COMMENTS

In re R.J. Reynolds Tobacco Co., Inc.: The "Common Sense" Distinction Between Commercial and Noncommercial Speech

Introduction

The Supreme Court has recognized that "commercial speech"[1] is afforded less first amendment protection than speech that "goes well beyond proposing a business transaction or discusses matters of public concern . . . ."[2] Under the Court's commercial speech doctrine, speech found to be "commercial" is subject to government regulation, whereas noncommercial speech, such as comment on public issues, is fully protected by the First Amendment.[3]

In August 1986, the Federal Trade Commission (FTC) faced the question of what characteristics make speech "commercial." *In re R.J. Reynolds Tobacco Co., Inc.*[4] involved an article entitled "Of Cigarettes and Science," published by R.J. Reynolds Tobacco Company, a large tobacco products manufacturer.[5] The article ostensibly expressed R.J. Reynolds' view on a medical study which purportedly weakened the "theory" that smoking can lead to heart attacks. The FTC issued a complaint alleging that the article was in fact an advertisement contain-

1. Commercial speech is readily identifiable when it is "bare advertising" in which the idea one "wishes to communicate is simply this: 'I will sell you . . . X . . . at Y price.' " Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). There are instances, however, when it is more difficult to determine whether speech is commercial. *See, e.g., infra* text accompanying notes 65 & 68.

2. *In re* R.J. Reynolds Tobacco Co., Inc., 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277, at 219 (Aug. 4, 1986). *See* Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

3. *See infra* text accompanying notes 58-62. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech."

4. 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277, at 219 (Aug. 4, 1986), *appeal docketed*, No. 9206 (FTC Aug. 7, 1986).

5. The full text of the article read:

ing misleading and deceptive representations in violation of section 5(a) of the Federal Trade Commission Act,[6] which prohibits false and deceptive advertising.

R.J. Reynolds moved for dismissal, arguing that the FTC lacked subject matter jurisdiction because the article was an expression of opin-

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Of cigarettes and science.

This is the way science is supposed to work.

A scientist observes a certain set of facts. To explain these facts, the scientist comes up with a theory.

Then, to check the validity of the theory, the scientist performs an experiment. If the experiment yields positive results, and is duplicated by other scientists, then the theory is supported. If the experiment produces negative results, the theory is re-examined, modified or discarded.

But, to a scientist, both positive and negative results should be important. Because both produce valuable learning.

Now let's talk about cigarettes.

You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them.

Much of this evidence consists of studies that show a statistical association between smoking and the disease.

But statistics themselves cannot explain *why* smoking and heart disease are associated. Thus, scientists have developed a theory: that heart disease is *caused* by smoking. Then they perform various experiments to check this theory.

We would like to tell you about one of the most important of these experiments. A little-known study

It was called the Multiple Risk Factor Intervention Trial (MR FIT).

In the words of the *Wall Street Journal*, it was "one of the largest medical experiments ever attempted." Funded by the Federal government, it cost $115,000,000 and took 10 years, ending in 1982.

The subjects were over 12,000 men who were thought to have a high risk of heart disease because of three risk factors that are statistically associated with this disease: smoking, high blood pressure and high cholesterol levels.

Half of the men received no special medical intervention. The other half received medical treatment that consistently reduced all three risk factors, compared with the first group.

It was assumed that the group with lower risk factors would, over time, suffer significantly fewer deaths from heart disease than the higher risk factor group.

But that is not the way it turned out.

After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths. The theory persists

We at R.J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point.

Despite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions.

They continue to believe these factors cause heart disease. But it is important to label their belief accurately. It is an opinion. A judgment. But *not* scientific fact.

We believe in science. That is why we continue to provide funding for independent research into smoking and health.

But we do not believe there should be one set of scientific principles for the whole world, and a different set for experiments involving cigarettes. Science is science. Proof is proof. That is why the controversy over smoking and health remains an open one. The R.J. Reynolds Tobacco Company

In re R.J. Reynolds Tobacco Co., No. 9206, slip op. at app. A (FTC June 11, 1986) (LEXIS, Trade library, FTC file) (emphasis in original).

6. 15 U.S.C. § 45(a) (1982).

ion and not commercial speech.[7] Granting R.J. Reynolds' motion to dismiss for lack of subject matter jurisdiction,[8] the administrative law judge (A.L.J.) ruled that the piece was "clearly an editorial" and "not commercial speech by any stretch of the imagination."[9] This ruling is being reviewed by the FTC commissioners.[10]

This Comment examines the A.L.J.'s constitutional analysis of the R.J. Reynolds article. Part I recounts the facts, reasoning, and holding in the A.L.J.'s initial decision. Part II presents a synopsis of commercial speech law. Part III then criticizes the A.L.J.'s analysis of factors which distinguish commercial speech from noncommercial expressions and illustrates the inaccurate application of such factors to R.J. Reynolds' article. Part IV states that precedents used to distinguish commercial and noncommercial speech are sound when correctly applied, and are an important adjunct to the increased level of protection afforded commercial speech. This Comment concludes that R.J. Reynolds' article was actually a cigarette advertisement disguised as an expression of opinion regarding a public issue, and therefore should be afforded the same protection as commercial speech.

I. The *R.J. Reynolds* Case

A. The Facts

Beginning in March 1985, the R.J. Reynolds Tobacco Company published a one-page article entitled "Of Cigarettes and Science" in more than twenty-five newspapers and magazines.[11] The article discussed a study known as the Multiple Risk Factor Intervention Trial (MR FIT). As reported in the article, the subjects of the study were 12,000 men thought to have a high risk of heart disease because of certain risk factors, among them smoking.[12] Half of this group reportedly received "no special medical intervention," while "[t]he other half received medical treatment that consistently reduced all three risk factors, compared with

7. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 219.

8. *Id.*

9. *Id.* at 221.

10. *In re* R.J. Reynolds Tobacco Co., Inc., 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277, at 219, *appeal docketed*, No. 9206 (FTC Aug. 7, 1986). *See infra* note 28 and accompanying text. For a discussion of FTC appeal procedure, see *infra* note 19 and accompanying text.

