

First Amendment Cases: Implications for Prop. 65

Prop 65 Clearinghouse Conference

September 23, 2024

First Amendment and Compelled Speech

Zauderer v. Office of Disciplinary Counsel
(U.S. 1985)

- First Amendment prohibits compelled commercial speech that is false or misleading
- Compelled warnings must be:
 - purely factual and uncontroversial
 - reasonably related to a substantial government interest
 - neither unjustified nor unduly burdensome

National Institute of Family & Life Advocates v. Becerra (U.S. 2018)

- By compelling individuals to speak a particular message, the government “alters the content of” and restricts their speech
- Burden of proof is on the government to “justify the restriction” on speech

First Amendment and Prop 65

- “A statement may be literally true but nonetheless misleading and, in that sense, untrue.” *CTIA – The Wireless Assoc. v. City of Berkeley* (9th Cir. 2017) (upholding requirement to provide FCC warning information to consumers)
- *American Beverage Assn. v. San Francisco* (9th Cir. 2019) (reversing denial of preliminary injunction concerning compelled warning on billboards advertising sugar-sweetened beverages)
- First Amendment is often asserted as an affirmative defense in enforcement actions, but litigated only twice:
 - *People v. Frito-Lay* (potato chips): L.A. Superior Court tentatively granted summary judgment, then reversed with no explanation. Case settled.
 - *CERT v. Starbucks* (coffee): L.A. Superior Court rejected defense after trial. OEHHA adopted special exemption for coffee, which ultimately resulted in defense victory.



First Amendment and Prop 65

Critical elements:

- Burden of proof is on the government, to show that the compelled language
- Is “purely factual and uncontroversial” and
- Is “not misleading”

WARNING: This product can expose you to chemicals including [name of chemical] **which is known** to the State of California **to cause cancer**. For more information, go to www.P65Warnings.ca.gov.

BOTTOM LINE: The state must prove that it is purely factual, uncontroversial, and not misleading to say that titanium dioxide causes cancer in humans

Nat'l Association of Wheat Growers lawsuit

- OEHHA listed glyphosate as a carcinogen (July 2017)
 - IARC classification as “probably carcinogenic” to humans
 - Based on “sufficient evidence” that glyphosate causes cancer in animals (four rodent studies) and “limited evidence” that it causes cancer in humans
- **Highly controversial:** Numerous other regulatory and scientific bodies have found that glyphosate is not carcinogenic
 - US EPA, Health Canada, various other national regulators
 - Both toxicology and epidemiology
 - Disagreement with IARC as to whether glyphosate causes cancer even in animals

International Agency
Research on Cancer



World Health
Organization



Nat'l Association of Wheat Growers lawsuit

- *Nat'l Assn. of Wheat Growers v. Zeise*, No. 2:17-cv-02401 (E.D. Cal. Nov. 15, 2017)
- Court (Judge Shubb) finds trade groups have a likelihood of success on the merits and grants preliminary injunction. 309 F. Supp. 3d 842 (Feb. 26, 2018)
 - Court finds that a valid Prop. 65 warning must state that a chemical is “known to the state to cause cancer”
 - Warning conveys a message that glyphosate’s carcinogenicity is an undisputed fact in light of “the heavy weight of the evidence in the record that glyphosate is not known to cause cancer”
 - Therefore, state fails to meet its burden to show that the warning is purely factual and uncontroversial under *Zauderer*
 - Court allows *listing* – as opposed to *warning requirement* – to stand (no speech component)
 - Court grants summary judgment. 468 F. Supp. 3d 1247 (June 22, 2020)
 - Ninth Circuit upholds ruling. *Nat'l Assn. of Wheat Growers v. Bonta*, 85 F.4th 1263 (9th Cir. 2023) (first challenge to go to judgment)



California Chamber of Commerce lawsuit

- *CalChamber v. Bonta*, No. 2:19-cv-02019 (E.D. Cal. Oct. 17, 2019)
- Key allegation: Proposition 65 cancer warnings for dietary acrylamide are misleading because they convey a message to consumers that the food will increase their cancer risk
- Numerous epidemiological studies demonstrate that dietary acrylamide does not increase cancer risk in humans
 - 2012 meta-analysis published in *European Journal of Cancer Prevention*
 - **National Cancer Institute**: “a large number of epidemiologic studies (both case-control and cohort studies) in humans have found no consistent evidence that dietary acrylamide exposure is associated with the risk of any type of cancer.”
 - **American Cancer Society**: “So far, reviews of studies done in groups of people (epidemiologic studies) suggest that dietary acrylamide isn’t likely to be related to risk for most common types of cancer” and it is “not yet clear if the levels of acrylamide in foods raise cancer risk.”



