Have the Courts Protected Free Speech for Business People?

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The First Amendment to the U.S. Constitution states: "Congress shall make no law…abridging the freedom of speech…". The notion that speech should be subject to a government cost-benefit analysis and judicial opinion strikes us as contrary to the principle of free speech as we understand it and as Benjamin Franklin expounded it.

The States ratified the U.S. Bill of Rights, which includes the First Amendment to the Constitution, on 15 December 1791. Two-hundred-and-twenty years later, in *R.J. Reynolds v. FDA* (2012), the judge upheld what has become a more limited right to speech by granting an injunction against the FDA. Judge Leon granted the injunction, and later granted the plaintiffs' Motion for Summary Judgment, on the basis that the FDA rule requiring tobacco companies to display disturbing color graphic images on the top 50% of the front and back of cigarette packets was, in "substantial likelihood," unconstitutionally compelled speech. He found the images did not constitute "purely factual and uncontroversial information" narrowly tailored for the purpose of informing consumers, but amounted to government advocacy.

The government advocacy in this tobacco case involved tampering with images in order to upset viewers. Presumably it would be illegal for a firm to mislead consumers in this way. Judge Leon noted that the government did not provide relevant scientific evidence. In November 2011, we sent an email request to the FDA asking for its evidence that the new packaging regulations would result in a net social benefit. A copy of our request can be found online[1]. Our requests were met with courteous replies, but scant substantive evidence. We were referred to the Federal Register pages 36628 to 36777 for evidence[2] and were told that no experimental evidence was available. A key statistic, the percentage reduction in smoking was based on a single comparison between Canada, in which a similar graphic warnings policy had been enacted in 2001, and the U.S., in which the policy had not been enacted.

Early Commercial Speech Restrictions

Compelled speech in the form of mandatory warnings was introduced in the U.S. in 1927 with the Federal Caustic Poisons Act (FCPA). Egilman and Bohme (2006) reported that prior to the Act, poisons were sold in bottles of unusual shapes, colors, and textures (they showed an image of a dark-blue skull-shaped bottle) in order to warn consumers, including the blind and illiterate, that the contents were dangerous.

After the passage of the FCPA in the U.S., manufacturers shifted to plain bottles in order to display the mandated warning label. The authors observed that the pre-FCPA bottles were more effective at protecting at least some people. The FCPA created the agency which three years later became known, as it is currently, as the Food and Drug Administration.

Exceptions that limited freedom of speech identified as commercial began to be made following *Valentine v. Chrestensen* (1942). The U.S. Supreme Court justices ruled that a New York City ordinance that was used to prohibit the owner of a submarine from distributing advertising material (handbills) on the streets was not a violation of the First Amendment right to free speech—even when the material included a statement of political protest and no prices. Prior to this opinion, the court did not make a commercial speech distinction (Boedecker, Morgan and Wright 1995).

Having created a commercial speech exception to free speech rights, the Supreme Court did not specifically uphold the right to disseminate "truthful and nonmisleading commercial messages about lawful products and services" until 1975. Subsequent judgments provided further clarification of this limited right (Boedecker, Morgan and Wright 1995; *44 Liquormart Inc. v. Rhode Island* 1996, 496). In contrast, citizens, consumer groups, and lobby groups—which often speak against commercial interests in order to further their own—have First Amendment protection to speak about products; protection that is denied to firms, even to the extent that Nike was denied the right to speak in its own defense against media coverage of lobbyists (Shugan 2006).

The Central Hudson Test of Commercial Speech Restriction, and Subsequent Developments

Recall that in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), the Supreme Court Justices stated, "we see no satisfactory distinction between the two kinds of speech…As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."

Despite the Justices' own concerns about the practical difficulties of holding to the concept of a commercial speech distinction, the Supreme Court did not abandon the concept. Instead, from 1980 the Court provided guidelines for making the distinction in ways that further reduced freedom by allowing considerable discretion to governments and courts to judge the importance of regulating the speech in question (Boedecker, Morgan and Wright 1995).

In *Central Hudson v. Public Service Commission of New York* (1980) the Supreme Court set out the requirements that must be met in order to warrant government regulation of commercial speech. Namely, there must be a substantial government interest that might be served by a restriction on speech, the regulation of the speech must directly advance that interest, and the restriction of speech must be no greater than is necessary to serve that interest. While concurring with the judgment, Justices Brennan, Blackmun, and Stevens variously argued that the Court's definition of commercial speech encompassed speech "entitled to the maximum protection afforded by the First Amendment" (Stevens) and that the speech test was too permissive of government regulation.

