Advertising Law: It's Not Your Father's First Amendment.

By Michael Nepple and Mark Sableman

Advertising seems like an unlikely candidate for constitutional protection. Think of the snake oil and patent remedy advertisements in newspapers a century ago. Even today, political candidate ads seem to take an "anything goes, facts be damned" approach. And there is always some loudmouthed car dealer on late-night TV who continues to give advertising a bad name.

But advertisements are the informational vehicles of the commercial world. They tell consumers about the seller's goods and help buyers understand what is available to fit their needs and means. Advertisements are messages. They contain information. They communicate opportunities. They are a form of speech.

And yes, advertisements are protected by the freedom of speech provided by the First Amendment to the United States Constitution. The free-speech protection for advertising that was first recognized about forty years ago has now blossomed into a vibrant and expanding strand of constitutional law. Advertising will clearly continue to enjoy constitutional protection. The intriguing issues are how far that constitutional protection will expand, procedurally and substantively.

This article will examine the history of the constitutional commercial speech doctrine, its coverage even of advertising of controversial "vice" products and services, its current reach, and the prospects for procedural and substantive expansion.

A. *We Bring Good Things to Life*[1] – History of the Commercial Speech Doctrine

Until 1976, the Supreme Court took the position that commercial speech was not protected under the First Amendment. But thereafter, in a series of rulings, it invalidated many state advertising regulations as hostile to free speech, outdated, unneeded, and paternalistic. Today, the Court even appears open to the position that commercial advertising is entitled to the same First Amendment protections as political speech.[2]

1. *Think Different*[3]- Benefits of Commercial Speech

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[4] a milestone decision, the Supreme Court rejected the view that commercial speech has no value, and noted rather its significant value to society:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. * * * [S]ociety also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest.[5]

1. General Electric Company, 1981.
2. *See Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011).
3. Apple Inc., 1998.
4. 425 U.S. 748 (1976).
5. *Id.* at 762-75.

Michael Nepple is a partner at Thompson Coburn LLP where he concentrates in intellectual property and media litigation. He graduated from Saint Louis University School of Law and received a B.S. in mechanical engineering from the University of Iowa.

Mark Sableman is a partner at Thompson Coburn LLP where he concentrates his practice in media, Internet and intellectual property law. He has taught media law at Webster University and Internet and censorship law at Washington University School of Law. He is listed in *Best Lawyers in America for Advertising Law*, Intellectual Property Litigation, First Amendment Litigation, Media Law and Trademark Law, and received his J.D. *cum laude* from Georgetown University Law Center.

The authors are counsel for a group of plaintiffs currently challenging certain of Missouri's alcohol advertising regulations. *See Missouri Broadcasters Association v. Lacy*, 2:13-cv-04034-SOW (W.D. Mo.).

Indeed, the Court viewed advertising as central to "preserve a predominantly free enterprise economy," because it helps allocate resources through intelligent and informed private economic decisions; "To this end," the Court stated, "the free flow of commercial information is indispensable."[6]

2. *Have It Your Way*[7] - Commercial Speech Defined

If the material sought to be regulated constitutes commercial speech, it is entitled to First Amendment protection. Although the textbook definition of commercial speech is speech that proposes an economic transaction, in 1983, the Court suggested three criteria that are suggestive of commercial speech: (1) it is an advertisement; (2) it refers to a specific product, or (3) it is motivated by an economic interest in selling product.[8] Classic advertisements certainly fall within the accepted definition.

