



First Amendment Law COMMENT

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ADVERTISING

FTC gives the boot to BOOST

by Jo Anne Rosenblum

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Nestlé is the maker of BOOST Kid Essentials, a nutritionally complete drink intended for children ages one to 13. BOOST Kid Essentials contains probiotics, which are live microorganisms found naturally in many foods, and are believed to aid digestion and fight harmful bacteria. The probiotics in BOOST Kid Essentials are embedded in a straw that comes with the drink.

From the fall of 2008 through the fall of 2009, Nestlé made representations in television, magazine, and other print advertisements that BOOST Kid Essentials prevents upper respiratory tract infections in children, protects against colds and flu by strengthening the immune system, and reduces absences from daycare or school due to illness. Nestlé also claimed that BOOST Kid Essentials would reduce the duration of acute diarrhea in children up to age 13.

The Federal Trade Commission works for consumers to prevent fraudulent, deceptive, and unfair business practices. The FTC conducted an investigation into these representations Nestlé made about its BOOST Kid Essentials, and found them unsubstantiated. As a result, the FTC filed a complaint against Nestlé, in which it accused Nestlé of violating the Federal Trade Commission Act by engaging in unfair or deceptive acts or practices and making false advertisements.

FTC challenges Nestlé representations

The FTC alleged Nestlé represented, expressly or by implication, that it possessed and relied upon reasonable information that substantiated the representations it made about its product, when in fact this was not true. In addition, the FTC alleged Nestlé represented, expressly or by implication, that clinical studies prove that drinking BOOST Kid Essentials reduces the general incidence of illness in children, including upper respiratory tract infections, reduces the duration of acute diarrhea in children up to age 13, or strengthens the immune system, thereby providing

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ACCESS TO COURTS

Jury anonymity in question

by Alisha Wyatt

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The trial of former Illinois governor Rod Blagojevich raised an interesting First Amendment issue. Members of the press challenged the district court's decision to keep the names of the jurors anonymous.

In an effort to protect the impartiality of the jurors in this matter, the judge ruled the names of the jurors would not be released until after the trial was over. The judge believed that if the names of the jurors were released, the jurors would be bombarded with text messages, e-mails, and instant messages that would compromise the impartiality of the jurors. In addition, the judge promised the jurors their names would not be disclosed until after the trial was complete. Throughout jury selection, the jurors were referred to by numbers. Thus, the jurors' names were never mentioned.

In response to the judge's decision, two newspapers and two local media associations intervened and argued the names should be released once the jurors were seated. The media argued they had an unqualified right of access to the jurors' names while the trial proceeds, even though those names had never been uttered in open court or in closed sessions. The judge argued the media would not be harmed by his decision

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ACCESS TO RECORDS

9/11 details must be unsealed

by Patrick Ogilvy

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A U.S. District Court in New York has determined some details of a settlement between several businesses, their insurers, airlines, and security companies for damages related to the terrorist attacks on September 11, 2001, must be available to the public under the First Amendment.

After the September 11, 2001, terrorist attacks on the World Trade Center, several businesses affected by the attacks and their insurers sued the airlines, security companies, and others for the resulting property dam-

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protection against cold and flu viruses, when in fact there are no clinical studies that prove this.

Nestlé has entered into a proposed settlement with the FTC in which Nestlé has agreed to stop claiming that BOOST Kid Essentials will reduce the risk of colds, flu, and other upper respiratory tract infections unless the claim is approved by the Food and Drug Administration. Nestlé has also agreed to stop claiming that BOOST Kid Essentials will reduce children’s sick-day absences and the duration of acute diarrhea in children up to age 13 unless the claims are true and backed by at least two well-designed human clinical studies. Although FDA approval of health claims generally is not required for compliance with the FTC Act, the FTC determined in this case that requiring FDA pre-approval before Nestlé makes any claims that certain products prevent or reduce the risk of upper respiratory tract infections will provide clearer guidance, and will make the order easier to enforce.

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age. The businesses claimed the airlines and security companies failed to properly screen passengers and their belongings on the morning of the attacks. After months of hard-fought negotiations and mediation, which included more than 180 depositions and millions of pages of documents, most of the parties reached a settlement agreement. Those businesses refusing to settle maintained interests in the World Trade Center Towers themselves and objected to the agreement over concerns their claims would not be paid due to liability ceilings imposed by the Air Transportation Safety and System Stabilization Act (ATSSSA) enacted in the immediate aftermath of the terrorist attacks. They also argued the negotiations had been “shrouded in secrecy” and involved collusion between insurers. Finding no merit in these arguments, the court approved the settlement.

Motion to unseal


Prior to the court’s approval of the settlement, The *New York Times* intervened in the case and requested the details of the settlement, which had been sealed upon request of the settling parties, be made available to the public. At issue were four categories of information: (1) the total settlement amount; (2) the allocation of that amount among the airlines’ and security companies’ insurers; (3) the portion of the amount to be paid to each settling business; and (4) the confidential documents exchanged during negotiations and mediation. The airlines and security companies opposed unsealing this information, arguing it would chill future settlements of the outstanding claims and suggest culpability for the attacks.

