Legal Opinion Letter

Vol. 26 No. 9 April 7, 2017

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

What Counts as "Commercial Speech" Today?

by James M. Beck

The definition of "commercial speech" has fluctuated since the US Supreme Court first recognized that such speech merits some First Amendment protection more than 40 years ago. However, the Court seems to be settling on a broader definition and broader protection in its most recent commercial-speech jurisprudence.

Initially, the Court defined commercial speech simply as "speech which does no more than propose a commercial transaction."[1] It reformulated this narrow definition somewhat in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, where commercial speech is described as "expression related solely to the economic interests of the speaker and its audience."[2] Another similar definition occurs in *Board of Trustees v. Fox*, characterizing the proposal of a commercial transaction as "the test for identifying commercial speech."[3]

The Court expounded in greater detail on the distinction between commercial and non-commercial speech in *Bolger v. Youngs Drug Products Corp.*, where the government sought to suppress speech that, although "conceded to be advertising," nonetheless contained information going beyond the previous definitions. "The mere fact" that speech was an "advertisement" did "not compel the conclusion that [it is] commercial speech." Nor did "reference to a specific product" that the defendant sought to sell or "an economic motivation" for engaging in the speech compel a finding of less-protected commercial speech.[4]

However, a "combination of *all* these circumstances"—the speech being an advertisement, discussing a product that the advertiser marketed, and pecuniary motives—was "strong support" for a finding of commercial speech. Even though the speech in *Bolger* also "contain[ed] discussions of important public issues," merely "link[ing] a product to a current public debate" did not convert it to fully-protected speech. *Bolger* did not hold that any of these characteristics "must necessarily be present" for the speech to be commercial.[5]

Corporations, like all other persons, have First Amendment-protected rights to speak out on public issues. "A company has the full panoply of protections available to its direct comments on public issues."[6] That a speaker is a commercial entity in no way limits its protected statements to commercial speech. Precedent "reject[s] the contention that a State may confine corporate speech to specified issues."[7]

The Supreme Court has likewise made clear that a pecuniary basis for the creation of speech does not render it less-protected commercial speech. "While the burdened speech results from an economic motive, so

---

[1] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation and quotation marks omitted). The Court had first suggested that commercial advertisements may enjoy a degree of First Amendment protection if they "conveyed information of potential interest and value to a diverse audience" in *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).
[2] 447 U.S. 557, 561 (1980).
[3] 492 U.S. 469, 473-74 (1989).
[4] 463 U.S. 60, 66, 66-67, 67 (1983).
[5] *Bolger*, 463 U.S. at 67, 67-68, 68, 67 n.14 (internal quotation omitted).
[6] *Id.* at 68.
[7] *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 533 (1980).

James M. Beck is Senior Life Sciences Policy Analyst with Reed Smith LLP in its Philadelphia, PA office, and founder of, and a regular contributor to, the award-winning *Drug and Device Law* blog.

too does a great deal of vital expression."[8] "[T]he degree of First Amendment protection is not diminished merely because the … speech is sold rather than given away."[9] "Some of our most valued forms of fully protected speech are uttered for profit."[10] This rule extends to commercially compensated speakers. "Publishers compensate authors because compensation provides a significant incentive toward more expression," so that "a prohibition on compensation unquestionably imposes a significant burden on expressive activity."[11]

Often it is not possible to separate the commercial and non-commercial aspects from the same speech. The Supreme Court addressed this situation in *Riley v. Nat'l Federation of the Blind*, holding that "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." The Court stated further:

> [Where] the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. … Therefore, we apply our test for fully protected expression.[12]

Scientific and medical topics have always been on the non-commercial side of the free-speech line. In *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, the US Court of Appeals for the Second Circuit held that peer reviewed scientific articles cannot be "false advertising," even where an article was allegedly created and distributed in the course of pharmaceutical promotion. Such articles are "statements of pure opinion" and thus protected by "an absolute privilege" under the First Amendment. Their promotional use in the marketing of pharmaceutical products, where their scientific conclusions were accurately conveyed, thus could not be challenged legally, given the article's First Amendment protection.[13]

The Supreme Court further protected truthful pharmaceutical marketing in *Sorrell v. IMS Health Inc.* A state had enacted legislation that forbade collecting truthful information about doctors' prescribing practices and disclosing it to drug companies. Indeed, the law "had the effect of preventing [pharmaceutical] detailers—and only detailers—from communicating … in an effective and informative manner." The Court declared "[s]peech in aid of pharmaceutical marketing" to be "a form of expression protected by the Free Speech Clause of the First Amendment." Content- and speaker-based speech restrictions were unconstitutional, *Sorrell* held, whether or not the speech in question is "commercial." The statute violated the First Amendment because it "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers."[14]

Thus, *Sorrell* establishes that, notwithstanding the Court's shifting definitions, restrictions that target particular commercial speakers, or seek to suppress particular commercial subjects, are subject to "heightened" scrutiny even where they are "commercial speech."

What is "commercial speech" today? Using its authority to "say what the law is," the Supreme Court has been refining the term over the last 40-plus years. The Court has held that "commercial speech" is more than just product advertising. It has also held that speech by corporations is not necessarily commercial speech and that an economic motive does not make speech commercial. It has said that commercial speech intertwined with other speech is fully protected. And it has frowned upon content- and speaker-based restrictions on speech of all types. Policymakers must recognize that the high court has widened the scope of First Amendment rights, and that labeling something as "commercial speech" will no longer exclude it from robust protection.

---

[8] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citations omitted).
[9] *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 n.5 (1988) (citation omitted).
[10] *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (citations omitted). *Accord City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-23 (1993) (speech does not lose protection because it arises from a speaker's economic interest).
[11] *United States v. National Treasury Employees Union*, 513 U.S. 454, 468-69 & n.14 (1995).
[12] 487 U.S. 781, 796 (1988).
[13] 720 F.3d 490, 495, 496, and 499 (2d Cir. 2013).
[14] 564 U.S. 552, 563-64, 564, 557, and 567 (2011).

 ISBN 1056 3059