11. Myers, *Suit Against R.J. Reynolds Is No Threat to Corporate Expression*, L. A. Daily J., July 9, 1986, § 1, at 4, col. 3. The R.J. Reynolds' article was one of four "focus group" reports "allegedly intended and designed to express '[R.J. Reynolds'] viewpoints on smoking issues to the public,' including 'issues such as courtesy, fire safety, teenage smoking, passive smoke and primary health' . . . ." *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 221-22.

12. The other risk factors were high blood pressure and high cholesterol levels. See *supra* note 5 for the text of the article.

the first group."[13] The article stated that: "It was assumed that the group with lower risk factors would . . . suffer significantly fewer deaths from heart disease than the higher risk factor group."[14] However, "that is not the way it turned out."[15] According to the article, the results indicated that "[a]fter 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths."[16] According to R.J. Reynolds, "[d]espite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory [that heart disease is caused by smoking] . . . ."[17] The article concluded by stating that "the controversy over smoking and health remains an open one."[18]

The Federal Trade Commission[19] issued a complaint against R.J.

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Some health groups have charged that R.J. Reynolds misconstrued MR FIT's results and conclusions. In a rebuttal article entitled "The Science of Selling Cigarettes," the American Heart Association claimed that because "*both groups* [in MR FIT] *had reduced their risk of heart disease* . . . naturally, and not surprisingly, the number of heart disease deaths between the two groups was not significantly different." National Interagency Council on Smoking and Health, *Coalition on Smoking or Health Petitions FTC to Stop "False and Deceptive" Ads By R.J. Reynolds Tobacco Company*, SMOKING AND HEALTH REP., July 1985, at 1, 5 [hereinafter *Coalition on Smoking or Health*] (emphasis in original). Further, both the American Heart Association and Dr. Lewis Kuller, Professor and Chairman of the Department of Epidemiology at the University of Pittsburgh and one of the principal investigators in MR FIT, claim R.J. Reynolds overlooked the fact that the MR FIT participants who quit smoking had a coronary death rate almost fifty percent below that of those who continued to smoke. *Id.* at 1, 5. Dr. Kuller emphasized that "MR FIT did not examine whether cigarette smoking was a cause of cardiovascular disease because the scientific evidence on that issue is considered beyond question." *Id.* at 1.

17. See *supra* note 5 for the text of the article.

18. *Id.* The American Cancer Society responded: "There is no controversy about the health effects of smoking. The case is closed. The only place where this controversy may still prevail is in the policy making, public relations, and executive offices of R.J. Reynolds Tobacco Company." *Coalition on Smoking or Health, supra* note 16, at 5.

19. Organized in 1914 pursuant to the Federal Trade Commission Act (current version at 15 U.S.C. §§ 41-58 (1982 & Supp. III 1985)), the FTC originally had jurisdiction only over anticompetitive trade practices affecting interstate commerce. Congress extended its jurisdiction to purely deceptive practices, without regard to their effects on competition, by the 1938 Wheeler-Lea Amendment, ch. 49, 52 Stat. 111 (codified at 15 U.S.C. §§ 41, 44, 45, 52-58 (1982)). Congress passed the Amendment as a reaction to the Supreme Court's ruling in FTC v. Raladam Co., 283 U.S. 643 (1931). In *Raladam*, the FTC sought to stop Raladam Company's alleged deceptive marketing of an "obesity cure." The Court held that the FTC did not have jurisdiction because the company had no competitors and thus, its deceptive practices were not anti-competitive. 283 U.S. at 648-54.

The FTC is composed of five commissioners appointed by the President and confirmed by the Senate. The commissioners serve terms of seven years. 16 C.F.R. § 0.1 (1986). The chairman of the Commission is also appointed by the President. 16 C.F.R. § 0.8 (1986). For a brief discussion of FTC structure and procedure, see Grady & Feinman, *Advertising and the FTC: How Much Can You "Puff" Until You're Legally Out of Breath,* 36 ADMIN. L. REV. 399, 399-

Reynolds on June 11, 1986,[20] alleging that the article's representations were misleading, deceptive, and hence, violated section 5(a) of the Federal Trade Commission Act.[21] On June 26, 1986, the company moved for dismissal on numerous grounds, claiming, *inter alia*, that the Commission lacked subject matter jurisdiction with respect to the "Of Cigarettes and Science" publication.[22] This portion of the dismissal motion raised only one issue: "whether [the article] may properly be classified as commercial speech, which . . . is subject to government regulation, including section 5 of the Federal Trade Commission Act, or noncommercial speech which is fully protected by the First Amendment and ordinarily lies beyond the power of government regulation . . . ."[23]

B. The Initial Decision

FTC Administrative Law Judge Montgomery K. Hyun issued his

402 (1984). *See also* Ronick, *The FTC: An Overview*, 88 CASE & COM., July-Aug. 1983, at 4. For a more in-depth discussion of FTC structure, policy and procedure, see E. ROCKEFELLER, DESK BOOK OF FTC PRACTICE AND PROCEDURE (3d ed. 1979).

20. *In re* R.J. Reynolds Tobacco Co., Inc., No. 9206, slip. op. at app. A (FTC June 11, 1986) (LEXIS, Trade library, FTC file). The FTC's Bureau of Consumer Protection investigates unfair or deceptive trade practices. 16 C.F.R. § 0.17 (1986). Transition from investigation to formal action occurs when the Commission issues a complaint and a four-digit docket number. 16 C.F.R. § 3.11(a) (1986). *See* E. ROCKEFELLER, *supra* note 19, at 119-20.

FTC Chairman Daniel Oliver, appointed by President Reagan, dissented from the vote to issue the complaint against R. J. Reynolds, stating that the article "engages an issue that is a subject [of] public concern . . . unlikely to be articulated elsewhere." *In re* R.J. Reynolds Tobacco Co., Inc., No. 9206, slip op. (FTC June 11, 1986) (LEXIS, Trade library, FTC file). Chairman Oliver further reasoned that, "as a matter of public policy, it is valuable for the public to hear all sides of an issue, and I am concerned about taking any action that may inhibit free expression of views." *Id.*

21. 15 U.S.C. § 45(a)(2) (1982) reads in relevant part: "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce." Once a complaint issues, procedural requirements are governed by section 554 of the Administrative Procedure Act, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-552a, 553-559, 701-706, 1305, 3105, 3344, 5362, 7521), FTC rules, *see* 16 C.F.R. §§ 3.1-3.83 (1986), and due process, Genuine Parts Co. v. FTC, 445 F.2d 1382, 1387 (5th Cir. 1971).

