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CLIENT ALERT

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Federal Court Prohibits Prop 65 Warning on Glyphosate-based Herbicides

On June 22, 2020, a US District Court for the Eastern District of California issued a permanent injunction against requiring a Proposition 65 warning on the labels of herbicides containing glyphosate, such as Roundup. In *National Association of Wheat Growers, et al. v. Xavier Beccera*, as Attorney General of the State of California, the court had previously issued a temporary injunction on commercial free speech grounds, finding that the Proposition 65 warning was false and misleading given the weight of authority showing that glyphosate is not known to cause cancer.

Permanent injunction issued

This latest round of litigation involved cross motions for summary judgment for a permanent injunction to replace the temporary injunction. The court reviewed developments since its preliminary injunction, including additional research, and found the following:

“The court’s initial conclusion remains the same. Notwithstanding the IARC’s determination that glyphosate is a “probable carcinogen,” the statement that glyphosate is “known to the state of California to cause cancer” is misleading. Every regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does.”

The court also noted EPA’s declaration of its position that including a Proposition 65 warning for glyphosate would be false and misleading and a violation of the federal herbicide labeling law.

Much of the decision involves a thorough discussion of applicable standards and framework for review of a First Amendment claim involving compelled commercial speech. However, several parts of the decision will be of particular interest to Prop 65 practitioners.

The risk of enforcement when a listed chemical is present but at low levels (or why companies label even when they can prove exposures are safe)

When discussing whether the issue was ripe for a decision, the court provided a thorough and thoughtful discussion of the threat of enforcement action and litigation that companies face if their products contain

glyphosate and they do not put a Proposition 65 warning on the label, even if the level of glyphosate is below No Significant Risk Levels. The court rejected the AG's argument that such enforcement is unlikely because of the Certificate of Merit process, the likelihood that the AG would inform the private plaintiff that their case has no merit, and would post a letter to that effect on the AG's website. The court's discussion is a clear-eyed view of the ease of bringing Prop 65 actions, the relative burdens on the plaintiff and defendant in such cases, and past enforcement litigation when defendants asserted that exposure to the listed chemical was below safe harbor levels – even when the AG had issued a determination that exposure was safe. Proposition 65 defense attorneys are all-too familiar with the dynamic that the court summarized, which is why companies put on warnings rather than relying on risk assessments. It is encouraging to see the written decision affirming that reality.

Alternative warning language

Prop 65 practitioners will also be interested in the section discussing alternative warning language modifying the "safe harbor" warning that was proposed by the AG. Three alternative warnings were proposed that added language to provide context, such as describing the IARC listing process and that EPA had not concluded that glyphosate causes cancer. The court found that each of these were still deficient. After many years of hearing that additional language to the safe harbor warning is unacceptable because it dilutes the message, it is interesting to see the AG put forward proposed warnings doing what the defense bar has sought to do, put the warning in context so consumers are not confused. Companies may want to revisit adding language to warnings to provide context in light of the alternatives that the AG's office proposed.

Buchalter has experienced environmental attorneys who have assisted many companies navigate the tricky waters of compliance and defense of enforcement actions in the unique world of Proposition 65. For further information or assistance, please contact any of the attorneys below.



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