

William MacLeod Examines the Constitutionality of the FTC's Rulings on Commercial Speech

November 14, 2005

Washington, DC-- William MacLeod, Chair of Kelley Drye's Antitrust Practice Group, co-authored the article, "Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy," for the American Bar Association's Antitrust Law Journal (No. 3). Mr. MacLeod's article, written with Elizabeth Brunins and Anna Kertesz, explores how the First Amendment has become a powerful defense against overreaching advertising regulators.

The Constitutional protection of commercial speech arose from Federal Trade Commission (FTC or "the Commission") competition cases and has reigned in its consumer protection excesses. Congress was prompted to redefine the structure of the FTC when the legal legacies of the 1964 "Cigarette Rule," the Children's Advertising rulemaking, and the Do Not Call Rule of 2003 threatened to transform each respective industry.

The article begins by illustrating how the 1964 "Cigarette Rule," the first attempt by the Commission at regulating the tobacco industry, created the first specific cigarette legislation in the modern era? the Federal Cigarette Labeling and Advertising Act (FCLAA). The FCLAA was just the beginning of the FTC's legacy of regulating the tobacco industry, and armed the Commission with the power to regulate other industries as well.

The article goes on to compare the FTC's efforts in the 1980s to crack down on children's advertising with its proposed rule that would ban all advertising to young children, ban advertising of the most heavily sugared products to older children, and require advertising or Public Service Announcements promoting good health to provide balance against commercials for other sugared foods. The legal premise for the proposal was based on the legal precedent set forth by the "Cigarette Rule," which initiated the Commission's authority to regulate.

Lastly, the FTC's Do Not Call Registry of 2003 allowed individuals the opportunity to select not to receive telephone calls from solicitors. This regulation on telemarketing by the Commission caused controversy similar to the "Cigarette Rule" and the Children's Advertising rules, and conflicts arose about the Commission's seemingly overreaching powers and violations of First Amendment rights.

The article concludes by pointing out that out of the three rules established by the FTC, the Supreme Court may only find the Children's Advertising unconstitutional, as it would have likely failed a First Amendment test.

The full text of the article is available [here](#).

About William MacLeod William MacLeod specializes in antitrust, advertising, and competition. He

is a former Bureau Director at the Federal Trade Commission (FTC) and has more than 20 years of experience representing domestic and international corporations in merger challenges, investigations, and approvals; and counseling companies on a broad range of distribution issues. He also represents advertising challenges before the FTC, the National Advertising Division of the Council for Better Business Bureaus, and courts under the Lanham Act.