Sugary Drink Warning Labels

A Legal Update

ChangeLab Solutions

Background

As evidence increasingly links sugary drink consumption with poor health outcomes, many state and local governments are considering policy responses. One approach that continues to attract attention is requiring warnings that educate consumers about the risks of sugary drink consumption.

In 2016, the San Francisco Board of Supervisors enacted an ordinance that would require certain sugary drink advertisements to include the following text:

> **WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.**[1]

Several states have introduced similar legislation requiring warnings on sugary drink packaging.[2]

The San Francisco ordinance never went into effect because the beverage industry sued and a court stayed the law until the lawsuit was resolved. In its most recent opinion, the Ninth Circuit Court of Appeals found that the ordinance likely violated the First Amendment because the warning requirement was "unduly burdensome." The opinion, however, did not foreclose the possibility that San Francisco could amend the ordinance to withstand legal scrutiny.

This legal update provides an overview of three recent court cases — including the San Francisco case — that are relevant to sugary drink warnings:

1. The US Supreme Court's 2018 decision on a California law requiring certain clinics that offer pregnancy-related services (but not abortions) to provide information to patients about the availability of free and low-cost family planning services from the state (*National Institute of Family and Life Advocates [NIFLA] v. Becerra*)[3]
2. The 2019 *en banc*[4] decision of the Ninth Circuit Court of Appeals on San Francisco's ordinance requiring warnings on sugary drink advertisements (*American Beverage Association [ABA] v. City and County of San Francisco*)[5]
3. The 3-judge decision of the Ninth Circuit Court of Appeals on Berkeley, California's law requiring cell phone retailers to provide a disclosure about radio-frequency radiation (*CTIA — The Wireless Association [CTIA] v. City of Berkeley, California*).[6]

Although no court to date has ruled definitively on the legality of sugary drink warnings, these cases nonetheless provide helpful guidance to policymakers and advocates who remain interested in sugary drink warning labels as a policy approach.

Discussion

The First Amendment to the US Constitution limits the government's ability to regulate many types of speech. This limitation also affects the government's ability to *require* a corporation or business to speak (known as *compelled speech*). Requiring an industry to put a safety warning on products or post a warning on business premises constitutes compelled commercial speech that is subject to a certain amount of First Amendment protection.

In the context of traditional health and safety warnings, First Amendment law requires that (a) the text of the warning be "factual" and "uncontroversial"; and (b) the warning requirement not be "unduly burdensome" or "unjustified."[7] The recent court decisions provide some relevant information on the meaning of *factual* and *uncontroversial*, as well as what is considered unduly burdensome or unjustified.

> Note that warning labels raise other legal issues as well. For example, to avoid a conflict with the federal Nutrition Labeling and Education Act, mandated language for disclosures on menus or packaging must constitute a warning and cannot include anything required by the federal nutrition labeling scheme. For more information on these issues, please contact ChangeLab Solutions.

I. The text of the warning must be "factual" and "uncontroversial."

The Supreme Court held in *NIFLA v. Becerra* that courts should use a lenient standard of review only when a compelled disclosure involves "purely factual and uncontroversial" information.[8] There is no binding legal precedent that determines exactly what these terms mean in the context of sugary drink warning labels. (In its *en banc* opinion, the Ninth Circuit did not reach the issue of whether the language of San Francisco's warning was factual and uncontroversial, so no court has reviewed specific sugary drink warning language using this standard.) Still, most courts ruling in this area have suggested that *factual* refers to statements of fact as opposed to statements of opinion, and that in order to qualify as uncontroversial, those statements of fact need to be true: based on evidence and well accepted. In other words, there must be no serious controversy *about the facts* included in the required disclosure.

The *NIFLA* case introduced a possible additional definition of *uncontroversial:* not subject to intense political debate. The Court noted in passing that abortion, which was the issue at hand in that case, was "anything but an 'uncontroversial' topic."[9] It's not clear that the Court meant to establish a new standard for uncontroversial, much less one that relies on a subjective analysis.[10] Few commercial disclosures relate to topics as inherently controversial as abortion in the United States, and the messages that commercial entities might be required to carry rarely involve hot-button religious or political issues, as was the case with the clinic disclosure law at issue in *NIFLA*. As the Ninth Circuit observed recently, "We do not read the [Supreme] Court [in *NIFLA*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial."[11]

Despite the changing legal terrain, these recent cases provide some lessons for governments interested in requiring disclosures related to sugary drinks:

- At the very least, the government must be able to provide substantial scientific and factual evidence to support the connection between sugary drink consumption and any health outcome listed in the warning. It would be advisable to focus on outcomes on which there is greatest scientific consensus.
- In the Ninth Circuit decision on San Francisco's warning requirement, 2 (out of 11) judges suggested that the text "Warning: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay" is not factually accurate because (a) it does not distinguish between type 1 and type 2 diabetes and (b) only people with type 2 should be warned.[12] While not binding law, this concurring opinion suggests that it may be more legally defensible to include the words *type 2* before *diabetes* in any warning language linking sugary drink consumption with diabetes.
- The same concurrence (again, not binding law) suggested that adding the word *may* (ie, "Drinking beverages with added sugar(s) may contribute to obesity, diabetes, and tooth decay") might make the warning language more clearly factually accurate.[13] The judges were concerned that without the addition of *may*, the warning's language could lead the average reader to conclude that any given person *will* contract one of the warned-about diseases if they consume a sugary drink.[14] Including *may* would likely lessen the risk that a court would find the warning statement to be factually inaccurate. It is true, however, that many existing required health warnings (eg, for tobacco products) do not include the word *may* and have not been challenged for lack of a qualifier. Nonetheless, using *may* is a more cautious approach.

