling the Supreme Court issued a decision on this issue and, more recently, a federal court judge in the Eastern District has upheld a similar argument from Monsanto regarding the listing of glyphosate, the active ingredient in the company's Roundup herbicide. Judge Berle rejected the defendants attempt to renew their argument in light of these subsequent opinions. The defendants have appealed the issue to the Court of Appeal [see **Judge Concludes Requiring Prop. 65 Warning on Glyphosate Products Violates First Amendment**⁶ , March 7, 2018].
- Has conflict preemption arisen? The U.S. Food and Drug Administration supported the OEHHA regulation opining that to require a warning on coffee would mislead consumers given that studies show that coffee actually has some benefits. A California Supreme Court case ruled that a similar OEHHA warning involving nicotine replacement products was preempted by FDA rejection of it. Margulies notes that the defendants are likely to argue preemption if their other arguments fail.

Conclusion

Margulies concludes that resolving all of these arguments could take years given the possibility of appeals. Thus neither side is likely to see the uncertainty over warnings on coffee be definitively resolved for some time.

Resources for this article

1. CERT v. Starbucks

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

2. Judge Refuses to Halt Coffee Prop. 65 Warning Trial Pending Finalization of OEHHA Rule

<https://prop65clearinghouse.com/articles/13568>

3. approved by the Office of Administrative Law on June 3

<https://oehha.ca.gov/proposition-65/crnrr/notice-adoption-section-25704-exposures-listed-chemicals-coffee-posing-no>

4. OEHHA Amends Proposal to Exempt Coffee From Proposition 65

<https://prop65clearinghouse.com/articles/13779>

5. summarized by long time Prop. 65 litigator Jeff Margulies

<https://www.consumerproductslawblog.com/2019/06/what-now-california-finalizes-prop-65-exemption-for-coffee/>

6. Judge Concludes Requiring Prop. 65 Warning on Glyphosate Products Violates First Amendment

<https://prop65clearinghouse.com/articles/13366>