First Round in Acrylamide in Coffee Trial Goes to Plaintiff

LITIGATION

By ROGER PEARSON, July 10, 2015

A trial judge in Los Angeles has issued a tentative opinion rejecting the affirmative defenses of defendants in a closely watched case alleging that sellers of brewed coffee should have provided Proposition 65 warnings of the presence of acrylamide in their products [see **Nonprofit Sues Coffee Chains Over Alleged Prop 65 Violations**[1)] , December 4, 2014]. In the most significant of the three rulings the judge ruled that the defense cannot argue that exposure to coffee as a mixture fails to create a significant risk of cancer. Instead, the defense must show that exposure to the levels of acrylamide in the mixture do not create a significant risk, which the judge concluded the defendants have failed to demonstrate.

Acrylamide was listed as a Prop. 65 carcinogen in 1990 pursuant to the authoritative bodies listing mechanism. At the time of its listing there was a relatively minor interest in the Prop. 65 private plaintiff community due to its known presence in only a few industrial products. However, that changed when in 2002 Swedish researchers found that the substance is formed during deep frying, roasting, or other heating of foods by what is known as the Maillard reaction. Plaintiff groups discovered that acrylamide levels in many cooked foods exceeded the safe harbor level established for acrylamide exposure leading to several lawsuits against sellers of french fries and other fried foods. This, in turn, led to efforts on the part of food manufacturers to get OEHHA to establish a separate safe harbor level for acrylamide in foods created by heating. However, that effort went nowhere, because the various interested parties were unable to come to any agreement on a proper standard [see **OEHHA Will Restart Acrylamide Regulatory Process**[2)] , April 1, 2006].

Acrylamide is formed in coffee beans during the roasting process. It is then released into coffee itself when the coffee is brewed. In April of 2010,

- that to require a warning violates the defendants' first amendment right of free speech; and
- that the California requirement of a Proposition 65 warning is preempted by federal law.

During the second phase, assuming none of the affirmative defenses prevails, the plaintiff would be required to make its case that the Prop. 65 warning requirement was violated by the defendants. The defense in the first phase was conducted on the part of the defendants as a group by Starbucks, Green Mountain, J.M. Smucker, and Kraft Foods Global. Judge Berle released his tentative decision on the three affirmative defenses on June 25. The lead attorneys for the defense are Michele Corash and Robin Stafford with Morrison & Foerster. Raphael Metzger, with Metzger Law Group represented

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No Significant Risk The defendants conceded that their coffee contains acrylamide. However, they argued that their coffee as a whole mixture does not create a significant risk of cancer. Even though the acrylamide in the coffee, when measured by itself, might exceed significant risk levels, this exposure is counterbalanced by some of the other thousand or so chemicals in the coffee mixture that reduce cancer risk.

Judge Berle rejects this argument. He cites OEHHA regulations requiring that a defendant asserting a "no significant risk" defense must prove that defense by relying on the "level in question" of the particular listed carcinogen on which the litigation is based--in this case acrylamide. The defendants, says Judge Berle, presented a risk assessment of exposure to the coffee mixture. However, coffee by itself is not a Prop. 65 listed carcinogen. The defendants, noted the judge, failed to present evidence indicating that the level of acrylamide in their products falls below the no significant risk level. Because the burden of proof in an affirmative defense falls on the defense, the defendants no significant risk argument fails.

Free Speech The defendants argued that requiring a Prop. 65 warning on their products violates their First Amendment free speech rights. Judge Berle notes that part of this argument is based on the defendants' contention that there is no risk from coffee itself; the same argument that the judge has already rejected. He also notes that commercial speech enjoys less protection under the First Amendment.

Preemption The defendants' argued that requiring them to place a Prop. 65 warning on their product would constitute a "misbranding" under the federal Food, Drug and Cosmetics Act and is thereby preempted by that Act. Judge Berle notes that this argument is dependent on the success of their first argument?that coffee as an entire mixture does not create a significant risk?an argument that the defendants have already lost.

What Now? The defendants have until July 16 to raise any objections they have to this proposed opinion. Assuming Judge Berle does not change his mind (which is unlikely) the case will move on to Phase Two--if the defendants do not settle before then.

Resources for this article

1. Nonprofit Sues Coffee Chains Over Alleged Prop 65 Violations
https://www.prop65clearinghouse.com/articles/2830

2. OEHHA Will Restart Acrylamide Regulatory Process
https://www.prop65clearinghouse.com/documents/2076