NINTH CIRCUIT A HOTSPOT FOR TROUBLING LAW ON FORCE DISCLAIMERS

Several recent rulings in the Ninth Circuit U.S. Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Washington) address the issue of when the government may compel advertisers to add warnings or make other marketing disclosures within the bounds of the First Amendment. The issue is significant, because it will determine what types of disclosures the nation's 30,000-plus governmental units might require from advertisers, and has the potential to reach the U.S. Supreme Court.

ANA participated in two of these appeals, one involving radiofrequency (RF) emission information to be provided with sales of cell phones, and another involving health warnings on sugar-sweetened beverages. The cases involve what grounds the government must assert to justify a compelled commercial disclosure, and the clarity with which it must craft the mandated language. The law in this area has disconcertingly taken a turn away from the trajectory of increasing First Amendment protection for commercial speech seen over the last several decades, and in the Ninth Circuit especially, different panels of judges have issued rulings that create confusion.

The Difference a Year Can Make

The Supreme Court has decided only two cases directly on point. In 1985, the Court held in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* that government-mandated commercial speech disclosures are permissible if there is a rational connection to a substantial government interest in preventing consumer deception, and the required disclosure is "purely factual and uncontroversial," and not unduly burdensome. In 2010, it decided *Milavetz, Gallop & Milavetz*, in 2010, also involving regulation targeting consumer deception, and the Court applied the same test it articulated in *Zauderer*. However, in recent years some federal appellate courts have begun expanding the types of government interests that may be used to justify disclosure requirements. In 2014, the D.C. Circuit in *American Meat Institute v. Department of Agriculture* rejected a challenge to country-of-original labelling requirements, holding that government interests besides correcting deception could justify compelled disclosures, and overruling prior D.C. Circuit cases to the contrary.

Until this year, Ninth Circuit law had applied the traditional understanding of *Zauderer*, that compelled disclosures were limited to cases of potential deception. For example, in 2009 the court decided *Video Software Dealers Association v. Schwarzenegger*, holding that disclosures must target consumer deception and be purely factual and noncontroversial, and thus cannot even "arguably ... convey a false statement." In 2012, in *CTIA-The Wireless Ass'n v. San Francisco*, the court held that the First Amendment potentially limited an ordinance requiring cell phone retailers to provide disclosures warning of the dangers of RF emissions, because the required warnings might be interpreted as stating the local government's opinion that cell phone use is dangerous, contrary to FCC pronouncements that cell phones are safe.

This year, however, a divided panel of the Ninth Circuit declined to enjoin a similar compelled-disclosure ordinance warning of cell phone radiation in *CTIA v. Berkeley*. ANA filed an *amicus* brief in support of enjoining the ordinance. The court held the required point-of-sale disclosure material (sign or circular) could be justified by reasons other than that sales material may

mislead consumers (there was no suggesting it did). It then held that, even though, as the dissenting judge put it, “the most natural reading” of the three-sentence disclosure was that carrying a cell phone close to one’s person is unsafe (contrary to FCC rules on RF emissions and cell phone package inserts it requires), Berkeley’s ordinance survived First Amendment scrutiny because each sentence, standing alone, was literally true.

At approximately the same time the Berkeley cell phone case was unfolding, there was litigation, in which ANA was an *amicus* from the outset, challenging a San Francisco ordinance requiring billboards and other posted ads for sugar-sweetened beverages (those with added sweeteners and more than 25 calories per 12 ounces—but excluding other beverages that may be highly caloric) to add a “Warning” covering 20 percent of the ad, that: “Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.” In that case, *American Beverage Association v. San Francisco*, a different panel of the Ninth Circuit reversed the refusal to preliminarily enjoin the warning.