3. *They Keep Going…and Going…and Going …*[9] - The Development of the Commercial Speech Doctrine

The Supreme Court's initial skepticism of commercial speech was revealed in its 1942 *Valentine* case, concerning the validity of a New York law that prohibited distribution of business related handbills.[10] In *Valentine*, the Court held that the Constitution imposed "no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user", were held to be matters for legislative judgment.[11]

Virginia Pharmacy overturned that position.[12] *Virginia Pharmacy* invalidated certain regulations that prohibited pharmacists from advertising the price of prescription drugs. For the first time, the Court held that commercial speech was entitled to a level of First Amendment protection. In addition to explaining the value of commercial information, the Court demonstrated disdain towards paternalistic state regulations, explaining that states must trust consumers to evaluate and use the information provided to them, as long as it was truthful and non-misleading.[13]

Not long thereafter, the seminal *Central Hudson* decision,[14] established a four-prong test for analyzing governmental regulations of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [Prong 1]. Next, we ask whether the asserted governmental interest is substantial. [Prong 2]. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted [Prong 3], and whether it is not more extensive than is necessary to serve that interest [Prong 4].[15]

Central Hudson created an exacting "intermediate" level of judicial scrutiny, which seeks to recognize the value of commercial speech while at the same time protecting the state and federal governments' interests in regulating commercial transactions. Both explicit legislative fact-finding and careful tailoring of regulation to the perceived harm are required. For example, in *Board of Trustees of State University of New York v. Fox*,[16] the Court held that, under the fourth requirement, often known as the "reasonable fit" requirement, the government must affirmatively establish that it had "carefully calculated" the burdens imposed by its regulations and that those burdens were justified in light of the weight of the government's objectives.[17] The Court explained that its decisions require "'fit' between the legislature's ends and the means chosen to accomplish those ends . . . ." This "fit" need not be "necessarily perfect", but a reasonable one "that represents not necessarily the single best disposition but one whose scope is 'in proposition to the interest served . . . .'"[18] Later cases have put even more teeth into the intermediate scrutiny test and the often-crucial "direct advancement" and "reasonable fit" prongs.

In many, but not all, commercial speech cases, the government's substantial governmental interest is conceded. Thus, the *Central Hud-*

6. *Id.* at 765.

7. Burger King Corporation, 1973.

8. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (holding that the presence of all three factors, while each may not be individually dispositive, strongly suggests that the speech is commercial).

9. Eveready Battery Company, Inc., 1989.

10. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

11. *Id.* at 54.

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

13. *Id.* at 770.

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

15. *Id.* at 566.

16. 492 U.S. 469 (1989).

17. *Id.* at 480.

18. *Id.*

son analysis often focuses on the trial court's findings on the prong 3 and 4 inquiries of whether the challenged advertising regulation directly advanced the governmental interest in a manner not more extensive than necessary to serve the interest. In this regard, the Court has stressed the daunting evidentiary burden imposed, noting that the government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and its restriction will in fact alleviate them to a material degree."[19]

B. *Where's The Beef?*[20] - Coverage of Vice Products and Services

The application of the *Central Hudson* test to so-called "vice" cases involving advertisement of alcohol, gambling, and tobacco has been a frequent source of Court review. This body of case law demonstrates the fact-specific nature of the *Central Hudson* inquiry, and the significant requirements of the third and fourth prongs.

1. *This Bud's For You*[21] – Alcohol Advertising Restrictions

The leading case involving restrictions on advertising the sale of alcohol is the Court's decision in *44 Liquormart*.[22] Rhode Island had prohibited distributors from advertising the price of alcohol sold within the state.[23] The state's liquor distributors objected and brought suit, alleging an infringement upon their First Amendment rights. The Court agreed and invalidated the regulation.[24]

The Court easily determined that the state had satisfied its burden regarding the first two prongs of *Central Hudson*. On the prong 3 analysis of whether the advertising ban advanced the state's interest "to a material degree", the state asserted, and the Court agreed, that "common sense" supported the conclusion that a ban on advertising would lead to higher prices (less competition), which would lower the demand for alcohol – consistent with the state's expressed interest in promoting temperance. However, the Court refused to find that the advertising ban alone would advance the state's interest in temperance "to a material degree." In the absence of findings of fact or evidentiary support, the Court could not "agree with the assertion that that price advertising ban will *significantly advance* the State's interest in promoting temperance."[25]

Thus, governments seeking to enact regulations impacting speech must provide at least some evidence that the regulation will have the desired effect. They are not free to rely upon "common sense" assumptions. This is consistent with the intermediate standard of review as applied in other areas; the government must do more than enact a regulation that is rationally related to its substantial evidence. It must come forward with at least some hard evidence that its proposed regulation will, in fact, have the desired impact.

