“Commercial Speech” – Simplified!

By Jeff Aran, CSA Legal Counsel, January 2024

In the sign industry, we often speak of protected speech rights and there are times when a sign ordinance unreasonably or unconstitutionally restricts those rights, especially where an ordinance unjustifiably limits the type or size of a sign such that the advertising message cannot be effectively or legibly read or illuminated, i.e., where the communicative aspects of the sign are unreasonably diminished, when content-control occurs, or when a city favors or prohibits one type of sign (such as digital or pole signs). The sign industry and its customers are concerned mostly with regulatory content control over advertising and commercial speech, i.e., speech which at its core essentially proposes a commercial transaction.

But what exactly is protected? In a recent case* pertaining to firearms advertising the court elaborated:

> "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." *Nat'l Inst. of Family & Life Advocates v. Becerra,* U.S. , 138 S. Ct. 2361, 2371, 201 L.Ed.2d 835 (2018). Under the First Amendment, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citations omitted). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citations omitted). In other words, "`content based' ... requires a court to consider whether a regulation of speech `on its face' draws distinctions based on the message a speaker conveys." *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011)).
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> However, "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) ("*Central Hudson*"), and "regulation of commercial speech based on content is less problematic." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); *see also Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 844 (9th Cir. 2017). […]
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> The core notion of commercial speech is "speech which does `no more than propose a commercial transaction.'" *Bolger*, 463 U.S. at 66, 103 S.Ct. 2875 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)). When determining whether speech can be classified as commercial speech, courts look to whether: (1) the speech is an advertisement; (2) the speech refers to a particular product; and (3) the speaker has an economic motivation. *See id.* at 66-68, 103 S.Ct. 2875; *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011). […]

Four-Part Test – "Intermediate Scrutiny"

> The Supreme Court has described a four-part test for analyzing the lawfulness of restrictions on commercial speech as follows:
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> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. "The *Central Hudson* analysis is commonly referred to as `intermediate scrutiny.'"[8] *Retail Digital Network,* 861 F.3d @ 844.

Regarding the third and fourth prongs (substantial governmental interest and "not more extensive than necessary"):

> Indeed, the third prong of *Central Hudson* "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane,* 507 U.S. 761, 770-71, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). As a result, a commercial speech restriction "cannot be sustained if it `provides only ineffective or remote support for the government's purpose,' ... or if there is `little chance' that the restriction will advance the State's goal." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 566, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (quoting *Edenfield,* 507 U.S. at 770, 113 S.Ct. 1792; *Greater New Orleans,* 527 U.S. at 193, 119 S.Ct. 1923). The government can justify its restriction by reference to studies, anecdotes, history, consensus, or "simple common sense"; it need not rely on empirical data accompanied by excessive background information. *See Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 628, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995).
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> The fourth, and final, inquiry under *Central Hudson* "requires that a regulation `is not more extensive than is necessary to serve' a substantial government interest." *Whiting,* 709 F.3d at 825 (quoting *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343). This fourth step "requires a reasonable fit between the means and ends of the regulatory scheme." *Lorillard Tobacco,* 533 U.S. at 561, 121 S.Ct. 2404. "The [Supreme] Court has also clarified *Central Hudson*'s fourth factor by making clear that it does not require satisfaction of a `least-restrictive-means standard,' but rather requires `a fit between the legislature's ends and the means chosen to accomplish those ends, []a fit that is not necessarily perfect, but reasonable[,] ... a means narrowly tailored to achieve the desired objective." *Retail Digital Network,* 861 F.3d at 846 (quoting *Fox,* 492 U.S. at 480, 109 S.Ct. 3028); *see also Fox,* 492 U.S. at 480, 109 S.Ct. 3028 (summarizing the Supreme Court's decisions requiring that the legislature's fit need not represent "the single best disposition but one whose scope is in proportion to the interest served").

While undertaking the analysis is easier said than done, as it requires the government to substantiate the basis for the restriction with evidence, it provides the framework for determining and challenging the constitutionality of a sign ordinance. Contractors and their customers (permit applicants) should be prepared to push back on regulations – and regulators -- that impinge these rights.

*_SAFARI CLUB INTERN. v. Bonta_, 650 F. Supp. 3d 1019 - ED California, 2023