FTC counsel also raised three procedural arguments against dismissal: (1) Since R.J. Reynolds' motion was a facial attack on the Commission's subject matter jurisdiction, the A.L.J. must assume that the complaint's allegations were true, and the allegations were sufficient to establish subject matter jurisdiction; (2) if the A.L.J. found the FTC's evidence insufficient to overcome R.J. Reynolds' jurisdictional challenge, the case should nonetheless proceed to trial to permit further discovery because R.J. Reynolds' motion raised issues which went beyond the face of the complaint; and (3) because the jurisdictional facts and merits of the case were so intertwined, the jurisdictional challenge must await the development of a complete trial record. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 213.

22. *Id.* at 219.

23. *Id.*

decision on August 4, 1986.[24] The case was one of first impression in the history of the Commission's section 5 enforcement in that it involved an advertisement which, on its face, was an editorial on the health effects of smoking.[25] Judge Hyun ruled that the piece was an "editorial" which expressed R.J. Reynolds' opinion or comments on smoking and health and, as such, was not commercial speech.[26]

Judge Hyun granted R.J. Reynolds' motion to dismiss and ordered a stay in the proceedings pending the Commission's determination of Reynolds' motion.[27] The FTC appealed Judge Hyun's ruling to the full panel of Commissioners.[28]

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24. *Id.* An A.L.J. must issue his or her decision within ninety days after receiving all of the evidence in the case. 16 C.F.R. § 3.51(a) (1986). Rulings on motions are made within the same time period. 16 C.F.R. § 3.22(e) (1986).

The initial decision becomes the Commission's decision thirty days after it is served upon all parties to the action unless, within ten days after service, any party files a notice of appeal or the Commission, *sua sponte*, places the matter on its own docket for review. 16 C.F.R. §§ 3.52-3.53 (1986). Thus, the FTC commissioners act as both prosecutor and judge, deciding against whom to issue a complaint, and making all final Commission rulings.

25. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 219.

26. *Id.* at 219-24.

27. In its second argument for dismissal, R.J. Reynolds urged that the proceeding constituted an unlawful attempt to enforce the Federal Trade Commission Act, in violation of the constitutional requirement of separation of powers. Judge Hyun rejected this argument. *Id.* at 223-24.

28. In its brief, the FTC argues that R.J. Reynolds' article is properly seen as commercial speech when analyzed under Bolger v. Youngs Drug Prods. Corp, 463 U.S. 60 (1983): (1) The piece is a paid-for advertisement, (2) it contains a clear reference to cigarettes, and (3) R.J. Reynolds will derive an economic benefit from its promotional message. *Staff Attacks Ad's Noncommercial Classification*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1281, News and Comment Section, Antitrust & Trade Regulation Briefs, at 356-57 (Sept. 11, 1986) [hereinafter Antitrust & Trade Regulation Briefs]. Further support is found in National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); like the advertisements found commercial in that case, R.J. Reynolds' advertisement " 'conveys to smokers that consumption of a particular product—cigarettes—is not as dangerous as they believe.' " Antitrust & Trade Regulation Briefs, *supra*, at 356. In addition, the FTC contends that the A.L.J. should have given the FTC "the opportunity to develop evidence relevant to subject matter jurisdiction," since the factual allegations in the complaint establish the Commission's jurisdiction. *Id.* at 356-57.

On December 15, 1986, the Director of the FTC's Bureau of Consumer Protection filed a motion to accept a supplemental reply brief of complaint counsel, or, in the alternative, to withdraw complaint counsel's appeal. As chief counsel in support of the complaint, the Director sought to submit his views on the first amendment issues involved in the *R.J. Reynolds* case. According to the Commissioners, granting a motion that does not support the original complaint is possible only when "changes in fact or law have occurred since issuance of the complaint that invalidate or undermine its legitimacy, or . . . public interest concerns have arisen that could not reasonably have been considered by the Commission before issuing the complaint." *In re* R.J. Reynolds Tobacco Co., Inc., No. 9206 (FTC Jan. 29, 1987) (LEXIS, Trade library, FTC file). Both motions were denied because they failed to meet this standard.

In addition, the Commissioners admonished the Director: "[The Commission] will not tolerate any further actions by complaint counsel . . . that are inconsistent with full and vigorous support of the complaint unless they are justified under the standard . . . ." *Id.* Chairman

II. The Commercial Speech Doctrine[29]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[30] However, laws regulating and even forbidding speech are commonplace. The Court has upheld abridgment of the right to freely engage in many types of speech, among them obscenity, advocacy of illegal action, libel, and fighting words.[31] Similarly, the Court has approved time, place, and manner restrictions on speech, provided that they can be justified without reference to the content of the speech, that they serve a significant government interest, and that they leave open alternate channels of communication.[32] Even political speech that advocates or incites imminent lawless action, and that is likely to incite such action, may be restricted.[33] Thus, the formulation of principles that separate protected from unprotected speech is a major task in preserving freedom of expression.

The Supreme Court first differentiated the constitutional protection afforded commercial versus noncommercial speech in *Valentine v. Chrestensen*.[34] Citing no precedent, the Court held that "the Constitu-

Oliver dissented from the order, arguing that "accepting [the Director's] views into the record of this proceeding would have provided the Commission a broader perspective on the important issues involved in this appeal." *Id.*

Oral arguments before the full commission were scheduled for March 10, 1987. *Oral Argument is Rescheduled in Cigarette Ad Case*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1301, News & Comment Section, Antitrust & Trade Regulation Briefs, at 217 (Feb. 5, 1987).

