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COURT URGED TO VOID A GOVERNMENT ORDER COMPELLING CORPORATE SPEECH

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

Last week the Washington Legal Foundation (WLF) filed a brief urging the U.S. Court of Appeals for the D.C. Circuit to set aside an order by the Federal Trade Commission (FTC) compelling Novartis Corporation, a pharmaceutical company, to include a governmentally-dictated message in its advertising.

This case arose when the FTC filed a complaint against Novartis, the manufacturer of Doan's Pills. The Commission alleged 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. Chief Administrative Law Judge Parker decided in the FTC's favor, ruling that the Doan's advertisements were deceptive. Accordingly, it issued a decision barring Novartis from running further advertisements claiming that Doan's is superior to other analgesics in relieving back pain. Judge Parker declined the FTC's request for an order compelling Novartis to engage in "corrective" advertising, however, which would obligate Novartis to include in its Doan's advertisements a message disclaiming the superiority of Doan's over competing brands.

A divided Commission reversed Judge Parker's decision on corrective advertisement. Over Commissioner Swindle's dissent, the 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, the most searching form of judicial review. 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.

“Companies ought to be free to choose what they say,” said WLF's Senior Counsel for Litigation Affairs Shawn Gunnarson. “The government must satisfy the most searching judicial scrutiny whenever it attempts to force a company to deliver a message with which that company disagrees, and the government simply cannot meet that burden in this case.”

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