

**June 20, 2002**

## **COURT DECLINES TO CONSIDER PROTECTING SPEECH DEEMED OF "PRIVATE CONCERN"**

*(Trans Union LLC v. FTC)*

The U.S. Supreme Court this week declined to review a lower-court decision that would deny full First Amendment protection to truthful speech deemed by the lower court not to "relate to matters of public concern."

The Court's decision in *Trans Union LLC v. Federal Trade Commission* was a setback for the Washington Legal Foundation (WLF), which had filed a brief in the case urging the Court to grant review. A silver lining is that two justices (Justice O'Connor and Justice Kennedy) dissented from the decision to deny review, suggesting that the Court might well be willing to revisit the issue in connection with a different case.

In its brief, WLF argued that all truthful, noncommercial speech should be entitled to full First Amendment protection, and that a court should not be getting into the business of determining which speech involves topics that it deems insufficiently weighty and thus less worthy of protection.

"The lower court decision established an extremely limited scope for First Amendment rights; it denied full constitutional protection to the great majority of speech engaged in on a daily basis, speech that is often far more important to the daily lives of citizens than is speech concerning the 'great issues' of the day," said WLF Chief Counsel Richard Samp after learning of the Supreme Court's decision not to hear the case. "The Supreme Court needs to address this issue sooner rather than later," Samp said.

The case involves an enforcement action brought by the Federal Trade Commission (FTC) against Trans Union LLC, a credit reporting company. In addition to providing credit reports to its customers regarding consumers seeking credit, Trans Union sells "target marketing" lists: lists of

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names and addresses of consumers who share certain characteristics (e.g., individuals who possess a department store credit card). Even though the target marketing lists reveal nothing about the creditworthiness of those included on the list, the FTC charged that Trans Union's dissemination of target marketing lists violated the federal Fair Credit Reporting Act (FCRA). It ordered Trans Union to cease such dissemination.

Trans Union appealed to the U.S. Court of Appeals for the District of Columbia Circuit; it denied violating the FCRA and contended that, in any event, the FTC's efforts to prohibit its speech violated the First Amendment. The D.C. Circuit sided with the FTC's somewhat far-fetched interpretation of the FCRA and also rejected Trans Union's First Amendment claims.

The court recognized that Trans Union's dissemination of names and addresses does not constitute "commercial speech" (a category of speech entitled to reduced-but-still-substantial First Amendment protection), because "commercial speech" is generally defined as speech (such as advertising) that "proposes a commercial transaction." The court nonetheless held that Trans Union's truthful speech was entitled to a "reduced" level of First Amendment protection because it did not "relate to matters of public concern." Applying that standard, the court held that the FTC's ban on Trans Union's speech did not violate the First Amendment because the ban directly advanced the FTC's substantial interest in protecting consumer privacy.

WLF's brief urged the Supreme Court to review the D.C. Circuit's decision. WLF argued that the Supreme Court has never sanctioned application of a lower level of First Amendment scrutiny to government bans imposed on speech deemed not to relate to "matters of public concern." WLF warned that the D.C. Circuit's standard would allow the government to ban all sorts of speech that heretofore has been considered fully protected by the First Amendment. For example, WLF argued, the government could ban individuals from telling their neighbors that another neighbor was convicted of a crime in the distant past; a court might well determine that such information from an individual's past does not relate to a "matter of public concern."

WLF also argued that the FTC's actions are largely irrational. The FTC's action does little to advance privacy because companies other than credit reporting companies continue to be free to sell consumer mailing lists, and Trans Union itself is still permitted to disseminate lists of *creditworthy* consumers who are to be extended "firm offers" of credit or insurance. WLF also argued that the privacy interests at issue are minimal because: (1) name and address information of consumers is widely available and thus not the sort of information that consumers can reasonably expect to keep confidential; and (2) Trans Union will remove from its lists the names of any consumers who request removal.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to defending the rights of individuals and the business community from unwarranted government intrusion.

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