California Chamber of Commerce lawsuit

- Court (Chief Judge Mueller) holds: CalChamber has standing based on harm to its members
- Court holds: Irreparable harm is presumed under the First Amendment
- Suit seeks a declaration and an injunction that Prop 65 warnings for acrylamide as a carcinogen in food or beverages violate the First Amendment because the warning is not “purely factual and non-controversial”
- Preliminary injunction granted: 529 F. Supp. 3d 1099 (Mar. 29, 2021)
 - Bars future lawsuits but does not address pending lawsuits
- Ninth Circuit ruling upholds preliminary injunction: *CalChamber v. CERT*, 29 F. 4th 468 (Mar. 17, 2022)
 - First positive ruling on Prop 65 by the Ninth Circuit after 36 years
 - Denies rehearing *en banc* with a dissent (Oct. 26, 2022)
 - Intervener CERT petitions for *certiorari* with US Supreme Court (denied)
- Now before Judge Calabretta
- MSJ to be filed Sept. 30, 2024; hearing Jan. 23, 2025



Personal Care Products Council lawsuit

- *PCPC v. Bonta*, No. 2:23-cv-01006 (E.D. Cal. May 26, 2023)
- Key allegation: Proposition 65 cancer warnings for titanium dioxide (airborne, unbound particles of respirable size) are misleading because they convey a message to consumers that the product will increase their cancer risk
- IARC listing was based on two studies (Heinrich and Lee) that observed excess incidence of lung tumors in rats that inhaled titanium dioxide
 - ECJ decision found that these studies were not reliable or acceptable because the excessive doses administered to the rats lead to “lung overload” conditions
 - Not related to “intrinsic properties” of titanium dioxide but to overloading the rats’ lungs with more material than they can clear
 - Lung overload does not occur in humans, who have greater capacity to clear their lungs of particulates. (Also not known to occur in any species other than rats.)
- Eight epidemiological studies show no association between lung cancer and exposure to titanium dioxide

Personal Care Products Council lawsuit

- Court grants preliminary injunction motion. *PCPC v. Bonta*, No. 2:23-cv-01006 (E.D. Cal. June 11, 2024)
 - Does not rely on consumer survey.
 - Focuses on lack of evidence of human carcinogenicity
- Summary judgment motion filed Sept. 10, 2024
- Hearing set for Nov. 14, 2024



Comparison Among Lawsuits

<i>Wheat Growers (glyphosate)</i>	<i>CalChamber (acrylamide)</i>	<i>PCPC (titanium dioxide)</i>
No intervener; no motion to dismiss; no sec. 1983 claim	CERT intervened; three motions to dismiss; amended with sec. 1983 claim	EHA denied intervention; sec. 1983 claim; no motion to dismiss
Disagreement between IARC and other authorities as to whether glyphosate causes cancer in animals or humans	Authorities agree on animal data and potential carcinogenicity of acrylamide, but disagree on risk from dietary acrylamide	Disagreement among authorities on whether respirable TiO ₂ causes cancer in humans; basis for listing is two discredited studies that apply only to rats
No consumer survey	Consumer survey	Consumer survey
Scientific declarations on basic issues	Toxicologist and epidemiologist declarations	Toxicologist and epidemiologist declarations
Filed before listing	Filed after enforcement	Filed after enforcement
PI granted; SJ granted; upheld on appeal.	PI granted; MSJ to be filed 9/30/24; hearing set for 1/23/25	PI granted; MSJ filed 9/10/24; hearing set for 11/14/24

Comparison Among Chemicals

<i>Glyphosate</i>	<i>Acrylamide</i>	<i>Titanium dioxide (airborne, unbound particles of respirable size)</i>
Listed via Labor Code July 17, 2017	Listed via Authoritative Bodies Jan. 1, 1990 (also listed for repro in 2011)	Listed via Labor Code Sept. 2, 2011
Safe harbor NSRL of 1100 mcg/day (Apr. 10, 2018)	Safe harbor NSRL of 0.2 mcg/day	Safe harbor NSRL proposed May 10, 2024: 440 mcg/day of particles < 10 µm and 44 mcg/day of particles < 44 µm µm
IARC 2A (probable human carcinogen)	IARC 2A (probable human carcinogen)	IARC 2B (possible human carcinogen)
IARC: limited evidence in humans sufficient evidence in animals	IARC: inadequate evidence in humans sufficient evidence in animals	IARC: inadequate evidence in humans sufficient evidence in animals
State adopted NSRL during litigation and alternative safe harbor after judgment and before appeal	State adopted alternative safe harbor after PI; then proposed multitude of safe harbors (pending)	State proposed NSRL during litigation (pending)

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“What is very clever about this challenge is that it does two things. First of all, you don’t have to win the fight, you do not have to show that acrylamide does not cause cancer, or even that it is more likely than not it doesn’t cause cancer. Rather, you simply have to cast doubt.”

Jim Wheaton

President & Legal Director ELF

Founder of the First Amendment Project



“Jim Wheaton, quite properly I think, was very complimentary about that argument as an effective argument.”

David Roe

Drafter of Proposition 65

Senior Attorney, EDF (1976-2001)