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SECRETARY

March 2, 2000

Federal Trade Commission
Office of the Secretary
Room 159
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

Re: Telemarketing Review - Comment. FTC File #P994414

Dear Sir/Madam:

Attached is my comment for the record regarding the review of the Telemarketing Trade Regulation Rule and the Telemarketing Act.

By this letter I request that this comment be put on the public record.

Very truly yours,

Jerome S. Lamet

JSL/nas

Enclosure

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"Does the Recent Supreme Court First Amendment Decision On Casino Broadcast Advertising Affect Other Advertising Regulations?"

By: Jerome S. Lamet, Adjunct Professor - Advertising Law

Early this summer, a unanimous Supreme Court held that a federal law prohibiting the broadcast of certain advertising of casino gambling violated the First Amendment. Greater New Orleans Broadcasting v. U.S., 119 U.S. 1923 (1999). Despite the narrow holding of Greater New Orleans, the Court cautioned that restricting or limiting truthful communication about legal products and activities should be approached with tremendous care. While this decision is not a change in the Supreme Court's attitude toward commercial speech and the course it began chartering for commercial speech more than 20 years ago, it does represent a continued progression toward giving greater protection to commercial speech. This greater protection may make it possible to challenge other similar advertising regulations, such as the Federal Trade Commission's Telemarketing Sales Rule, 16 C.F.R. § 310 *et.seq.*, as unconstitutional.

In Greater New Orleans, the challenged FCC regulation prohibited radio and television stations from broadcasting advertisements about lotteries and casino gambling. Greater New Orleans, 119 S.Ct. at 1927. However, the regulation exempted several types of gambling, including state or government-run lotteries, not-for-profit fishing contests and Native American-run casinos. Id. at 1927-8. In finding the regulation unconstitutional, the Court applied the Central Hudson test. Under the Central Hudson analysis, for a regulation to be constitutional, the speech at issue must concern a lawful activity, must not be misleading, and the government interest in its regulation must be substantial. Id. at 1930. If these three prongs are satisfied, the regulation must also pass a second test. The regulation must directly advance the government interest and may not be more extensive than necessary to serve the government interest. Id.

Applying the Central Hudson test in Greater New Orleans, the Court found that the speech being regulated, gambling advertising, was not misleading, concerned a lawful activity in the petitioners' state, and was one in which the government has a substantial interest. Id. at 1930-1. However, the Court found that the regulation did not directly and materially advance that government interest. Id. at 1934. Writing for the Court, Justice Stevens acknowledged that the government has a legitimate interest in reducing the social costs associated with casino gambling and assisting states that restrict or prohibit such gambling. Id. at 1931. However, the regulation did not advance that interest because it "'directly undermine[d] and counteract[ed] its effects'" because it allowed gambling advertising by certain speakers without sufficient justification. Id. at 1934 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995)). Stevens pointed out that the operation of the federal law, which has been amended to include many exceptions over the last two decades, "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." Id. at 1933. Had the government adopted a more coherent policy or accommodated speakers' rights in states with legal private casino gambling, the regulation may have been upheld. Id. at 1936.

While Greater New Orleans did not abandon the Central Hudson test as many had hoped, it does give more ammunition to commercial speech advocates fighting for fewer commercial speech regulations. Although the Court conceded that perhaps the government does have a legitimate interest in protecting society -- especially children and others who are vulnerable -- from ads for legal but harmful products and activities, it cannot regulate capriciously. Id. at 1933-5. If the government chooses to regulate commercial speech, it may not regulate by singling out certain "speakers conveying virtually identical messages," based on the identity of the speaker. Id. at 1935.

Greater New Orleans offers an opportunity for commercial speech advocates to push the limits of the commercial speech doctrine by attempting to convince the courts to invalidate portions of other inconsistent and self-defeating advertising regulations. For example, the Telemarketing Sales Rule ("Rule"), adopted by the Federal Trade Commission in 1995, appears to be constitutionally suspect because it is also riddled with exceptions and bases its constraints on the identity of the speaker. 16 C.F.R. § 310 *et. seq*. In general, the Rule prohibits certain acts and practices and requires certain affirmative disclosures. Id. One requirement of the Rule, which will be the focus of the analysis below, is that telemarketers are required to make specific disclosures, including the total cost of an item or service being sold.[1] 16 C.F.R. § 310.3(a)(1)(i).