The court considered whether these arguments outweighed the First Amendment presumption of public access to information central to its decision to approve

If the settlement agreement is approved, the agreement will be valid for 20 years. As part of the order, Nestlé will have to maintain for five years all tests, reports, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question any of the representations the FTC has challenged, or the basis relied upon for any of the representations, including complaints and other communications with consumers or with governmental or consumer protection organizations. In addition, the order will apply not only to BOOST Kid Essentials, but to representations by Nestlé made in connection with the manufacturing, labeling, advertising, promotion, sale, or distribution of any drink product containing probiotics, or any nutritionally complete drink, other than infant formula, medical foods, and any product not sold primarily in traditional retail stores. ■

the settlement. Due to the ATSSSA liability caps, the court determined the allocation and proportioning of the settlement amount bore directly on its decision. The court was unconvinced future settlement interests outweighed public access rights, and did not believe the public or press would consider the settlement information as an admission of fault for the attacks.

However, the court did find significant privacy interests regarding the allocation of settlement amounts among the businesses. Based on these considerations, the court allowed public access to the settlement amount and allocation among the airlines’ and security companies’ insurers, but not to the amount paid to each business settling claims. The court also refused to unseal the confidential documents, which were used only during negotiations and mediation, and did not bear on the court’s decision to approve the settlement. ■



“I Didn’t Know That”
(Why We Say The Things We Say) by Karlen Evins

“Deadbeat”- The first deadbeats were technically “debt beaters.” These were people who avoided their creditors by leaving their debts behind. In the early days of this country, there were two ways to shirk your financial obligations: (1) by declaring bankruptcy, or (2) by actually moving out of the colony where the debt was incurred. Those choosing the latter were known as debt beaters, which later was shortened and mispronounced as deadbeats.

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INDECENCY

FCC's latest policy is unconstitutionally vague

by Elizabeth Holt

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A recent case out of the U.S. Court of Appeals in New York determined that the Federal Communications Commission's indecency policy is unconstitutionally vague and creates a chilling effect.

Over the decades, the FCC has struggled to determine what is considered obscene, indecent or profane language. The FCC attempted to provide guidance to the broadcasting industry by setting out indecency standards in detail. In determining indecency, two determinations must be made: (1) whether the material describes or depicts sexual or excretory organs or activities and (2) whether the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium. In determining if language is patently offensive the court considers three factors: (1) the explicitness or graphic nature of the description or depiction; (2) whether the material dwells on or repeats at length the description or depiction; and (3) whether the material appears to pander or is used to titillate, or whether the materials appear to have been presented for its shock value. In 2004, the FCC changed its policy on single nonliteral use of expletive language due to complaints made regarding the 2003 Golden Globe Speech of Bono. At that time, the FCC also expanded its enforcement efforts to include fleeting expletives and began issuing record fines.

Concerns of networks

After the 2004 changes to the indecency policy, several networks including NBC Universal Inc. filed a petition for reconsideration raising statutory and constitutional challenges to the new policy. As the case was pending reconsideration, the FCC applied the new policy to various television broadcasts from February 2002 through March 2005. The Commission found four programs (2002 Billboard Music Awards, 2003 Billboard Music Awards, episodes of ABC's NYPD Blue, and CBS's The Early Show) use of the fleeting expletives were indecent and profane under the new policy standards. The FCC reaffirmed the words "f****" and "s****" were presumptively indecent and profane.

Fox Television Stations, Inc, CBS Broadcasting Inc. and ABC Inc., and other networks sought a review of the order. The FCC issued a second order stating that the fleeting expletives on CBS's The Early Show occurred during a bona fide news interview and reversed the determination as well as the NYPD Blue complaint. The networks continued their arguments in the courts, presenting both administrative and constitutional arguments. In 2009, the U.S. Supreme Court found the

FCC's position to be administratively defective because it was arbitrary and capriciously. Therefore, the Supreme Court returned the case to the court of appeals for constitutional considerations.

The First Amendment protects indecent speech, but such speech may be restricted to protect children. Even in those situations the First Amendment places a special burden to ensure that restrictions on speech are not impermissibly vague. When a policy is determined impermissibly vague it is unconstitutional. To avoid vagueness, fair notice must be given to help guide individuals from prohibited speech. Failure to give notice can chill speech and leads individuals to be censored wider than the forbidden boundaries. The vagueness also limits discriminatory enforcement and guards against subjectivity and discriminatory enforcement.

The First Amendment protects indecent speech

Why is the policy vague?

