

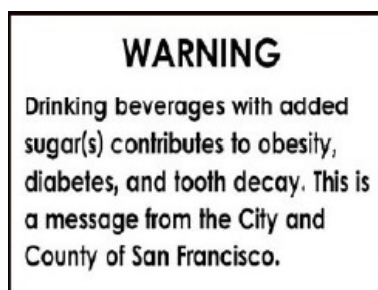
Government-Mandated Health Warnings in Sweetened Beverage Advertising Found Likely to Chill Protected Free Speech

William C. MacLeod

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On September 20, the Ninth Circuit [blocked](#) the City and County of San Francisco from implementing an ordinance that would have required health warnings on advertisements for beverages that contain one or more added sweeteners and more than 24 calories per 12 fluid ounces of beverage. The Ninth Circuit's panel opinion, in reversing a district court order, held the ordinance likely chilled protected commercial speech under the First Amendment.

The 2015 ordinance would have required that advertisements (not labels) for sweetened beverages contain an explicit health warning that "occup[ied] 20 percent of the advertisement [] set off by a rectangular border", like so:



The American Beverage Association, the California Retailers Association, and the California State Outdoor Advertising Association ("Associations") sued to enjoin the implementation of the ordinance on constitutional grounds. The district court denied a preliminary injunction and the Ninth Circuit granted interlocutory appeal.

Under established precedent, regulations that compel speech by imposing a disclosure are governed by the framework set forth in the SCOTUS case of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) (upholding a state bar disciplinary rule requiring that attorney advertisements regarding contingent-fee rates inform clients they would be liable for costs (as opposed to legal fees), even if their claims were unsuccessful). The *Zauderer* framework historically had been applied to government-mandated disclosures needed to prevent consumer deception.

The Ninth Circuit panel opinion applied the *Zauderer* framework beyond the context of preventing consumer deception. Under the framework, the Ninth Circuit held that compelled disclosures could

be related to other substantial government interests, such as promoting public health, but had to be “factual and non-controversial” and not “unjustified or unduly burdensome.”

The San Francisco ordinance satisfied neither of these factors. The Ninth Circuit panel observed the warning falsely conveyed the message that sweetened beverages contribute to obesity, diabetes, and tooth decay, regardless of the quantity consumed or other lifestyle choices. This message was contrary to statements by the FDA that added sugars are “generally recognized as safe,” and “can be a part of a healthy dietary pattern when not consumed in excess amounts.”

The Ninth Circuit also held the warning was misleading. “By focusing on a single product, the warning conveyed the message that sugar-sweetened beverages were less healthy than other sources of added sugars and calories and were more likely to contribute to obesity, diabetes, and tooth decay than other foods.” This message was found to be deceptive in light of the current state of research on the issue.

Finally, the court held the warning requirement unduly burdened and chilled protected commercial speech. The panel observed the black box warning “overwhelms other visual elements” in the advertisement. This, according to the panel, would defeat the purpose of the advertisement, “turning it into a vehicle for a debate about the health effects of sugar-sweetened beverages.”

Thus, Ninth Circuit panel concluded that the Associations had shown a likelihood of success on the merits of their First Amendment claim.