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NINTH CIRCUIT BLOCKS SAN FRANCISCO'S WARNINGS ORDINANCE FOR SWEETENED BEVERAGES

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In a decision likely to have important implications for regulation of commercial speech, the Ninth Circuit Court of Appeals has blocked a San Francisco ordinance requiring warnings about the health effects of certain sugar-sweetened beverages on fixed advertising.

In *American Beverage Association v. the City and County of San Francisco*, a three-judge panel held that the California Retailers Association, American Beverage Association, and the California State Outdoor Advertising Association are likely to prevail in their lawsuit challenging the ordinance as violating the First Amendment, and reversed the district court's denial of a preliminary injunction against enforcement of the ordinance.

The ordinance, S.F. Health Code § 4200 through 4206, was enacted in June 2015 and would require the following warning on any advertisement that "identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use":

"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."

"Sugar-Sweetened Beverage" includes soda and other non-alcoholic beverages that contain at least one added sweetener and more than 25 calories per 12 fluid ounces of beverage.

The ordinance applies to ads posted on billboards, structures, or vehicles, and provides detailed instructions regarding the form and placement of the warning, including requiring that it occupy 20 percent of the advertisement.

Violation of the ordinance can result in administrative penalties by San Francisco's Director of Health for any violation.

The Ninth Circuit held that the plaintiffs are likely to succeed on the merits of their claim that the ordinance imposes an unconstitutional restraint on commercial speech because the warnings required by the ordinance are (1) not purely factual and uncontroversial; and (2) unduly burdensome.

Writing for the panel, Judge Sandra S. Ikuta wrote:

“We conclude that the factual accuracy of the warning is, at a minimum, controversial . . . The warning provides the unqualified statement that ‘[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay,’ . . . and therefore conveys the message that sugar-sweetened beverages contribute to these health conditions regardless of the quantity consumed or other lifestyle choices. This is 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 Court also noted that held that the warning is “misleading and, in that sense, untrue,” because it is required exclusively on advertisements for sugar-sweetened beverages, and not for other products with equal or greater amounts of added sugars and calories.

The Court’s decision raises the question whether a similar reasoning and legal challenge could be applied to the recent controversy over taxation on sweetened beverages in some jurisdictions. As we recently reported, a number of jurisdictions have enacted ordinances recently singling out sweetened beverages for increased taxation due to the allegedly unhealthy nature of those drinks.

For questions or additional information, please contact the authors, Merrit Jones at Merrit.Jones@bryancave.com or (415) 675-3435, or Vanessa Fulton at Vanessa.Fulton@bryancave.com or (602) 364-7057.

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Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

+1 415 675 3435

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