

Federal District Court Blocks Enforcement of Titanium Dioxide Warnings under Prop. 65

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A [federal district court has issued a preliminary injunction](#) in *PCPC v. Bonta* blocking enforcement of the Proposition 65 warning requirement for titanium dioxide (airborne, unbound particles of respirable size) in cosmetic and personal care products, citing the First Amendment. The Personal Care Products Council (PCPC) sued California Attorney General Rob Bonta last year alleging that the requirement to place Prop. 65 cancer warnings on makeup and other personal care products was not backed up by science, and therefore forced untrue commercial speech in violation of the First Amendment.

Under Prop. 65, the Office of Environmental Health Hazard Assessment (OEHHA) is required to list any chemicals that the World Health Organization's International Agency for Research on Cancer (IARC) concludes is a probable or possible carcinogen in humans. [IARC designated a form of the mineral titanium dioxide](#) (airborne, unbound particles of respirable size) as a group 2b carcinogen—"possibly carcinogenic" to humans—in 2010. OEHHA moved to automatically list the substance in 2011, and the warning requirement went into effect in 2012.

Since then, private enforcers of Prop. 65 have filed hundreds of notices of violation alleging businesses have failed to warn of the presence of titanium dioxide in products including eyeshadow, blush and foundation.

Facing mounting enforcement actions and lawsuits, the PCPC sued OEHHA last year, challenging the veracity of the titanium dioxide listing and seeking a preliminary injunction to block enforcement while the litigation plays out. Citing scientific uncertainty over whether titanium dioxide causes cancer in humans, Sacramento District Judge Troy L. Nunley granted the preliminary injunction.

IARC reached its conclusion largely based on two studies in rats, "that inhaled titanium dioxide where an increased rate of lung tumors was observed," Nunley wrote.

"Subsequent research, however, has cast some doubt on IARC's conclusion that titanium dioxide is possibly carcinogenic to humans, and there remains somewhat of a scientific debate on [its] ... carcinogenicity in humans," he wrote.

The plaintiff met the three-part test under the 2008 U.S. Supreme Court ruling in *Winter v. Natural Resource Defense Council* for granting a preliminary injunction—they are likely to succeed on the merits, they can show they will suffer irreparable harm and the balance of the equities and public interest tips in their favor, the court ruled.

First, the plaintiff is likely to succeed on the merits of their claim that the Prop. 65 warning requirements requires untrue compelled speech in violation of the First Amendment, the court held. There are two competing tests for assessing such claims, with the more lenient test laid out in the U.S. Supreme Court decision [Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio](#).

Under the more lenient *Zauderer* standard, "the government may compel commercial speech so long as it is reasonably related to a substantial governmental interest, and the compelled speech is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome," Nunley wrote.

But the safe harbor warning language set out by OEHHA is "not purely factual," according to the ruling. While it "contains only factual information, it is nevertheless misleading to the average consumer," Nunley wrote.

The Attorney General's office "contends the warning is not misleading because there is no

legitimate debate about listed titanium dioxide causing cancer in animals," Nunley wrote. "However, Prop 65 is principally concerned about chemicals that are carcinogenic to humans, not animals."

"Thus, it is reasonable for the average consumer to read the warning requirement and conclude that listed titanium dioxide may cause them cancer or increase their chances of obtaining cancer," Nunley wrote. "But such a conclusion is misleading, particularly where, as here, the organization that prompted listed titanium dioxide's inclusion on the Prop. 65 List—IARC—specifically found that there is inadequate evidence for the carcinogenicity of titanium dioxide in humans." The plaintiff has adequately shown its members will suffer irreparable harm and the balance of the equities and public interest also favors the plaintiff, the court concluded.

"Although the issuance of a preliminary injunction will necessarily impose some hardship on public and private enforcers of Prop. 65 as it relates to listed titanium dioxide, the balance of equities must tip in favor of those whose First Amendment rights are being violated," Nunley wrote. "Moreover, the public interest favors the proper exercise of First Amendment rights." The preliminary injunction blocks the Attorney General's office and any private enforcers from "filing or prosecuting new lawsuits" related to Prop. 65's warning requirement for titanium dioxide in cosmetic and personal care products. The order "does not alter any existing consent decrees, settlements, or agreements related to Prop 65 warning requirements," according to the ruling.

The court also rejected a motion by Environmental Health Advocates (EHA), which has filed numerous Prop. 65 enforcement actions for titanium dioxide, to intervene in the case.

Environmental Health Advocates' interests are adequately represented by the Attorney General's office and its intervention would needlessly delay the case, the court ruled.

This court decision is the latest victory for business groups that have been attacking Prop. 65 listing decisions on First Amendment grounds in recent years. The 9th Circuit has upheld a district court ruling related to OEHHA's listing of glyphosate as a carcinogen—concluding the listing is unconstitutional and granting a permanent injunction against enforcement [see [OEHHA's Glyphosate Warning Violates First Amendment, 9th Circuit Rules](#), November 15, 2023]. The 9th Circuit has also upheld a preliminary injunction that a district court granted blocking enforcement of warnings for acrylamide [see [9th Circuit Denies En Banc Review of Injunction Prohibiting Acrylamide Suits](#), November 22, 2022 and [U.S. Supreme Court Rejects Review of Acrylamide Prop. 65 Injunction](#), May 3, 2023].

OEHHA declined to comment on this latest court ruling and the Attorney General's office did not respond to a request for comment from CEI. PCPC referred questions to its attorneys Trent Norris of Hogan Lovells and Greg Sperla of DLA Piper. Norris and Sperla did not respond to requests for comment, although [Hogan Lovells wrote about the court ruling on its website](#).

"These victories, as well as evolving appellate precedent on compelled commercial speech, bode well for future challenges to Prop 65's warning requirements for other chemicals where the science on risks to humans is controversial or, as for titanium dioxide, shows its safety," according to the website.

OEHHA is currently soliciting comments on a [proposed a safe harbor level for exposures to titanium dioxide](#) (airborne, unbound particles of respirable size). [OEHHA is accepting public comment](#) on the proposed NSRL until Monday, July 1, 2024 [see [OEHHA Proposes Proposition 65 Safe Harbor Level for Titanium Dioxide](#), June 20, 2024].