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FRESH BAGELS AND A SCHMEAR[1]: A SIGN OF THE TIMES RULING ON COMMERCIAL FREE SPEECH

by
Arnold I. Friede

The City Council of Redmond, Washington, in an ostensible effort to preserve community aesthetics and promote vehicular and pedestrian safety, enacted an Ordinance that banned most portable and offsite signs. The City's Department of Planning and Community Development then sought to apply this half-baked law to prevent the owner of *Blazing Bagels* from having what we used to call a "sandwich man" stand on the sidewalk in front of his store with a sign that read "Fresh Bagels—Now Open." From this *schmear* campaign emerges a profound decision from the U.S. Court of Appeals for the Ninth Circuit on commercial free speech rights that effectively leaves the City Council with a "bagel"—0 for 2—in its effort to sustain the Ordinance at both the trial court and appellate levels. *Ballen v. City of Redmond*, ___ F. 3d ___, 2006 WL 2640537 (9th Cir. Sept. 15, 2006).

In its Opinion upholding the District Court's invalidation of the Ordinance, the Ninth Circuit acknowledged, under the second prong of Supreme Court's *Central Hudson*[2] test for evaluating the constitutionality of restraints on commercial speech, the substantiality of the City's interest in preserving community aesthetics and promoting vehicular safety. But the court had little difficulty in nevertheless overturning the Ordinance because it was content-based and exception-riddled in ways that did not directly relate to the State's asserted interest in aesthetics and safety. For example, the Ordinance excepted real estate signage from its prohibition. As the Ninth Circuit explained:

> [U]biquitous real estate signs, which can turn an inviting sidewalk into an obstacle course challenging even the most dextrous hurdler, are an even greater threat to vehicular and pedestrian safety and community aesthetics that the presence of a single employee holding an innocuous sign that reads: 'Fresh Bagels—Now Open' . . . Additionally, temporary window signs and signs on kiosks are no less a threat to vehicular and pedestrian safety and community aesthetics than the ambulant bagel advertisement.[3]

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[1] *Schmear*: "a dab, as of cream cheese, spread on a roll, bagel, or the like" (http://dictionary.reference.com/browse/schmear).

[2] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

[3] 2006 WL 2640537 at *4.

From a doctrinal perspective, and while it did not analyze the restraint in precisely these terms, the court was troubled by the underinclusiveness of the statute given the asserted governmental interests in aesthetics and safety. This underinclusiveness test for evaluating commercial speech restraints has sometimes been analyzed under the third prong of *Central Hudson*—"whether the regulation directly advances the governmental interest asserted."[4] Here, the court evaluated it instead under the "not more extensive than necessary" standard of the fourth *Central Hudson* prong.[5] But whatever the right analytic prong, the Ninth Circuit is sending a powerful message here about the serious burden that government has in order to sustain the validity of commercial speech restraints in a variety of contexts. While government need not fix every problem before it can tackle any,[6] it must still make a meaningful hole in the problem before it could constitutionally single out the *Blazing Bagels* sign man for this *schmear* campaign, which the Redmond, Washington Ordinance failed to do.

Arnold I. Friede is Senior Corporate Counsel with Pfizer, Inc. The views presented here are his own and do not necessarily represent those of Pfizer.

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[4] 447 U.S. at 566.

[5] *Id.*

[6] *Greater New Orleans Broadcasting, Ass'n vs. United States*, 527 U.S. 173, 190 (1999) ("The operation of [the statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.").