

## First Amendment Still Trumps Prop 65

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Sunday, June 17, 2018

Recently, a federal judge sitting in the Eastern District of California (Sacramento), for the first time, refused to require a manufacturer to place a Prop 65 warning on its product based on a finding that the requirement would violate the company's First Amendment rights. We have been following this developing issue for some time. (See prior posts [here](#), [here](#), and [here](#).)

On June 11, 2018, Judge Walter Shubb held a hearing to consider California Attorney General Xavier Bacerra's motion to alter or amend the court's February 2017 order. A motion for reconsideration may be granted if the court: (1) is presented with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law.

The Attorney General (AG) claimed that the reconsideration of the order was warranted in light of new evidence and because the court erred in the first instance in determining that a Prop 65 warning was not proper regarding the pesticide chemical Glyphosate. The court rejected the argument that the only new evidence that could not have been presented to the court in February 2017 was the CA State Appellate Court decision that adopted a safe harbor level for Glyphosate and additional information posted on the CA Office of Environmental Health Hazard Assessment (OEHHA) website. Judge Shubb's June 12th order reasoned that the "new" evidence did not change the court's conclusion that the original Prop 65 warning for Glyphosate is not purely factual and uncontroversial. Neither the safe harbor level for Glyphosate, information on the OEHHA website regarding the debate as to Glyphosate's toxic effects, nor the Appellate decision, which did not address the impact of the First Amendment, were relevant to the question of whether the warnings required by Prop 65 and corresponding regulations override Monsanto's First Amendment rights.

The AG made additional arguments that new evidence supported its motion to overturn the court's February 2017 decision:

1. The existence of new sources that support the position that glyphosate causes cancer, as had been concluded by the United Nations International Agency for Research on Cancer (IARC), which was the agency opinion that OEHHA relied upon to determine that Glyphosate was carcinogenic; and
2. The AG's newly proposed alternative warnings.

The court rejected both arguments on the following grounds:

1. Additional support for IARC's position did not change the fact that the IARC came to its conclusion in the face of the opposite finding by an overwhelming majority of agencies that have reviewed the issue and determined that Glyphosate is not carcinogenic. The court reiterated that its analysis focused upon whether the position that Glyphosate causes cancer is a factual and uncontroversial position. And it is not.
2. The AG's first new proposed warning language: "[This product can expose you to Glyphosate] a chemical



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listed as causing cancer pursuant to the requirements of California law” is a distinction without a significant difference. The old warning states: [This product can expose you to Glyphosate], “a chemical known to the State of California to cause cancer.” The new warning also included a reference to [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov), and the court further noted that referring consumers to the website does not solve the problem. First, it is unknown what percentage of consumers, if any, would avail themselves of the opportunity to look up a warning online. Second, the AG conceded at the hearing that whether a warning is factual and uncontroversial is determined by looking at the warning, standing alone. The court thus stated: “A warning that is deficient under the First Amendment may not be cured by reference to an outside source.” The court also rejected the AG’s suggestion that the warning does not violate the First Amendment because Monsanto may provide its own additional information. Citing the recent U.S. Supreme Court decision issued on June 4, 2018, [\*Accord Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission\*](#), the court concluded: “Because the court cannot compel speech, it also cannot require speakers to affirm in one breathe that which they deny in the next.”

3. The AG’s second proposed warning added context to the debate as to Glyphosate’s alleged carcinogenicity by stating that the listing was based on IARC’s determination and that “[T]he US Environmental Protection Agency has tentatively concluded in a draft document that Glyphosate does not present a cancer hazard” and a citation to the Prop 65 website. The court held that this proposed warning was not “new” evidence. Interestingly, at the initial hearing in February, the AG specifically rejected the court’s proposal of a warning that would state that Glyphosate was a carcinogen as “determined by one of the agencies [IARC] but not by others” as such language would “dilute” the warning. Additionally, the court rejected the second proposal on the grounds that it:
  1. failed to accurately set forth the nature of the debate (that is, it conveys the false message that there is equal weight of authority for and against the proposition that Glyphosate causes cancer);
  2. a lengthy discussion on the warning regarding conflicting agency findings may not comply with the First Amendment; and
  3. a warning properly characterizing the debate appears to violate the AG’s own Settlement Guidelines that preclude using words that “contradict or obfuscate otherwise acceptable warning language.”

It is clear that the plaintiffs in this case have won another battle, but the First Amendment “war” with Prop 65 appears to be far from over. The stakes are high for both sides in this particular action and for other manufacturers who face the daily struggle with Prop 65 warnings that, by their very nature, are extended far beyond the borders of California.

We will continue to follow this case as well as any others that impact the application and reach of Prop 65.

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**Source URL:** <https://www.natlawreview.com/article/first-amendment-still-trumps-prop-65>