Similarly, with respect to prong 4, the Court found Rhode Island's regulation deficient because it was more extensive than necessary to accomplish the state's stated goal of temperance. According to the Court, it was "perfectly obvious that alternative forms of regulation that would not involve any restriction of speech would be more likely to achieve the State's goal of promoting temperance."[26] The Court even listed ways the state could accomplish its goal that would not restrict speech in any manner: it could raise the price artificially (decreasing demand); increase taxation of alcohol sales; limit per capita purchases; or enact educational campaigns focused on the problems of excessive drinking. Thus, if a state attempts to regulate commercial speech in order to advance a state interest, *Central Hudson* will require it to defend its regulation in comparison to alternatives that "would not involve any restriction on speech . . . ."[27]

2. *What Happens Here, Stays Here*[28] - Restrictions on Gambling

Two casino advertising cases thirteen years apart demonstrate the Court's movement towards increased First Amendment protection of commercial speech. In 1986, the Court considered a ban by Puerto Rico on casino advertising directed towards residents.[29] Puerto Rico authorized casino gambling in an effort to promote island tourism, but also prohibited promoting casinos "to the public of Puerto Rico." Casino operators that had been fined for violating the advertising regulation filed a

19. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

20. Oldemark LLC, 1984.

21. Anheuser-Busch, LLC, 1979.

22. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

23. *Id*. at 490.

24. *44 Liquormart* expressly disavowed the Court's opinion in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (where the Court announced a so-called "vice" exception to the *Central Hudson* commercial speech doctrine, predicated on the now discredited belief that "the power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . . "), holding that "on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis." *44 Liquormart*, 517 U.S. at 509.

25. *Id.* at 505 (emphasis added).

26. *Id.* at 507.

27. *Id*.

28. Las Vegas Convention and Visitors Authority, 2002.

29. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

First Amendment challenge.

In applying *Central Hudson*'s third prong, the Supreme Court determined that the advertising restrictions directly advanced the government's interest because – in effect – advertising works: "[t]he Puerto Rico Legislature obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . . ."[30] In addressing the final prong of *Central Hudson* – whether the restrictions were no more extensive than necessary to promote the state's interest – the Court again found for Puerto Rico because, "[i]n our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ."[31] The Court distinguished its earlier opinion in *Bigelow*[32] that struck down a criminal conviction based on the advertisement of an abortion clinic, explaining that in *Bigelow*, "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the state", whereas the "Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether."[33] In essence, the Court created a "vice" exception to the commercial speech analysis.[34]

Thirteen years later, the Court again considered advertising restrictions on casino gambling. In *Greater New Orleans Broadcasting*, Louisiana broadcasters sued the Federal Communication Commission for threatening to impose sanctions against radio and television stations that desired to broadcast advertisements for private, for-profit state casinos.[35]

The Court's analysis of the third and fourth prongs of *Central Hudson* departed significantly from the reasoning of *Posadas*, which had been effectively overruled four years earlier in *44 Liquormat*. While the Court again assumed that advertising would drive demand for gambling ("it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling . . . ."), the Court carefully evaluated the overall regulatory context in which the challenged regulation was enacted. In that context, the Court found the government's demand-reducing argument lacking.