The FCC's determination of which words or expressions are patently offensive is determined by the three-factor test that the courts have determined fails to give fair notice to broadcasters. Although the FCC determined certain words like bulls*** were offensive, they determined other expletives were not. The court of appeals determined the three-factor test hardly puts broadcasters on notice of how the FCC will apply the factors in the future. The FCC also had exceptions to its indecency policy regarding bona fide news or artistic necessity. However, there has not been a clear reason for the exceptions. Thus it leaves the broadcasters to guess whether a word is indecent. Although its latest policy gives the FCC more flexibility, it results in a standard FCC cannot articulate or apply consistently.

Under the new policy, broadcasters were required to risk a \$325,000 per showing fine and possible loss of license, or censor programs. When weighing the possible punishment, broadcasters would likely choose to censor or fail to show the controversial show, thus chilling the broadcasters' speech. As the result, the court ruled the FCC's indecency policy is vague and unconstitutional. ■

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When does pretrial publicity become unfair?

by Brent Mayo

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In an age of high profile headlines and unparalleled access to information, at what point does pretrial publicity deny the defendant his or her right to a fair trial? The U.S. Supreme Court faced this issue on appeal by Enron's ex-CEO, Jeffery Skilling. Skilling was one of three defendants charged with falsifying documents and making false public statements about Enron's finances. Because of the intense media coverage surrounding his case, Skilling wanted his trial moved from Houston, Texas to a different jurisdiction. He contended the pre-trial coverage in Houston would deprive him of his 6th Amendment right to a fair trial.

In an unsuccessful attempt to convince the court to relocate the trial, Skilling, along with a team of media experts, highlighted the heavy volume and volatile nature of the pretrial media coverage. According to one expert, a Houston newspaper assigned as many as 12 full-time reporters to the case. The paper mentioned Enron more than 4,000 times in the three-year period following Enron's bankruptcy. Hundreds of these articles mentioned Skilling by name. Houston news stations ran approximately 19,000 segments on Enron, of which 1,600 directly mentioned Skilling.

Not only was the coverage plentiful, it was often times harsh and emotional. One paper created a series called "The Faces of Enron," which chronicled the hardships of nearly one hundred victims of the collapse. The series stirred emotion by profiling former Enron employees facing eviction or unable to afford Christmas presents. Multiple stories quoted former employees as being "scared," "helpless" and "betrayed." Another paper characterized the indictment of Skilling as "long overdue."

The presumption of guilt grew larger as the case and coverage evolved. Every section of the newspaper capitalized on Enron, even the sports page: "If you believe

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because the jurors' names would be released when the trial concluded.

Court of Appeals weighs in

The newspapers and media groups took their argument to the U.S. Court of Appeals in Chicago. That court noted other courts have held jurors' names are open to the public, under the first amendment. The court of appeals also noted other courts have held if there is a right to access information in a trial, disclosure at the end of the trial gives the press everything to which it is constitutionally entitled. Finally, the court noted it has long been held that anonymous juries are permissible when the jurors' safety would be jeopardized by

the stories about [Coach Bill Parcells] not having anything to do with the end of Emmitt Smith's Cowboys career, then you probably believe in other far-fetched concepts. Like Jeff Skilling having nothing to do with Enron's collapse." One paper labeled Skilling's defense the "doofus defense."

How do you determine prejudice?

The trial lasted four months. The jury found Skilling guilty on 19 counts and not guilty on nine counts after five days of deliberation. On appeal, Skilling argued prejudicial pretrial media coverage influenced the jury resulting in an unfair trial. The Supreme Court disagreed. Houston is a city where more than 4.5 million people are eligible for jury duty. The Court found it hard to believe a city of that size and diversity could not provide 12 impartial jurors.

The Court also examined the nature of the pretrial media coverage. The coverage, though not favorable, was not blatantly prejudicial, nor did it contain a confession or information so unforgettable as to create a lasting impression. Furthermore, a four-year lapse existed between Enron's bankruptcy announcement and Skilling's trial. During this period, the impact of media coverage diminished in the minds of jurors. The Court also referred to acquittals on nine counts stating it is difficult to agree with an argument about jury bias when part of the jury's deliberations resulted in a not guilty verdict.

Thus the Court denied Skilling's appeal because of pretrial publicity. The Court said media "prominence does not necessarily produce prejudice, and juror impartiality...does not require ignorance." However, the Court overturned Skilling's conviction for other reasons unrelated to the media coverage. ■

public knowledge, or where the defendant has attempted to bribe or intimidate witnesses or jurors.

Given the conflict in the law, the court of appeals chose to follow the actions of its sister courts and found that anonymous juries are permissible to foster jury safety and prevent bribery. Here, the district judge decided this issue out of concern and caution, without actually showing the jurors would be harmed. Because the judge acted without evidence, the court of appeals asked the district judge to hold a hearing to illustrate why it is necessary to protect the jurors' anonymity. The court of appeals did, however, hold the juror's names would remain confidential until the hearing on the issue was held. ■