Key Pending and Recently Decided Court Cases

The First Amendment protections for commercial speech are the ultimate safety net for all advertisers. As an ever-widening range of advertising becomes controversial, the courts become an even more crucial battleground for advertisers. ANA has played an active role in almost every major commercial speech case over the past twenty years, through "friend-of-the-court" briefs or by supporting parties in critical lawsuits.

These efforts have been successful. In a number of recent cases, the U.S. Supreme Court has ratcheted up the level of First Amendment protection for commercial speech. In its decision in *Greater New Orleans Broadcasting Association v. United States,* 527 U.S. 173 (1999), the Supreme Court cited ANA's brief for its articulation of the position that truthful, non-misleading commercial speech should be protected by a strict scrutiny standard instead of the current *Central Hudson* test. While the Supreme Court has not yet gone that far, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), a commercial speech case, Justice Sandra Day O'Connor wrote that "if the First Amendment means anything, it means that regulating speech must be a last – not first – resort." ANA continues its active efforts in the courts to protect the First Amendment rights of marketers to communicate with consumers.

Following is a summary of some important pending and recently decided advertising cases.

Currently Pending Case(s)

Merck & Co, Inc., et al. v. United States Department of Health and Human Services, et al.

ANA and three drug companies, Merck, Eli Lilly, and Amgen filed suit in June in U.S. District Court for the District of Columbia seeking a stay of a rule from the Centers for Medicare and Medicaid Services (CMS) that required direct-to-consumer televised ads for prescription drug products to show the list (wholesale) price of the drug. CMS issued the rule under its authority to issue rules for the administration of Medicaid and Medicare generally. The rule was initially set to take effect on July 9, 2019.

The lawsuit alleged that the rule, despite the intentions behind it, would cause harm to consumers as the price they pay for drugs differs wildly from the list price, based on a number of factors. Any price information aired in ads would be inaccurate, misleading, and confusing. This would violate the First Amendment, as in the Supreme Court's landmark *Zauderer* case, it held that government mandated disclosures must be factual and uncontroversial. It also alleged that CMS lacked the statutory authority to issue such a rule by Congress, as it relied on a provision that did not have anything to do with the facts at hand.

One day before the rule was set to take effect, the District Court struck down the rule. It did so on statutory grounds and did not reach a decision on the First Amendment aspect of the case.

The district court's opinion was upheld in June 2020 by the U.S. Court of Appeals for the District of Columbia Circuit. The appeals court agreed that HHS lacked statutory authority to adopt the disclosure requirement, as well as finding the rule raised very serious First Amendment concerns.

The American Beverage Association, California Retailers Association, California State Outdoor Advertising Association v. The City and County of San Francisco

In June 2015, the city of San Francisco approved two ordinances relating to food and beverage marketing. One requires that all out-of-home ads for "sugar sweetened beverages" contain a health warning that "drinking beverages with added sugars contributes to obesity, diabetes and tooth decay." The second ordinance bans all ads for "sugar sweetened beverages," except for several enumerated but highly limited exceptions, from any city/county property.

Clearly if the thousands of cities and counties in the U.S. are allowed to place these types of onerous and sweeping restrictions on advertising, this could be very disruptive to national advertising in the United States. On July 24, a lawsuit was filed in federal court by the American Beverage Association, the California Retailers Association and the California State Outdoor Advertising Association challenging on First Amendment grounds the ordinance that bans advertising on public property (http://www.ana.net/getfile/22663). A subsequent filing challenged the other ordinance mandating the disclosures as well and also sought injunctive relief. In December 2015, the Board of Supervisors repealed the ordinance banning advertising on public property, but the other ordinance remained on the books.

ANA filed a "friend of the court" brief in opposition to the mandated disclosures, which can be viewed at http://www.ana.net/getfile/23343. Our brief argued that the ordinance could set a dangerous precedent for other products and services that fall out of favor with various governmental bodies and unconstitutionally would compel manufacturers to disseminate the government's preferred message.

In May 2016, the U.S. District Court for the Northern District of California denied the motion for preliminary injunction http://www.ana.net/getfile/23883), finding that the ABA was "not likely to succeed on the merits of their First Amendment claim, and it is unlikely that they would suffer irreparable harm if the ordinance were to go into effect." Enforcement of the ordinance, however, was stayed pending appeal.

