



Judge Concludes Requiring Prop. 65 Warning on Glyphosate Products Violates First Amendment

PROPOSITION 65, LITIGATION, OEHHA, FIRST AMENDMENT

By ROGER PEARSON, March 7, 2018

A federal judge has issued a preliminary injunction barring the Office of Environmental Health Hazard Assessment (OEHHA) or anyone else from enforcing Proposition 65's warning requirement for the recently listed pesticide ingredient glyphosate. The decision holds that the agricultural plaintiffs in the case are likely to succeed in their argument that to force a responsible party to place a warning on a product containing glyphosate violates the party's first amendment rights, because there is substantial evidence in the record that glyphosate does not cause cancer. **National Association of Wheat Growers v. Lauren Zeise, Memorandum and order re: motion for preliminary injunction, 2:17-cv-02401-WBS-EFB¹** (US Dist. Ct., Eastern Dist. of CA, memo., filed Feb. 26, 2018).

Glyphosate is the active ingredient in several herbicide brands, including Monsanto's Roundup, generally believed to be the most widely used herbicide in the world. OEHHA listed glyphosate last July as a substance "known to the state" as a carcinogen. The listing would require anyone exposing the public to glyphosate to place a Prop. 65 cancer warning on their product, beginning this July.

The listing was finalized by the agency administratively based on what is known by OEHHA as the Prop. 65 Labor Code listing mechanism [see **OEHHA Lists Glyphosate After Supreme Court Rejects Monsanto Plea²**, July 17, 2017]. OEHHA has interpreted the Proposition 65 statute as requiring it to list any substance that is found to be a "probable" human carcinogen by the International Agency for Research on Cancer (IARC), based on substantial evidence of carcinogenicity in either humans or experimental animals. IARC made such a finding in 2015.

Last November Monsanto and several agricultural associations filed this lawsuit in federal court [see **Monsanto and Farm Groups Sue to Overturn Glyphosate Listing³**, December 21, 2017]. The plaintiffs argued that numerous governments and other organizations have studied glyphosate and none of them have come to the same conclusion as IARC. The plaintiffs argued that if the listing is not voided agricultural producers would have three options, beginning this July they can:

- attach what they claim would be a "false and disparaging" Prop. 65 warning to their products,
- try to show that the glyphosate residual level in their products is below any safe harbor level ultimately established by OEHHA for glyphosate exposure, an option that would require expensive and difficult testing, or

- stop using the herbicide. The lawsuit included the following causes of action:
- that the listing will force producers to make false and misleading statements (i.e., the warnings) contrary to the First Amendment of the U.S. Constitution;
- that the listing is preempted by the Food, Drugs, & Cosmetic Act's prohibitions against misbranding of regulated products; and
- that the listing violates the Due Process Clause of the 14th Amendment to the U.S. Constitution in that OEHHA relied upon an IARC finding for which there is no rational basis. The Court's Decision

The suit landed in the court of Judge William B. Shubb of the U.S. District Court for the Eastern District of California. On February 26 Judge Shubb issued his decision on a motion by the plaintiffs seeking a preliminary injunction. The proposed injunction was based only on plaintiffs' first argument that requiring a warning would violate their first amendment rights. The plaintiffs asked that the injunction require OEHHA to void the listing itself and, alternatively, to prevent OEHHA from enforcing the warning requirement.

Ripeness

Judge Shubb first ruled on OEHHA's argument that the case is not "ripe" for decision. The agency claimed that the challenge is unripe, because plaintiffs might not end up needing to provide a warning if exposure to glyphosate in their products is below the "safe harbor" level that OEHHA is expected to finalize. Judge Shubb rejected this argument citing evidence provided by the plaintiffs that some parties had been sued even though their products were below the safe harbor level and that plaintiffs were likely to have to spend considerable sums on proving any safe harbor claim. Judge Shubb also rejected OEHHA's argument that the case is unripe, because the content of any warning has yet to be determined. Judge Shubb referred to his ruling on the substance of the case making it clear that any warning consistent with Prop. 65 would violate the plaintiffs' first amendment rights.

Substantive Decision

Judge Shubb first decided that the plaintiffs are unlikely to succeed in their claim that the first amendment requires OEHHA to void the listing itself. The judge pointed out that the first amendment only prohibits government action limiting a private individual's speech and has no applicability to government speech. In this case the listing by itself is simply a statement by the government.

However, Judge Shubb found merit in the plaintiffs' second ground for injunction; i.e., that forcing the plaintiffs to place a misleading label on their products violates the first amendment.

In order to obtain a preliminary injunction the plaintiffs must demonstrate: (1) that they are likely to succeed on the merits after a trial on the substance; (2) that not issuing the injunction would cause irreparable harm to the plaintiffs; (3) that a balance of the equities between the parties favors plaintiffs; and (4) that to grant the injunction is in the public interest.

The bulk of Judge Shubb's decision is devoted to the first requirement that the plaintiffs are likely to prove a first amendment violation by requiring a Prop. 65 cancer warning. Judge Shubb cited Supreme Court precedent that in forcing a business to make a particular statement against its will the government has the burden of proof to show that the statement is purely "factual and

uncontroversial." The government also has to show that even if a statement is literally true that it is nevertheless not misleading. OEHHA argued that requiring the standard Prop. 65 carcinogen warning that glyphosate is "known to the state of California to cause cancer" is literally true. Judge Shubb says that is irrelevant "if the required warning would nonetheless be misleading to the ordinary consumer." He then states:

"On the evidence before the court, the required warning for glyphosate does not appear to be factually accurate and uncontroversial because it conveys the message that glyphosate's carcinogenicity is an undisputed fact, when almost all other regulators have concluded that there is insufficient evidence that glyphosate causes cancer." The judge notes that it is "inherently misleading" for a warning to state that California has found that glyphosate causes cancer based on the finding of one organization, when all other government bodies have found the opposite.

Having found that the plaintiffs are likely to prove their first amendment violation, Judge Shubb then finds it easy to rule for plaintiffs for the other three elements noting that a first amendment violation pretty much determines satisfaction of those elements.

What Now?

At least for now Monsanto and other producers of glyphosate containing products will not have to provide warnings when the warning requirement becomes effective in July. Judge Shubb could still reach a different result after trial, or OEHHA can try to get the Ninth Circuit to intervene to overturn the injunction. Ultimately a substantive decision favoring plaintiffs is likely to be appealed to the Ninth Circuit.

Resources for this article

1. National Association of Wheat Growers v. Lauren Zeise, Memorandum and order re: motion for preliminary injunction, 2:17-cv-02401-WBS-EFB

<https://toxreports.com/documents/25985>

2. OEHHA Lists Glyphosate After Supreme Court Rejects Monsanto Plea

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

3. Monsanto and Farm Groups Sue to Overturn Glyphosate Listing

<https://toxreports.com/articles/13282>