29. Although the commercial speech doctrine generally applies to statutes prohibiting an entire type of speech, such as casino advertising, *see, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986), or utility advertising, *see, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980), the same four-part analysis used in *Central Hudson* is applied to FTC actions against particular advertisements. *See, e.g.*, Grolier Inc. v. FTC, 699 F.2d 983, 988 (1983). For an in-depth discussion of the commercial speech doctrine, see Welkowitz, *Smoke in the Air: Commercial Speech and Broadcasting*, 7 CARDOZO L. REV. 47 (1985); Comment, *Constitutional Law—Commercial Speech—Federal Statute Prohibiting Mailing of Unsolicited Contraception Advertisements Violates First Amendment as Applied to Accurate Mailings That Contribute to Informed Decision Making.* Bolger v. Youngs Drug Products Corp., *103 S. Ct. 2875 (1983)*, 14 U. BALT. L. REV. 367 (1985) [hereinafter Comment, *Commercial Speech*].

30. U.S. CONST. amend. I.

31. *See* Miller v. California, 413 U.S. 15 (1973) (obscenity, as defined by the Court, is subject to local regulation); Brandenburg v. Ohio, 395 U.S. 444 (1969) (striking down Ohio's Criminal Syndicalism Act, but reaffirming a state's power to proscribe "incitement to imminent lawless action"); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel of public officials is not protected if done with actual malice); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) ("[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech"); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (state can prohibit speech when "plainly tending to excite the addressee to a breach of the peace").

32. *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); United States v. O'Brien, 391 U.S. 367 (1968).

33. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

34. 316 U.S. 52 (1942). In *Chrestensen*, the appellant had printed and distributed handbills advertising his submarine exhibit. He was told by the Police Commissioner that such

tion imposes no . . . restraint on government as respects purely commercial advertising."[35] Regulating public promotion of a gainful occupation was a matter for legislative judgment.[36] Thus, *Chrestensen* divided speech into "commercial" and "noncommercial" categories, but did not provide a framework for distinguishing the two.

Over the next three decades, the Court adopted what has been characterized as the "primary purpose" test[37] to determine whether commercial speech may be regulated. Under this test, the Court denied protection to advertisements whose purpose was purely economic, while affording first amendment protection to speech whose purpose was not "primarily economic."[38] The "primary purpose" standard left intact *Chrestensen*'s holding that the Constitution did not protect commercial speech;[39] however, it substantially narrowed the class of speech to which *Chrestensen* applied.[40] In this respect, the test anticipated current Court attempts to distinguish commercial from noncommercial speech.

In *Bigelow v. Virginia*,[41] the Court moved further away from *Chrestensen*. In *Bigelow*, a newspaper was charged with violating a Virginia statute prohibiting the sale or circulation of any publication intended to encourage or prompt the procurement of an abortion.[42] Although the Virginia Supreme Court upheld the statute under *Chresten-*

distribution constituted a violation of the sanitary code, but that he might freely distribute handbills devoted solely to "information or a public protest." The appellant then published a double-sided handbill, with an advertisement on one side and on the other side a protest of police restraint of the distribution of his previous handbill. The police restrained the appellant's distribution of the double-sided handbills also. *Id.* at 53.

35. *Id.* at 54.

36. *Id.*

37. The Supreme Court has never characterized the test in these terms; rather, the label results from scholarly comment. *See* Welkowitz, *supra* note 29, at 55 n.57. For examples of cases employing this test, see *infra* note 40.

38. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 451 (1971); Note, *Commercial Speech—An End In Sight to Chrestensen?*, 23 DE PAUL L. REV. 1258, 1262-63 (1974); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1028 (1967).

39. The viability of the *Chrestensen* doctrine was demonstrated in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), in which the Court upheld an ordinance forbidding publication of sex-designated advertising. Citing *Chrestensen*, the Court stated that the employment advertisements in *Pittsburgh Press*, grouped according to gender, were "classic examples of commercial speech" in that "[e]ach [was] no more than a proposal of possible employment." *Id.* at 385.

40. The first amendment protects speech that is partly motivated by economic purposes. *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (the fact that a newspaper sold space for a civil rights advertisement is immaterial to whether the first amendment protects such an advertisement); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (the fact that religious literature is sold rather than donated does not transform such a service into a commercial enterprise).

41. 421 U.S. 809 (1975).

42. *Id.* at 811.

sen,[43] the United States Supreme Court reversed, holding that speech is not stripped of first amendment protection merely because the speech appears in the form of paid commercial advertising.[44] Justice Blackmun wrote for the majority: "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the first amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[45] In *Bigelow*, the Court focused primarily on refining the level of constitutional protection afforded commercial speech. However, the Court did distinguish the *Bigelow* advertisement from one simply proposing a commercial transaction, in that the former "contained factual material of clear 'public interest.' "[46]

One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[47] the Court explicitly stated for the first time that the First Amendment protected commercial speech.[48] In striking down a Virginia statute which prohibited advertising of drug prices, the Court recognized the advertiser's economic interest in expounding ideas,[49] the consumer's interest in receiving the information,[50] and society's interest in promoting intelligent and well-informed consumer decisions.[51] Although the sweeping language of *Virginia Pharmacy* suggested full first amendment protection for commercial speech, the Court cautioned that its decision did not prevent states from "insuring that the stream of commercial information flow clearly as well as freely."[52] Several Supreme Court cases following *Virginia Pharmacy* demonstrate that the Court will continue to afford commercial speech "a limited measure of protection, commensurate with its subordinate position in the scale of first amendment values."[53]

43. Bigelow v. Virginia, 213 Va. 191, 193, 191 S.E.2d 173, 174 (1972), *rev'd*, 421 U.S. 809 (1975).

44. 421 U.S. at 818, 826.

45. *Id.* at 826. Although the Court never explicitly delineated a set of distinguishing characteristics, in *Bigelow* it implied three elements which typify commercial speech: (1) the speech is a sales solicitation, (2) the speech is paid for, and (3) the speech is motivated by profit. *Id.* at 818.

46. *Id.* at 822.

47. 425 U.S. 748 (1976).

48. In *Virginia Pharmacy*, plaintiffs, prescription drug users, claimed that a Virginia statute banning advertisement of drug prices violated their first amendment right to receive information. *Id.* at 753-54. Defendants countered that the advertising was commercial speech and thus could be regulated by the state. *Id.* at 758.

