

Federal Judge Enjoins Prop 65 Glyphosate Warning

February 27, 2018

Food, Beverage, and Dietary Supplements

Yesterday (February 26, 2018), six days after hearing the motion, Judge William B. Shubb of the U.S. District Court granted, in part, a preliminary injunction, enjoining California's Proposition 65¹ warning requirement for glyphosate. The court concluded that the Plaintiffs had demonstrated a likelihood of success on the merits that the State's glyphosate warning requirement violates the First Amendment by compelling Plaintiffs to make false and misleading statements about their products.

The case was filed against the State by the National Association of Wheat Growers² last November, four months after California added glyphosate (a main ingredient in the herbicide Roundup) to its Prop 65 list of chemicals.

The court's First Amendment analysis concludes that the glyphosate warning would be "inherently misleading"

Under *Zauderer*,³ the court conducted its First Amendment analysis of the glyphosate warning requirement, finding that California had listed glyphosate under Prop 65 as a carcinogen based on only one authority's conclusion that the chemical was "probably carcinogenic," a conclusion supported largely by animal studies and in contrast to the conclusions of several other authorities.⁴ Because Prop 65's "clear and reasonable" warnings are required to state that the

¹ California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5-25249.14 ("Prop 65").

² See *National Association of Wheat Growers et al v. Lauren Zeise, director of OEHHA, et al*, U.S. District Court, Eastern District of California, No. 17-at-01224.

³ See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (holding that the government may require commercial speakers to disclose "purely factual and uncontroversial information" about commercial products or services, as long as the "disclosure requirements are reasonably related" to a substantial government interest and are neither "unjustified [n]or unduly burdensome.").

⁴ The conclusion came from the International Agency for Research on Cancer ("IARC"). The court found this conclusion to be in contrast to conclusions of other credible authorities, including the EPA, EU authorities, and the WHO stating, "It is inherently misleading for a warning to state that a chemical is known to the state of California to cause cancer based on

listed chemical is “known to . . . cause cancer,” the court concluded that the glyphosate warning would be “inherently misleading.” The court enjoined the warning after concluding that the Plaintiffs had also established irreparable harm and that the equities weighed in the Plaintiffs’ favor.

The court’s First Amendment analysis may provide helpful precedent for other Prop 65 provisions

The court’s decision is an important development in Prop 65 jurisprudence, albeit a district court decision, because it holds that the First Amendment bars the government from compelling a company to say that its product contains a chemical that causes cancer based on the conclusions of a single authority when other similarly credible authorities have concluded to the contrary. This ruling could play an important role in modifying other controversial Prop 65 provisions, including that OEHHA’s 1,000 fold safety factor (which is used to set the level at which a warning is required for reproductive and developmental toxicants) is unconstitutional under circumstances in which the actual level of the toxicant in a given product is well below that which would cause reproductive or developmental toxicity. This First Amendment argument against the 1,000 fold safety factor is bolstered in that most, if not all, other regulatory agencies and reputable scientific organizations do not apply a 1,000 fold safety factor, and this safety factor was imposed as a result of voter referendum rather than by an authoritative scientific body.

Who is protected by the court’s order?

The court’s order enjoins “defendants, their agents and employees, all persons or entities in privity with them, and anyone acting in concert with them . . . from enforcing as against plaintiffs, plaintiffs’ members, and all persons represented by plaintiffs, California[’s] . . . requirement that any person in the course of doing business provide a clear and reasonable warning before exposing any individual to glyphosate.” The court denied Plaintiffs’ request for a preliminary injunction enjoining the State’s listing of glyphosate under Prop 65. In light of the court’s order concluding that the listing of glyphosate was not unconstitutional, the glyphosate listing becomes operative July 7, 2018. Moreover, because the court’s order, on its face, enjoins only actions that target the Plaintiffs (and those represented by the Plaintiffs), it is unclear what impact the preliminary injunction will have on 60-day notices targeting companies not covered by the order.

the finding of one organization (which as noted above, only found that substance is probably carcinogenic), when apparently all other regulatory and governmental bodies have found the opposite, including the EPA, which is one of the bodies California law expressly relies on in determining whether a chemical causes cancer.”

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