

WRF Client Contributes to First Amendment Victory in California False Advertising Case

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Washington, DC—Writing on behalf of the Association of Medical Publications (AMP), WRF attorneys Bert W. Rein, Rosemary C. Harold and John F. Kamp helped convince a California court to dismiss an attempted extension of the controversial California false advertising statute reviewed by the Supreme Court earlier in 2003. AMP's *amicus* submission in *Congress of California Seniors v. Pharmacia, et al.*, argued that pressing the law against a scientific article published in a peer-reviewed professional journal would violate the publisher's First Amendment rights.

The scope of California's false advertising and unfair competition law first became a prominent issue in *Nike v. Kasky*. In that case, critics of the shoe company's labor practices used the state statute to challenge the veracity of Nike's responses even though the responses came in the form of letters to the editor, press releases and other formats not traditionally considered to be advertising. The California courts upheld the use of the false advertising law in *Nike*, triggering a high-profile First Amendment appeal to the U.S. Supreme Court. The justices eventually dismissed *Nike* on procedural grounds, leaving the lower court ruling intact and First Amendment proponents concerned about how far the new precedent might be extended.

The *Congress of California Seniors (CCS)* case, already pending when *Nike* concluded, represented one of the first efforts to use the precedent against corporate speakers. CCS filed suit against two drug manufacturers on the basis of an article published in the *Journal of the American Dentistry Association (JADA)*. The article, which was written by employees and consultants to the drug companies, concerned studies conducted on efficacy of the prescription drug Bextra for a so-called "off-label use" (a use not approved by FDA).

Related Professionals

Bert W. Rein
Founder
202.719.7080
brein@wiley.law

Practice Areas

Insurance
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CCS claimed that the drug companies engaged in false advertising by promoting the drug through the journal article, thereby implying that Bextra was safe and effective for the use even though it was not specifically approved by FDA for use in treating dental pain. CCS did not argue, however, that the study data was false or that the account of the research was false or misleading.

Although JADA's editors selected and helped to shape the Bextra article, along with the assistance of independent peer reviewers, CCS did not sue JADA itself. AMP, which represents many of the leading professional and academic journals in the medical field-participated to ensure that the court understood that the outcome of the case could potentially stymie the editorial operations of all peer-reviewed journal publishers.

AMP's *amicus* submission argued that imposition of the California false advertising statute in these circumstances would impermissibly chill the rights of professional journal publishers to select, edit and disseminate scientific speech: "In particular, the threat that peer-reviewed reports on new scientific studies targeted to a highly educated audience could be deemed 'false' or 'misleading' commercial speech and subject to severe penalties under a strict liability standard designed to protect average consumers in the commercial marketplace may well eviscerate a publishing system that has supported scientific advancement for more than a century." .

Judge Victor Person of the Superior Court of California, Los Angeles Division, granted a motion to strike the CCS complaint on free speech grounds. .

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