49. *Id.* at 762-63.

50. *Id.* at 763-65.

51. *Id.* at 764-65.

52. *Id.* at 772.

53. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). The Court, in *Ohralik*, also acknowledged it would continue to "[allow] modes of regulation [in the area of commercial speech] that might be impermissible in the realm of noncommercial expression." *Id. See*

The most significant commercial speech case since *Virginia Pharmacy* has been *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[54] In overturning a state law completely banning utility advertising, the Court clarified its position on government regulation of commercial speech. Writing for the majority, Justice Powell outlined a four-step analysis to determine when commercial speech may be regulated:[55]

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[56]

This four-part test has become the primary standard for commercial speech analysis under the First Amendment.[57] Indeed, the Court most recently applied the *Hudson* analysis in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico,*[58] upholding a ban on casino advertisements directed at Puerto Rican citizens.

The Supreme Court has cited three basic reasons in support of its position that the Constitution affords less protection to commercial speech than to noncommercial speech. First, the Court has consistently recognized a "common sense" distinction between commercial and noncommercial speech.[59] Second, the Court feels advertising has a greater

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also Friedman v. Rogers, 440 U.S. 1, 5 (1979) (upholding a Texas ban on "the practice of optometry under . . . a trade name" due to the potentially deceptive nature of such practice); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (the Court acknowledged the state's power to regulate false or deceptive advertising, while striking down the state's general prohibition of attorney advertising as more restrictive than necessary to accomplish the state's purpose).

54. 447 U.S. 557 (1980).

55. Justice Powell also found that prior Supreme Court decisions had made " 'the "common sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech,' " and concluded that "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).

56. *Id.* at 566.

57. *See* Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2976-79 (1986); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68-69 (1983); *In re* R.M.J., 455 U.S. 191, 203 n.15 (1982); Dunagin v. City of Oxford, 718 F.2d 738, 746-51 (5th Cir.), *cert. denied*, 463 U.S. 1259 (1983); Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686, 693-94 (6th Cir. 1981).

58. 106 S. Ct. 2968 (1986).

59. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); Bolger v. Youngs Drug Prods., Inc., 463 U.S. 60, 64 (1983); Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 563 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455, 456 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976).

potential for deception than does noncommercial speech[60] and consumers must therefore be protected.[61] Finally, the Court views commercial speech as more "durable" than noncommercial speech and less likely to be inhibited by regulation, since the former is the "*sine qua non* of commercial profits."[62]

III. Distinguishing Commercial Speech from Noncommercial Speech.

The threshold issue in any case involving regulation of an advertisement is whether the expression properly may be classified as commercial speech.[63] Judge Hyun and the parties involved in *R.J. Reynolds* recognized that R.J. Reynolds' motion to dismiss depended solely on the resolution of this question.[64] However, as Judge Hyun's opinion noted: "The term 'commercial speech' does not admit of a precise or neat definition."[65]

Although the Supreme Court has generally recognized a common sense distinction,[66] Judge Hyun expounded on this distinction in stating: "[E]xpression which does no more than propose a commercial transaction or promote a product is commercial speech, while speech which has no element of a commercial or goes well beyond proposing a business transaction or discusses matters of public concern, is not."[67] However, as Judge Hyun candidly confessed in his opinion, "application of this common sense distinction . . . is not easy in all cases."[68] R.J. Reynolds' motion to dismiss turned on this classification because the advertisement, on its face, appeared to be an editorial.[69]

60. *See In re* R.M.J., 455 U.S. at 200; Friedman v. Rogers, 440 U.S. 1, 10 (1979).

61. *See Ohralik*, 436 U.S. at 460, 462.

62. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

63. *See Bolger*, 463 U.S. at 64-69; Harry and Bryant Co. v. FTC, 726 F.2d 993, 1001-02, *cert. denied*, 469 U.S. 820 (1984).

64. *In re* R.J. Reynolds Tobacco Co., Inc., 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277, at 219 (Aug. 4, 1986).

65. *Id.*

66. *See supra* note 59 and accompanying text.

67. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 219 (citing Pacific Gas & Elec. Co. v. Public Util. Comm'n, 106 S. Ct. 903 (1986)). *See Bolger*, 463 U.S. at 64-65; *Central Hudson*, 447 U.S. at 561-63; *Virginia Pharmacy*, 425 U.S. at 758-61.

68. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 220. As the Court noted in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985), "[T]he precise bounds of the category of expression that may be termed commercial speech" are "subject to doubt." Some commentators have suggested broad and inclusive definitions, while others have suggested considerably narrower definitions. *See, e.g.*, Jackson and Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1 (1979) (commercial speech refers solely to business advertising); Machina, *Freedom of Expression in Commerce*, 3 LAW AND PHIL. 375, 377 (1984) (commercial speech is "any expression concerned with buying or selling" (emphasis omitted)).

69. *See supra* note 25 and accompanying text.

The Supreme Court has stated that "[I]f commercial speech is to be distinguished, it 'must be distinguished by its content,' "[70] and "advertising 'which links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."[71] In fact, according to the Ninth Circuit, special caution must be exercised in such cases because "when discussion of a matter of public concern becomes a vehicle for sale of a product, the representations which bear on the characteristics of the product may take on increased importance in the mind of the public . . . ."[72]

In his opinion, Judge Hyun relied heavily on the supposed difference between R.J. Reynolds' advertisement and the informational pamphlets involved in *Bolger v. Youngs Drug Products Corp.*[73] *Bolger* stressed three salient characteristics which rendered the two pamphlets commercial speech: (1) they were paid advertisements, (2) they referred to a specific product, and (3) they were mailed to fulfill an economic motive.[74] Each element alone does not compel the conclusion that speech is commercial, but the presence of all three provides strong support for such a determination.[75]

Judge Hyun disputed the presence of only the second factor. He stated that the advertisement did not mention "any brand name or list prices or discuss desirable attributes of a product or show where the product may be purchased."[76] Although it is true that R.J. Reynolds'

70. Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977) (quoting *Virginia Pharmacy*, 425 U.S. at 761).

71. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 68 (1983) (quoting *Central Hudson*, 447 U.S. at 563 n.5)

72. Standard Oil Co. of Cal. v. FTC, 577 F.2d 653, 659 (9th Cir. 1978). Speaking on the use of advertisements to make public comments, the Supreme Court stated: "A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Bolger*, 463 U.S. at 68. For a proposal of how a company might discuss matters of public concern while retaining the full protections of the First Amendment, see *infra* text accompanying notes 113-119.

73. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 220 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983)). In *Bolger*, Youngs Drug Products, manufacturer of Trojan brand prophylactics, sought declaratory and injunctive relief against the United States Postal Service. The Postal Service had notified Youngs that its proposed mailings of three informational and promotional pamphlets would violate 39 U.S.C. § 3001(e)(2) (1982), prohibiting unsolicited mailing of contraceptive advertisements. The Supreme Court ruled that the pamphlets constituted commercial speech, but nonetheless struck down the statute because the Act's sweeping prohibition was an unconstitutional infringement on the right of free speech.

74. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 220 (citing *Bolger*, 463 U.S. at 467-68).

75. *Bolger*, 463 U.S. at 67-68. One commentator has concluded that the presence of two of the three *Bolger* elements is sufficient to render speech commercial. *See* Comment, *Commercial Speech*, *supra* note 29, at 375 n.68.

76. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 221.

advertisement did not state any specific product brand names, such specificity is not required. According to the Court in *Bolger*, "[t]hat a product is referred to generically does not . . . remove it from the realm of commercial speech. . . . [A] company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names."[77]

The Court has not stated explicitly when it deems a manufacturer's market control "sufficient" to negate the specific product reference requirement. However, based on the context in which the "market control" exception was expressed in *Bolger*, it appears that market control is "sufficient" to negate the requirement of reference to a specific product when generic reference to a product serves to promote that manufacturer's brands. According to the American Lung Association, R.J. Reynolds controls over thirty percent of the cigarette market.[78] Thus, even though its advertisement refers to cigarettes generically, R.J. Reynolds will receive direct pecuniary benefit from the decision by at least one out of three smokers to begin or continue smoking. Such overwhelming market control fits within the plain meaning of the "sufficient control of the market" standard.[79]

Judge Hyun also unnecessarily expanded the second commercial speech characteristic from *Bolger* by including the fact that Reynolds' advertisement does not mention prices, desirable attributes, or places where its cigarettes may be purchased.[80] *Bolger* does not require that an advertisement must mention such facts to be classified as commercial expression.[81] The presence or absence of these additional factors has no bearing on classification of the advertisement as commercial speech—there need only be reference to a specific product or generic reference accompanied by "substantial market control."

Judge Hyun did not consider whether the advertisement contained attributes mentioned in the remaining two *Bolger* criteria: whether (1) the advertisement was paid for, and (2) was intended to fulfill an economic motive.[82] The first of these is plainly met; R.J. Reynolds paid for publication of the advertisement in the twenty-five newspapers and magazines that ran it.[83]

77. *Bolger*, 463 U.S. at 66 n.13.

78. *See Coalition on Smoking or Health, supra* note 16, at 1; *see also* FTC News Release, *Administrative Law Judge Rules R.J. Reynolds Smoking and Health Ad is Noncommercial Speech Protected by First Amendment; Grants Company's Request to Dismiss FTC Complaint.* (Aug. 6, 1986) (copy available from the Federal Trade Commission, 6th Street & Pennsylvania Avenue Northwest, Room 130, Washington, D.C. 20580).

79. *See supra* note 77 and accompanying text.

80. *See supra* note 76 and accompanying text.

81. *See supra* note 74 and accompanying text.

82. *Id.*

83. *See supra* note 11 and accompanying text.

The second factor, presence of an economic motive, also exists in this case.[84] In *Bolger*, one of the informational pamphlets, "Plain Talk About Venereal Disease," repeatedly discussed condoms without specific reference to those manufactured by appellee Youngs Drug Products. The only reference to the company was at the bottom of the last page, where Youngs was identified as the distributor of Trojan brand prophylactics.[85] Although the Court did not explicitly state how it found an economic motive from such facts, it reasonably inferred that Youngs intended to dispel some of the negative public opinion regarding condoms in general and, by associating its name with this more positive view, to boost its own sales.

R.J. Reynolds attempted the same result with its advertisement. By weakening the link between heart disease and cigarette smoking, R.J. Reynolds tried to attract new buyers and retain current smokers as customers. As in *Bolger*, the advertisement was intended to promote the association of a positive view of a product with a particular manufacturer.[86] Additionally, because it owned a sizable market share, R.J. Reynolds did not need to mention specific brand names to reap the pecuniary benefits of improved public opinion.[87]

Judge Hyun also compared R.J. Reynolds' advertisement to the advertisements in *National Commission on Egg Nutrition v. FTC.*[88] In *National Commission on Egg Nutrition (NCEN)*, the challenged advertisements were part of a promotional campaign designed to induce the sale of eggs.[89] Judge Hyun's single attempt to distinguish Reynolds' advertisement from NCEN's advertisement was a finding that the former

84. Judge Hyun, apparently answering FTC counsel's assertion that an economic motive is present, stated that "[t]he Commission and courts . . . have consistently held that the intent or motive of an advertiser is immaterial to the determination of an ad's *meaning*." *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 221 n.8 (emphasis added). However, because the issue in the *R.J. Reynolds* case was one of classification and not interpretation, Judge Hyun's assertion is inapposite. Judge Hyun's refusal to consider motive runs directly counter to the Court's statement in *Bolger* that economic motive is one factor to be considered. *See supra* note 74 and accompanying text.

85. *Bolger*, 463 U.S. at 66 n.13.

86. *See supra* notes 84-85 and accompanying text.

87. *See supra* notes 77-78 and accompanying text.

88. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 220 (citing National Comm'n on Egg Nutrition (NCEN) v. FTC, 88 F.T.C. 89 (1976), *aff'd*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978)).

