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Commercial Regulation and the First Amendment

Andres Medrano

Author Contact Information:
Andres Medrano
Gardere Wynne Sewell LLP
Austin, TX

amedrano@gardere.com
512.542.7013

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Commercial Regulation and the First Amendment

Andres Medrano

Speaker/Author:
Andres Medrano
Gardere Wynne Sewell LLP
600 Congress Avenue, Suite 3000
Austin, Texas 78701
amedrano@gardere.com
512-542-7013

I. Introduction

The practice of administrative law often considers the application and enforcement of statutes and rules that regulate behavior within contexts that the State deems itself to have a public policy interest in monitoring, restricting, or prohibiting. Frequently, these contexts involve commercial activity. An important challenge being confronted by administrative lawyers in the context of commercial regulation relates to the applicability of the speech protections of the First Amendment of the United States Constitution¹ to commercial activity that promotes or conveys a message related to the economic interests of the speaker. Though there is established legal precedent for the level of constitutional scrutiny to be given commercial speech and the factors to be considered when evaluating laws or rules that would impair such speech, this precedent is subject to considerable interpretation and its application produces inconsistent determinations of what is protected and what is not.

Commercial speech may be descriptive, based in fact, and accurately convey the viewpoint of the speaker, yet still be contrary to regulation. Viewed exclusively through the lens of First Amendment principles, such regulations may seem to be unconstitutional restrictions of speech based on the content of the speech and the identity of the speaker. Yet regulations restricting or prohibiting certain kinds of commercial speech have been consistently determined to pass constitutional muster. Because all commercial activity conducted between two or more persons will invariably involve communications that qualify as speech, if the First Amendment is allowed to supersede all regulations of commercial activity then the regulation of vast categories of commercial activity would seem to be facially invalid, including some regulation that has significant public interest value such as consumer protection laws, anti-trust and securities regulations, and the protection of intellectual property.

This paper presents a framework for the analysis of First Amendment challenges to commercial regulations – whether the challenge is mounted by an advocate of a commercial interest attempting to avoid regulation on free speech grounds or defended by an advocate of continued application of reasonable regulations in the public interest. Section II reviews the history of commercial speech jurisprudence, Section III provides guidance on the steps needed to

¹ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

analyze the constitutional protection of commercial speech based on legal precedent, focusing on several examples to illustrate the challenges of balancing commercial regulation with free speech protections, and Section IV considers the implications of expanding the constitutional protections afforded to commercial speech by individuals and corporations as advocated by many academic commenters and implicated to some extent by the Supreme Court in its *Citizens United* decision.

II. The Gradual Application of the First Amendment to Commercial Speech

Commercial speech historically was not afforded protection by the First Amendment; governmental restrictions of commercial speech were not subject to any level of scrutiny by the courts, rather like obscenity, slander, and fighting words, it was simply outside of the First Amendment's purview.² The absolute exclusion of commercial speech from First Amendment protection began to be questioned by the Supreme Court in the mid-1970s, with the court observing in *Bigelow v. Virginia*³ that it was error to assume that commercial advertising was entitled to no protection, though this conclusion was tempered somewhat by the conclusion that the speech at issue in the case had significant public interest value as well as commercial value.⁴

The following year, the Court extended First Amendment protection to speech with purely commercial content in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*

² *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In *Valentine*, the Court upheld a New York statute that prohibited the distribution of handbill advertising materials on the street. The history of *Valentine* is an interesting one, as it was issued not more than a decade after the Supreme Court unambiguously applied the First Amendment protections of free speech to the regulations of state and local authorities via the Fourteenth Amendment. There is persuasive scholarship that *Valentine* did not consider the First Amendment protection of "commercial speech" so much as the due process limitations on regulations restricting "advertising" and that its final balance was not so much a rejection of the free speech protection of commercial speech as a practical balance of advertising interests and the desires of cities not to have their streets littered with discarded handbills. See *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747 (1992-1993). However, *Valentine* is generally cited as the first instance of the Court refusing to extend First Amendment protection to commercial speech.

Additional examples of the Supreme Court excluding commercial speech from First Amendment protection include *Breard v. Alexandria*, 341 U.S. 622 (1951) (upholding ban on door-to-door solicitations), and in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Thomas v. Collins*, 323 U.S. 5116 (1945), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Jamison v. Texas*, 318 U.S. 413 (1943) where the Court applied First Amendment protection in various contexts on the grounds that the communications at issue were not purely commercial.

³ 421 U.S. 809 (1975).

⁴ *Bigelow*, 421 U.S. 809, 822 (1975). Notably, the admixture of public interest speech with commercial speech interests has continued to be used by courts in difficult cases of determining whether specific expressions of commercial speech are entitled to protection despite the Supreme Court's determination that purely commercial speech is protected, as discussed *infra*.

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