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Sugar-Sweetened Beverage Warning Policies in the Broader Legal Context: Health and Safety Warning Laws and the First Amendment

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Abstract

Introduction—Health and safety warnings are a regular part of the consumer protection landscape. However, the only sugar-sweetened beverage policy passed to date was found unconstitutional under the First Amendment. This paper evaluates sugar-sweetened beverage warning policies in light of existing health and safety warnings on consumer products and the First Amendment.

Methods—In 2019, using LexisNexis, existing federal, state, and local health and safety warning laws for consumer products were identified. Then, bills proposed and laws passed through July 2019 that required sugar-sweetened beverage warnings were examined. Finally, First Amendment case law related to warning and disclosure requirements was analyzed to identify outstanding questions about the constitutionality of sugar-sweetened beverage warning policies.

Results—Warnings on consumer products provide key examples of long-established health and safety warning language, rationales for passage, and formatting requirements. Between 2011 and 2019, nine jurisdictions proposed 28 bills (including one law by San Francisco) requiring sugar-sweetened beverage warnings on labels, advertisements, and at point of sale. This analysis highlighted outstanding First Amendment questions on permissible wording and formatting requirements, and the need for evidence and rationales that focus on specific health harms of sugar-sweetened beverages. Warnings on labels and at point of sale may pose fewer First Amendment concerns than on advertisements.

Conclusions—Sugar-sweetened beverage warning policies that mirror health and safety warnings long established as permissible on other consumer products should be considered constitutional; however, evolving First Amendment jurisprudence leaves outstanding questions, especially on the interpretation of controversy, formatting requirements, and levels of required specificity for warning language.

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INTRODUCTION

Several U.S. cities and states proposed policies to require health and safety warnings on sugar-sweetened beverage (SSB) labels, advertisements, and at the point of sale. The public health rationale stems from SSBs' particular contribution to diet-related disease, together with limited consumer knowledge about the full range of health risks association with consumption,[1] including tooth decay, weight gain, obesity, type 2 diabetes, fatty liver disease, and heart disease.[2–6] Even one daily SSB serving can increase risks.[4] SSBs are the leading source of added sugar in the U.S. diet,[7] and their liquid form enables rapid consumption and digestion without the same satiety cues as solid food.[2] Warning labels may therefore provide important information to enable informed consumer decision making.[8–10]

In 2015, San Francisco enacted the only SSB warning law to date.[11] The American Beverage Association and retailer and advertising associations sued San Francisco, arguing the law violated their First Amendment rights.[12] The First Amendment protects commercial speech (e.g., advertising, labeling) from unreasonable government restrictions or compulsions.[13] In 1985, the U.S. Supreme Court held, in *Zauderer v. Office of the Disciplinary Counsel*, that governments may require commercial speakers to disclose factual information, including warnings, that: (1) are reasonably related to a governmental interest; (2) compel factual, accurate, and uncontroversial information about the product itself; and (3) are not unjustified or unduly burdensome.[13] Courts routinely uphold disclosure and warning requirements under *Zauderer*.[14–17] However, in 2017, the Court of Appeals for the Ninth Circuit found San Francisco's SSB warning law likely violated the First Amendment (2017 decision). The full panel of Ninth Circuit judges agreed to rehear the case and also found the ordinance likely violated the First Amendment (2019 decision).[18] This 2019 decision found San Francisco's law was unduly burdensome and thus failed *Zauderer's* third part; the majority did not evaluate the remaining parts of the test.

Between the two Ninth Circuit decisions, the Supreme Court decided *NIFLA v. Becerra*, striking down a California disclosure requirement for reproductive health clinics as violating the First Amendment.[19] Although this case left many uncertainties,[20] the Court did state: "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[19] The *NIFLA* case and subsequent court opinions raise questions about which types of health and safety warnings remain permissible, with one judge arguing that only those dating back to 1791 qualify.[21]

In light of the health harms of SSBs and a consumer protection landscape that regularly includes health and safety warnings, the question of whether SSB warnings are a constitutionally feasible policy option is crucial. As such, this investigation evaluates whether SSB warning policies proposed nationally are consistent with existing warnings on consumer products and identified outstanding First Amendment questions raised in the case law.

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METHODS

All research was conducted in 2019 using LexisNexis. First, to identify key examples of long-standing (>20 years) health and safety warnings related to the consumption of consumer products (excluding drugs) in existence through July 2019, searches were conducted in the federal register using keywords *warning* and *product*. This search did not intend to capture every federal warning in existence. LexisNexis provides results according to relevance, so the search concluded after review of 300 records as only one relevant warning was identified in the final 135 records. Once relevant warnings were identified, the associated regulations and statutes were retrieved from LexisNexis. In addition, state and local warning requirements that had been the subject of First Amendment legal challenges, as identified in the review of case law under research method part three, were included to be consistent with and ensure clarity of the research findings. Data extracted for all warnings included statue or regulation number, year of enactment, legal challenges, rationale for warning as indicated in a preamble's purpose clause (an optional statement preceding statutory or regulatory text explaining rationales for enactment, often used by courts to interpret ambiguities), warning language, placement, and formatting requirements (e.g., size, font, prominence).