The case was appealed to the Ninth Circuit Court of Appeals. In September 2017, a three-judge panel reversed the denial of the preliminary injunction, holding that the groups challenging the ordinance were likely to succeed on their claim that the ordinance was an unjustified or unduly burdensome disclosure requirement which violates the First Amendment. The panel agreed with the argument made by ANA and others that the warning requirements would overwhelm other visual elements of advertising and placed too great a burden on commercial speakers by forcing them to convey the government's policy views. In fact, it observed that the compelled message was misleading because it singled out only certain products and failed to add that consumption of other products not covered by the law could have similar health effects. The case was appealed for a rehearing *en banc* by the Ninth Circuit and the appeal was granted in January 2018.

In June 2018, the parties were asked to file supplemental briefs detailing how the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra* impacts the case.

CTIA – The Wireless Association v. The City of Berkeley, California, et al.

Berkeley, Calif. passed an ordinance requiring mobile telephone producers and sellers in the city to provide a notice at the point of sale regarding the danger of radio frequency (RF) radiation from cell phones, contrary to federal findings that cell phones are safe. The ordinance was challenged in U.S. District Court, which denied a preliminary injunction. The case was appealed to the Ninth Circuit Court of Appeals.

ANA filed an amicus brief with the appellate court (http://www.ana.net/getfile/23446), arguing that the ordinance was compelling marketers to convey the government's preferred message and thus violating the First Amendment.

In March 2016, a three-judge panel of the Ninth Circuit Court of Appeals refused to overturn the lower court's denial of the preliminary injunction. The Ninth Circuit denied a petition for rehearing en banc in October 2017, and the case was appealed to the U.S. Supreme Court, where we also filed an amicus brief (http://www.ana.net/getfile/26204).

In June 2018, the Supreme Court vacated and remanded the case to the Ninth Circuit, in light of its decision in *National Institute of Family & Life Advocates v. Becerra,* in which it found that the First Amendment limits the government's authority to compel speech by private parties. In July 2019, the Ninth Circuit held that the disclosures met the Supreme Court's *Zauderer* test and did not violate the First Amendment. The parties are currently weighing an appeal.

Recently Decided and Other Important Cases

Reed v. Town of Gilbert

The U.S. Supreme Court issued a unanimous decision on June 18, 2015 (http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf) that could have very significant implications for the level of First Amendment protection that advertising enjoys. The Court struck down a town sign ordinance that had different rules and standards for signs that could be displayed, based on the type of event and the content of the sign. While the ordinance could likely have been struck down under existing First Amendment principles, the Court held that the content-based law was subject to a higher standard of "strict scrutiny." That standard requires the government to prove that the challenged law is "narrowly tailored to serve compelling state interests."

This is a higher standard than has traditionally been applied in commercial speech cases. In previous cases, the Court has held that laws were content-based if they were passed to suppress speech with which the government disagreed. Here, the Court seemed to say that any law that singles out a topic for regulation and discriminates based on content is presumptively unconstitutional. Legal scholars are debating the potential scope of the decision and its impact on various forms of government regulation of speech. While she supported the result, Justice Kagan wrote a separate opinion warning that when lower courts apply the Supreme Court's sweeping decision to review various sign laws across the country, the Supreme Court will "find itself a veritable Supreme Board of Sign Review."

Direct Marketing Association v. Brohl

The Direct Marketing Association (DMA) challenged a Colorado law that requires out-of-state merchants with sales over $100,000 in Colorado to disclose confidential information about their customers' purchases to the state's revenue department. The purpose of the law is to make it easier for Colorado to collect sales and use taxes on e-commerce purchases by its residents. The DMA argued that the law was an unconstitutional restriction on interstate commerce. The U.S. District Court for the District of Colorado agreed and stopped the law's enforcement, but on appeal, the U.S. Court of Appeals for the Tenth Circuit held that the federal courts had no jurisdiction over the case because of the Tax Injunction Act (TIA), which prevents federal courts from interfering in local "assessment, levy or collection" of taxes. The Tenth Circuit opinion can be viewed at https://www.ca10.uscourts.gov/opinions/12/ 12-1175.pdf.

The DMA appealed to the U.S. Supreme Court, which in July agreed to hear the case. ANA subsequently joined with National Federation of Independent Business (NFIB) Small Business Legal Center, NetChoice, the Electronic Retailing Association (ERA), and the American Catalog Mailers Association in a "friend of the court" brief. Our brief can be read at http://www.ana.net/getfile/21384. Our brief contends that the Tenth Circuit's reading of the Tax Injunction Act is in conflict with both the text and legislative history of the law and that it unlawfully restricts interstate commerce, as it will encourage states to enact legislation that imposes burdens selectively on out-of-state retailers.

