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Roundup Warning Label Ruling Less Surprising Than It Seems

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A federal judge recently blocked the state of California from requiring Monsanto Company to put Proposition 65 warning labels on its Roundup products, ruling there is “insufficient evidence” that glyphosate — the active ingredient in the popular weed killer — causes cancer.[1] While at first blush this decision may have seemed surprising, a deeper look at the broader historical context of Proposition 65 offers a different perspective.

California’s Proposition 65 requires a “clear and reasonable warning” label on products that may expose people to a substance found on a published list of 900+ chemicals known to the state of California to cause cancer, birth defects or reproductive harm (the Proposition 65 list)[2]. California listed glyphosate on the Proposition 65 list in 2017, based primarily on a 2015 conclusion of the International Agency for Research on Cancer, or IARC, that the chemical is a “probable” human carcinogen. Several other government health organizations, however, including the U.S. Environmental Protection Agency and the World Health Organization, have concluded there is no evidence that glyphosate causes cancer.

Monsanto and several agribusiness groups challenged California’s listing of glyphosate on the Proposition 65 list, as well as the attendant warning requirements that would become effective for glyphosate on July 7, 2018, claiming that the listing and warning requirements violate Monsanto’s First Amendment rights. Monsanto argued that by adding glyphosate to the Proposition 65 list and thereby requiring warnings, the state would compel Monsanto to make false, misleading and highly controversial statements about their product.

U.S. District Judge William B. Shubb granted Monsanto’s request for preliminary injunction enjoining the state from requiring warning labels for glyphosate. Judge Shubb reasoned that California depended too much on IARC’s analysis that glyphosate is a “probable” carcinogen, stating that the required warning would “be misleading to the ordinary consumer” in light of contrary analysis by “virtually all other government agencies and health organizations.” Shubb continued, that “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 it causes cancer.”

Curiously, Judge Shubb denied Monsanto’s request for an injunction barring California from listing glyphosate on the Proposition 65 list. In refusing to order the state to delist the chemical, Shubb adhered to a strict application of the First Amendment’s free speech clause, which restricts government regulation

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of private speech, but does not regulate government speech. “California’s listing of chemicals it purportedly knows to cause cancer is neither a restriction of private speech nor government-compelled private speech,” Shubb said, adding it is the “upcoming July 2018 deadline for providing the Proposition 65 warning that compels private speech,” and that any harm to Monsanto would arise from the Proposition 65 warning requirements, not the listing.

While the court did not officially rule on the merits of the case by issuing a preliminary injunction, it appears Judge Shubb gave significant weight to the plaintiff’s arguments. When “California seeks to compel businesses to provide cancer warnings, the warnings must be factually accurate and not misleading. As applied to glyphosate, the required warnings are false and misleading,” likely violating Monsanto’s First Amendment rights.

It is unknown at this time whether the state will appeal Shubb’s decision.

On first read, Monsanto’s preliminary success in pursuing its First Amendment claim seems a surprising departure from decades of Proposition 65 jurisprudence. Courts up to now have generally stopped short of providing regulatory relief on constitutional grounds. Cases challenging application of the statute by way of the commerce clause, federal preemption and constitutional standing principles have largely failed.

Similarly, in a 2001 case involving an analogous Vermont law that required manufacturers of some mercury-containing products to label their products and packaging to inform consumers to dispose of the used products as hazardous waste, the Second Circuit reversed a preliminary injunction against that state’s enforcement of the labeling requirements, finding the manufacturer association plaintiffs had not shown likelihood of success on the merits of their commerce clause and First Amendment claims.[3] The distinguishing First Amendment factor between the Vermont and California cases is that the Second Circuit found Vermont’s mercury label requirements to be accurate and true, while Judge Shubb found California’s Proposition 65 glyphosate label requirements to be inaccurate and false.

The European Union is also grappling with the problem of whether and how to regulate glyphosate — the most widely used pesticide in the world — in light of conflicting opinions about the chemical’s safety. Last November, the European Commission reauthorized use of glyphosate over strong objections from nine of its 28 member states. Earlier this month, the government of the Brussels region (which has banned use of glyphosate within its territory) filed a complaint with the European Court of Justice, claiming the EC breached the precautionary principle, which requires adoption of a precautionary approach in cases of scientific uncertainty about environmental or health risks. Brussels claims that the precautionary principle would require banning glyphosate on the basis of the IARC’s 2015 findings that the chemical was “probably carcinogenic to humans,” despite the contrary conclusions of the United Nation’s Food and Agricultural Organization, the World Health Organization, the European Food Safety Authority, and the European Chemicals Agency, that glyphosate is unlikely to pose a cancer risk to humans through dietary exposure.

In Monsanto’s case in California, Judge Shubb ruled — unflinchingly — that the state had overstepped its authority to list glyphosate on the Proposition 65 List based on the weight of the available scientific evidence. This decision, perhaps, is less surprising when viewed in the historical landscape of private enforcement of Proposition 65. It may be that this court seized an opportunity to flex its checks-and-balances authority to reign in one aspect of the oft-criticized Proposition 65 enforcement scheme.

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Proposition 65 has been the subject of repeated legislative reform efforts since it was first enacted in 1986. A main criticism of the law has been the prevalence of predatory enforcement by private plaintiffs, often driven by the prospect of monetary recovery by those plaintiffs and their attorneys. Businesses almost universally choose to settle Proposition 65 cases brought against them (sometimes cases of dubious or no merit), rather than expend the costs necessary to litigate their defense. Under Proposition 65, the burden of scientific proof is on the regulated community to demonstrate that it is not subject to enforcement in any given case, which is usually a costly endeavor, requiring expensive litigation and scientific experts. This, in turn, has led businesses to sometimes provide unnecessary warnings in attempt to avoid the threat of enforcement action even when warnings may not be required. Arguably, this dilutes the effect of the needed warnings and their ultimate value to the public they are meant to inform and protect.

Statutory reforms intending to curtail enforcement abuses by private parties have added requirements that a private enforcer must include a certificate of merit stating that the plaintiff has a reasonable and good faith belief that the case is meritorious, based on informed consultation with a qualified expert; documentation of exposure to a Proposition 65-listed chemical; court approval of settlements; and the opportunity for the attorney general to review and comment on proposed settlements prior to court approval hearings. Despite these added requirements, such attempts to reform Proposition 65 have been less than effective at stemming apparent private enforcement abuses. The numbers of in- and out-of-court settlements, and the dollar amounts involved, continue to increase. The vast majority of cases continue to be brought by a handful of repeat private enforcers and law firms.

When viewed with a lens toward reform, the Monsanto decision may be one court's attempt to chip away at the pervasive abuses in the Proposition 65 regulatory scheme.

Notes

[1]N*ational Association of Wheat Growers v. Zeise*, 2018 WL 1071168 (Feb. 26, 2018).

[2]California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65 List webpage.

[3]*National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

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