Legal Opinion Letter

Vol. 26 No. 4 February 10, 2017

Washington Legal Foundation
Advocate for Freedom and Justice®
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Better Think Twice Before Restricting Commercial Speech

by Thomas R. Julin

Activists hostile to free enterprise have lately turned their attention toward speech that promotes products or services—"commercial speech." They urge legislators to curb such speech, arguing that promotional activities encourage negative economic and personal consumption. Policymakers, however, must pause before following the activists' censorial path. Most commercial-speech limits are presumptively unconstitutional, and the prospects for successfully defending such restrictions in court have never been more daunting.

After decades of dormant First Amendment protection for commercial speech, the US Supreme Court began setting the standard of review for such restrictions in the 1976 decision *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[1] The Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"[2] It recognized that "the particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate" and that free flow of information "is indispensable to the proper allocation of resources in a free enterprise system."[3] These observations strongly suggested that commercial speech should receive the same First Amendment protection as non-commercial speech, but the Court refrained from going that far.[4]

The Court took the next step in the 1980 case *Central Hudson Gas & Electric Corporation v. Public Service Commission*.[5] The Court examined a policy prohibiting utility companies from promoting the use of electricity. This was a speaker-based, content-focused viewpoint restriction, and the Court could have decided to apply strict scrutiny just as it did to discriminatory restrictions on non-commercial speech. Instead, it examined the policy to decide whether it "directly and materially advanced an important state interest" and had been appropriately tailored to serve such an interest.[6] Eight justices agreed that the policy at issue failed this test.

The Court soon proceeded to invalidate a wide variety of commercial-speech regulations under *Central Hudson*.[7] Across three decades of opinions, the Court seemed to conduct an increasingly vigorous review of commercial-speech restrictions while constantly casting *Central Hudson* as a test requiring "intermediate scrutiny."

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[1] 425 U.S. 748 (1976).

[2] *Id*. at 762, *quoting Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973). In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65-68 (1983), the Court held that speech is commercial if it meets two out of three criteria: 1) the message is in an advertising format; 2) the communication refers to a specific product; and 3) the speaker's motive is economic.

[3] *Id*. at 763 & 765.

[4] *Id.* at 771-73

[5] 447 U.S. 557 (1980).

[6] *Id.* at 566-71.

[7] *E.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981) (plurality) (billboards); *Bolger v. Young Drug Prods. Corp.,* 463 U.S. 60 (1983) (contraceptive ads); *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (Tupperware parties in dorms); *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993) (commercial publication newsracks); *Edenfeld v. Fane,* 507 U.S. 418 (1993) (lawyer personal solicitations); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995) (beer labels); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996) (alcohol prices); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (lottery and casino gambling ads); *Thompson v. Western States Med. Ctr.,* 535 U.S. 357 (2002) (drug compounding ads).

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When the Court agreed to review a case involving a Vermont law limiting the use of pharmacy records in 2011, *Sorrell v. IMS Health Inc.*,[8] the stage appeared set for higher level scrutiny of commercial-speech limits.

The law under review in *Sorrell* imposed "content-and-speaker-based restrictions on the sale, disclosure, and use of" pharmacy records which showed which drugs doctors prescribed.[9] Vermont had enacted the law to deter pharmaceutical companies from aiming their marketing at specific doctors. That marketing, the state believed, might change doctors' prescribing behavior and thus increase Vermont's Medicaid program expenses.

In a six-justice majority opinion, Justice Kennedy noted that laws such as Vermont's, which targeted the viewpoint of drug companies and discriminated against commercial use of the prescription information, are presumptively unconstitutional.[10] On this basis, he concluded "heightened judicial scrutiny was warranted."[11] The opinion did not elaborate further on the meaning of "heightened scrutiny," however, because the Court determined that the law also failed to withstand the intermediate scrutiny of *Central Hudson*. Justice Kennedy applied *Central Hudson* in a demanding fashion and found that Vermont violated the First Amendment.

The specific holding of *Sorrell,* however—that Vermont's law neither directly and materially advanced the state's interest nor was appropriately tailored for that task—has left lower federal courts confused as to what scrutiny is appropriate for commercial-speech restrictions. Targets of such restrictions have rightly argued that when a ban or limit on commercial speech is content- or viewpoint-based, those measures presumptively violate the First Amendment and government must overcome heightened judicial scrutiny. Some federal courts have agreed that *Sorrell* strengthened the test for certain commercial-speech limits, while others have adhered to application of the *Central Hudson* test.[12]

Meanwhile, legislators and regulators must be aware that laws and rules that ban or burden commercial speech in areas such as labor, health, advertising, marketing, and privacy will undergo exacting scrutiny if challenged in court. Before taking action that impacts commercial speech, evidence must be marshalled that the action is essential to advance at least a substantial governmental interest. Speculation that a new law or rule will do this will not suffice. Expert testimony may well be essential.

Lawmakers and regulators also should keep in mind that they cannot rely on the creativity of lawyers to do their jobs for them after the fact. Courts now consider only what the government was trying to accomplish when a law or regulation was adopted. Before any new restriction on commercial speech is adopted, officials must assess whether an alternative is available which would be less restrictive of commercial speech but would achieve the same results. They must also decide whether the action being considered will leave a good deal of activity unregulated which causes the same problems as the targeted commercial speech. This inquiry will determine whether the fit is properly tailored.

Four decades ago, the Supreme Court concluded that commercial speech, like other forms of speech, deserves First Amendment protection. Ever since, the Court has flirted with whether commercial speech merits the same level of protection as non-commercial speech. Legislators and regulators, however, would be wise not to misread such debate within the judiciary as a sign that commercial-speech rights need not be a factor when adopting new laws and rules. Whether courts apply a stringent version of the *Central Hudson* test or something even stricter, they will no longer tolerate bans or burdens on commercial speech that are content- or speaker-based.

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[8] 131 S. Ct. 2652 (2011).
[9] *Id.* at 2663.
[10] *Id.* at 2667.
[11] *Id.* at 2664.
[12] *Compare Retail Digital Network, LLC v. Appelsmith*, 810 F. 3d 638 (9th Cir. 2016), *vacated* and *en banc rev. granted sub nom. Retail Digital Network, LLC v. Prieto,* 842 F.3d 1092 (9th Cir. 2016), *with 1-800-411-PAIN Referral Serv. LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014).

 ISBN 1056 3059