



Federal Judge Issues Final Injunction Banning Prop. 65 Warning for Glyphosate

PROPOSITION 65, WARNINGS, CHEMICALS OF INTEREST, FIRST AMENDMENT, LITIGATION, PESTICIDES, OEHHA

By ROGER PEARSON, June 25, 2020

On June 22, U.S. District Court Judge William Shubb issued his final ruling in **National Association of Wheat Growers v. Zeise**¹, banning enforcement of the requirement that manufacturers of glyphosate containing pesticides attach a Proposition 65 cancer warning to their products. The decision by Judge Shubb, of the Eastern District of California, is based on his conclusion that the required warning violates the First Amendment of the U.S. Constitution.

Glyphosate is the active ingredient in several fungicides, including the widely used product Roundup manufactured by Monsanto (now owned by Bayer). In 2015 the International Agency for Research on Cancer (IARC) determined that glyphosate is a "probable human carcinogen." Based on that determination California's Office of Environmental Health Hazard Assessment (OEHHA) in July of 2017 listed the substance as a Prop. 65 carcinogen [see **OEHHA Lists Glyphosate After Supreme Court Rejects Monsanto Plea**², July 17, 2017]. The listing would have required manufacturers of glyphosate fungicides containing glyphosate to label their products as containing a Prop. 65 carcinogen as early as July of 2018.

A coalition of grower groups joined Monsanto in filing a lawsuit to compel a federal judge to invalidate the labeling requirements as a violation of the First Amendment. That argument relied, primarily, on the U.S. Supreme Court's *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* [471 U.S. 626 (1985)] decision. That case recognized a narrow exception to the First Amendment ban on compelled speech allowing a government to compel commercial speakers to disclose "purely factual and uncontroversial" information about their products. The plaintiffs argued that notwithstanding the IARC finding the vast majority of government authorities have found glyphosate not to be carcinogenic and thus the OEHHA warning requirement violates the *Zauderer* standard.

In February of 2018, OEHHA was preliminarily enjoined from enforcing its labeling requirement by Judge Shubb, who provisionally agreed with the plaintiffs' first amendment claim. However, the judge delayed his final ruling on the substance of the claim pending the Ninth Circuit Court of Appeal's decision on two then-pending cases raising the same *Zauderer*-based first amendment claims. The Ninth Circuit subsequently reached its decision on the two Ninth Circuit cases [see **Ninth Circuit Invalidates San Francisco's Sugary Beverage Warning Law on First Amendment Basis**³, February 25, 2019 and **Ninth Circuit Upholds Berkeley Cell Phone Warning Ordinance**⁴, August 14, 2019].

In August of last year U.S. EPA sent a letter to producers of glyphosate-containing pesticide products warning them that it would consider any product containing a Prop. 65 warning to be "misbranded" within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Both the plaintiffs and the California Attorney General's office representing OEHHA filed summary judgment motions with Judge Shubb. The plaintiffs sought the judge's validation of their first amendment claim, while the AG sought to have the case dismissed. Judge Shubb's June 22 ruling comes down decisively on the side of the plaintiffs.

Ripeness

In his ruling on the joint motions Judge Shubb first dismisses the AG's argument that the case is not yet "ripe" for ruling. The AG argued that the plaintiffs face no real risk in the near future that they will incur any injury as a result of the warning requirement. In support of this argument the AG points out that prior to the effective date of the warning requirement it adopted a "safe harbor" level for exposure to glyphosate and that all indications are that levels in the plaintiffs' products are well below that level. However, Judge Shubb cites evidence submitted by the plaintiffs of numerous instances of Prop. 65 defendants being sued even though they claimed exposures below the safe harbor. A plaintiff can initially file a valid Prop. 65 complaint as long as it can demonstrate some level of the Prop. 65 listed chemical in its product. In order to prevail on its safe harbor claim, the defendant must pay to have its product tested, thus incurring considerable cost. The plaintiffs thus face an injury, which allows them to maintain the lawsuit.

The Merits

In order to evaluate the merits of the plaintiffs' first amendment claim, Judge Shubb first deals with the "level of scrutiny" to apply to the alleged free speech infringement. This involves a decision between two Supreme Court cases; the *Zauderer* decision and the earlier decision in *Central Hudson & Electric Corp. v. Public Service Commission*, [447 U.S. 557 (1980)].