The Court noted that the FCC regulation at issue did not apply to Indian casinos. Indian-based casinos could advertise without fear of FCC action; only non-Indian casinos were threatened with FCC fines and penalties. Thus, the government failed to show that the advertising ban on non-Indian casino gambling would materially advance the government's asserted interest in reducing the social costs of gambling.[36] While the non-Indian casino advertising ban would arguably reduce demand, the failure to also ban Indian-based casino advertising would "merely channel gamblers to one casino rather than another."[37] The Court's analysis showed that it would no longer automatically defer to rote arguments that advertising restrictions always reduce demand. Rather, it now requires government regulators to demonstrate how the advertising restriction will play out in the real world where there are multiple purchasing options available to the consumer.

3. *You've Come a Long Way Baby*[38] – Limitations on Tobacco Advertising

With the demise of the *Posadas* "vice" exception, and because adult use of tobacco products is legal in the United States, regulations directed at limiting tobacco advertising are subject to the full *Central Hudson* constitutional analysis. In its 2001 *Lorillard* opinion, the Court considered regulations adopted by Massachusetts that, among other things, banned outside tobacco advertising "within a 1,000 foot radius of any public playground . . . public park, elementary or secondary school", as well as any point-of-sale tobacco advertising that "is placed lower than five feet from the floor of any retail establishment" – purportedly so as not be in the direct line of vision of children.[39]

Several tobacco companies sought to enjoin the Massachusetts regulations. Initially, they argued that the tobacco advertising regulations should be subject to a higher level of review than *Central Hudson*'s intermediate scrutiny because the regulations targeted the content of their speech.[40] The Court noted that although "several members of the Court have expressed doubt about the *Central Hud-*

30. *Id*. at 341-42.

31. *Id*. at 345-46.

32. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

33. The greater/lesser analysis (the power to ban the greater necessarily includes the power to restrict the lesser) announced in Posadas was sharply criticized by commentators and overruled in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

34. Id. at 345-48.

35. *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173 (1999).

36. The Court easily identified other methods of advancing the government's asserted interest: "There surely are practical and nonspeech-related forms of regulation – including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; and licensing requirements – that could more directly and effectively alleviate some of the social costs of casino gambling." *Greater New Orleans*, 527 U.S. at 192.

37. *Id*. at 189-90.

38. Philip Morris USA Inc., 1968.

39. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001).

40. *Id*. at 554.

son analysis", it saw "no need to break new ground" because the analysis, "as applied in our more recent commercial speech cases, provides an adequate basis for our decision."[41]

Addressing the merits, the Court concluded that Massachusetts had introduced "ample documentation" satisfying prong 3 of the *Central Hudson* analysis as it related to the restriction of advertising billboards being located near schools, parks, and playgrounds. The state relied upon a combination of FDA studies, reports on advertising and underage use of tobacco products, and the "theory that product advertising stimulates demand for products, while suppressing advertising may have the opposite effect"[42] to clear the initial hurdle. However, as to prong 4, the Court explained that because the billboard regulation "would constitute a nearly complete ban on the communications of truthful information" about tobacco products in major metropolitan areas – as compared to suburban and rural areas – its adoption demonstrated that the state had not performed "a careful calculation of the speech interests involved."[43] Importantly, the Court found that the state had not considered the countervailing interests of tobacco retailers and manufacturers and adult consumers in conveying (and receiving) truthful information about the products, and that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[44]

With respect to the requirement that point-of-sale tobacco advertising must be located at least five feet off the ground, the Court concluded that the regulation failed both the third and fourth prongs of *Central Hudson*. The rule did not advance the state's interest because "[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings."[45] Further, the "blanket height restriction" did not constitute a "reasonable fit" with the state's goal.

Taken together, the alcohol, gambling and tobacco cases demonstrate that no "vice" exception protects advertising restrictions. Rather, all restrictions of commercial speech, "vice" product or not, will be reviewed under at least *Central Hudson*'s intermediate scrutiny standard. Additionally, the anti-paternalism principle announced in *Virginia Pharmacy* prevents states from justifying regulations on the ground that they shield adults from receipt of truthful, non-misleading product information. Put simply, it is no longer a winning argument that advertising restrictions will inhibit adults from buying certain products. Finally, if the state defends a regulation that restricts the flow of truthful, non-misleading information between producers and adult consumers, the regulation must be narrowly tailored to the state's goal, because the Court will look closely for the presence of better alternatives.