89. The advertisements disseminated in *NCEN* stated that there was no scientific evidence that eating eggs increases the risk of heart and circulatory disease. Defendant was charged by the FTC with false and deceptive advertising in violation of sections 5 and 12 of the Federal Trade Commission Act (codified at 15 U.S.C. §§ 45 & 52 (1982)). Contrary to defendant's contention, the advertisements were held to be commercial speech and thus subject to the Federal Trade Commission's jurisdiction.

lacked the "express promotional language" of the latter.[90] Instead, R.J. Reynolds' advertisement was "an editorial in format," expressing "Reynolds' opinion or point of view regarding the scientific method, the MR FIT study . . . and the smoking and health controversy."[91]

The National Commission on Egg Nutrition proposed a similar defense in the suit brought against it by the FTC, namely that its advertisements were "expressions of opinion on an important and controversial public issue."[92] However, the Seventh Circuit's finding that the *NCEN* advertisements were commercial speech did not turn on the presence of "express promotional language." Rather, the court reasoned:

> [A]s to the intended scope of the Supreme Court's expressions on the subject of commercial speech, we believe they were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product.[93]

The Seventh Circuit relied far more heavily on the falsity of the message conveyed, than on a standard looking only to "express promotional language."[94] Thus, Judge Hyun completely misconstrued the basis of the Seventh Circuit's finding that the *NCEN* advertisement was commercial speech. In fact, a requirement that commercial speech necessarily contain "express promotional language" encourages advertisers to employ deceptive phrasing in their promotions. Such campaigns are exactly what Congress intended the FTC to regulate.[95]

R.J. Reynolds' deceptive use of the MR FIT study[96] also renders moot any argument that the advertisement was published primarily to comment on a public issue. In the MR FIT study, half of the subjects received normal medical intervention, while the other half received special medical attention.[97] The rates of heart disease deaths in the two groups were not significantly different.[98] However, participants who quit smoking in both groups suffered heart attacks at a rate fifty percent lower

90. *Id.* at 221. The *NCEN* advertisement contained statements such as: " 'There is absolutely no scientific evidence that eating eggs in any way increases the risk of heart attack,' " and " 'you *need* cholesterol.' " *Id.* (emphasis in original).

91. *Id.*

92. *NCEN*, 570 F.2d at 162-63.

93. *Id.*

94. The Seventh Circuit never indicated that its finding was based on a rigidly applied standard of "express promotional language," but cited extensively from Bates v. State Bar of Arizona, 433 U.S. 350, 381-84 (1977), where the Supreme Court held that " '[a]dvertising that is false, deceptive, or misleading of course is subject to restraint.' " *NCEN*, 570 F.2d at 162.

95. *See supra* notes 19 & 21 and accompanying text.

96. *See supra* note 16 and accompanying text.

97. *See supra* note 5.

98. *Id.*

than those who continued to smoke.[99] The study was not intended to determine "whether cigarette smoking was a cause of cardiovascular disease because the scientific evidence on that issue is considered beyond question."[100] Rather, the purpose of MR FIT was to determine the effectiveness of medical intervention more comprehensive than that prescribed in most high risk heart attack cases.[101] R.J. Reynolds' advertisement did not "editorialize on any subject, cultural, philosophical, or political,"[102] but instead completely misrepresented the factual findings of the MR FIT study. The company would risk the consequences of such deception only if those consequences were outweighed by the possibility of profit.

In this respect, R.J. Reynolds' advertisement is identical to the advertisement held to be commercial speech in *NCEN*. The thrust of NCEN's advertisement was that " 'there do not exist competent and reliable scientific studies from which well-qualified experts could reasonably hypothesize that eating eggs increases the risk of heart disease.' "[103] The Seventh Circuit found this "message [to be] patently false and misleading," and accepted the FTC's conclusion that "impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease, it is possible to determine the existence and amount of evidence on that issue."[104]

The scientific community generally regards as overwhelming the evidence that "cigarette smoking is the single most preventable cause of death and disease and a major cause of heart disease . . . ."[105] According to Dr. John Holbrook, Chairman of the American Heart Association's Subcommittee on Smoking, "[T]here are now over 40,000 studies involving millions of people which support the conclusion that smoking is a major cause of not only cardiovascular disease but also lung cancer, emphysema, chronic obstructive lung disease, and numerous other health problems."[106] As in *NCEN*, R.J. Reynolds has "done more than espouse one side of a genuine controversy. . . . It has made statements denying the existence of scientific evidence which the record clearly shows does exist."[107]

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99. *See supra* note 16 and accompanying text.

100. *See Coalition on Smoking or Health*, *supra* note 16, at 5.

101. *See supra* notes 13 & 16 and accompanying text.

102. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748, 761 (1975).

103. *NCEN*, 570 F.2d at 161.

104. *Id.*

105. *Coalition on Smoking or Health*, *supra* note 16, at 1.

106. *Id.*

107. *NCEN*, 570 F.2d at 161 (citing FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 489 (7th Cir. 1975) (reversing district court's denial of temporary injunction against further publication of advertisement)).

The advertisement involved in *R.J. Reynolds* is indistinguishable in both purpose and effect from those in *Bolger* and *NCEN*. Since R.J. Reynolds' advertisement is commercial speech and is deceptive, the FTC has jurisdiction under section 5(a) of the Federal Trade Commission Act.[108] Enforcement of section 5(a) in this case is constitutional because R.J. Reynolds' advertisement fails to satisfy the first requirement of *Hudson* that the advertisement "not be misleading."[109] In addition, the government has a substantial interest in prohibiting deceptive advertising, as manifested by Congress' enactment of section 5(a). Enforcement against the R.J. Reynolds Tobacco Co. directly advances this interest. Finally, enforcement of section 5(a) is no more extensive than necessary. The "Of Cigarettes and Science" advertisement was one of a series of pieces published to express R.J. Reynolds' "viewpoints on smoking issues."[110] The FTC is seeking enforcement only against the "Of Cigarettes and Science" piece.[111]

Judge Hyun erroneously granted R.J. Reynolds' motion to dismiss. If the full Commission, currently reviewing Judge Hyun's order, upholds the decision, further judicial review would be barred.[112] Enforcement of the deceptive advertising statute would be frustrated by the very administrative body charged with that responsibility.

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108. *See supra* note 21 and accompanying text.

