

## **Notable Ruling: Precedent-Setting Proposition 65 Pre-emption Decision Involving Breakfast Cereal**

Last week, the California Court of Appeal held that a plaintiff's suit seeking to require Proposition 65 acrylamide based cancer warnings on 59 popular breakfast cereals was pre-empted by federal nutrition policies aimed at encouraging Americans to consume more whole grains and by FDA letters stating that any warnings should be deferred given the uncertain science on the risks to humans of acrylamide in food. This conflict pre-emption ruling should help convince courts in other contexts that state warning requirements should defer to more carefully articulated federal policies. Acrylamide, which forms in many foods during high-temperature cooking (e.g., frying, roasting, baking), has been a Proposition 65 listed substance since 1990, though its presence in food was not discovered until 2002. As the FDA has stated, there is much uncertainty if the levels of acrylamide in food pose any risk to humans. In this case, the manufacturers argued at summary judgment that a Proposition 65 warning would pose an obstacle to federal policies that encourage Americans to eat more whole grain foods and the FDA's guidance that the risks of reducing consumption of whole grain foods outweighed the debatable benefits of a Proposition 65 warning. The manufacturers produced evidence that Proposition 65 warning labels deter consumers from eating the cereals and other whole grain foods. Although the trial court recognized the existence of "an important national policy of increasing consumers' intake of whole grains," it held the manufacturers had not established conflict pre-emption because "there has been no acrylamide warning *requirement* at the federal level." A unanimous three-justice panel reversed the trial court, finding it had overlooked the FDA's guidance. The trial court "should have given weight to the FDA's analysis and concerns regarding a Proposition 65 warning and the obstacles it would pose to the fulfillment of its statutorily-driven dietary goals." Applying the appropriate deference to the FDA's determination, the appellate court found Plaintiff's Proposition 65 claim was pre-empted by federal law. This ruling shows that California courts should be deferential to federal policies that often reflect a far more nuanced understanding of risks and benefits than the blunt force of a Proposition 65 warning.

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