Second, all bills proposed anytime through July 2019 that required a warning related to SSBs were identified using keywords: *warning*, *drink*, *beverage*, *sugar*, *sweetened*, *sugary*, *sugars-weetened*. Extracted data included the bill or law number, rationale for warning, warning language, placement, and formatting requirements.

Third, to identify outstanding questions relevant to requiring SSB warnings consistent with the First Amendment, case law analyzing the constitutionality of disclosure and warning requirements according to the *Zauderer* standard was evaluated (this was completed by Shepardizing *Zauderer* in LexisNexis). Because the San Francisco case is the only case directly on SSB warnings, the 2017 opinion and 2019 concurring opinions were included as a potential indication of how other courts may rule, even though they are not binding precedent as a result of the 2019 decision.

RESULTS

This research identified several long-established government-mandated warnings on consumer products. Appendix Table 1 summarizes key examples of federal (unless noted) warning requirements for: alcoholic beverages (enacted 1988); chemicals known to cause cancer, birth defects, or reproductive harm (California; approved 1986); cigarettes (2009; original Surgeon General's Warning, 1970[22]); iron-containing dietary supplements (1997); high-protein products (1984); high-sodium restaurant food (New York City; 2015); smokeless tobacco (2009; original, 1986); and unpasteurized juice (1998). These examples warn of potential acute illness or toxicity (e.g., unpasteurized juice, iron-containing supplements) or long-term health harms (e.g., cigarettes, high-sodium food), with alcohol requirements warning of both acute and long-term risks. Rationales for enacting these warnings universally included informing the public about dangers, hazards, and health harms

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associated with consumption; government goals also included informed consumer decision making (e.g., high-sodium and high-protein warnings).

With the exception of California's Proposition 65, which provided suggested language considered presumptively valid, all laws required specific warning language that included a mixture of factual statements and cautionary language linking products to health or safety risks.

Examples of factual statements include: "According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects"; "Cigarettes are addictive"; and "Accidental overdose of iron-containing products is a leading cause of fatal poisoning in children." Warning language cautioned of health risks using various main and auxiliary verbs, often using "cause" and "can" (e.g., alcohol "may cause health problems"; cigarettes "cause cancer"; smokeless tobacco "can cause mouth cancer"; and "High sodium intake can increase blood pressure and risk of heart disease and stroke.").

Formatting requirements varied. Cigarette package warning labels were the largest evaluated (50% of main panels); warnings on tobacco advertisements were 20% of the advertisement. Type sizes were highly prescribed, either with minimum size requirements for federal food and dietary supplements (at least one-sixteenth inch in height), or based on the size and type of print advertisements (tobacco), or increasing in size with container size for alcohol (at least 1 mm and not more than 40 characters per inch for 8 ounce containers; at least 2 mms and no more than 25 characters per inch for 8 ounce to 3 liter containers; and at least 3 mms and no more than 12 characters per inch for containers larger than 3 liters). Cigarette package warnings were required to be enclosed within a rectangular border and unpasteurized juice warnings enclosed within a hairline border. Federal food, dietary supplement, and alcohol warnings were required to be "conspicuous" and "prominent," with alcohol warnings additionally required to be separate and apart from other information on contrasting background. The word "warning" was often required to be bold and in all caps.

The identified SSB warning bills and laws are set forth in Appendix Table 2. From 2011 through July 2019, seven states and two localities proposed 28 bills (including San Francisco's law). Twenty-one applied to beverage containers, multipacks, exteriors of self-service vending and dispensing machines, and at the point of sale (sometime explicitly including menus); five applied to outdoor advertisements; one to advertisements and menus; and one to SSB containers alone. There were no federal bills or laws.

Fourteen bills had no preamble; those with a preamble generally set forth evidence related to added sugar and unique health harms of SSBs, including their association with diet-related disease and dental caries. Most also expressed interests in informed choice, increasing knowledge, and reducing SSB consumption. San Francisco additionally highlighted the purpose of informing consumers about the presence of added sugar.

The texts of the SSB warnings were very similar, warning of long-term health harms from "drinking beverages with added sugar," including obesity, diabetes, and tooth decay; two California bills specified type 2 diabetes. Uniquely, a New York bill included sugary food and an Oregon bill warned of "overconsumption" and heart disease. No bill mentioned risks

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of weight gain or fatty liver disease, nor required disclosure of factual statements unrelated to associated health risks.