C. *It Takes a Licking and Keeps on Ticking*[46] - The Current Reach of the Commercial Speech Doctrine

While the Court's commercial speech decisions have wavered at times, and often involved closely split decisions, the Court's most recent decisions have strongly endorsed a highly protective regimen for commercial speech. The Court's 1996 decision in *44 Liquormart,*[47] reprised *Virginia Pharmacy* and reaffirmed its finding of the positive values of advertising in American society:

> Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares . . . . Indeed, commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.[48]

That movement toward ever greater protection was suggested again in *Greater New Orleans Broadcasting Ass'n*,[49] in which the Court observed that "certain judges, scholars, and amici curiae have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." Finally, the Court's unexplained use of both the traditional pure-speech "strict scrutiny" test and the intermediate-scrutiny *Central Hudson* commercial speech test in *Sorrell v. IMS Health Inc.,*[50] in 2011, further suggests a turn to more expansive protection of commercial speech.

Sorrell, which involved a challenge to a Vermont law that restricted collection and sale of data concerning the prescribing habits of state physicians, may be another watershed commercial speech opinion. Vermont's restrictions made it more difficult for pharmaceutical companies to market particular drugs to the physicians who would be most interested in them.[51] In an opinion written by Jus-

41. *Id.* at 554-55 (internal citations omitted).

42. *Id.* at 557.

43. *Id.* at 562.

44. *Id.* at 564 (internal citations omitted).

45. Id. at 566.

46. Timex Group USA, Inc., 1956.

47. 517 U.S. 484 (1996).

48. *Id.* at 495.

49. 527 U.S. 173 (1999).

50. 131 S.Ct. 2653 (2011).

tice Kennedy, the Court held the law unconstitutional because it attempted to restrict speech (the dissemination and use of prescriber-identifying information) in order to promote the state's own viewpoint (encouraging use of less expensive generic drugs).

Interestingly, and without substantial explanation, the Court applied both the high "strict scrutiny" test applicable to non-commercial speech, and the less-restrictive "intermediate scrutiny" *Central Hudson* standard to the regulation. The Court rejected Vermont's argument that data was not speech, finding that data is an essential initial ingredient in protected communication: "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[52] The Court rejected Vermont's argument that it could ban certain data from being disseminated because of what might happen (increased sales of expensive new drugs) when the pharmaceutical companies presented the collected information to physicians in the state: "If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it."[53] *Sorrell*, in short, strongly reaffirmed the constitutional rights to use commercial speech.

D. *Don't Leave Home Without It*[54] - Prospects for Continued Expansion

Considering that commercial speech is central to our "predominantly free enterprise economy," because "the free flow of commercial information" helps to allocate resources, it is not surprising that the pro-business Roberts Court vigorously embraces the doctrine. Even Justice Samuel Alito, a lone dissenter on some key Roberts Court free speech decisions from the political arena, appears to strongly support commercial speech protection.[55] The prospect for a promotion of commercial speech to the same level of protection as classic political speech is looking better and better.[56]

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51. *Id.* at 2659-60.

52. *Id.* at 2667.

53. *Id*. at 2670.

54. American Express Marketing & Development Corp., 1975.

55. Compare *United States v. Stevens*, 559 U.S. 460 (2010) (Alito, J., dissenting), *United States v. Alvarez*, 132 S.Ct. 2537 (2012) (Alito, J. dissenting) and *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (Alito, J., dissenting), with *Pitt News v. Pappert*, 379 F.3d 96 (2004) (*Central Hudson* analysis precludes enforcement of law prohibiting advertisements for alcoholic beverages in student newspaper).

56. Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA.L.REV. 627 (1990).