109. *Central Hudson*, 447 U.S. at 566. Justice Blackmun, in his *Hudson* concurrence, stated he would apply the majority's analysis only when the government has directly regulated or outlawed the type of speech. *Id.* at 573 (Blackmun, J., concurring). "[T]he Court's four-part test is [not] the proper one to be applied when a state seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly." *Id.*

However, Justice Blackmun recognized that "this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading . . . speech." *Id.* The FTC sued R.J. Reynolds pursuant to section 5(a) of the Federal Trade Commission Act, wherein Congress has stated that deceptive advertising is illegal. *See supra* note 21 and accompanying text. Thus, even under Blackmun's more stringent *Hudson* concurrence, the action against R.J. Reynolds is constitutional.

110. *In re* R.J. Reynolds Tobacco Co., Inc., 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277, at 221-22 (Aug. 4, 1986). The subjects of the other pieces included courtesy, fire safety, teenage smoking, passive smoking and primary health. *See supra* note 11.

111. *In re R.J. Reynolds*, 51 Antitrust & Trade Reg. Rep. (BNA) at 221-22.

112. 15 U.S.C. § 45(c) (1982) allows the respondent against whom an order is issued to appeal to the United States Court of Appeals in the circuit where the alleged violation occurred or in the circuit where the respondent conducts business. If there is no order, there is no further review; only a respondent may petition for review. Public interest intervenors have challenged this procedure, but without success. *See* Consumer Fed'n of America v. FTC, 1975-1 Trade Cas. (CCH) ¶ 60,378 (D.C. Cir. 1975). *See generally* E. ROCKEFELLER, *supra* note 19, at 157-58.

IV. Proposal

Bolger[113] and *NCEN*[114] established sound criteria for distinguishing advertising from statements of opinion. Advertising in the form of newspaper editorials or op-ed pieces, also should be analyzed under the *Bolger* and *NCEN* criteria. Under these criteria, an advertiser is free to comment on matters of public importance as long as such comment is accurate and shown to be more than a veiled attempt to increase profits. If a piece is found to be commercial speech, the four-part review standard established by the Court in *Central Hudson*[115] protects the public, the advertiser and the consumer. This standard also addresses the concerns expressed in *Virginia Pharmacy*[116] by protecting the public's right to receive accurate information, by permitting advertisers to pursue economic interests through truthful exposition of both commercial and noncommercial ideas, and by promoting society's ability to make intelligent, well-informed consumer decisions. As Justice Stewart stated in his *Virginia Pharmacy* concurrence: "[T]he elimination of false and deceptive claims serves to promote the one facet of commercial . . . advertising that warrants first amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking."[117]

The trend in first amendment analysis of commercial speech[118] is toward greater protection. However, such protection must be tempered by continued enforcement of statutes, such as the Federal Trade Commission Act,[119] designed to protect consumers from misleading advertising. The Court has never held that misleading advertising is protected under the First Amendment. In cases involving "borderline" commercial speech, it is necessary to apply accurately the *Bolger* and *NCEN* criteria. Accurate application is essential to protect both freedom of expression and the consumer.

Conclusion

The Court has recognized that the First Amendment protects commercial speech subject to an intermediate level of scrutiny.[120] However,

113. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983). *See supra* notes 73-75 and accompanying text.

114. National Comm'n on Egg Nutrition v. FTC, 88 F.T.C. 89 (1976), *aff'd*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). *See supra* notes 88-112 and accompanying text.

115. 447 U.S. 557 (1980). *See supra* notes 54-56 and accompanying text.

116. 425 U.S. 748 (1976). *See supra* notes 47-53 and accompanying text.

117. *Virginia Pharmacy*, 425 U.S. at 761 (Stewart, J., concurring).

118. *See supra* notes 58-62 and accompanying text.

119. *See supra* notes 19 & 21 and accompanying text.

120. *See supra* notes 54-57 and accompanying text.

the FTC and the courts must still regulate advertising that is false and misleading. Distinguishing between commercial speech and fully-protected noncommercial speech is the initial task in applying statutes which prohibit deceptive advertising, such as section 5(a) of the Federal Trade Commission Act.[121] The courts have developed a set of factors to differentiate "borderline" cases involving advertisements which appear, at least in form, to be editorials.

The pending FTC case, *In re R.J. Reynolds Tobacco Co., Inc.*,[122] further clarifies this important distinction. However, in granting R.J. Reynolds' motion to dismiss for lack of jurisdiction, the administrative law judge misconstrued and inaccurately applied the two precedential cases on which he based his decision. The A.L.J. focused only on the lack of reference to a specific product in R.J. Reynolds' advertisement. Yet, specific product reference is not necessary when generic reference serves to further the advertiser's pecuniary interests.

Furthermore, the A.L.J. completely neglected to analyze the remaining two distinguishing characteristics of commercial speech set forth in *Bolger*. R.J. Reynolds paid to have its advertisements published. In addition, R.J. Reynolds had an economic motive, because it sought to create a more positive public perception of its product. Specific product reference was not necessary for R.J. Reynolds to reap the pecuniary benefits of improved public opinion of the health effects of smoking.

The A.L.J. in *Reynolds* also misconstrued the Seventh Circuit's primary basis for holding that the advertisements in *National Commission on Egg Nutrition v. FTC*[123] were commercial speech subject to regulation. The court in *NCEN* relied on the false nature of the advertiser's claims that eating eggs would have no effect on one's cholesterol level. To be consistent with *NCEN*, Judge Hyun should have considered the veracity of R.J. Reynolds' statements in his analysis.

If the five FTC commissioners uphold the dismissal, further judicial review will be barred, as only the party to be regulated may appeal from a decision by the commissioners.[124] The Commission should reverse Judge Hyun's order to dismiss the complaint. Failure to regulate deceptive advertising merely because its promoters adopt the form of an editorial would set dangerous precedent. The public deserves the greatest protection from such questionable trade practices.

*By Thomas H. Nienow**

121. *See supra* note 21 and accompanying text.

122. 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277, at 219 (Aug. 4, 1986).

123. 88 F.T.C. 89 (1976), *aff'd*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

124. *See supra* note 112 and accompanying text.

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