

ADVERTISING AND THE FIRST AMENDMENT

Thesis

Tobacco advertising should be afforded the same free speech as by other commercial entities. This free speech should be based on the definition of “free speech” defined by the Free Speech Clause of the First Amendment and the interpretation of the term “commercial speech.”

In the 1996 case *Rubin v. Coors Inc.*, the Supreme Court ruled “cigarette advertising is afforded no less First Amendment protection than any other truthful advertising for a legal product.” This ruling was later reinforced by the *Liquormart Inc. v. Rhode Island* case of 1996. This second case gave a specific example of a “bad” product or vice that was not banned due to its protection under the First Amendment. In the case the Supreme Court ruled that the Free Speech Clause grants the same protection to liquor price advertising as for any and all other commercial products.

The Argument: Protecting Children

The ban on cigarette advertising has been supported by many members of the community who believe that because the ban is aimed at protecting children that the ban should be legal. The Court ruled in *Butler v. Michigan* (1957) that the fact that the restrictions are set forth to prevent children from smoking does not make them constitutional. The meaning of this ruling was expanded upon in both the *Cincinnati v. Discovery Network* case of 1993 and the *Reno v. American Civil Liberties Union* (1997). Combining the ruling of these two cases leaves us with the knowledge that “the Government may not reduce the adult population to only what is fit for children” and that “any regulation of commercial speech [must] be “narrowly tailored” and its costs “carefully calculated” to accomplish its asserted purpose.”

The Argument: An Example

Act 199 banned alcohol advertising in college newspapers in Pennsylvania under the stipulation that if college students didn't know where the cheap beer was they would drink less and thus curtail the amount of underage and binge drinking. One college, Pennsylvania State University, decided to challenge the legality of Act 199 on First Amendment grounds.

Pitt News v. Pappert was decided by the U.S. Court of Appeals for the 3rd Circuit. The ruling stated that Act 199 was “an impermissible restriction of

commercial free speech.” Act 199 was ruled unconstitutional because it targeted to narrow segment of the media.

A parallel can be drawn from Act 199 to cigarette advertising. Cigarette companies are banned from showing ads of television; however, other mediums are acceptable.

The Argument: Unfair Regulations

This being said there have been some alternatives suggested such as text-only restrictions, which would make it illegal for cigarette ads to feature pictures or graphics. Proponents of this method say it is legal because it allows cigarette companies to continue advertising with a diminished chance of catching or a child’s attention. This idea was quickly shot down by the precedent set by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel* (1985), which ruled that commercial illustrations are entitled to the same constitutional protection as verbal commercial speech because illustrations or pictures in advertisements serve important communicative functions. This supreme court decision was later backed up by *Shapiro v. Kentucky Bar Association*, 1988: “[A state] may claim no substantial interest in restricting truthful and non-deceptive [commercial] solicitations to those least likely to be read by the recipient.”

The Flip Side: Cigarette Companies' POV

On the Phillip Morris USA corporate website under the tab “Marketing our Cigarettes”, Phillip Morris USA (Marlboro) states: “The tobacco settlement agreements fundamentally changed the way cigarettes are advertised, promoted and sold in the U.S.; affect every aspect of our marketing practices; and place limitations on our marketing activities.”

Another, R.J. Reynolds Tobacco Company (Camel) states: “There is extensive regulation of the tobacco industry and the products it produces at every level of government. Perhaps no other product is regulated in so many ways, or by so many agencies, as tobacco products. Moreover, while regulation of consumer products is typically left to federal agencies, Congress itself has stepped in to oversee the tobacco industry in many areas.”

A third company, Lorillard, Inc. (Newport) has stated in the “Frequently Asked Questions” section of their website that “The best way to fight new taxes and laws that target you as a smoker is to contact your federal and state legislators. Let them know that you feel it is unfair to be singled out. Visit your state's legislative website to find your local legislators, or click here to visit www.house.gov and www.senate.gov to find your federal representatives.”

It is clear that major tobacco companies oppose the amount of regulation for their products. They all claim that they regulate themselves. PM USA even

says that they do not want to encourage kids or non-smoking adults to begin to smoke but rather to earn a bigger share of the market in regards to adults whom already are smokers.

