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# Don’t Overlook The 1st Amendment in Labeling Litigation

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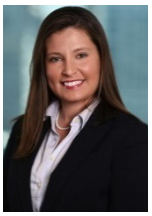

Recently, in a case that should remind retailers and their suppliers to consider their First Amendment rights as they relate to the regulation of product labeling, the Eleventh Circuit Court of Appeals held that the actions of the Florida Commissioner of Agriculture and the Chief of the Florida Bureau of Dairy Industry violated a dairy company’s First Amendment rights relating to use of the term “skim milk.” Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228 (11th Cir. March 20, 2017).

The challenge before the court involved the interpretation as applied to Ocheesee Creamery LLC of Florida law that restricted the sale of milk and milk products that are not classified as Grade A. In order to receive the Grade A designation, vitamin A that is lost and/or removed through the skimming process must be replaced.

In the instant case, Ocheesee Creamery created an all-natural, additive-free skim milk that only contained skimmed milk, and labeled its product as “skim milk.” However, the state of Florida notified Ocheesee that its skim milk did not fall within the definition of milk, and advised Ocheesee that it could only continue to sell its all-natural skim milk as long as it was labeled as “imitation milk product.” Ocheesee did not agree to label its product as “imitation” because skimmed milk was the only ingredient in the product, and it refused to add vitamin A back into the product.

Because the Eleventh Circuit was reviewing a restriction on commercial speech, it relied on the three-prong test set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission. 447 U.S. 557, 100 S. Ct. 2343 (1980). Central Hudson requires the court to initially determine “whether the expression is protected by the First Amendment” since not all commercial speech is protected.

Commercial speech is not protected if “the speech concerns unlawful activity,” or if “the speech is false or inherently misleading.” The Eleventh Circuit found that Ocheesee’s conduct was not unlawful because the state was willing to permit the sale of the “skim milk” as long as it was labeled as “imitation.”

Additionally, the Eleventh Circuit found that the term “skim milk” as used by Ocheesee was not inherently misleading or merely potentially misleading because it was a statement of objective fact. Thus, the speech is protected by the First Amendment. Accordingly, the restriction was subject to Central Hudson’s three-prong test for intermediate scrutiny:

1. Whether the asserted governmental interest is substantial;

2. Whether the regulation directly advances the governmental interest asserted; and

3. Whether it is not more extensive than is necessary to serve that interest.

The state and Ocheesee agreed that there is substantial government interest to regulating milk and milk products. The Eleventh Circuit did not address the second prong because it found that the restriction was more extensive than necessary to achieve its goal, and the state failed to provide evidence to the contrary.

In light of the extensive negotiations between the state and Ocheesee to compromise on language to place on the milk label, the Eleventh Circuit found that the "State's mandate was clearly more extensive than necessary to serve its interest in preventing deception and ensuring adequate nutritional standards." Consequently, the restraint violated the First Amendment.

Similarly, the District Court of Vermont denied a motion to dismiss in a case brought to challenge Vermont's "Right to Know" Act, also known as Act 120, which required labeling regarding "whether raw and processed food sold in Vermont was produced through genetic engineering (GE), and which prohibited manufacturers from labeling or advertising GE foods as natural," in part, because the complaint stated a "claim that statute's use of "natural" terminology violated First Amendment." Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015). (The matter was appealed to the Second Circuit, but was voluntarily dismissed because of preemption by latter enacted federal law.)

The lawsuit was brought by the Grocery Manufacturers Association, the Snack Food Association, the International Dairy Food Association and the National Association of Manufacturers (the Associations) against the Governor of Vermont, Attorney General of Vermont, and related state officials, to challenge Vermont's Act 120.

In order to comply with the disclosure requirement of the Right to Know Act, a manufacturer who made products either entirely or in part through genetic engineering was required to label any "agricultural commodity ... with the clear and conspicuous words 'produced with genetic engineering,'" and to label processed foods with the words "'partially produced with genetic engineering'; 'may be produced with genetic engineering'; or 'produced with genetic engineering.'"

Moreover, the law banned GE product manufacturers from using the terms "natural," "naturally made," "naturally grown," "all natural," or any similar words.

The Associations challenged the validity of the Right to Know Act, arguing that its disclosure requirement and restriction on labeling violated the First Amendment. The District Court found that the state of Vermont "failed to establish that Act 120's restriction of GE manufacturers' use of 'natural' terminology restrains only inherently or actually misleading speech."

The District Court went further and stated that speech that is "only potentially misleading is protected by the First Amendment." Consequently, the District Court found that a restriction on potentially misleading commercial speech must withstand the scrutiny proffered by Central Hudson.

Similar to the court in Ocheesee, the District Court then analyzed the restraint under the three-prong test in Central Hudson. The District Court in applying Central Hudson found that the "potential benefits of prohibiting the use of undefined terms by only some food manufacturers and the likelihood those benefits will be achieved remains remote, contingent, and speculative, turning almost entirely on how 'natural' terminology is defined and which commercial speakers are banned from using it."

The District Court stated that the state failed to show that the restriction directly advanced a substantial government interest, and that the restriction was not "greater than necessary to serve that interest". Thus, pursuant to Central Hudson, the ban on the use of the term "natural" in the "advertising, labeling, and signage for GE food products therefore violates the First Amendment."

However, First Amendment challenges to labeling requirements have not been universally accepted. For example, the Court of Appeals for the District of Columbia found that the "government's interests in making country-of-origin information available to consumers were sufficient to sustain regulations" and requiring product labels to reflect the same. American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18 (2014).

The Court of Appeals reviewed the arguments of the parties and analyzed the principles invoked by Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), and Central Hudson.

The court applied Zauderer and found the government had an interest in country-of-origin labeling for food due to the "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."

The court then went on to apply the Central Hudson factors to assess whether the regulatory disclosure directly advanced the government's interest, and whether it was narrowly tailored to achieve that interest. The court found that the mandate requiring disclosure of purely factual product information was not a violation of the First Amendment.

While arguing that the First Amendment provides protection related to labeling practices is far from a slam dunk, these cases highlight how important it is for suppliers and retailers to have knowledgeable attorneys and legal advisors assisting them in defending against private and governmental claims associated with their advertising practices and policies, while being mindful of the jurisdictions that the claims are being brought in.

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