The case was argued on Monday, December 8, 2014. In a decision released March 3, 2015, the Court held that the suit was not barred by the Tax Injunction Act. The opinion, written by Justice Clarence Thomas for a unanimous Court, dismissed the court of appeals' interpretation of the TIA, and remanded the case to the lower courts.

The Supreme Court's opinion can be viewed at http://www.supremecourt.gov/opinions/14pdf/13-1032_8759.pdf.

American Broadcasting Cos., Inc. et al v. Aereo

Aereo is a company that was capturing over-the-air broadcast signals and transmitting them to subscribers for viewing over the Internet at virtually the same time they were being broadcast to those receiving them via antenna or cable. Aereo did this by employing a system of small antennas each dedicated to an individual subscriber that captured the broadcast and made an individual copy that was then transmitted to the subscriber. The major broadcasters brought suit against Aereo, claiming that it was violating the Copyright Act by infringing on their right to "perform" their copyrighted works "publicly," known as the Transmit Clause. Aereo claimed that it was simply supplying the equipment for the subscriber to obtain the broadcast. The U.S. Court of Appeals for the Second Circuit agreed with Aereo and held that did not violate the Transmit Clause as it did not stream directly to the public, but instead sent an individualized, private signal directly to each subscriber from their own antenna.

In a major victory for broadcasters, the U.S. Supreme Court in June overruled the lower courts and agreed that Aereo was illegally transmitting copyrighted material. On a 6-3 vote, the Court held that Aereo "performs" works "publicly" under the definition of the Transmit Clause, which was revised in 1976 in response to the retransmission of broadcast television by cable companies. These changes to the Copyright Act required the cable companies to pay retransmission fees for the right to deliver copyrighted broadcast television to their customers. Much like a cable company, the Court found that Aereo was "performing" as it "transmitted a performance" of the copyrighted material to its subscribers. It also found that it did so "publicly" as even though in Aereo's case each transmission was unique to the subscriber, it was transmitting to multiple subscribers at once.

The Court's decision can be viewed at http://www.supremecourt.gov/opinions/13pdf/13-461_l537.pdf.

American Snuff Company, LLC et al v. United States of America

In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act into law, giving the Food and Drug Administration for the first time authority over tobacco products and their marketing and advertising. Soon after, a challenge against the advertising provisions contained in the law was initiated by six major tobacco companies in the U.S. District Court for the Western District of Kentucky (as *Commonwealth Brands, Inc. v. United States of America*). These provisions, that were under review were the most stringent ever passed into law by Congress. They include bans on color and graphics in ads, mandated warning text and images, and a ban on outdoor advertising and point-of-sale communications. The suit contends that the government goes too far in restricting speech directed at a legal audience in advancing its legitimate interest in reducing youth tobacco use, and is thus unconstitutionally restricting speech.

ANA joined in a "friend-of-the-court" brief with the 4As and AAF. We believe if allowed to stand, these restrictions would serve as a template for limiting many other controversial categories of advertising. Our brief argued that Congress overlooked a number of less restrictive alternatives that could have achieved the objectives of discouraging smoking and protecting minors without restricting speech – and that these alternatives would in fact be more effective. Our brief is available at http://www.ana.net/advocacy/getfile/15431.

The District Court held that the ban on colors and images in ads was too broad and unconstitutional. However, the court upheld other speech restrictions, including those on sponsorships, outdoor advertising, and the language and graphics required in warning labels. Both sides in this case cross-appealed to the U.S. Court of Appeals for the Sixth Circuit. We filed a further "friend-of-the-court" brief in this case, which argued that the lower court seriously erred in upholding most of the Act's marketing restrictions. We contended that the District Court should have struck down all of the marketing restrictions as overly broad and unconstitutional. This brief can be read at http://www.ana.net/getfile/15753.

In March 2012, the Sixth Circuit handed down a 2-1 decision (in *Discount Tobacco City & Lottery, Inc. v. United States of America*), largely agreeing with the lower court. It found some of the FDA's new regulatory authority over the marketing of tobacco products to be constitutional. Specifically, the court ruled that the provisions requiring new graphic warning labels on products and advertising, as well as those banning sponsorships, were constitutional. Conversely, the court struck down the provisions banning the use of colors or pictures in tobacco advertisements featured in media that have underage youth comprising 15% or more of their audiences. The ruling is available at http://www.ana.net/getfile/17386.