The Opposition

Many believe that cigarette companies cannot be trusted to advertise their products responsibly and therefore the government should step in. It is not this belief that is wrong but the unconstitutionality of the methods implied by the government that is in question by the cigarette companies.

The Alternative Argument

The argument for the legality of banned ads will often argue that advertising does not deserve the same freedom under the Free Speech Clause because it is a censor because advertisers and media consumers differ in their content desire and the station (TV, Radio) is stuck between a rock and a hard place, as described below.

On one side there is the consumer who desires programming, on the second the advertiser who desires ads and in the middle is the station that wants to make a profit. As long as people continue to pay for service and the advertisers continue to pay to place their ads the station is happy. If the station attempts to run an ad that a select advertiser or group of advertisers don't

want shown (such as antismoking ads) then the advertising company, in this case a cigarette company, may threaten to withdraw their ads and the station will lose money in the long run. Stations don't want to lose money.

Due to the control advertisers have over the station, many people argue they are not protected by the first amendment and that the government has the right to control this situation in order to protect the free speech of the station. From this viewpoint, it must be understood that its proponents believe that the control advertisers have over a station as described above, affects the free speech of the station. When an advertiser threatens to withdraw its ads, and thus funding, from the station because the station wants to show an ad or show that the advertising company does not want shown the station is often forced to not show the ad or show they originally planned to and thus the station's free speech has been infringed upon. This power to influence a station's content is a concern for many people and entities.

On the Contrary

Consumers have this same power. If a large group of consumers don't like the ads on a station they have the choice to not watch that station. Without consumers viewing their programming, and thus ads, the station will be forced to make a change. This is a market theory on the relationship between advertising and broadcasting. It's similar to the capital system on which the United States of America is based. Since this is not happening, it must be

assumed that none of the advertisements are so overly offensive as to disturb the consumer.

So far it has been established that consumers have the ability to affect the station's ads indirectly in much the same way as an advertising company. It is also universal knowledge that individuals are protected by the First Amendment's promise of free speech. It logically follows that an advertiser must have the same right to free speech. After all, we have just said that the advertiser is not that much different from the consumer—both are willing to pay for a service, and both have the choice to choose a different provider if the station they are using doesn't make par.

Judgment

After considering all of the evidence, the conclusion can be drawn that ads should be afforded commercial free speech. It is understood that this free speech must be within the legal limits of the product. For cigarette companies, this means tailoring ads for an adult population. Also, the advertisement in question must not contain false or deceptive information. The FTC definition of false or deceptive advertising, as outlined by Pember (p. 572), is that "there must not be a representation, omission or practice that is likely to mislead the consumer. [Also,] the representation, omission, or practice must be material." This must be determined via the perspective of a consumer who is acting reasonably. The government, the FCC, and select advertising departments

should have the power to ban ads that do not target an audience that can legally purchase the product but should not be able to ban ads on a per product basis. According to Pember (p.575), there are several tools that can be used to stop false advertising: Guides and the Child Online Privacy Protections Act, consent agreements, litigated orders and substantiation are a few examples. Consent agreements are the most commonly used and entail an agreement by the advertiser to refrain from making specific claims in the future. Litigated orders are an official order by the commission. Substantiation, since 1972, has been very important. This method requires the advertiser to substantiate or prove claims made in an advertisement as truthful.

In addition, based on the precedent set in *Pitt News v Pappert*, any ban on advertising cannot target one small section of the media. In today's time, it can be argued that with all the new media, such as the Internet, targeting one medium is too narrow to be allowed.

Conclusion

Cigarette ads were banned, on television, with the protection of children in mind. While this is a noble cause, it is plain to see that banning advertisements based on the type of product being advertised; assuming the product itself is in good legal standing raised important First Amendment questions.

Even though cigarette ads are illegal, according to various court cases (Rubin v. Coors Inc., Liquormart Inc. v. Rhode Island) mentioned earlier that grant free speech to commercial advertisements, regardless of the morality of the product, it is illegal to ban them on such a broad spectrum based solely on the type of product being advertised.

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