BOTTOM LINE: While there is still no definitive ruling on what constitutes a legally defensible warning for sugary drinks, it may be advisable to add the words *type 2* before *diabetes*. It may also be advisable to use *may contribute to* instead of *contributes to*. Whatever language is employed should be grounded in the best available evidence, and each word (eg, *contributes to* vs. *causes*) must be chosen carefully based on the best available evidence.

II. The warning requirement cannot be "unduly burdensome" or "unjustified."

The Ninth Circuit decision reviewing San Francisco's sugary drink warning requirement focused the "unduly burdensome" inquiry on the size of the warning. The San Francisco law would have required the warning to occupy 20% of a sugary drink advertisement. The court found that the 20% requirement was, on the evidence before it, unduly burdensome.[15] To show that sugary drink warnings are effective, the city had relied on a study in which the warning occupied only 10% of the image yet effectively communicated the health risks of sugary drink consumption. Therefore, the court reasoned, the city might have been able to accomplish its goals with a smaller warning.[16] (Note that the court placed the burden on the government to establish that a disclosure is not unduly burdensome or unjustified.) The court explicitly declined to determine whether 10% — or any other specific size — would be legally acceptable. It's possible that if the city were to provide more or different evidence, even 20% could be valid; however, it seems that a 10% requirement would have been more likely to be upheld.

- The Ninth Circuit's analysis of the size of warnings applies specifically to warnings on billboards and other outdoor advertisements. For a policy requiring warnings in another context (eg, at the point of sale, on containers), the "unduly burdensome" requirement would need to be applied differently. In *CTIA*, the court looked at the degree to which the disclosure requirement "interfere[d] with advertising or drown[ed] out messaging by the cell phone retailers."[17] Similarly, for warnings on containers, a court might look at what space is left for manufacturers to include their own information after including the warning as well as the other information required to be included by the US Food & Drug Administration, such as the Nutrition Facts panel.
- If other courts proceed the way the Ninth Circuit did, looking at evidence of effectiveness based on the size of warnings will be important. It will be safest to require the minimum size for which there is evidence of effectiveness. If there is no evidence directly on point, it may be helpful to look at evidence from other contexts (eg, tobacco, alcohol) and to examine the requirements for other information that must be disclosed (eg, the Nutrition Facts panel). A court might look at the font size required for the Nutrition Facts panel, for example, and determine that a similar font size would be sufficient for the warning language.

BOTTOM LINE: Although what is considered unduly burdensome will depend heavily on the context, the size of a warning should be closely tied to the minimum size that research deems effective. When determining the proper size for a warning, the government should also consider the degree to which the warning language and any required graphics limit the space left for the manufacturer or retailer to include their own messaging.

For more information on sugary drink warning labels, please contact ChangeLab Solutions**.**

Notes

1 San Francisco, Cal., Health Code § 4203.

2 *See, eg,* S.B. 347 (Cal. 2019); S.B. 307 (Haw. 2017); S.B. 06435 (N.Y. 2016); H.B. 2798 (Wash. 2016).

3 Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

4 *En banc* refers to a hearing in front of all (or, in the case of the Ninth Circuit, most) of the judges on a particular court, rather than a smaller panel of judges.

5 Am. Beverage Ass'n v. City & County of San Francisco (*ABA*), 916 F.3d 749 (9th Cir. 2019).

6 CTIA – The Wireless Corp. v. City of Berkeley, Cal. (*CTIA*), 928 F.3d 832 (9th Cir. 2019).

7 *See* Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio, 471 U.S. 626 (1985). *Accord* Ibanez v. Florida Dep't of Business & Prof. Reg., Bd. of Accountancy, 512 U.S. 136 (1994); Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229 (2010). Although the Supreme Court has not applied *Zauderer* to compelled commercial disclosures when the government interest is something other than preventing consumer deception, federal appeals courts have done so unanimously. *See, e.g., ABA*, 916 F.3d 749; Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18 (D.C. Cir. 2014) (overruling prior cases, including R.J. Reynolds Tobacco Co. v. F.D.A., 696 F.3d 1205 (D.C. Cir. 2012)); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001). Unless and until the Supreme Court decides the issue otherwise, this can be considered the prevailing and accepted standard.

8 *NIFLA*, 138 S. Ct. at 2372 (citing *Zauderer*, 471 U.S. at 651).

9 *Id*. at 2373.

10 *See, eg,* Nationwide Biweekly Admin., Inc. v. Owen, 873 F.3d 716, 732 (9th Cir. 2017). *Accord Zauderer*, 471 U.S. 626.

11 *CTIA*, 928 F.3d at 845.

12 *ABA*, 916 F.3d at 765-67. The judges' rationale in distinguishing between type 1 and type 2 diabetes was that there is no research to support a connection between sugary beverage consumption and development of type 1 diabetes. Additionally, the judges noted that consumption of sugary drinks is sometimes medically indicated for type 1 diabetics.

13 *Id*. at 766.

14 *Id*.

15 *Id*. at 757.

16 *Id*.

17 *CTIA*, 928 F.3d 832, 849 (9th Cir. 2019).

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