Appellate Court Rejects Effort to Require Prop. 65 Warnings for Acrylamide in Breakfast Cereals

APPELLATE CASES, WARNINGS, LITIGATION, OEHHA, US FDA

By ROGER PEARSON, August 5, 2018

The Second District Court of Appeal has directed a lower court to dismiss a Proposition 65 private plaintiff lawsuit seeking to require breakfast cereal manufacturers to place warning labels on their products due to the presence of acrylamide in them. The Court concluded that the Proposition 65 warning requirement is preempted by federal law in this instance. **Sowinski v. POST**[1)] , Opinion, B284057 (C.A. 2nd, July 16, 2018).

Acrylamide was originally listed as a Proposition 65 carcinogen in 1990, and a safe harbor (No Significant Risk Level) of 0.2 micrograms/day was established for it. The chemical was subsequently listed as a Prop. 65 reproductive toxicant. Initially the substance's listings provoked little interest among Prop. 65 litigants, because the only known exposure to the chemical was in limited industrial settings.

However, in 2002 Swedish researchers discovered that acrylamide is generated when carbohydrate-rich foods are subjected to high heat levels during baking, roasting, frying, or similar processes. The levels of the chemical in these products were considerably higher than the 0.2 micrograms safe harbor level.

The Swedish results led to suits being filed by Proposition 65 plaintiff groups against several purveyors of fast food and other cooked foods. In response the industry asked the Office of Environmental Health Hazard Assessment to establish alternative exposure levels for acrylamide in cooked foods or, alternatively, to exempt acrylamide formation in cooked foods entirely. These efforts failed to generate a permanent solution on the state level [see **Industry and Environmentalists Clash Over Cooked Food Exemption**[2)] , October 24, 2005].

In the meantime the U.S. Food and Drug Administration warned OEHHA against establishing any alternative level requiring warnings for acrylamide in foods. The FDA pointed out that it had a policy to encourage consumers to eat more whole grain foods and to require manufacturers to place warnings on cereals and other whole grain products would cause confusion among California consumers. The FDA also pointed out that it was actively engaged in research on the impact of acrylamide consumption in foods in coordination with the World Health Organization. In 2016 the FDA issued its **Guidance for Industry, Acrylamide in Foods**[3)] , in which it outlined ways for food manufacturers to reduce acrylamide content in their products through modifying crop growing conditions and food processing. The Guidance also noted that producers could reduce acrylamide content by reducing the whole grain content in their foods. However, the agency noted that it did not recommend that

approach given the benefits of whole grain consumption.

The Lawsuit

The lawsuit leading to this appellate court decision was filed against manufacturers of 59 breakfast cereal products by private party plaintiff Dr. Richard Sowinski. Sowinski alleged that the manufacturers failed to warn consumers of the presence of acrylamide in their products. All but 10 of the targeted products contain whole grains. The defendant manufacturers filed a summary judgment motion seeking a dismissal of the lawsuit based on federal preemption claims. They argued that requiring Prop. 65 warnings on cereals is expressly preempted by the **Nutritional Labeling and Education Act**[4] (NLEA), because such warnings are not identical to the FDA's regulations authorizing certain health claims on cereals. The defendants also argued that warnings are preempted, because requiring a warning would pose an obstacle to Congress' nutrition policies encouraging the consumption of whole grain foods; which is a category of preemption based on a conflict between federal and state policy.

The trial court rejected both preemption claims and the defendant manufacturers filed this appeal, which covers only the trial court's rejection of the manufacturers "obstacle" preemption claim.

The Appellate Court Decision

On appeal attorneys for Dr. Sowinski defended the trial court decision by arguing that a savings clause to the NLEA preserves the right to file lawsuits alleging non-compliance with Proposition 65 warning requirements. Whatever the merits of this argument the appellate court notes that it doesn't apply here, because the cereal manufacturers are basing their obstacle preemption claim on the federal policy promoting the consumption of whole grains; not on the NLEA.

The trial court had rejected the obstacle conflict preemption claim on the basis that there is no federal warning for acrylamide content and that the continued research by the FDA means there is no standard on the federal level conflicting with Prop. 65. However, the Appellate Court notes that a direct conflict with a federal requirement is only one of two types of conflict preemption. The other—the possibility that a state rule obstructs the achievement of a federal policy—can also be the basis of a valid preemption claim. In this case the FDA's continued warnings that requiring a Proposition 65 label would obstruct the national goal of consuming whole grain foods is compelling evidence of a conflict-obstruction preemption.

Finally, Dr. Sowinski argued that summary judgment covering all 59 cereal products was improper, because 10 of them lacked whole grains. The appellate court noted, however, that these 10 cereals contained other nutrients identified by the FDA as beneficial and thereby are arguably covered by its warnings against state preemption. Because the cereal manufacturers had successfully stated an affirmative defense in their summary judgment motion, it was up to Dr. Sowinski to cite facts that these other cereals should be treated differently.

Attorneys for Post are Trenton Norris with Arnold & Porter Kay Scholer, and David Biderman and Eric Miller with Perkins Coie. Anthony Graham of Graham & Martin represented Dr. Sowinski.

Resources for this article

1. Sowinski v. POST
/cases/2341

2. Industry and Environmentalists Clash Over Cooked Food Exemption
/articles/170

3. Guidance for Industry, Acrylamide in Foods
https://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm374524.htm

4. Nutritional Labeling and Education Act
/documents/27942