



September 27, 2013

Appeals Court Strikes Down Commercial Speech Restrictions

(Educational Media Co. at Va. Tech, Inc. v. Insley)

U.S. Court of Appeals for the Fourth Circuit

A divided panel of the U.S. Court of Appeals for the Fourth Circuit this week declared unconstitutional (under the First Amendment) the Commonwealth of Virginia's controversial ban on truthful alcohol advertising in college student publications, in a case where a majority of the readers of those publications are adults over the age of twenty-one.

The 2-1 decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in *Educational Media Co. at Va. Tech v. Insley* arguing that the ban violated the First Amendment rights of alcohol manufacturers and distributors to speak truthfully about their products. While acknowledging that states such as Virginia have a strong interest in reducing and discouraging underage consumption and abuse of alcohol, the appeals court agreed with WLF that the First Amendment does not permit the government to use the challenged speech restrictions as the means of achieving those goals.

"Alcohol manufacturers and distributors have an interest in conveying truthful information about their products to adults, and adult consumers have a corresponding interest in receiving truthful information," said WLF Senior Litigation Counsel Cory Andrews after reading the appeals court's opinion. "The Fourth Circuit's decision vindicates those interests by reminding state governments that the Constitution requires that any restriction on truthful speech be no more extensive than necessary to achieve its aims," Andrews said.

In its brief, WLF emphasized that the Supreme Court's opinion in *Sorrell v. IMS Health Inc.* establishes that where a law restricts truthful, non-misleading commercial speech on the basis of its content and the identity of its speaker, that law must be subjected to heightened judicial scrutiny. *Sorrell* also clarifies, WLF argued, that restrictions on truthful speech that discriminate based on content or speaker are presumptively invalid, whether those restrictions impose burdens on political speech, commercial speech, or any other kind of speech. In other words, content and speaker-based restrictions on commercial speech will fail heightened scrutiny in the ordinary case.

Although WLF continues to believe that Virginia's advertising ban constitutes a content and speaker-based restriction subject to strict scrutiny, the Fourth Circuit chose to apply the intermediate level of scrutiny established by the Supreme Court in *Central Hudson*. WLF had also argued that the district court's application of the third prong of that test was so watered down and deferential to the Government that it rendered that prong essentially meaningless. Such an approach, WLF insisted, marks a fundamental shift away from the Supreme Court's commercial speech precedent

and severely weakens the protections afforded to commercial speakers by the First Amendment.

In holding that the challenged regulation violates the First Amendment, the Fourth Circuit focused on the fourth prong of the *Central Hudson* test, which requires any regulation impacting speech to be no more extensive than necessary. Relying on language from the Supreme Court's opinion in *Sorrell*, the appeals court reminded the Commonwealth of Virginia that states may not "seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements." Slip. Op. at 22. In this case, the court concluded, the advertising ban impermissibly "attempts to keep would-be drinkers in the dark based on what the [Commonwealth] perceives to be their own good." *Id.* at 23.

WLF is a public interest law and policy center with supporters in all 50 States, including Virginia. WLF devotes a substantial portion of its resources to protecting and preserving commercial speech rights under the First Amendment.

For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.