In relation to mandatory disclaimers and warnings, the U.S. Supreme Court stated, "We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" (*Zauderer v. Supreme Court of Ohio* 1985). Justices Brennan and Marshall elaborated that the State must "demonstrate that the advertising either 'is inherently likely to deceive' or must muster record evidence showing that 'a particular form or method of advertising has in fact been deceptive'… and it must similarly demonstrate that the regulations directly and proportionately remedy the deception." The Justices also noted that compelling the publication of information that is large in quantity relative to the advertiser's information "would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception."

In *SUNY v. Fox* (1989), the Supreme Court weakened the *Central Hudson* condition that regulation of speech should be "not too extensive", requiring instead only that regulation should be "reasonable" and noted that it would not hold government regulation of commercial speech to the "least restrictive means," as the dissenting Justices argued was required under *Central Hudson*.

The Florida Department of Business and Professional Regulation reprimanded a lawyer for "false, misleading, and deceptive" advertising for advertising her Certified Public Accountant (CPA) and Certified Financial Planner (CFP) credentials (*Ibanez v. Florida* 1994). In this case, which parallels the *Ducoin v. Viamonte Ros* (2009) case for which we conducted our research, the CFP credential was conferred by a private organization and the Department required Ibanez to display a form of the Florida Mandatory Disclaimer. The Supreme Court held that the Board's censure of Ibanez was "incompatible with First Amendment restraints on official action." In particular, the Court rejected the requirement for a disclaimer on the grounds that hypothesized

possible deception was not sufficient grounds for rebutting "the constitutional presumption favoring disclosure over concealment." Further, Justice Ginsburg observed that "the detail required in the disclaimer currently described by the Board effectively rules out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing."

Over the years since the review by Boedecker, Morgan and Wright (1995), more than a dozen U.S. Supreme Court decisions have cited the key *Central Hudson* judgment, and seven of these were germane to this paper.

In *Rubin v. Coors* (1995), Coors Brewing sought to include alcohol content on bottle labels. The government sought to restrict Coors speech in order to keep consumers ignorant of the alcohol content of beer, evidently for the sake of their own protection. The Justices found the Federal Alcohol and Tobacco Administration Act clause that prohibits that practice violated the First Amendment right to free speech, because it failed the *Central Hudson* test. Justice Stevens concurred that the labeling ban was unconstitutional but, in a dissenting opinion, claimed that the *Central Hudson* test was not relevant when the legislation was a plain attempt to suppress truthful information that was of interest to consumers.[3]

The Supreme Court found that a Florida Bar rule that prohibited injury lawyers from sending direct mail solicitation to victims or their relatives before 30 days after the accident or disaster passed the *Central Hudson* test for the restriction of commercial speech and did not therefore violate the First Amendment (*Florida Bar v. Went For It* 1995). The Florida Bar rule was based on surveys of public opinion, complaints, newspaper editorials, concerns that victims should not be exposed to invasion of privacy and undue influence, and concerns that the reputation of the legal profession was harmed by the practice of soliciting recent victims. In the opinion of the Court, delivered by Justice O'Connor, the nature of evidence that is needed to satisfy the *Central Hudson* test is at the discretion of the Court, and may be none. The Court was concerned not so much with whether harm was inflicted on the recipients of the advertising material, who could easily make the short trip from mailbox to trashcan, but with the potential damage to the reputation of the legal profession.

Justice Kennedy's dissent, with Justices Steven, Souter, and Ginsburg joining, was scathing of the majority opinion upholding the prohibition. He wrote, "This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry." He concluded:

> "Today's opinion is a serious departure… from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it… knows what is best… Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence."

In *44 Liquormart Inc. v. Rhode Island* (1996), the Court followed *Rubin v. Coors* and found that the government of Rhode Island had violated the First Amendment protection of free speech by banning the advertising of alcoholic beverage prices. All Justices concurred but differed in their reasoning. Delivering the Court's opinion, Justice Stevens drew a distinction between State regulation of commercial messages for the purpose of protecting or informing consumers and the complete prohibition on disseminating truthful and non-misleading commercial messages for other reasons. He argued that the latter situation provided "far less reason to depart from the rigorous review that the First Amendment generally demands" (p. 501). Justice Stevens warned that commercial speech bans typically rested solely on the paternalistic premise that people will respond "irrationally" to the truth and need to be kept in the dark for their own good. He further warned that banning speech would conceal the government policy from the public and hence from debate. Justice Stevens rejected the State's claim that commercial speech about "vice" products were not entitled to First Amendment protection, pointing out that such an exception would allow state legislatures to impose censorship on lawful activities by characterizing them as vices.