Though the court joined the prior panel in holding that *Zauderer* disclosures could be justified by grounds other than preventing consumer deception, it held the disclosure flunked *Zauderer*’s requirement of being purely factual and noncontroversial. It held, applying the rule identified in *CTIA v. Berkeley*, that the disclosure was “misleading and, in that sense, untrue” because it singled out only certain sugar-sweetened products, and took no account that overconsumption of these or other products not covered by the ordinance can cause adverse health effects. The court also found it constitutionally problematic that the city sought to force advertisers “to convey San Francisco’s disputed policy views” (and that the size and format were too burdensome because it “overwhelms other visual elements in the advertisement”).

Most recently, yet another Ninth Circuit panel affirmed the denial of a preliminary injunction in *Nationwide Biweekly Administration v. Owen*, which challenged as unconstitutional a California state financial services marketing disclosure requiring those seeking to compete with borrowers’ lenders to say (among other things) their solicitations were “not authorized” by the incumbent. The court relied on *CTIA v. Berkeley*, and relegated *American Beverage* to footnote to reject the challenge. The court was unpersuaded the “not authorized” disclosure misleadingly suggests incumbent lenders have some authority to permit (or not) competitors’ solicitations, or that it also casts competing solicitations in a dubious light of being somehow not allowed. Contrary to *American Beverage*’s reasoning, the court held that merely being able to “conjure up” a negative connotation in a disclosure does not mean it violates *Zauderer* and, by extension, the First Amendment.

Confusion Reigns

These conflicting panel decisions have sown confusion about the constitutional law of compelled disclosures under *Zauderer*. In *CTIA v. Berkeley*, a dissent pointed out that the “natural reading” of the parts of Berkeley’s RF emissions warning, read together, contradicted FCC conclusions and required retailers to make misleading or false statements about their products. The dissent also disagreed that *Zauderer* could apply to government interests other than preventing consumer deception. CTIA sought *en banc* rehearing, with *amicus* support from ANA (among others), but the petition was denied. That denial in turn drew a dissenting opinion expressing concerns about allowing potentially misleading compelled commercial disclosures.

Meanwhile, the panel decision in *American Beverage* striking down the sweetened-beverage warning had one judge criticize the "tenuous conclusion that [its] language is controversial and misleading," and thus only concur in the outcome by agreeing the 20 percent coverage mandate was unduly burdensome. And San Francisco has petitioned for rehearing *en banc*, noting the discord between the *CTIA v. Berkeley* and *American Beverage* decisions. It remains to be seen if the court will invite an opposition (as it did in *CTIA v. Berkeley*), and thus provide opportunity for *amicus* support of the panel decision. A petition for rehearing *en banc* is also being filed in *Nationwide*, raising similar issues.

Attention Must Be Paid to Compelled Commercial Disclosure Law

Without strict application of *Zauderer*'s limiting principles, there is virtually no logical stopping point for disclosure requirements on any product that any government body might decide should bear warnings to consumers, based on whatever health- or safety-related hobby horse a regulator might maintain. These Ninth Circuit decisions, and the fact that the only recourse from there is to the Supreme Court, brings the advertising industry to a critical juncture regarding the law on constitutionality of compelled disclosures.

The Ninth Circuit's rulings may be the clearest signal yet that there could be virtually no limit to similar efforts targeting other products and services. Every food disfavored by the science of the moment, and every other product or service that regulators view as creating "risk"—or even that simply relate to a message they want to send—could be susceptible to having a significant portion of ads conscripted for government messages. And if the government is restricted in crafting disclosures only by statements having to be "literally true"—regardless of their connotations, negative implications, or other collective impact the language may have—there would only be the narrowest of grounds for advertisers to object to forced speech on First Amendment grounds.

And advertisers face that risk from any city, town, county, or other municipal authority with a particular concern about a given product, service, or industry segment, and at the state level as well. If and when the Ninth Circuit opens the *American Beverage* and/or *Nationwide* rehearings for full briefings, or one or more of the disappointed litigants seek Supreme Court review, they will offer key opportunities for the advertising community to try to turn this tide of giving regulators—down to the municipal level—the freedom to require that ads carry whatever warning they believe may be beneficial.