The text of 26 bills used the verbs "contributes to," one bill used "is linked to," and one used "may contribute to." There were various formatting requirements for size (e.g., 20% of the advertisement) and prominence (e.g., bold type); most applicable to containers required text size to increase with container size. The word "warning" was often required to be bold and in all-caps.

Research into the case law under *Zauderer* identified several outstanding questions regarding the constitutionality of SSB warning policies. *Zauderer* first requires warnings to be reasonably related to the government's interest in passing them. The Supreme Court twice found an interest "in preventing deception of consumers" valid under *Zauderer*.[13,23] All federal circuit courts to examine government interests under *Zauderer* have found that interests other than preventing consumer deception are valid.[14,24] Moreover, in *NIFLA*, the Supreme Court stated that it did not question the legality of health and safety warnings "long considered permissible."[19] As noted in Appendix Table 1, governments passed, and courts have upheld, warnings "long considered permissible" to inform the public about health and safety risks associated with consumption of consumer products and not necessarily to prevent deception.[15] For example, a New York state court upheld restaurant menu sodium warnings based on the government's interest in "improving consumer knowledge about potential health risks."[16] And since *NIFLA*, the Ninth Circuit upheld a warning requirement for cellular telephone radio frequency radiation, finding Berkeley's interest in "protecting the health and safety of consumers" was substantial.[17]

Under the second part of *Zauderer*, government may only compel factual, accurate, and uncontroversial information about the product itself.[13,19,23] Courts' evaluation of factual accuracy historically had been more straightforward than that over controversy. For example, in 2012, the Sixth Circuit upheld the revised text-based federal tobacco warnings, finding the language was factual and not disputed within the scientific or medical communities.[15] Similarly, a New York state court found it "factual, accurate and uncontroversial" that consuming a day's worth of sodium from one menu item can increase medical risk.[16] However, in 2018 a federal district court found that California's Proposition 65 warning for glyphosate failed because glyphosate's carcinogenicity is not "an undisputed fact," as other regulators found "insufficient evidence" that it causes cancer.[25] Similarly, in San Francisco's SSB warning case, the 2017 opinion suggested the warning language should include the terms "may" or "overconsumption" to increase factual accuracy,[12] and a 2019 concurring opinion found the language was " literally false" because it did not specify "type 2 diabetes."[21]

Courts have generally interpreted "controversial" as controversy over facts or requiring a "onesided or incomplete" disclosure or warning.[26] For example, in 2017, the Ninth Circuit found it misleading and thus controversial to single out SSBs for a warning based on San Francisco's interest in addressing added sugar, which the court noted is "generally recognized as safe" under federal law.[12] However, in *NIFLA*, the Supreme Court found an otherwise factual disclosure requirement to be "controversial," because it required health

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clinics that oppose abortion to disclose the availability of government services including abortion.[19] Given limited case law, it is unclear whether the finding of controversy in *NIFLA* will be confined to abortion-related cases or have broader ramifications for disclosure requirements.[17,20,27] Thus, under *Zauderer's* second inquiry, there are unanswered questions about whether certain words are necessary in the warning language to ensure factual accuracy and the extent controversy can undermine an otherwise factual warning.

Under *Zauderer's* third part, warnings cannot be unjustified, so government must gather evidence that the harm it seeks to remedy is "real" and not "hypothetical."[19] Courts regularly evaluate the evidence relied upon but rarely discuss this requirement separate from their inquiry into the factual nature of the warning itself.[15,24]

Under *Zauderer's* third part, warnings may also not be unduly burdensome by "chilling," or dissuading, commercial speech.[13] The Supreme Court found certain disclosures to be unduly burdensome when the word length was excessive[28] or it was required to be disclosed in multiple languages simultaneously.[19] Lower courts often struggle with formatting requirements (e.g., striking down font size as large as the advertisement's largest print[29]; upholding font size the same or larger than the statement it sought to clarify[30]).

In an effort to show burden in San Francisco, SSB companies submitted declarations stating they would stop advertising if required to disclose the warning. Despite acknowledging these were "self-serving," the Ninth Circuit's 2017 decision accepted these as evidence that the warning was unduly burdensome.[12] The Ninth Circuit's 2019 decision struck down San Francisco's SSB warning requirement as unduly burdensome because the government failed to show the rectangular border and 20% coverage would not "drown out" the advertiser's message or dissuade their advertisement in the first place.[18] The court recognized that the Sixth Circuit had upheld similarly formatted warnings for tobacco advertisements, but found the same was not justified for SSBs, especially in light of a study supporting efficacy at 10%.[18] Yet, the Ninth Circuit cautioned that 10% coverage is not automatically valid for future requirements, confirming the "burdensome" standard is not easily measurable through prior decisions.[18] Notably, the Ninth Circuit subsequently found Berkeley's radio frequency radiation warning not burdensome because retailers could disclose it on a poster or handout (and include additional information) without interfering with their own advertising.[17]