Justice Thomas argued that the government has no legitimate interest in keeping purchasers ignorant in order to manipulate their choices, and therefore the *Central Hudson* test did not apply. Moreover, Justice Thomas professed skepticism over making a commercial speech distinction: "I do not see a philosophical or historical

basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech" (p. 522). He pointed out that application of the *Central Hudson* test, as interpreted by Justices Stevens and O'Connor in this case, would stop the government from restricting commercial advertising except where it outlaws or otherwise restricts the transactions themselves, because these measures would more effectively achieve the government purpose.

Justice Scalia shared Justice Thomas's "discomfort with the *Central Hudson* test" as seeming to "have nothing more than policy intuition to support it" (p. 517). Justice Thomas observed that the *Central Hudson* test is difficult to apply uniformly, given that it is subject to individual judicial preferences and judges' opinions as to which situations citizens cannot be trusted with information on and for which products consumption should be discouraged. He suggested a return to the holding of *Virginia Board of Pharmacy* (1976).

In *Greater New Orleans Broadcasting v. U.S.* (1999), Justice Stevens presenting the opinion of the Court acknowledged the difficulty of applying the Central Hudson test and that there were calls for its replacement by "a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." The Court, however, decided that it was not appropriate to tackle the broader constitutional issue when the test provided "an adequate basis for decision" for the case before it.

In presenting the Court's opinion on *Lorillard Tobacco Co. v. Reilly* (2001), Justice O'Connor suggested that the Court's established position on the Central Hudson test's requirement for empirical data to support regulation of commercial speech is not an onerous one, but can be met with "studies and anecdotes" from different situations, or even "history, consensus, and 'simple common sense.'" In respect to the cost-benefit test, the Court maintained that, "A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products."

In his partial concurrence, Justice Thomas reasserted his opposition to drawing a commercial speech distinction, as he also did in *Greater New Orleans Broadcasting v. U.S.* He restated his position that there is no historical or philosophical basis for assigning commercial speech a lower value than other speech and adding that it is doubtful "whether it is even possible to draw a coherent distinction". On the question of whether tobacco is a product that is so exceptional as to be outside any First Amendment consideration, Justice Thomas concluded his opinion with the following uncompromising statement about the intended scope of the First Amendment:

> No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression always are made when the specter of some threatened harm is looming. The identity of the harm may vary. People will be inspired by totalitarian dogmas and subvert the Republic. They will be inflamed by racial demagoguery and embrace hatred and bigotry. Or they will be enticed by cigarette advertisements and choose to smoke, risking disease. It is therefore no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are all entitled to the protection of the First Amendment.

Pharmacists who wished to advertise that they could supply drugs in compounded and other convenient forms for customer had their right to do so affirmed by the Supreme Court in *Thompson v. Western States Medical Center* (2002). Justice O'Conner, delivering the majority opinion of the Court noted, "We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." In a dissenting opinion, Justices Breyer, Stevens, and Ginsburg maintained that the Court's opinion had given insufficient regard to the government's role as protector of consumers from untested products, citing evidence that physicians believe that advertising leads consumers to pressure them to prescribe drugs they would not otherwise prescribe. The dissenting justices argued that commercial speech should be subject to government policy objectives and to less rigorous First Amendment protection.

In *Milavetz, Gallop and Milavetz. v. United States* (2010), the Court upheld a requirement for lawyers who offer bankruptcy advise or assistance to include in their advertisements notice that their operation is a "Debt

Relief Agency" that "helps people file for bankruptcy". The plaintiffs claimed that these statements would cause confusion among consumers, but did not offer evidence. The majority opinion, delivered by Justice Sotomayor, held that the likelihood that consumers would be misled if the mandated statements were absent was self-evident.

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[1] http://kestencgreen.com/letter-to-fda.pdf

[2] Available online at http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15337.pdf

[3] The same legislation required *disclosure* of alcohol content on wine and spirit labels.