Tobacco — Constitutionality
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ASH ▸ NEWS UPDATE ◂

WEEK OF MARCH 1, 1998

ACTION ON SMOKING AND HEALTH

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Two Major MYTHS About Tobacco Ads and the Constitution

Some have argued that imposing major restrictions on cigarette advertising would raise serious First Amendment problems. Therefore, they say, the only way to achieve such restrictions — and avoid a court challenge — would be to grant the tobacco industry immunity (or a "cap") in exchange for their cooperation. But both arguments are incorrect.

Perhaps the strongest evidence that very strict limits on product advertising are constitutional comes from two areas where restrictions far more sweeping than any Congress plans to impose on tobacco products have been in effect for dozens of years without either controversy or challenge.

Federal law requires advertisements for all prescription drugs to contain a detailed and prominent statement (with adequate emphasis) of the warnings, side effects, contraindications, etc. related to use of the product.■ Applied to cigarettes, this would require several pages of warnings for every newspaper or magazine ad, and make billboard and point-of-sale advertising virtually impossible.

If the government can constitutionally impose these restrictions on the advertising of thousands of prescription drugs — most of which are not addictive, are rarely used illicitly by children, and present far less serious risks than cigarettes — it is hard to see why they would suddenly become unconstitutional when applied to products containing nicotine — which the FDA has ruled is a deadly and addictive "drug."

Federal law also requires advertisements for certain financial products such as stocks and bonds to adhere to what is known as the "tombstone format" — plain black letters on a white background with no pictures and no fanciful claims or slogans (e.g., "high rate of return," etc.).■■ If such draconian restrictions can constitutionally be imposed on ads which have no impact on children, and which are designed solely to protect against financial loss, it is hard to see how they would suddenly become unconstitutional when applied to ads for which directly impact children, and where the rule's purpose is to protect against childhood addiction and ultimate death for at least one-third of all users.

Even if a deal is made and the tobacco industry agrees not to challenge allegedly unconstitutional restrictions on cigarette advertising, such challenges will certainly be brought. Any entity which suffers monetary injury as a result will have both the requisite legal "standing" and the financial incentive to challenge the restrictions in court. These plaintiffs include newspapers and magazines, billboard companies, advertising agencies, printers of point-of-sale advertisements, etc. In short, support by the tobacco industry will not prevent challenges to legislation limiting tobacco advertising, and any resulting delay.

■ See 21 CFR 202.1 ■■ See SEC Rule 134