The Sixth Circuit denied a rehearing by the full court in May. On October 26, 2012, the tobacco companies filed a petition for a writ of certiorari with the U.S. Supreme Court. On November 27, 2012, ANA, along with the 4As and AAF, filed an amicus brief with the U.S. Supreme Court urging them to hear the appeal. Our brief is available at http://www.ana.net/getfile/18097.

On April 22, 2013, the Supreme Court decided not to hear the case, leaving the decision of the 6th circuit in place.

R.J. Reynolds Tobacco Company v. FDA

In a case related to the one above, five tobacco companies filed suit in the U.S. District Court for the District of Columbia seeking an injunction and summary judgment against the Food and Drug Administration's rules enacting the warning label provisions of the Family Smoking Prevention and Tobacco Control Act. The FDA's rules, issued on June 21, 2011, required graphic, grisly images to accompany the warning text on tobacco packages and advertisements. In November 2011, a preliminary injunction was issued by the court, finding that requiring the labels may be "unconstitutionally compelled speech." ANA filed a "friend of the court" brief in that case which can be read at http://www.ana.net/getfile/16958.

The motion for summary judgment was heard by the court in February 2012, with Judge Richard Leon granting the plaintiff's motion, finding that the warning labels violated the First Amendment to the U.S. Constitution. Judge Leon wrote that "the Government...may not force others...to serve as its unwilling mouthpiece" and that the rule was insufficiently tailored to meet the government's interest to warrant compelling speech in such a manner. The court's decision can be viewed at http://www.ana.net/getfile/17278.

The Court of Appeals for the District of Columbia Circuit heard oral arguments on appeal of both the preliminary injunction and summary judgment in April 2012. ANA filed a "friend of the court" brief during the court's consideration of the case, which can be read at http://www.ana.net/getfile/17890. In August 2012, the court released its opinion, which vacated the FDA rule. The court held that the rule would turn product packages and ads into miniature billboards for the government's preferred message, going far beyond purely factual and accurate commercial disclosures. The court noted there

are many other less intrusive alternatives the government can use to reduce smoking, but compelling speech is a step too far under the Constitution. Additionally, the FDA failed to provide "any evidence" that requiring the graphic warnings would accomplish its stated goal of reducing smoking rates, which it must do to justify any resection on speech under the U.S. Supreme Court's *Central Hudson* decision. The court's decision can be read at http://www.ana.net/getfile/17889.

In December 2012, the D.C. Circuit denied rehearing of the case. The FDA decided not to appeal to the U.S. Supreme Court in March 2013 and will now have to conduct a new rulemaking to implement the requirements of the act.

FCC v. Fox Television Stations

In 2004, the Federal Communications Commission changed its policies regarding so-called "fleeting expletives," making any broadcast of an expletive, even inadvertent, a violation of its indecency rules. Up until this change, the FCC had followed the policy it adopted after the Supreme Court's landmark *Pacifica* ruling (the famous "seven dirty words" case), and issued fines against broadcasters only for repeated indecency violations. The FCC then proceeded to levy substantial fines against broadcasters that had aired live events where such fleeting expletives were used. However, the Second Circuit Court of Appeals overturned these fines and raised questions about the FCC's indecency actions as they relate to the First Amendment.

The Commission appealed to the U.S. Supreme Court, and in a fractured 5-4 decision, it reversed the Second Circuit. However, the case was decided on other grounds and did not reach the First Amendment issues raised by the FCC's order. The Court instead remanded it back to the appeals court for consideration of those issues, which struck down the fleeting expletives policy again in July, finding them too vague to withstand First Amendment scrutiny. The FCC appealed to the full Second Circuit, which agreed with the panel decision in November 2010.

The case returned to the Supreme Court in its 2011 term. On June 21, 2012, it vacated the Second Circuit's opinion in a unanimous decision (with Justice Sotomayor not participating). The court held that the FCC failed to give Fox or ABC fair notice prior to the broadcast that fleeting expletives and momentary nudity would be indecent, so the Commission's standards as applied to these broadcasts were vague. The Court reached its decision under the due process clause, so it did not address the First Amendment issues or the constitutionality of FCC policy. The FCC has the freedom to modify its policy in light of public interest and legal requirements.

Schwarzenegger v. Entertainment Merchants Association et al

California passed a law in 2005 that prohibited the sale or rental of "violent video game[s]" to persons under 18 years of age. A "violent video game" is defined in the law as a game including killing, maiming, dismembering or sexually assaulting an image of a person, if depicted in a way that a reasonable person would find appeals to a morbid interest to minors, is offensive to prevailing community standards, or causes the game to lack serious literary, artistic, political or scientific value for minors. Parents and guardians were still permitted to rent or purchase games on a minor's behalf. Suit was filed in the U.S. District Court for the Northern District of California alleging the law violated the First Amendment and seeking an injunction against enforcement.

