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PERSPECTIVE

Sugar case rehearing could affect public health efforts

By Amy Lally

The 9th U.S. Circuit Court of Appeals is at the intersection of the First Amendment and public health with *American Beverage Association v. City and County of San Francisco*. A San Francisco ordinance would require a black box health warning to cover 20 percent of the surface area for every billboard or other large outdoor advertisement of sugar-sweetened beverages. Plaintiffs claim a black box health warning would mislead consumers and chill free speech.

This showdown is reminiscent of the battle between government and the tobacco industry. Are sugary drinks the "tobacco" of public health issues for the 21st century? Can the same protocols applied to tobacco advertising apply equally to soda advertising? Those are two of the questions with which the 9th Circuit is wrestling.

Last fall, a 9th Circuit panel answered these questions in the negative and reversed the district court, which had denied a motion for preliminary injunction against enforcement of the ordinance. 871 F.3d 884 (2017). The specific warning language at issue is "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." Judge Sandra Ikuta, writing for the majority, held San Francisco's warning was not purely factual and uncontroversial because it conveyed a direct correlation between consuming sugar-sweetened beverages in any amount and obesity, diabetes and tooth decay, regardless of other lifestyle factors. The panel also held the warning was false because it contradicted the Food and Drug Administration's finding that added sugars are generally recognized as safe, and it was misleading because it did not address other sources of sugar.

On Jan. 29, the 9th Circuit granted San Francisco's petition for rehearing en banc. The key issue is whether the panel properly applied the correct level of scrutiny to the ordinance. San Francisco primarily argued that the panel erred in not applying a "reasonable relationship" level of scrutiny. In *Zauderer v. Office of Disciplinary Counsel*, the U.S. Supreme Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related" to the government's interest in requiring the disclosure. 471 U.S. 626, 651 (1985). For *Zauderer* deference to apply, however, the disclosure must be "purely factual and uncontroversial" and not "unjustified or unduly burdensome" so as to chill protected speech. The panel found that San Francisco's disclosure was neither purely factual nor unduly burdensome.

San Francisco asserted that the panel's decision regarding the "purely factual and uncontroversial" nature of the disclosure conflicts with the 9th Circuit's recent decision in *CTIA-The Wireless Association v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017). Specifically, San Francisco argued that *CTIA* determined that for *Zauderer* review to apply, the disclosure need only be "factually accurate" regardless of "its subjective impact on the audience." San Francisco insisted that the panel ignored *CTIA* by questioning the disclosure's accuracy based on unsubstantiated predictions about what message consumers would infer from the warning. In other words, the panel looked to the subtext of the disclosure instead of its actual text. For instance, the panel found that the disclosure is not purely accurate because it does not quantify how much consumption or other lifestyle choices lead to harm. Similarly, the panel held that the disclosure is deceptive because it applies only to sugary beverages and thus consumers could be misled into thinking other sugary foods are not as unhealthy. San Francisco concluded that such findings create an unrealistically high standard for the accuracy of consumer warnings. Specifically, San Francisco took issue with the panel's holding that "[a] disclosure that *may* deceive consumers" does not qualify for *Zauderer* review. (Emphasis added.) San Francisco argued that the panel's holding ultimately requires a disclosure to have no potential for misunderstanding in order to receive *Zauderer* review.

Plaintiffs insisted that the panel faithfully applied the legal standards articulated in *CTIA*, and that what a disclosure conveys to a reasonable consumer matters for purposes of *Zauderer*. Plaintiffs read *CTIA* as rejecting a literalist approach, in observing that "a statement may be literally true but nonetheless misleading and, in that sense, untrue." In any event, plaintiffs contended that the panel held that even the literal text of the disclosure is inaccurate when it characterized the disclosure as an "unqualified statement."

San Francisco further argued that the panel erred in finding that the disclosure is unduly burdensome because it "overwhelms other visual elements in the advertisement." San Francisco contended that such a holding conflicts with a subsequent 9th Circuit decision that "[a] disclosure is 'unduly burdensome' when the burden 'effectively rules out' the speech it accompanies." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017) (citation omitted). San Francisco also argued that the panel's burdensome finding created a circuit split with the 1st and 6th Circuits' findings that tobacco warnings covering 20 percent of ad space are not unduly burdensome. Finally, San Francisco contended that the panel erred in giving dispositive weight to the declarations of soda advertisers who said that they would remove advertisements if the warning requirement went into effect. San Francisco said that such a decision gives an effective veto to an advertiser.

Plaintiffs asserted the panel's decision is not in tension with Nationwide because whether a disclosure is unduly burdensome requires a contextual analysis. Plaintiffs explained that the different result reflects nothing more than the application of the same legal standard to two different sets of facts. Plaintiffs further responded that physical space is just one aspect of the burdensome analysis, as are the declarations of advertisers, neither of which are dispositive. Plaintiffs also attempted to distinguish the other Circuit findings regarding tobacco warnings by highlighting the "vast differences" between tobacco products and sugary beverages.

Today's society grapples with many public health issues. The outcome of the 9th Circuit's rehearing on San Francisco's ordinance could profoundly impact the ability of government to compel private individuals to advance the government's position on public health issues in order to exercise their First Amendment right to free speech.

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