

August 23, 2000

COURT UPHOLDS GOVERNMENT ORDER COMPELLING CORPORATE SPEECH

(Novartis Corp. v. Federal Trade Commission, No. 99-1315)

Last week the U.S. Court of Appeals for the District of Columbia Circuit issued a decision upholding an order by the Federal Trade Commission (FTC), which compelled Novartis Corporation to include a governmentally-dictated message in its advertising.

This decision was a setback for the Washington Legal Foundation (WLF), which had filed a brief arguing that the court should not defer to the FTC's finding that advertisements for Doan's Pills were deceptive and that the FTC's order should be set aside as a violation of the First Amendment.

The D.C. Circuit rejected WLF's contention that the proper standard of review gives no deference to the FTC's factual findings. Instead, the court held that its "task" is "to determine if the Commission's finding is supported by substantial evidence on the record as a whole." This more relaxed standard allowed the court to largely defer to the FTC's finding that Novartis had engaged in deceptive advertising.

Instead of testing the FTC's corrective advertising order according to the highest level of judicial scrutiny, as urged by WLF, the court of appeals asked only whether the FTC could "assert a substantial interest" in issuing the order, whether the order "directly advance[s]" that interest, and whether the FTC's asserted interest "could be served as well by a more limited restriction." Measured by this standard, the court found that the FTC's order survived Novartis's First Amendment challenge.

WLF attorneys expressed disappointment with the ruling. "The First Amendment leaves companies, no less than persons, free to choose what they say," said WLF's Senior Counsel for Litigation Affairs Shawn Gunnarson. "When it tries to compel a company to deliver a particular message, the government must satisfy the most searching judicial scrutiny," Gunnarson said. "But the FTC has simply failed to meet that high standard."

This case arose when the FTC filed a complaint against Novartis, the manufacturer of Doan's Pills, alleging that advertisements for Doan's had been misleading insofar as they suggested that Doan's offers more effective relief for back pain than other pain relievers.

A divided Commission ordered Novartis to include the following statement in all Doan's advertising: "*Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain.*" According to the Commission, that order is to remain effective until Novartis (1) spends \$8 million on advertising for Doan's or (2) five years elapse. Novartis appealed.

In its brief filed with the court of appeals, WLF argued that the FTC's corrective advertising order ought to be set aside for two reasons. First, as an attempt by the government to compel Novartis to convey a message with which it disagrees, the order is subject to strict scrutiny. Unless the Commission can show that its corrective advertising order is narrowly tailored to serve a compelling interest, the First Amendment requires the order to be set aside. Tested by that high standard, WLF pointed out, the FTC's corrective advertising order fails. It does not serve a compelling interest, since correcting *possible* misimpressions based on past advertising does not fairly compare with established compelling interests like the prevention of violent crime or the eradication of invidious racial discrimination. Nor is the FTC's order narrowly tailored to that interest, since the order has the effect of inducing Novartis to abandon any advertisement of Doan's—even when that advertisement is both truthful and nonmisleading. Second, because the FTC's corrective advertising order raises substantial First Amendment issues, the court of appeals must conduct an independent review of the facts on which the FTC relied. Given this standard of review, which gives no deference to the Commission's factual findings, WLF argued that the court of appeals should decide in favor of Novartis. As Commissioner Swindle pointed out in dissent, the challenged advertisements have not substantially created or reinforced a false opinion of Doan's effectiveness, and even if the Doan's advertisements have somehow led to such a misimpression, any resulting deception is unlikely to linger long into the future.

The Washington Legal Foundation is a nonprofit public interest law and policy center with supporters nationwide. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights.

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