DISCUSSION

This is the first study to evaluate SSB warning policies, with evidence derived from existing warnings on consumer products, proposed SSB warning policies, and First Amendment jurisprudence. Long-established warnings for a range of products reveal that government routinely requires the disclosure of both factual statements and cautionary language warning of acute and long-term health risks. Governments' rationales uniformly included informing the public about potential health and safety harms from consumption, which aligns with the rationale for SSB warnings. Although federal law requires large and highly visible formatting for textual tobacco advertisement warnings, case law indicates that such requirements may not be upheld in other contexts, including SSB advertisements. Conversely, federal food, dietary supplement, and alcohol label warnings were less

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proscribed and potentially relevant to SSB containers. Indeed, several SSB warning bills used identical formatting requirements as the federal alcohol warning law.

The SSB warning bills warned of scientifically well-supported long-term health risks. However, compared with straightforward relationships between tobacco and lung disease, or sodium and hypertension, the relationship between SSBs and a range of diseases is more complex. Thus, it may be necessary to specify type 2 diabetes for SSBs, and if used, preambles must set forth evidence and policy rationales specific to SSBs rather than added sugar more generally.[31] SSB warning bills included preambles; yet, courts have used them to uphold[15] and strike down laws under the First Amendment.[32]

To increase the likelihood that courts would find warnings factually accurate, the warning language itself must reflect scientific evidence about unique health harms of SSBs. Ninth Circuit judges found a lack of scientific consensus over added sugar, which led them to find it controversial and not factually accurate to single out SSBs for a warning; this may also have led them to focus heavily on word choice for the warning text. Yet, contrary to the court's 2017 suggestion, including the term "overconsumption" would not be factually accurate from a scientific perspective given "overconsumption" has no clearly defined meaning and health risks are not solely associated with "over"-consumption.[4,31] However, adding "may" or "can" to "contribute" or another verb, would be factually accurate and consistent with existing health and safety warnings (e.g., "may" for alcohol, "can" for smokeless tobacco and high-sodium food).[31] Notably, if an authoritative body issued a formal recommendation on SSB consumption, the required disclosure of such a statement on SSB containers would be similar to the Surgeon General's statements on alcohol and tobacco, and potentially feasible as factual and noncontroversial. Yet, the uncontroversial standard is still evolving, and future case law will be necessary to flesh out this part of the *Zauderer* test.

In terms of potential burden, the case law is sparse and therefore unclear on appropriate size or border requirements, especially for advertisements which have the sole purpose to communicate the advertiser's message.[12] Conversely, product labels are already regulated to require the disclosure of factual information manufacturers might not otherwise provide voluntarily (e.g., ingredients, nutrition facts).[13] Perhaps for this reason, government more customarily requires warnings on product labels than advertisements. Like tobacco and alcohol labels—both of which include mandated federal warnings—SSB labels almost exclusively communicate the product's brand name and flavor with a recognizable color scheme and without additional marketing. Therefore, there may be less of an argument that warnings on SSB labels—or posters or at point of sale—leave companies "little room to communicate their intended message,"[12] and thus may pose less of a First Amendment concern than on advertisements.

The Supreme Court's statement that it would not question health and safety warnings long considered permissible should indicate that a range of warnings could meet the *Zauderer* test and not only historic warnings remain valid[21]; otherwise, government could not address newly invented threats (e.g., e-cigarettes) or products for which the science has evolved (e.g., SSBs). However, courts seem to be providing increased protection to commercial

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speech at the expense of public health.[19,21,33] Some of the cases analyzed here lead to uncertainties about whether SSB warnings will survive judicial scrutiny—whatever the language or formatting requirements— without broader acceptance of the health harms associated with SSB consumption or a shift in consideration about protections afforded to commercial speech. Additional outstanding questions related to the burdensome nature of warning policies suggest a need for further research on how various formatting requirements influence the efficacy of warnings and whether industries subject to international warning requirements continue their advertising in those locations. Otherwise, if "self-serving" declarations can simply defeat policy, this would undermine the need for courts to engage in First Amendment analysis in the first place.

Strengths of this study include the evaluation of SSB warning policies within the context of existing consumer protection warning laws and under First Amendment jurisprudence.

Limitations

Potential limitations include that research into warnings on consumer products may not fully represent all warnings in the marketplace, not all SSB warning bills may have been identified, and this area of case law is evolving rapidly. Further, this research did not include analysis of state or federal preemption of SSB warning requirements, which is warranted.

CONCLUSIONS

The current landscape of health and safety warnings provides valuable context to consider the government's role in requiring warnings for SSBs. Future case law is needed to answer outstanding legal questions and future research is needed to ensure warnings are effective and not burdensome.

Supplementary Material

Refer to Web version on PubMed Central for supplementary material.

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