wiley

NEWSLETTER

First Amendment Litigation Could Impact Many Products, Not Just Cigarettes

June 2012

Several First Amendment challenges to tobacco labeling and advertising restrictions are pending in federal courts, and one is likely soon to arrive at the Supreme Court. Depending on how these cases are decided, manufacturers and retailers of a variety of products could face more burdensome government "disclosures" that purport to advance government policy goals.

Graphic Product Labels Are Upheld by the Sixth Circuit, Under Review in the D.C. Circuit

Mandatory product labels are subject to First Amendment scrutiny, and cases testing them have been litigated in two federal court cases. In March, the United States Court of Appeals for the Sixth Circuit upheld the Family Smoking Prevention and Tobacco Control Act. *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509 (6th Cir. 2011). The law mandates that the Food and Drug Administration (FDA) create a new package labeling regime, which would include requiring large, graphic images on cigarette packaging. The Sixth Circuit's 2-1 decision sustaining the labeling requirement illustrates the doctrinal questions surrounding mandatory warnings and labels.

The majority reasoned that labeling depicting smoking as pleasurable is inherently deceptive, so the government can require the promotion of information, including graphic images, to inform consumers of health risks of tobacco. The Court concluded that the government's requirements need only meet the lower level of scrutiny set forth in the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio* because, in the case of misleading or potentially misleading commercial speech, "an advertiser's rights are adequately protected as long as disclosure

Authors

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law

requirements are reasonably related to the State's interest in preventing deception of consumers," 471 U.S. 626, 651 (1985). The manufacturers and retailers sought rehearing and rehearing *en banc*, arguing that in sustaining the warning regime, the panel majority misapplied and improperly relaxed *Zauderer*'s requirements, expanding government authority to compel speech. On May 31, the Sixth Circuit denied rehearing *en banc*, so the next step is likely the Supreme Court.

The FDA's warning regime met a very different fate in the District of Columbia. Tobacco manufacturers in the D.C. action brought an as-applied challenge to the graphic package labels FDA promulgated through rulemaking, claiming the labels violated their First Amendment rights to be free from compelled speech. *R.J. Reynolds Tobacco Co. v. FDA*, 2012 WL 653828 (D.D.C. 2012). In February, Judge Richard Leon ruled that the warning labels were unconstitutional. He held that the more permissive *Zauderer* test should not apply because the labels "were neither designed to protect the consumer from confusion or deception, or to increase consumer awareness of risks . . . ."

Because Judge Leon did not deem existing packaging misleading or confusing, the court applied the traditional strict scrutiny test for compelled speech. It requires that government action be narrowly tailored to achieve a compelling government interest. He held that the government had not met this stringent standard because the labels' purpose—which he characterized as "an interest in simply advocating that the public not purchase a legal product"—was not compelling, and "the sheer size and display requirements for the graphic images [were] anything but narrowly tailored." The FDA appealed the decision to the Court of Appeals for the D.C. Circuit, which held oral argument on April 10, 2012. Based on the judges' questioning of the parties, they appeared skeptical of the government's case.

The D.C. District Court decision is in direct conflict with the Sixth Circuit's conclusion, and these important issues are making their way to the Supreme Court.

Poster Obligations Also Trigger First Amendment Scrutiny

Governments also require retailers to display posters conveying scripted content. Such poster obligations have been challenged under the First Amendment as well. For example, in *23-34 94th St. Grocery Corp. v. New York City Board of Health*, 757 F. Supp. 2d 407 (S.D.N.Y. 2010), manufacturers, retailers, and trade associations challenged New York City health regulations that would require retailers to display posters of graphic tobacco-related images in their stores. Judge Jed Rakoff in the Southern District of New York ruled that the regulations were preempted by a federal law that prohibits states and localities from imposing additional restrictions on advertisements that meet FDA requirements.

Because the local regulation was preempted by federal law, the court did not reach the First Amendment issues presented by the case. However, the industry raised the First Amendment as an alternative ground for affirmance of the lower court's decision on appeal to the Second Circuit. They argued that the City cannot satisfy its First Amendment burden to justify conscripting retail space for posters of the City's design. The City argued in response that the posters are government speech and permissible because the retailers remain free to speak and the posters bear official disclaimers that demonstrate they are the government's, not the

retailers', speech.

If the court concludes that the City's regulations are not preempted by federal law, it will have to grapple with the First Amendment issues. The Second Circuit heard arguments on December 1, 2011, and a decision is expected any time.

All Retailers and Manufacturers Should Watch These Cases

Developments in First Amendment compelled speech doctrine could empower federal, state, and local governments to require significant new "warning" or "disclosure" regimes across industries. Retailers and manufacturers should watch for such obligations and evaluate whether they are based on sound factual predicates and are properly tailored to achieve appropriate government purposes.