

The FTC Pressures Press Interactions, Defies Commercial Speech Doctrine

November 18, 2015

On Tuesday, the FTC joined the Department of Justice and several other federal agencies in announcing numerous recent and ongoing actions against dietary supplement marketers. The FTC, in its discussions, highlighted a case that it filed earlier this year against marketers of green coffee products. That case is closely related to another case involving the unpaid appearance of a health foods commentator, Lindsay Duncan, on the Dr. Oz show. The FTC has alleged that the appearance by Duncan on the television program constituted commercial speech that is subject to the FTC's advertising jurisdiction. That allegation appears to be part of a growing trend at the FTC to attempt to reach unpaid media interviews and appearances. This trend is troubling in that it is at odds with Supreme Court precedent and threatens companies' ability to participate in news interviews, talk shows, or other media interactions.

Four main principles emanate from the Supreme Court precedent defining commercial speech.

1. Early cases like *Virginia Bd. of Pharmacy* and *Bates* provided the foundation that commercial speech is "speech proposing a commercial transaction."
2. Cases like *Bolger* and *Zauderer* built on that foundation, finding that whether a publication "proposes a commercial transaction" depends on circumstances such as the speaker's potential economic motivations and whether a specific product is identified.
3. Cases like *Bolger* and *Zauderer* also found that if speech proposes a commercial transaction, it will normally remain commercial speech even if it touches on matters of public debate. In *Zauderer*, for example, the Court held that a print advertisement by a law firm remained commercial speech even though it discussed the potential hazards of an intrauterine device.
4. Finally, two later cases, *Riley* and *Fox* provided the caveat that if commercial speech is "inextricably intertwined" with fully protected speech, it will be treated as fully protected. The "inextricably intertwined" standard will likely not be met by an advertiser voluntarily choosing to mix product information and discussions of matters of public debate. Rather, the mixing of types of speech likely must be something more akin to the facts of *Riley* in which a state law interjected a mandatory commercial disclosure into charitable solicitations, which are otherwise fully protected speech. The Court, in that instance, treated the whole of the speech as fully protected.

In recent years, the FTC has addressed the definition of commercial speech in only two litigated cases. Each of the Commission decisions - *Daniel Chapt. One* and *FTC v. POM* - incorporated only the standards from cases like *Bolger* and *Zauderer* without acknowledging or integrating at all the "inextricably intertwined" standard. This omission continues to be apparent in actions like those against green coffee marketers, where the FTC readily identifies media appearances and interviews

as commercial speech subject to its standards for advertising.

In contrast to the FTC's actions, courts hearing Lanham Act and other false advertising cases have largely found that media interviews are not commercial speech. The courts have rested their holdings on the "inextricably intertwined" standard from *Riley* and *Fox*. For instance, in a Lanham Act case by a taxi cooperative against Uber, a district court in California allowed the case to proceed as to an Uber website and blog, but not as to statements by Uber representatives published in news media. The court held that "[b]ecause the challenged statements are 'inextricably intertwined' with the news reporters' coverage of a matter of public concern, i.e., whether Uber is safe for riders, they cannot constitute commercial speech actionable under the Lanham Act." The court observed, "Statements made to the media and published in a journalist's news article concerning a matter of public importance are not commercial speech, and are protected under the First Amendment." The Second Circuit reached a similar decision in a case involving statements in media by an art dealer, and another court in California reached a similar decision in a case involving statements in media by an product endorser.

Companies have a right to direct comment on matters of public debate. In participating in media interviews and televisions appearances, companies should be aware of the FTC's prior actions and seek creative ways to maximize the protections of relevant Supreme Court standards and minimize the risk of enforcement. The same commercial speech standards also apply to companies' use of social media and should be carefully considered in that context, as well. I spoke about this topic recently at a [symposium sponsored by the Food & Drug Law Journal](#).