

# NINTH CIRCUIT RULES AGAINST SAN FRANCISCO WARNING LABEL ORDINANCE INVOLVING BILLBOARD ADS FOR SUGARY DRINKS

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On Jan. 31, 2019, the Ninth Circuit Court of Appeals struck down an effort to control the health effects of sugary drinks, holding that it violated the First Amendment. In particular, the court reversed a lower court decision that had denied an injunction to stop enforcement of a San Francisco ordinance requiring warning labels on billboard ads for sugary drinks.

The Plaintiffs in *American Beverage Association v. City and County of San Francisco*, 2019 WL 387114, ---F.3d --- (2019), are comprised of three groups: the American Beverage Association, the California Retailers Association and the California State Outdoor Advertising Association. San Francisco's sugar-sweetened beverage warning ordinance ("SSB") requires that specific SSB advertisements contain the following statement: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."

San Francisco's SSB ordinance further requires that this warning occupy at least 20% of the advertisement and be set off within a contrasting rectangular border. This ordinance applies to any advertisement that promotes or markets an SSB for sale or use, which appears on several types of advertising, including billboards.

Plaintiffs contested the enforcement of the SSB billboard advertising requirements by arguing that the ordinance violated their First Amendment Right by compelling the disclosure. They claimed that the ordinance was an unjustified or unduly burdensome disclosure requirement that could offend First Amendment rights by chilling protected commercial speech.

The Ninth Circuit Court of Appeals agreed. Relying on a study referred to by the defendant's expert witness, the Court found that the goals of the SSB ordinance could be achieved by warnings of a smaller size and accordingly, that a warning requirement occupying 20% of the billboard was not justified when balanced against the likely burden it would have on protected speech.

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Not only did the defendant not meet its burden of demonstrating that the SSB ordinance requirement was not “unjustified or unduly burdensome,” in addition, the Court found that the Plaintiffs met each of the four requirements for the issuance of a preliminary injunction, including that the Plaintiffs are likely to succeed on the case on the merits.

The Ninth Circuit held that the trial court abused its discretion when it denied the Plaintiffs’ request for a preliminary injunction and remanded this case back to the trial court.

### Takeaways

Jurisdictions at the state and local level across the country have been addressing alleged dietary issues involving excess sugar in the American diet through either similar ordinances, or in some cases, through taxes on sugary products. This San Francisco case reminds us that when the effort at changing behavior is directed through compelled commercial speech, the record must demonstrate that there is a clear public health issue and the measure must ensure compliance with First Amendment protections. Cigarettes are an example of where courts have upheld such warnings, but as the Ninth Circuit stated, the science at issue here, which involves a product which is only potentially dangerous if used to an excess, is insufficient to compel the mandatory warnings required in this case.

For questions regarding this case or any other First Amendment issue, contact one of the Hodgson Russ attorneys in this practice area. If you received this alert from a third party or from visiting our website, and would like to be added to our First Amendment mailing list or any other of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/subscription-center-hr.html>