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Commercial-Speech Regulations Must Be No More Extensive Than Necessary

by Sarah Roller and Katie Bond

In *Central Hudson Gas & Electric Corp.*, the US Supreme Court provided the First Amendment test for assessing commercial-speech restrictions.[1] The first part of the test focuses on the speech at issue. As a threshold matter, the speech must "concern[] lawful activity" and must not be inherently misleading. The remainder of the test focuses on the regulatory scheme at issue. The government bears the burden to (1) identify a substantial interest that justifies the speech restriction; and (2) show that the restriction "directly advances" that interest and is "[no] more extensive than necessary."[2] A pair of recent federal appellate court decisions provides an instructive case study on how judges evaluate the second part of the *Central Hudson* test.

Ocheesee Creamery LLC v. Putnam. A dairy creamery selling all natural milk products within Florida challenged the state's restriction on use of the term "skim milk."[3] When fat is removed from whole milk, almost all vitamin A—a fat-soluble vitamin—is also removed. Under Florida law, manufacturers are required to restore vitamin A to the levels present in whole milk. If a manufacturer fails to do so, it must obtain a state "imitation milk permit" and a state-approved product name.[4]

Because Ocheesee "prides itself on selling only all natural additive-free products," it declined to add vitamin A to its skim milk. In 2012, Florida issued two stop-sale orders. At that time, Ocheesee and state regulators attempted to negotiate a permit and product name. Ocheesee offered language such as, "PASTEURIZED SKIM MILK, NO VITAMIN A ADDED" or "PASTEURIZED SKIM MILK, MOST VITAMIN A REMOVED BY SKIMMING CREAM FROM MILK." State regulators, however, refused to allow any language including the term, "skim milk." Regulators instead offered language such as "Non-Grade 'A' Milk, Natural Milk Vitamins Removed." After two years of failed negotiations, Ocheesee filed suit, arguing that Florida's refusal to allow it to use "skim milk" "amounted to censorship in violation of the First Amendment."

The lower court upheld Florida's actions, but the US Court of Appeals for the Eleventh Circuit reversed that decision. Applying *Central Hudson*, the court first considered whether the speech at issue related to lawful conduct. The state argued that it did not, given that unfortified skim milk was "simply prohibited for sale in Florida." The court rejected this contention finding that, with a permit, any unlawfulness related only to using the term "skim milk." The court likewise rejected Florida's arguments that the term "skim milk" was inherently misleading. The court found, rather, that use of the term on Ocheesee's products was "merely a statement of objective fact" and that even Webster's Dictionary defines "skim milk" simply as "milk from which the cream has been taken."[5]

[1] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).
[2] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566).
[3] 851 F.3d 1228 (11th Cir. 2017).
[4] *Id.* at 1231 (discussing Fla. Stat. §§ 502.091 and Fla. Admin. Code r. 5D-1.001(1)). Given that Ocheesee sold its products only within Florida, the federal standards of identity for milk were not at issue.
[5] *Id.* at 1239. This approach is generally consistent with Food and Drug Administration (FDA) policies allowing regulated terms

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In assessing the regulatory scheme, the court found that even though the law advanced a substantial interest, Florida's blanket prohibition against use of "skim milk" was "clearly more extensive than necessary to achieve its goals." The court observed that "[t]he record makes clear that numerous less burdensome alternatives existed and were [in fact] discussed by the State and the Creamery during negotiations."

Ocheesee is consistent with other modern cases finding that "the preferred remedy" in First Amendment commercial-speech matters "is more disclosure, rather than less."[6] For instance, in the *Pearson* line of cases in the DC Circuit, FDA asserted that it had properly prohibited certain disease-prevention claims for dietary supplements (*e.g.*, that folic acid reduces the risk of neural tube defects) where the claims failed to be backed by "significant scientific agreement."[7] Courts repeatedly rejected FDA's position and found, rather, that as long as "credible evidence" supports the claims, they must be allowed with disclosures explaining the level of support.[8] Where a state or federal entity seeks to prohibit specific, fact-based commercial speech, it bears a heavy burden to show that requiring more explanation would not be an effective, more narrowly tailored remedy than outright prohibition.

Chiropractors United for Research & Education, LLC v. Conway. A group of chiropractors sought a preliminary injunction preventing enforcement of Kentucky's "New Solicitation Statute."[9] The law barred healthcare providers, including chiropractors, from contacting victims of motor-vehicle accidents within the first 30 days following an accident. The lower court denied the injunction request, finding that the plaintiffs failed to show a strong likelihood of success on the merits. The Sixth Circuit upheld that decision.

The court first held that chiropractor solicitations "are entitled to First Amendment protection" under the threshold parts of *Central Hudson*. The court further found that the state's interests in preventing abuse of a state "Personal Injury Protection" (PIP) program justified the law, and that "sufficient data" was offered showing that the law directly advanced that interest and was sufficiently narrow. The court noted "complaints and orders" from medical-licensing boards over similar solicitations and a report showing that questionable PIP claims "ranked in the top three loss types for 2012-2014 in Kentucky." The court also observed that the law did not restrict victims from contacting providers, and that providers and patients with a pre-existing relationship were exempt.

The Supreme Court has observed that the "degree to which speech is suppressed—or alternative avenues remain available—under a regulatory scheme tends to be case specific."[10] *Chiropractors United* bears out this point and demonstrates that the burden is on the government to identify evidence showing that there is "a reasonable fit between the means and ends of [a] regulatory scheme."[11]

Conclusion. *Ocheesee* demonstrates that the state bears a heavy burden under *Central Hudson* in prohibiting a business's dissemination of truthful information in advertising. *Chiropractors United* however demonstrates that a state may nevertheless restrict businesses' speech rights if it can identify evidence showing a reasonable fit between a regulatory scheme and the state interest underlying the scheme.

(*e.g.*, standard of identity terms) to be used to identify a nonstandardized food where the term is qualified to disclose material differences (*e.g.*, "Tomato Juice" and "Tomato Juice with Vitamin C"). *See, e.g.*, 58 Fed. Reg. 2431 (Jan. 6, 1993) (finalizing provisions prescribing "a general definition and standard of identity for foods named by use of a nutrient content claim defined in part 101 (*e.g.*, 'fat free,' 'low calorie,' and 'light') in conjunction with a traditional standardized name (*e.g.*, 'reduced fat sour cream')").

[6] *Ocheesee Creamery LLC,* 851 F.3d at1240 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 375 (1977)).

[7] *See Alliance for Natural Health U.S. v. Sebelius*, Civ. Action No. 09-10470 (ESH) (D.D.C. May 27, 2010); *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 10-11 (D.D.C. 2002); *Pearson v. Shalala*, 164 F.3d 650, 655, 659-660 (D.C. Cir. 1999).

[8] *Whitaker*, 248 F. Supp. 2d at 10.

[9] 2015 WL 5822721 (6th Cir. July 1, 2016).

[10] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001).

[11] *Cent. Hudson*, 447 U.S. at 569.

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