Applying the Central Hudson test to the Rule produces a result similar to the result reached by the Court in Greater New Orleans. As is typically the case, the first prong of the test is easily met since telemarketing is a lawful activity. Second, whether it is misleading must obviously be decided on a case by case basis. With regard to the third prong, there are several governmental interests that would undoubtedly pass constitutional muster. One legitimate interest is to prevent harassment, untruths, and the overall protection of consumers. It is almost impossible for the government to regulate telemarketing because the conversations are private, occurring between the caller and consumer. Thus, fraud may easily go unnoticed. Other valid government interests include the prevention of false or misleading advertisements.

The second part of the Central Hudson test presents more of a problem. It cannot be denied that telemarketing is unique. It is the only form of advertising (besides door-to-door or

[1]Among the restrictions, telemarketers are also required to call between certain times, to discontinue calls after a consumer requests not to be called and to keep certain business records. See 16 C.F.R. §§ 310.3, 310.4, 310.5.

other in-person solicitation) that allows the telemarketer (advertiser) to tailor his sales pitch to a consumer's articulated wants or needs. Additionally, unlike in-person solicitations, telemarketers are anonymous and anonymity can foster deceptive practices. Thus, by requiring a telemarketer to disclose the total price, a buyer is protected from the potential of untruths in an area that often means the most to a purchaser -- cost.

However, although a legitimate government interest exists, the Rule unfairly distinguishes between speakers, i.e., those that use the telephones to sell products and those that use other mediums. The Rule places several requirements and conditions on telemarketing, all of which would not apply if the same advertising message was delivered by a different speaker through another medium such as the newspaper, television, or even direct mail. One requirement of the Rule is that telemarketers are required to disclosure the total cost of an item or service being sold. 16 C.F.R. § 310.3(a)(1)(i). This requirement restricts the telemarketer's First Amendment rights since he must make disclosures his competitors are not required to make. For example, a seller of a product advertised on television is not required to include the price of the product in the advertisement while a telemarketer selling that very same product over the telephone would be required to make price disclosures.

Furthermore, the Rule is inconsistent because it does not apply to all telemarketers. Exempt from the law are banks, federal credit unions and federal savings and loan institutions. Common carriers, nonprofit organizations, and, in certain situations, insurance companies are also exempt.[2] Thus, telemarketers of these types of companies are free to telemarket without disclosing the prices of the products or services they are promoting.

Although the Rule was designed to prevent harassments and untruths, there are other

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[2]These entities are exempt from the Federal Trade Commission's jurisdiction. 15 U.S.C. § 45 (a) (2). However, any telemarketing services done on their behalf must comply with the rule.

ways the FTC could achieve its goal than by restricting a telemarketer's First Amendment right. For example, the FTC (and the states) can amend their home solicitation "three-day cooling off rule" to include sales procured through telemarketing. This would give the consumer the right to cancel his contract within the allotted time period. Other alternatives could include mandating that telemarketers register with the states so that if a consumer complaint is made, the telemarketer may be easier to locate for investigation purposes or impose stiffer civil penalties and require telemarketers to pay restitution to victims of fraud. The FTC and the states may also want to consider requiring telemarketing calls to be recorded as a way of fostering accountability.

In Greater New Orleans, the Court found that the government's scheme of regulation, and the interest it purports to advance, must not be undermined by its exemptions. Like the regulation invalidated in Greater New Orleans, the Rule imposes its strict regulations only on certain advertisers who use telemarketing while exempting others, thereby undermining the interests it purports to advance. Thus, if challenged, the Rule should also be declared unconstitutional. While the Court in Greater New Orleans did not go so far as commercial speech advocates may have hoped, this decision is still a small victory for commercial speech. But, where the court will go from here, when there are more difficult commercial speech issues to address, is unclear. Just as the Court has occasionally advised, the way to avoid a sensitive message is by averting one's eyes or ears. That same mantra should be repeated to unwilling recipients of a telemarketing solicitation -- if you don't like the message just hang up.