The District Court found that the law did violate the First Amendment. The court held that while the government has a compelling interest in protecting minors, it did not prove that video games were any

different from other media or that they led to violent behavior, which was the main justification propounded for the law. The U.S. Court of Appeals for the Ninth Circuit agreed, and California filed a petition for cert with the U.S. Supreme Court. The Supreme Court heard oral arguments in the case on November 2, 2010.

ANA joined a "friend-of-the-court" brief filed in conjunction with various publishers and recording groups to the Supreme Court. The brief argued that the Supreme Court has long refused to carve out a distinction under the First Amendment for violent materials and discussed the long history of textual and visual depictions of violence in art and literature. The brief, which can be viewed at http://www.ana.net/getfile/15862, contended that the justifications California made for the law are not sufficient to withstand Constitutional scrutiny.

On June 27, 2011, in one of the last decisions released in the 2010 term, the Court held 7-2 that the law violated the First Amendment. Justice Antonin Scalia, writing for the court, held that the state's responsibility to protect children from harm "does not include a free-floating power to restrict the ideas to which children may be exposed. . . Even where the protection of children is the object, the constitutional limits on governmental action apply." In his opinion, Justice Scalia discussed many of same examples from art and literature throughout history that our friend-of-the-court brief cited.

IMS Health cases

Vermont, New Hampshire and Maine passed similar legislation banning the use of physician histories for commercial purposes, including their use in marketing prescription drugs to doctors, which is known as "detailing." New Hampshire, which passed its law first, claimed in response to a challenge to the law in federal court (*IMS Health v. Ayotte*) that the law did not regulate speech, and even if a court determined that it did, the state has an interest in promoting public health and protecting patient privacy. The U.S. District Court for the District of New Hampshire disagreed, finding the law violated the First Amendment under the U.S. Supreme Court's *Central Hudson* test. New Hampshire appealed to the U.S. Court of Appeals for the First Circuit, which held in late 2008 that the law was constitutional as it regulated "conduct" and not "speech," and thus the higher level of scrutiny given commercial speech restrictions under *Central Hudson* did not apply. Under the lowest level of constitutional scrutiny, known as rational basis, the state merely needed to show its actions were rationally related to a legitimate government interest, and the court would be required to uphold the law.

The U.S. Supreme Court declined to hear the case in 2009. ANA previously had filed a brief with the Supreme Court arguing that whole categories of speech would be found to be impermissible if judged under the lesser level of scrutiny used by the First Circuit in *Ayotte* and that defining speech activity as conduct severely undermines First Amendment values. Our brief can be viewed at http://www.ana.net/advocacy/getfile/ 15130. The First Circuit also upheld the challenge to the Maine law (*IMS Health v. Mills*) on similar grounds.

In the Vermont case (*IMS Health v. Sorrell*), the U.S. District Court for the District of Vermont held that the law violated the First Amendment. The U.S. Court of Appeals for the Second Circuit heard arguments on October 13, 2009, and upheld the lower court's decision in November 2010, finding the law violated the *Central Hudson* test. Vermont appealed to the U.S. Supreme Court, which agreed to take the case in January 2011, most likely due to the split between the First and Second Circuits.

In a 6-3 decision on June 24, 2011, the U.S. Supreme Court agreed with the Second Circuit and found that the Vermont law violated the First Amendment (and effectively reversing the First Circuit). In doing so, it rejected the First Circuit's finding that it regulated conduct and not speech, with Justice Anthony Kennedy writing that "the creation and dissemination of information are speech within the meaning of the First Amendment. . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes." In doing so, the Court found that Vermont's restrictions on speech were subject to "heightened scrutiny" but found it unnecessary to decide whether to apply the traditional test for regulating commercial speech. It said the result would be the same whether it conducted a commercial speech inquiry or applied a stricter form of judicial scrutiny. The state's asserted purpose, in preventing doctors from receiving more effective pitches from marketers, did not justify a restriction on speech.

This case sets a strong, positive precedent for marketers that wish to target their message to consumers.

If you have any questions about the status or importance of any of these cases, please contact Daniel L. Jaffe in ANA's Washington, D.C. office at (202) 296-1883 or djaffe@ana.net.