

Client Alert

Environmental, Health and Safety

MAY 08, 2025

For more information, contact:

Peter Hsiao

+1 213 443 4379

phsiao@kslaw.com

Cynthia AM Stroman

+1 202 626 2381

cstroman@kslaw.com

Michael Leslie

+1 213 218 4013

mleslie@kslaw.com

Smitha Stansbury

+1 202 626 2902

ssansbury@kslaw.com

Alexander Moore

+1 415 318 1218

amoore@kslaw.com

King & Spalding

Los Angeles

633 West Fifth Street

Suite 1600

Los Angeles, California 90071

T. +1 213 443 4355

New Federal Court Decision Holds Proposition 65 Warnings Are Not Required Where There Was No Scientific Consensus on the Carcinogenicity of the Chemical in the Product

In an important decision under California's Proposition 65, a federal court recently ruled that businesses cannot be required to provide a product warning under Proposition 65 where there is no scientific consensus on whether the chemical found in the product is a carcinogen. On May 2, 2025, the Court granted summary judgment for plaintiffs in *California Chamber of Commerce v. Bonta*, No. 19-CV-02019 (E.D. Cal.) ("*Cal Chamber*"), holding that the First Amendment bars the State of California from requiring businesses to provide a Proposition 65 warning for potential exposure to dietary acrylamide, a chemical commonly found in foods subjected to high-temperature cooking. This decision has far-reaching implications for Proposition 65 warnings and provides an important defense to enforcement actions brought by the state and citizen plaintiffs.

This Client Alert describes the challenge Proposition 65 presents to companies doing business in California, outlines the key takeaways from the *Cal Chamber* decision, and explains its significance to businesses facing Proposition 65 notices or lawsuits.

PROPOSITION 65 APPLIES TO MANUFACTURERS, DISTRIBUTORS, AND SELLERS OF GOODS IN CALIFORNIA

Proposition 65 is intended to inform California residents of potential exposures to chemicals causing cancer or reproductive toxicity. Among other means, a chemical is "known to the state to cause cancer" if an authoritative body has formally identified it as a carcinogen. The California Labor Code requires that chemicals be added to the

Proposition 65 list if agencies or organizations such as the U.S. EPA, Food and Drug Administration (“FDA”) or the International Agency for Research on Cancer (“IARC”) identify them as carcinogens. Once a chemical is identified and added to the Proposition 65 list, and absent an applicable exemption, all businesses with ten or more employees are required to provide a “clear and reasonable warning” to California consumers of the chemical’s presence in any product prior to sale in the state.

The law has been described as a “trap for the unwary” because of its provisions allowing private parties to enforce the warning requirements even if the chemical is detected at very low levels. A private party may give notice of its intent to file a potentially expensive lawsuit “in the public interest” even if the plaintiff has not used the product, subjecting the business to daily penalties of up to \$2,500 per violation and payment of plaintiff’s attorney fees and costs. The California Chamber of Commerce has publicly expressed its concerns about Proposition 65 and advocated for its reform.

THE CAL CHAMBER CASE APPLIES FIRST AMENDMENT PROTECTIONS FOR COMMERCIAL SPEECH TO PROPOSITION 65

The *Cal Chamber* case applied and extended prior case law regarding the protections for commercial speech from the warning requirements in Proposition 65. In 2023, in *National Association of Wheat Growers v. Bonta*, No. 20-16728, the Ninth Circuit affirmed that businesses cannot be compelled to issue Proposition 65 warnings for glyphosate, a common herbicide, where such warning is not “purely factual and uncontroversial” due to a lack of scientific consensus that glyphosate is, in fact, carcinogenic. This ruling identified an inherent conflict in Proposition 65. The statute requires a warning for the state’s list of chemicals formally identified by an authoritative body as a carcinogen. The court found under the facts presented that the warning was compelled commercial speech and unconstitutional under the First Amendment because it forced businesses to convey the message that the product will cause cancer in humans despite a lack of scientific consensus supporting that conclusion.

In June 2024, the court in *The Personal Care Products Council v. Bonta*, No. 23-CV-01006 (E.D. Cal.), granted a preliminary injunction prohibiting California from requiring businesses to provide a Proposition 65 warning for potential exposure to titanium dioxide based upon First Amendment considerations.

Cal Chamber applied similar reasoning to grant a permanent injunction against the State of California forbidding enforcement of Proposition 65 warnings—this time for products containing dietary acrylamide. The record presented by the Chamber of Commerce showed a divide in scientific studies surrounding the potential human carcinogenicity of dietary acrylamide. While EPA, the Department of Health & Human Services’ National Toxicology Program (“NTP”), and IARC have identified acrylamide as a hazard, other entities—including the FDA, National Cancer Institute, and American Cancer Society—questioned whether there is sufficient scientific proof that *dietary* acrylamide presents a cancer risk. Expert testimony reviewing the state of acrylamide studies conducted worldwide also showed there was a lack of scientific consensus.

Based upon this record, the Court analyzed whether California could compel businesses to provide Proposition 65 warnings consistent with their right to commercial speech under the First Amendment. The Court applied two tests. The first allows the State to compel commercial speech if it is (i) reasonably related to a substantial government interest, (ii) “purely factual and noncontroversial,” and (iii) not unjustified or unduly burdensome. The Court found the acrylamide Proposition 65 warnings at issue were “neither uncontroversial nor purely factual as the warnings espouse a one-sided view that dietary acrylamide poses a human cancer risk despite a lack of scientific consensus on that point.”

The second test allows compelled commercial speech if it directly advances a government interest and is no more extensive than necessary. The Court found “misleading statements about acrylamide’s carcinogenicity” cannot

possibly advance Proposition 65's purpose to inform California residents about exposures to chemicals that are *actually* known to cause cancer. Moreover, if California wished to warn its residents about the potential harms of acrylamide, it could do so "without burdening the free speech of businesses" by launching an ad campaign or posting information online.

The state has not yet announced whether it will appeal the decision.

CAL CHAMBER PROVIDES A POTENTIAL DEFENSE TO BUSINESSES FACING PROPOSITION 65 LAWSUITS

Cal Chamber provides important precedent and a potential defense to Proposition 65 lawsuits regarding warnings required for a product, extending the analysis beyond the presence of dietary acrylamide. The First Amendment is a defense to Proposition 65 lawsuits where there is a lack of scientific consensus regarding the carcinogenicity or reproductive toxicity of a chemical listed by the state. A business, upon receiving a notice of intent to sue by the state or a private enforcer, should carefully review the current state of scientific studies on the carcinogenicity and reproductive toxicity of the subject chemical, with a focus on established authorities, including EPA, FDA, the National Institute of Occupational Safety and Health, the National Institutes of Health, the National Toxicology Program, the National Cancer Institute, the American Cancer Society, and IARC.

Businesses should also be proactive in assessing the Proposition 65 warning requirements as applied to their products. This includes identifying the chemicals used in their products, determining the need for any warnings, adequately providing those warnings, and training personnel with the knowledge necessary identify Proposition 65 issues.

King & Spalding LLP has decades of experience advising clients with consumer product matters including those regarding Proposition 65. With four offices located in California and a global environmental, health and safety practice, our team is well positioned to provide strategic counseling on food, beverage and pharmaceutical issues. If you have any questions about this Client Alert, please contact any of the authors listed above.

ABOUT KING & SPALDING

Celebrating more than 140 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 24 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

View our [Privacy Notice](#).