Client Alert

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When Can Companies be Forced to Say What They Don't Want to Say?

As the US Supreme Court opens its 2014 term, it faces a number of politically-charged issues regarding same-sex marriage, the Affordable Care Act, abortion and affirmative action. An issue that gets less attention but may be more important to American businesses is when they can be forced to say what they don't want to say.

Although there is no doubt that the First Amendment allows government to require disclosures that protect the public from fraud, state and federal laws increasingly seek to conscript private companies to carry government propaganda. Some companies are fighting this trend.

A petition for certiorari filed by many of the nation's leading pharmacy benefit managers asks the Supreme Court to clarify that disclosure requirements are subject to heightened First Amendment scrutiny when they compel a company to provide data to its clients for a purpose other than deception prevention. Pet. for Writ of Cert., *Anthem Prescription Mgmt. LLC v. Beeman*, No. 14-62 (July 17, 2014). The *Anthem* petition identifies a three-way split among the federal courts of appeals on this issue.

The Supreme Court held nearly 30 years ago that government can require a firm advertising its services to disclose "purely factual and uncontroversial information" about the terms upon which its services will be offered in order to prevent potential deception of the consuming public. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court upheld a state bar rule that required lawyers advertising contingency fee services to inform clients that they would be liable for court costs (as opposed to fees) if their claims were unsuccessful.

The Court found it "self-evident" that a layperson would not understand the distinction between legal fees and costs and therefore could be led to believe that litigation would be a cost-free endeavor. In those circumstances, the Court held the advertiser's First Amendment rights were adequately protected "as long as the disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

The Court reiterated this rule in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), where it unanimously upheld a law that "share[d] the essential features of the rule at issue in *Zauderer*." The federal statute at issue required qualifying professionals who provide certain types of bankruptcy assistance to identify themselves as debt relief agencies in advertising and to disclose that the assistance may involve bankruptcy relief.

Since *Zauderer*, federal, state and local governments have enacted an array of regulations requiring companies to disclose information for reasons *other* than preventing consumer deception. These include laws and regulations requiring manufacturers to warn that products contain mercury and should be recycled; restaurants to publicize calories in menu items; tobacco companies to put graphic depictions of health consequences on cigarette packages; meat producers to display the country-of-origin on labels; and makers of products containing so-called "conflict minerals" to investigate and disclose the origin of the minerals in SEC filings, just to name a few.

Federal appeals courts typically have upheld disclosure requirements. The First, Second and Sixth Circuits all held that they are subject to First Amendment scrutiny, but receive only the lowest level of protection under *Zauderer*.

The DC Circuit took a different tack, striking down the FDA's graphic tobacco warning requirements and the SEC's conflict minerals disclosure requirements, holding *Zauderer* allows low scrutiny only if disclosure requirements are reasonably related to preventing consumer deception, not when they are adopted to advance other goals.[1] The court in both of those cases applied intermediate scrutiny generally applicable to restrictions on commercial speech, as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), to strike down the laws without deciding whether strict scrutiny is required.

But the DC Circuit *en banc* overruled those panel precedents to the extent they limited *Zauderer* to cases in which the government points to an interest in correcting deception.[2] The court found the government's interest in country-of-origin labeling for food was substantial and therefore did not decide whether *Zauderer* would permit government reliance on interests that do not qualify as substantial under *Central Hudson*.

Judge Brett Kavanaugh concurred to express his view that *Zauderer* is actually an application of the *Central Hudson* commercial speech standards and still requires the government to show both a substantial interest in requiring the disclosure and that it is tailored in a reasonable manner to satisfy that interest. He wrote this can be done by showing that the disclosure is purely factual, uncontroversial, not unduly burdensome and reasonably related to the interest it is designed to advance. From his perspective *Zauderer* imposes a more stringent standard than rational basis review used for evaluating laws that implicate no First Amendment concerns.

Judge Janice Rogers Brown dissented that the "clear trajectory of the Supreme Court's jurisprudence is toward greater protection for commercial speech, not less," and chastised the majority for creating a standard that "provides even less protection than rational basis review." Where the government's interest is not in curing deceptive advertising, she wrote, the *Zauderer* standard cannot be used.

According to the *Anthem* certiorari petition,[3] the Ninth Circuit has gone even further and held that laws that compel companies to make factual disclosures are not subject to *any* First Amendment scrutiny. The California law at issue in *Anthem* requires prescription drug claims processors to disclose certain pricing information. The law had been enacted to help independent pharmacies compete against large pharmacy chains. A panel of the Ninth Circuit held the law was not subject to any First Amendment scrutiny because it did not compel or affect the content of any protected speech (because the law did not regulate advertising, the court found it did not implicate commercial speech).[4] The Ninth Circuit *en banc* vacated the panel opinion and certified a question to the California Supreme Court to determine whether the law compelled speech in violation of the California constitution.[5] The California Supreme Court answered that question in the negative, relying on US Supreme Court decisions to conclude that the law

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[1] *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

[2] *Am. Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). The court did not, however, indicate that the results of the graphic tobacco warning and conflict mineral cases would be any different. The regulations in both of those cases involved disclosures that were highly controversial and therefore arguably would fall outside of *Zauderer*.

[3] The *Anthem* certiorari petition was filed prior to the DC Circuit's en banc decision in *AMI*.

[4] *Beeman v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085 (9th Cir. 2011), *vacated,* 741 F.3d 29 (9th Cir. 2014) (en banc) (remanding to panel), *on remand,* 564 F. App'x 332 (9th Cir. 2014) (remanding to district court).

[5] *Beeman v. Anthem Prescription Mgmt., LLC,* 682 F.3d 779 (9th Cir. 2012).

regulated commercial speech (rejecting the Ninth Circuit panel's determination that the law did not merit any form of First Amendment scrutiny) but survived "rational basis" review under *Zauderer*.[6]

Faced with the marked divergence of opinions of numerous federal and state judges, the Supreme Court may take up this issue relatively soon. All companies facing burdensome label and disclosure requirements should keep this in mind when evaluating whether the requirements could be challenged successfully.

One case that likely will have a significant impact on how the US Supreme Court treats this issue is *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). Hunton & Williams LLP represented IMS Health in that case and persuaded the Court that a Vermont law violated the First Amendment by prohibiting the use of truthful information about doctors' historical prescribing practices in drug marketing.

In *Sorrell*, the Supreme Court held the Vermont law had to be subjected to "heightened" judicial scrutiny. Justice Anthony Kennedy's majority opinion reflected the Court's tendency to view government interference with commercial speech with almost as much concern as it does government interference with pure political speech. "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.' … That reality has great relevance in the fields of medicine and public health, where information can save lives," Justice Kennedy wrote. *Id.* at 2664 (citation omitted). Vermont had urged the Court to let its law stand because it was doing nothing more than regulating cold, dry facts used for commercial purposes. But "[f]acts," Justice Kennedy responded, "are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Id.* at 2667.

We doubt that this Supreme Court will have less concern about laws that force companies to carry unwanted messages than laws that prohibit companies from conveying their own messages. Both types of law interfere with speech. If the Court continues on its current trajectory, we believe it will hold that heightened and perhaps strict scrutiny applies to government regulations that force companies to say what they don't want to say. Laws that require disclosure to prevent fraud and protect consumer health and safety would continue to survive this standard easily. But laws that advance less compelling interests or that are of doubtful effectiveness likely would be invalidated.

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[6] *Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71 (Cal. 2013).