



PRECAUTIONS FOR COMMERCIAL-SPEECH REGULATORS

by Bert W. Rein and Megan L. Brown

WLF's recent LEGAL OPINION LETTER series discussing First Amendment limitations on government intrusions into commercial speech teaches important lessons to those legislators and regulators who intend to restrain speech or impose mandatory disclosures to advance their conceptions of sound public policy. Failure to heed these lessons could throw lawmakers into complex and expensive First Amendment litigation. Such litigation bears a substantial risk of defeat and a loss of the opportunity to pursue public-interest goals under the more relaxed rational-basis test used to review the constitutionality of non-speech commercial regulation. Hence, a precautionary checklist for First Amendment compliance should address the following lessons:

Lesson 1: Avoid Acting to Suppress Consumer Choice. A government authority may believe that consumption of a lawfully-offered product is unwise, a waste of consumer resources, or less valuable than an alternative choice. Forbidding dissemination of information about that product may seem like an easy way to restrict or eliminate its use. However, no commercial-speech doctrine is better established than the principle that government should not dictate consumer choices through speech suppression. In *Virginia State Board of Pharmacy*,¹ for example, the US Supreme Court rejected an effort by Virginia's Board of Pharmacy to channel consumers to "full service" pharmacies rather than discounters by foreclosing price advertising. Similarly, in *44 Liquormart*,² the Court overturned a legislative effort to protect in-state distributors against out-of-state rivals by suppressing price advertising. And most recently in *Sorrell*,³ the Court condemned Vermont's effort to favor generic over branded drugs by, *inter alia*, denying brands access to information necessary to shape effective marketing efforts. Thus, authorities considering or being pressured to steer consumer choice to preferred products or sellers by information suppression should simply say "no."

Lesson 2: Do Not Overuse a "Deceptive or Misleading" Rationale. Government authorities may seek to justify suppression motivated by a desire to steer consumer choice by claiming that the suppressed information is deceptive or misleading. The Supreme Court's foundational *Central Hudson*⁴ decision made clear that deceptive or misleading commercial speech plays no beneficial role in the marketplace and may be banned in the same manner as speech that directly advocates an unlawful activity.⁵ But governments do not have free rein in declaring commercial speech deceptive or misleading, especially when enacting necessarily generalized legislation or regulation rather than through adjudication of specific claims.

For example, in *Pearson v. Shalala*,⁶ the US Court of Appeals for the DC Circuit addressed a Food and Drug Administration (FDA) prohibition on health claims made by dietary supplement manufacturers that were deemed not supported by significant scientific agreement and therefore, in FDA's view, "inherently misleading" and subject to ban. Judge Silberman disagreed, holding that the threshold for finding claims to be "inherently misleading" was extremely high and that the First Amendment required even potentially misleading claims to be

¹ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

² *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 494 (1996).

³ *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

⁴ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

⁵ *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973).

⁶ 164 F.3d 650 (D.C. Cir. 1999).

protected if additional disclosures would avoid consumer confusion. Thus, *Central Hudson* will not abide blanket suppression by the government, absent a compelling record capable of surviving judicial scrutiny that potential for misleading consumers is incurable by disclosure. As a result, government authorities should instead focus on less burdensome, carefully tailored, curative disclosures.

Lesson 3: Mandatory Disclosure Unrelated to Curing Deception Does Not Get a First Amendment Pass.

Recent government interventions into commercial speech have compelled commercial speakers to disseminate messages that governments think consumers should receive. This may be prompted—as in the case of disclosure of GMO-derived ingredients⁷ or rBST-fed milk cows⁸—by some consumers contending they have a “right to know” about products being offered to them. It might also be prompted by a government determination that information questioning the value or inherent risk of a product—as in the case of sugar-sweetened beverages⁹—will motivate consumers to make choices the government thinks are better. Sellers forced to disseminate a negative message are not only involuntarily handing over some of their valuable advertising or branding space to the government, they are also prevented from shaping their own market communications.¹⁰

Some courts have read the Supreme Court’s decision in *Zauderer* to give government *carte blanche* to compel sellers to make any disclosure that is factual and non-controversial.¹¹ The Supreme Court, however, has never endorsed that analysis, and it appears both contrary to basic commercial-speech principles and difficult to apply. As properly interpreted by Judge Silberman in *Pearson*, *Zauderer* is a decision that limits, rather than expands, government power. The regulator in *Zauderer* was properly concerned about lawyer advertising that could influence potential litigants to choose contingent-fee representation believing that it would immunize them from financial risk when, in-fact, they would be assuming the risk of court costs. Rather than suppress the advertising, the regulator chose the *less intrusive remedy* of curative disclosure, a remedy more consistent with the First Amendment value of providing consumers with information of the seller’s choosing. Even where some compelled disclosure was permissible however, the Supreme Court limited its scope to a formulation that was factual and non-controversial.

Focusing on the text of the disclosure alone ignores the key constitutional premise of *Zauderer* that a finding of potential deception is a precondition to compelled disclosure. Absent that premise, compelled disclosures should be subject to the heightened scrutiny recently applied by the Supreme Court in its review of commercial-speech restrictions in *Sorrell*. This review requires the government to prove it has a substantial interest in influencing consumers’ market decisions and has narrowly tailored its disclosure to serve that specific interest. To some extent, shaping the disclosure to make clear that it is sponsored by the government, not the seller,¹² may be helpful tailoring but is unlikely to suffice to satisfy heightened scrutiny. Moreover, *Zauderer*’s “factual and non-controversial” test itself may draw governments into a quagmire. Whether a food product has a GMO-derived ingredient may seem a factual statement at first blush, but highlighting that product characteristic implies the message that it has purchasing significance which is a government judgment rather than a fact.

Conclusion. The commercial-speech doctrine remains in flux and is somewhat unsettled. The direction of its development, however, points to increasing constitutional sensitivity regarding the value of commercial speech to sellers and consumers in a free-market economy. Government legislators and regulators should think long and hard before using any speech restraint or compelled disclosure to pursue their consumption preferences or policy goals. A healthy respect for First Amendment principles, careful analysis of legitimate justifications for commercial-speech restrictions, and an exacting review of the fit between any proposed limitation and those goals are well advised before implementing any commercial-speech restraint.

⁷ *Grocery Mfrs. Assoc. v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015).

⁸ *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

⁹ *American Bev. Ass’n v. San Francisco*, No. 15-3415 (N.D. Cal. May 17, 2016).

¹⁰ *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

¹¹ See, e.g., *American Meat Inst. v. Dep’t of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014).

¹² *CTIA v. City and County of San Francisco*, 494 Fed. Appx. 752 (9th Cir. 2012).