Under *Zauderer* the government can require commercial speakers to disclose "purely factual and uncontroversial information" about their products and courts are instructed to apply a lower level of scrutiny in deciding whether the alleged free speech infringement is valid. In this case the plaintiffs argued that the Prop. 65 warning that California is requiring is neither purely factual nor uncontroversial. They pointed out that the IARC finding of carcinogenicity was an outlier that so far has not been supported by any other major health agency or organization, including U.S. EPA, several European health agencies, and Canada—all of which have found glyphosate to be non-carcinogenic.

Judge Shubb notes in order to evaluate whether it is true or misleading, the required warning should be evaluated on the basis of its understanding by the average consumer. Despite the warning's qualification that it is "known to the state" to cause cancer, the average consumer is going to understand the warning to mean that glyphosate causes cancer. Since this is contrary to the accepted authority, Judge Shubb agrees with the plaintiffs that it fails the *Zauderer* test.

The AG argued that Judge Shubb should take into account research that has appeared since the 2015 IARC determination that supports that group's conclusion. However, Judge Shubb notes that none of that recent research has so far caused any of the other government agencies to reverse their conclusions. Judge Shubb also discounts the 2018 decision of the California Court of Appeal upholding the OEHHA listing decision in **Monsanto Company v. Office of Environmental Health Hazard Assessment, Opinion, F075362⁵⁾** [see **State Appellate Court Approves Prop. 65 Glyphosate Listing⁶⁾**, April 30, 2018]. Judge Shubb notes that this decision did not deal with the

plaintiffs' First Amendment claim. The judge also rejects as irrelevant the three recent lower court jury decisions finding that Roundup causes cancer (now on appeal) for the same reason.

Judge Shubb also rejects the AG's argument that the plaintiffs should have accepted one of several alternative warnings offered in an attempt to settle the case. Each of these warnings would have broadened the required warning by allowing the plaintiff manufacturers to in some way indicate that there is argument in the scientific community about the merits of IARC's cancer conclusion. Judge Shubb notes that each of these alternatives suffers from the same flaws as the state's mandated warning; i.e., that they still require the plaintiffs to admit that their products cause cancer. The Judge also points out that each of the optional warnings seem to violate the state's own regulations on what is a permissible warning to the extent that they qualify the statement of the product's carcinogenicity.

The second Supreme Court decision, *Central Hudson*, which applies an intermediate level of scrutiny to the infringement claim, would allow the warning requirement if the state can show that it directly advances a valid government interest and the burden it imposes is no more than is necessary to advance that interest. Judge Shubb notes that the preamble to Prop. 65 states that it is designed to inform the citizens of the state about exposures to cancer causing substances. Judge Shubb agrees that this is a valid government interest. However, for the reasons already stated, he disagrees that in this case the glyphosate warning meets that purpose. He also concludes that the warning fails the second test; in that there are other, less intrusive ways to inform the citizens about the substance's cancer risk.

What Now?

It will now be up to the State of California as to whether it wishes to appeal this decision to the Ninth Circuit Court of Appeals. In the meantime nothing changes since all this decision does is change a preliminary injunction prohibiting enforcement of the warning requirement against glyphosate manufacturers into a permanent injunction. It also should be noted that Judge Shubb's decision does not reverse the listing of glyphosate as a Prop. 65 carcinogen. It only prohibits enforcement of the warning requirement that normally results from that listing.

Attorneys for the plaintiffs were Philip J. Perry, Richard P. Bress and Andrew D. Prins with the lawfirm Latham & Watkins.

Susan S. Flering, Supervising Deputy Attorney General along with Deputy Attorney Generals Laura J. Zuckerman, Dennis A. Ragen, and Heather C. Leslie represented the State of California.

Resources for this article

1. National Association of Wheat Growers v. Zeise

<https://prop65clearinghouse.com/cases/4881>

2. OEHHA Lists Glyphosate After Supreme Court Rejects Monsanto Plea

<https://prop65clearinghouse.com/articles/13123>

3. Ninth Circuit Invalidates San Francisco's Sugary Beverage Warning Law on First Amendment Basis

<https://prop65clearinghouse.com/articles/13724>

4. Ninth Circuit Upholds Berkeley Cell Phone Warning Ordinance

<https://prop65clearinghouse.com/articles/13904>

5. Central Hudson & Electric Corp. v. Public Service Commission

<https://casetext.com/case/central-hudson-gas-electric-corporation-v-public-service-commission-of-new-york>

6. Monsanto Company v. Office of Environmental Health Hazard Assessment, Opinion, F075362

<https://prop65clearinghouse.com/documents/26677>

7. State Appellate Court Approves Prop. 65 Glyphosate Listing

<https://prop65clearinghouse.com/articles/13420>