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MEMORANDUM

From: Martin Hahn
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Re: **California Appeals Court Reverses Decision Requiring Proposition 65 Warnings on Cereals for Acrylamide**

A California appeals court has reversed a trial court decision that would require businesses to post Proposition 65 cancer warnings on certain breakfast cereals for acrylamide. The court ruled that a Proposition 65 warning for acrylamide on these cereals would pose an obstacle to the federal scheme, and therefore is preempted by federal law. To support the ruling, the panel of appeals court judges referenced the advisory letters issued by the U.S. Food and Drug Administration (FDA) to the California regulators and Attorney General with "persuasive reasoning why Proposition 65 acrylamide warnings on whole grain cereals would mislead consumers and lead to health detriments." 1/ We do not know if the decision will be appealed to the California Supreme Court.

I. Proposition 65 and Acrylamide Litigation

For brief background, Proposition 65 requires the Governor of California to publish, at least annually, a list of chemicals known to the state to cause cancer or reproductive toxicity. Businesses are required to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone in California to a listed chemical. 2/ Acrylamide has been a listed Proposition 65 carcinogen since 1990. 3/ In April 2002 Swedish researchers discovered acrylamide is commonly produced in many plant-based human foods as a byproduct of high-temperature cooking. Since then, the California Attorney General and plaintiff's lawyers have filed numerous lawsuits in California seeking to impose Proposition 65 warning requirements on food products for acrylamide. For example, in 2005, the Attorney General in California sued several food companies for selling potato chips and French fries that contained acrylamide. Since then, the plaintiff's lawyers have targeted many other companies and food products that contain acrylamide.

The current case alleges that 59 breakfast cereals manufactured by various food companies and sold in California contain acrylamide and are required to include cancer and reproductive toxicity warnings under Proposition 65. The industry moved for summary judgement on two distinct preemption grounds: (1) the Proposition 65 acrylamide warning requirements on cereals is expressly preempted by the Nutritional Labeling and Education Act (NLEA) because such warnings are not identical to the FDA regulations authorizing certain health claims on cereals; and (2) the Proposition

1/ *Post Foods, LLC v. Superior Court* (July 16, 2018, B284057) Cal.App.2d at 24.
2/ Cal. Health and Safety Code § 25249.6.
3/ Acrylamide is also currently listed under Prop 65 as causing reproductive toxicity.

65 warning would pose an obstacle to federal nutrition policies and programs aimed to increase Americans' consumption of whole grain cereals containing fiber and important vitamins and minerals. The trial court denied the motion on both grounds, ruling that the Proposition 65 warning is not preempted. The industry defendants appealed the trial court's ruling on ground (2) and the appellate court focuses specifically on whether the warning would be preempted because it poses an obstacle to the federal nutritional policies and programs.

II. California Appeals Court's Ruling

The Appeals Court reversed the trial court's decision and found a Proposition 65 warning for acrylamide on these cereals would pose an obstacle to the federal scheme, and therefore is preempted by federal law. The panel of judges noted there are many federal statutory directives promoting whole grains consumption in the United States. For example, the panel noted that federal law authorizes the establishment of Dietary Guidelines for Americans that encourage Americans to eat at least 48 grams of whole grains per day. 4/ The panel also noted other federal laws such as the special supplemental nutrition program for women, infants, and children (WIC), which mandate that at least half of the cereals authorized on a State Agency's food list have at least 51% whole grain. 5/

The appellate court also gave great weight to the statements issued by FDA in advisory letters to the California regulators and the Attorney General. In these letters, FDA states that:

> "[A] requirement for warning labels on food might deter consumers from eating foods with such labels. Consumers who avoid eating some of these foods, such as breads and cereals, may encounter greater risks because they would have **less fiber and other beneficial nutrients in their diets**. For these reasons, premature labeling requirements would conflict with FDA's ongoing efforts to provide consumers with effective scientifically based risk communication to prevent disease and promote health." (emphasis added) 6/

The court reasoned that California courts should focus on a federal agency's explanation of how state law affects the federal regulatory scheme. In this case, the FDA letters were "thorough, consistent, and contained persuasive reasoning why Proposition 65 acrylamide warnings on whole grain cereals would mislead consumers and lead to health detriments." 7/

The plaintiff argued that, even if conflict preemption applies, not all of the breakfast cereals subject to the challenge contain whole grains. The court responded by referring to the above FDA statement on the "fiber and other beneficial nutrients" and noted that several of the cereals "contain lipids and folic acid," and also are consistent with "FDA nutritional guidelines that identify folic acid and dietary lipids as qualifying for health claims." 8/

4/ 7 U.S.C. §5341.
5/ 42 U.S.C. §1786 and 7 C.F.R. §246.10.
6/ Letter from FDA Deputy Commissioner Lester Crawford to Joan E. Denton, Director of California's Office of Environmental Health Hazard Assessment (OEHHA), July 14, 2003; Letters from FDA Director Terry Troxell of the FDA's Office of Plant and Dairy Foods, Center for Food Safety and Applied Nutrition to Edward Weil, Deputy Attorney General of California, and Joan E. Denton, Chief Counsel of OEHHA, March 2006.
7/ *Post Foods, LLC*, *supra* note 1, at 24.
8/ *Id.* at 27–28.

III. Related Developments

The decision represents another development on the application of Proposition 65 to the food industry. On June 15, the California Office of Environmental Health Hazard Assessment (OEHHA) announced a proposed regulation clarifying that exposures to Proposition 65 chemicals in coffee do not pose a significant cancer risk. In essence, the proposed regulation, once adopted, would exempt coffee products from Proposition 65 carcinogen warning requirements, to the extent that these carcinogens are created by and inherent in the process of roasting coffee beans or brewing coffee. The public hearing for the proposed regulation will be on August 16th and OEHHA accepts public comments until August 30th.

Also earlier this year, in February, 2018, the U.S. District Court for the Eastern District of California issued a preliminary injunction prohibiting California from implementing its "false and misleading" Proposition 65 labeling requirement for the herbicide glyphosate. The court reasoned that it is inherently misleading for a warning to state that a chemical is known to the state of California to cause cancer based on the finding of one organization, when apparently all other regulatory and governmental bodies have found the opposite.

The plaintiffs have not yet indicated whether they will file an appeal to the Supreme Court. If an appeal is filed and the Supreme Court of California decides to hear the case, we will need to wait until that decision to determine the impact of this ruling on the food and beverage industry.

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We will continue to monitor Proposition 65 litigation and regulation. Please contact us if you have any questions.