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Court Blocks San Francisco's Push to Put Warning Labels on Ads for Sugary Drinks

By Ross Todd

A federal appellate court has blocked a San Francisco city ordinance that would have required health warnings on advertisements for sodas and other sugar-sweetened drinks.

An en banc panel of the U.S. Court of Appeals for the Ninth Circuit on Thursday found that the city's law compelled commercial speech and violated the First Amendment rights of the plaintiffs in the case, American Beverage Association, California Retailers Association, and California State Outdoor Advertising Association, who were represented by Latham & Watkins.

The San Francisco ordinance, enacted in June 2015, would have required certain advertising materials and billboards for drinks that included more than 25 calories per 12 ounces to include a label stating: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."

Writing for the majority in Thursday's opinion, Circuit Judge Susan Graber noted that although the city's expert had defended its requirement that the warning label cover 20 percent of the regulated ads, the expert had cited a study finding that smaller, less burdensome warning labels could be just as effective.

"On this record, therefore, the 20 percent requirement is not justified when balanced against its likely burden on protected speech," Graber wrote. "Defendants have not shown that the contrasting rectangular border containing a warning that covers 20 percent of the advertisement does not 'drown out' plaintiffs' messages and 'effectively rule out the possibility of having [an advertisement] in the first place.' "

The ruling, however, stopped short of saying whether a smaller label would be constitutional.

John Coté, a spokesman for San Francisco City Attorney Dennis Herrera, said that the decision was "solely about the size of the warning label."

Said Coté: "We're evaluating our next steps in light of this decision. But make no mistake: We're committed to protecting the health of San Francisco residents by allowing them to get factual information."

Latham's Rick Bress, who argued on behalf of the plaintiffs at the Ninth Circuit, called the ruling "an important vindication of First Amendment commercial speech rights."

"The Court agreed that the extraordinary size of the warning—20 percent of the overall ad—is 'not justified when balanced against its likely burden on protected speech,' " Bress said. He added that his clients continue to believe that the required disclosure was "inaccurate and controversial," points that multiple concurring judges raised.

Thursday's decision reaches the same outcome as a prior Ninth Circuit panel decision from 2017 penned by Judge Sandra Ikuta. Ikuta joined with the majority's decision to block the San Francisco law on Thursday but dissented from its reasoning. Ikuta found that the majority failed to apply the framework for analyzing when government-compelled speech violates the First Amendment, as outlined in *National Institute of Family & Life Advocates v. Becerra*. The 2018 U.S. Supreme Court decision found California requirements for crisis pregnancy centers to make certain notifications violated the First Amendment.

Judges Morgan Christen and Jacqueline Nguyen both filed separate concurrences, with Chief Judge Sidney Thomas joining Nguyen's.

A number of large firms and appellate specialists filed briefs on behalf of amici in the case, including Davis Wright Tremaine for The Association of National Advertisers Inc., Wiley Rein for the U.S. Chamber of Commerce, Gupta Wessler for a group of public health advocates, including the American Cancer Society Cancer Action Network, Jenner & Block for the Retail Litigation Center Inc., and Hogan Lovells for the Grocery Manufacturers Association.

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