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To Label Or Not To Label? Companies May Have No Choice

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Most everyone knows that the First Amendment restricts the government's ability to limit commercial speech. Similarly, most everyone would probably think the First Amendment also restricts the government's ability to compel commercial speech. But, are there times when the government may compel commercial speech? Indeed it can in some circumstances, and the D.C. Circuit recently expanded those circumstances in American Meat Institute v. U.S. Department of Agriculture.[1] AMI involved a trade association's challenge to regulations requiring meat producers to include country-of-origin labels on their products. This decision is important to almost any company that is, or could be, subject to a regulatory mandate to disclose what the court calls "purely factual and uncontroversial information."

Rehearing en banc a case decided in the government's favor by a three-judge panel, the D.C. Circuit in AMI upheld the regulations, applying the test from the U.S. Supreme Court's decision in Zauderer v. Office of Disciplinary Counsel.[2] Zauderer upheld, against a First Amendment challenge, a state's disciplinary action against an attorney whose advertisements had the potential to deceive consumers by failing to comply with state regulations mandating certain cost disclosures to prospective clients. Although the regulations concerning meat origins in AMI had nothing to do with countering consumer deception, the D.C. Circuit nonetheless applied Zauderer and thus extended its application beyond protection against consumer deception to the advancement of consumer edification.

So, after AMI, what remains of any First Amendment constraints on governmental regulations compelling companies to make public disclosures about a company's goods or services? On the one hand, the protections of the First Amendment seemed robust just two years ago when the D.C. Circuit struck down on First Amendment grounds certain U.S. Food and Drug Administration regulations that implemented an express statutory directive requiring cigarette packages to bear certain health warnings, including color graphics depicting the negative consequences of smoking. The court in R.J. Reynolds Tobacco v. FDA[3] viewed Zauderer as not allowing the government to compel speech beyond what was required to protect against consumer deception, and thus held that the FDA's compelled graphic warnings violated the tobacco companies' First Amendment right to refrain from speaking.

On the other hand, we now have AMI, upholding compelled country-of-origin disclosures over the

industry's First Amendment objections. To better understand the post-AMI state of the law, we need to look deeper into the AMI en banc decision.

AMI Expands Zauderer Beyond Protection Against Consumer Deception

Circuit Judge Stephen F. Williams, writing for the nine-judge majority, against two dissents, applied Zauderer's two-part test, which requires first that the government advance a "substantial interest," which in Zauderer concerned preventing consumer deception. In AMI, the government's interest was characterized as an "interest in country-of-origin labeling for food," which the court found substantial for the following reasons:

[T]he context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak.

Although the AMI argued that the required disclosures did nothing more than satisfy consumers' "idle curiosity," the court rebutted this with the following facts:

1. country-of-origin disclosures have a historical pedigree: Congress has been requiring such disclosures in certain contexts for over a century;
2. the enabling statute's legislative history showed that Congress intended to enable consumers' informed choices; and
3. surveys showed that consumers wanted — and were willing to pay for — information regarding the origins of the food they buy.

Notably, the majority opinion held that "[t]o the extent that other cases in this circuit may be read as holding to the contrary and limiting Zauderer to cases in which the government points to an interest in correcting deception, we now overrule them," citing, among other cases, R.J. Reynolds Tobacco.

The second part of the Zauderer test requires that the compelled disclosure be "reasonably related" to the government's interest. The challenged regulation was reasonable, Judge Williams wrote, because it required disclosure only of "purely factual and uncontroversial information."

Judge Kavanaugh Concurs to Limit Reach of Majority's Analysis

Circuit Judge Brett M. Kavanaugh joined the majority, but also wrote separately to show that applying the Supreme Court's Central Hudson Gas & Electric v. Public Service Commission[4] decision yielded the same result. The Central Hudson test requires the government to: "([1]) identify a substantial governmental interest and ([2]) demonstrate a sufficient fit between the law's requirements and that substantial interest."

Judge Kavanaugh disagreed that "providing consumers with information" alone justifies interference with commercial speech since that interest could be asserted to support nearly any disclosure mandate. Instead, the government's regulation here could be justified by an interest in promoting U.S. industries against foreign competition. Although the government did not advance this interest in litigation, Congress had done so in the course of passing the enabling statute.

Although Judge Kavanaugh saw the governmental interest he identified (i.e., protecting U.S. industry) as less sweeping than the interest identified by the majority (i.e., educating consumers — which he rejected as insufficient and overbroad), a smart would-be regulator could likely come up with a protectionist rationale for a broad range of disclosure mandates.

In other words, it is questionable whether Judge Kavanaugh's identified governmental interest would pose any greater First Amendment restriction on government than the one he identified as insufficient. Thus, companies and associations faced with a proposed rulemaking involving a disclosure mandate should consider whether to submit comments explaining how the mandate helps or hurts segments of U.S. industry (particularly vis-a-vis foreign competition), depending on whether they are supporting or opposing the proposed rule.

Judge Brown Dissents to Criticize Majority's Lax Review Standard

Two judges dissented. Circuit Judge Janice R. Brown, who wrote for the panel in R.J. Reynolds Tobacco, penned a stinging rebuke of the majority's employing of such a permissive standard "even more relaxed than rational basis review," for authorizing regulatory infringement of vital First Amendment rights. In her view, a "generous swath of protection the First Amendment once afforded to businesses against [compelled labeling aimed at serving any number of so-called public interests] has now been ceded to the government's allegedly good intentions."

Foreseeing almost limitless regulatory labeling mandates to come, she warned that under the majority's principle of constitutional adjudication, "there really is no limit to what government may compel." Circuit Judge Karen L. Henderson joined Judge Brown's dissent, but also wrote separately to scold the three-judge panel that first heard this case for failing to follow R.J. Reynolds Tobacco.

Where Does it End?

AMI's en banc multiplicity of perspectives on the meaning and application of the Supreme Court's Zauderer test for when commercial speech can be compelled by governmental regulators, as well as the important constitutional interests at stake, suggest that this case might not end with the en banc decision analyzed here. Even if the en banc court does not grant petitioners' pending petition for rehearing, the issue is important enough that the Supreme Court might yet want to have the last word in this case.

In the meantime, given that it overruled R.J. Reynolds Tobacco, AMI all but invites the FDA to revisit the gory graphical warnings struck down in that earlier case and opens the doors to government to impose additional regulatory disclosure mandates on the business community. If the case ends up standing for the broad proposition that the government may mandate disclosure of any facts reasonably related to consumer curiosity, it's hard to tell where the government's power might end. This was Judge Kavanaugh's fear, but whether his concurrence or the views of the dissenters succeed in limiting the potentially sweeping reach of Judge Williams' majority opinion remains to be seen.

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[1] __ F.3d __, No. 13 5281, 2014 WL 3732697 (D.C. Cir. July 29, 2014), available at http://www.cadc.uscourts.gov/internet/opinions.nsf/A064A3175BC6DEEE85257D24004FA93B/$file/13-5281-1504951.pdf.

[2] 471 U.S. 626 (1985), available at http://scholar.google.com/scholar_case?case=9961821012845558561.

[3] 696 F.3d 1205 (D.C. Cir. 2012), available at http://scholar.google.com/scholar_case?case=7553770370209139524.

[4] 447 U.S. 557 (1980), available at http://scholar.google.com/scholar_case?case=1962482840967580827.