

Coffee Regulations Offer Affirmative Defense in Proposition 65 Suit

On July 15, 2020, a California state court made an important ruling upholding the validity and application of regulations exempting coffee from Proposition 65 warnings.

Better known as Proposition 65, the California's Safe Drinking Water and Toxic Enforcement Act of 1986 requires businesses that sell consumer products—including food and beverages—to notify Californians about certain chemicals that are in those products. The court's ruling means that companies may use a special coffee exemption as an affirmative defense to allegations that they violated the state's warning requirements.

In [June](#) 2019, California's Office of Environmental Health Hazard Assessment (OEHHA) approved regulations that exempted coffee from Proposition 65 warnings. In the past, coffee companies have been targeted for their alleged failure to provide warnings about the presence of acrylamide in coffee, a chemical that is produced during the coffee roasting or brewing process. In 2018, the U.S. Food and Drug Administration (FDA) [noted](#) that Proposition 65 warnings for coffee "would be more likely to mislead consumers than to inform them."

Despite the FDA's public announcement and OEHHA's regulation exempting coffee products, serial Proposition 65 plaintiff Council for Education and Research on Toxics (CERT) continued to pursue claims alleging that coffee companies failed to provide adequate Proposition 65 warnings on their coffee products. CERT alleged that OEHHA's regulatory exemption was unenforceable because the agency failed to consider its prior scientific conclusions and contradicted a strict interpretation of Proposition 65's statutory language.

The recent ruling by the Superior Court of California, County of Los Angeles allows the coffee companies to use OEHHA's coffee exemption as an affirmative defense in the ongoing CERT lawsuit.

Takeaway

While the state court's decision is unlikely to end this long-brewing litigation over coffee warnings, it is an important step forward as OEHHA's 2019 coffee exemption passed a critical test. Namely, can private litigants use the regulation as an affirmative defense against allegations of a Proposition 65 violation? The answer is a clear "yes."

This decision is an important development because the potential risks of a Proposition 65 violation are significant. Penalties range up to \$2,500 per violation per day. So far this year, Proposition 65 settlements have resulted in civil penalties that have exceeded \$4 million.

The ability to raise a state regulation as an affirmative defense to a claim that companies violated state law seems straightforward. Like so many things with Proposition 65, complexities quickly arise. It remains important that food and beverage companies doing business in California carefully monitor litigation trends, develop protocols to identify "high-litigation-risk" products, respond promptly to Proposition 65 notices, and seek out experienced counsel to mitigate and respond to Proposition 65 risks.

Authors



[Kristine E. Kruger](#)

Senior Counsel

KKruger@perkinscoie.com [206.359.3111](tel:206.359.3111)



[Thomas \(Tommy\) Tobin](#)

Counsel

TTobin@perkinscoie.com [206.359.3157](tel:206.359.3157)



[Jasmine Wetherell](#)

Partner

JWetherell@perkinscoie.com [310.788.3294](tel:310.788.3294)

Explore more in

[Food & Beverage](#) [Food & Consumer Packaged Goods Litigation](#) [Retail & Consumer Products](#)

Related insights

Update

[Employers and Immigration Under Trump: What You Need To Know](#)

Update

'Tis the Season... for Cybercriminals: A Holiday Reminder for Retailers