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ABA v. San Francisco: A Small Step in the Right First Amendment Direction

Constitutional Law

Commercial Speech

Am. Beverage Ass'n v. San Francisco, looked at an ordinance that required 20 percent of promotional space on sugar-sweetened drinks to contain a warning about the bad health effects of the product. The Ninth Circuit held that the plaintiff beverage associations were likely to succeed on their claim that the ordinance is an unjustified burdensome disclosure requirement that might chill protected commercial speech. Bert Rein of Wiley Rein LLP says the decision can be applauded by commercial speech advocates but they should still be wary of the court's position that forced disclosures are less onerous than direct restrictions on commercial speech.

By Bert W. Rein

Business interests advocating the recognition of full First Amendment rights for commercial speakers should cautiously welcome the Ninth Circuit's Sept. 19 decision in *Am. Beverage Ass'n (ABA) v. City & Cty of San Francisco*.

The appellate court reversed the district court's denial of injunctive relief to ABA against a local ordinance that would have required 20 percent of the promotional space used by sugar-sweetened beverage advertisers to be dedicated to a ''WARNING'' that beverages with added sugar(s) contribute ''to obesity, diabetes, and tooth decay.''

Bert W. Rein is a founding partner of Wiley Rein LLP. He is a consummate litigator and made his mark in major FDA matters. He also practices antitrust, communications, insurance, and international law. Mr. Rein has been on the forefront of constitutional litigation involving the First Amendment and free commercial speech, as well as preemption challenges to regulatory initiatives and tort law expansions.

In effect, the ordinance conditioned the beverage makers' right to speak about their products on broadcasting a government message adverse to their business interests.

The Ninth Circuit did not directly address the constitutionality of the government's conditioning of an advertiser's right to speak on transmitting a government message. Such conditioning would have been summarily rejected were it applied to non-commercial speech.

It would be unthinkable, for example, for the government to survive First Amendment scrutiny of a requirement that any ''pro-choice'' advertisement devote 20 percent of its available space to a government warning about the adverse physical and psychological effects of abortion. One might fairly ask why imposing a similar sponsor-adverse messaging requirement on true and non-misleading commercial speech regarding lawful products calls for a different result.

Commercial Speech The Ninth Circuit's answer to this question began with its recital that ''commercial speech'' deserves First Amendment protection ''principally by the value to consumers of the information such speech provides,'' *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*. Putting aside the interest of the speaker, it held that commercial speech

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''can be subject to greater government regulation than noncommercial speech.''

The court then further denigrated the protection of commercial speakers from mandatory government disclosure requirements. As opposed to government restrictions that directly limit commercial speech reviewable under three part balancing test from *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, for evaluating the substantiality of the government's interest, the ability of the restriction to advance that interest and the tailoring of the restriction to that goal, mandated disclosures, in its view, could survive constitutional scrutiny under ''a lesser standard set forth in *Zauderer*.''

The Ninth Circuit framed the *Zauderer* standard by saying ''a purely factual and uncontroversial disclosure that is not unduly burdensome will withstand First Amendment scrutiny so long as it is reasonably related to a substantial government interest.''

Tilting Toward Business Having warmed the hearts of those believing that governments should be able to commandeer private advertising space to disseminate government messages, the Ninth Circuit then tilted to the business side in applying the *Zauderer* standard.

First, the court reviewed the fact base for claiming a *Zauderer* sanction on a *de novo* basis, holding those facts to be of constitutional significance and independently determinable by an appellate court. The court also held that the government bears the burden ''of showing that its regulation 'directly and proportionally' addresses [its] . . . interest.''

Turning to ''the factual accuracy of the disclosure'' under review, the court said it requires that it be ''*purely* factual and uncontroversial'' to meet *Zauderer*. It acknowledged that a controversial opinion could not meet this test nor could a mandated one-sided disclosure that itself might be deceptive by omission. Further, if the disclosure promotes policies or views that ''are biased against or are expressly contrary to the corporation's views,'' that flaw cannot be overcome by the corporation's ability to respond when it would prefer to remain silent.

Addressing San Francisco's required disclosure specifically, the court interpreted it to convey the message that sugar-sweetened beverages contribute to obesity, diabetes and tooth decay regardless of the quantity consumed or other lifestyle choices. This message, the court found, was not ''purely factual and uncontroversial'' because it exaggerated the risks of sugar-sweetened beverages when used in moderation or by those exercising vigorously. Moreover, the court determined the warning to be misleading because it implied that sugar-sweetened beverage consumption was *uniquely* related to these health risks when other high calorie products presented the same risk.

No Antagonistic Ideological Messages Thus, while the court seemed to tolerate the forced disclosure of non-controversial facts that might be adverse to the advertiser's product, it drew the line at forcing advertisers to use their own space to convey an antagonistic ideological message.

The court then addressed the plaintiffs' contention that the required black box warning covering 20 percent of their advertisements would effectively bar them from advertising. Recognizing that the black box warning would overwhelm other visual elements in the advertisement and effectively force an advertiser to use additional space to respond, the court found an additional infringement of the advertiser's First Amendment right to remain silent.

Based on the disclosure's chilling effect on the right to advertise and the controversial nature of the disclosure under review, the appellate court held the district court's denial of a preliminary injunction was an abuse of discretion and reversed and remanded for entry of preliminary relief.

Taking a Hard Look The Ninth Circuit's willingness to take a hard look at whether a forced disclosure presents only factual statements that would enhance consumer choice or crosses the line into a government effort to steer consumers into choices the government prefers is encouraging.

Most importantly, the court's recognition that, by selecting some facts and ignoring others for policy purposes, the government loses *Zauderer* protection is a major step forward in protecting commercial First Amendment interests. So too is the court's examination of the speech-chilling burden the space absorbed by the disclosure imposes on a commercial speaker's access to the marketplace of ideas.

What remains disappointing is the Ninth Circuit's espousal of the position that forced disclosures are somehow less onerous than direct restrictions on commercial speech.

In a free market economy, sellers should not face government-imposed conditions on the right to disseminate information that is neither untrue nor misleading about their products.

Even were it acceptable for government to seek to direct consumers to what government considers better purchasing decisions, the First Amendment should place responsibility for transmitting that advocacy on the government's own communications. The ABA decision takes a small step down that road but much of it remains to be traveled.

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