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Nike v. Kasky: Will the Shield of the Commercial Speech Doctrine Become a Sword?

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In 1976, the U.S. Supreme Court gave birth to the commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[1] extending for the first time the safeguards of the First Amendment—at a somewhat reduced level—to product advertising. Over the quarter century that followed, and particularly of late, the Court has fortified this protection. As the result of recent rulings concerning gambling and tobacco,[2] it seems fair to say that advertising for nearly all products and services now constitutes protected speech as long as the subject of the advertisement is legal and the speech accurate.

But a recent and potentially far-reaching ruling by the California Supreme Court threatens to turn the shield of protected speech into a sword. In *Kasky v. Nike, Inc.*,[3] the state supreme court held in May 2002 that Nike's statements to the press and others regarding its controversial business practices in Southeast Asia constituted commercial speech primarily because they were motivated in part by pecuniary interests. This decision effectively subjects corporate speech in California on any issue concerning a company's business practices to that state's false advertising and consumer protection laws, meaning that such speech can serve as the basis for liability if it turns out to be false or misleading.

This decision should alarm not only corporate leaders, but also journalists and others with an interest in fostering debate on issues of public concern. The regulatory regime that governs typical product advertising attaches strict liability to misleading speech, even if it is truthful. If those rules also apply to public discussions about business-related issues, such as Nike's labor practices in developing countries, the potential for staggering damages verdicts will stifle the speech of many of those who have the most to contribute. This chilling effect would result in poorer media coverage, a far different effect than the labor and antiglobalization groups supporting the California Supreme Court decision hope to achieve. On January 10, 2003, the U.S. Supreme Court granted Nike's petition for certiorari, taking the unusual step of agreeing to review a state court decision before the underlying case has become final.

This article contends that the U.S. Supreme Court should reverse and, at a minimum, refuse to allow the commercial speech doctrine to curtail expression outside the realm of traditional product advertising.

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Background

The *Nike* case grew out of an ongoing public debate concerning the labor conditions in Southeast Asia, where many large companies have manufacturing plants. Several labor and environmental groups began publicly asserting in 1995 that working conditions in Nike's overseas factories were dangerous, workers were mistreated and underpaid, and child labor was used.

The assertions quickly generated a storm of media scrutiny and editorial coverage, rendering Nike a lightning rod for already crackling critiques of economic globalization. Columnist Bob Herbert of the *New York Times*, for example, charged that Nike "benefit[s] directly and indirectly from the systematic oppression of the Indonesian people. . . . Nike executives . . . are not bothered by the cries of the oppressed. It suits them. Each cry is a signal that their investment is paying off."[4] Groups in the United States and abroad began calling for legislative action and boycotts of Nike products.

In response, Nike defended its business operations in "press releases, in let-

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ters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes."[5] Nike also bought full-page advertisements in leading newspapers to publicize a report that GoodWorks International had prepared under a contract with the company. The report, based on an investigation by former United Nations Ambassador Andrew Young, found that the charges against Nike were largely baseless.

Despite the fact that none of Nike's statements appeared in any product advertising or promoted the sale of its products, Marc Kasky, identifying himself only as a California resident, filed suit against Nike alleging that selected factual assertions in Nike's releases violated that state's false advertising and unfair trade practice laws. Kasky expressly disavows that Nike's releases induced him to purchase any Nike product, much less that he was injured as a result. Rather, Kasky invokes California's "private attorney general" rule, under which any state resident may sue on behalf of all consumers in the state. He seeks restitution that would require Nike to "disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice,"[6] and relief in the form of a court-supervised information campaign to correct any misleading corporate statements. He also requests reimbursement of his legal fees.

Kasky alleges that Nike's statements, "although addressed to the public generally, were *also* intended to reach and influence actual and potential purchasers of Nike's products,"[7] and therefore ought to be subject to consumer protection laws and reduced First Amendment protection. Kasky concedes that he cannot prevail if he cannot subject Nike's statements to the commercial speech doctrine, for he has no evidence that Nike made any false statements with constitutional actual malice, i.e., actual knowledge that the statements were false or with reckless disregard as to whether they were false.[8]

The trial court dismissed the complaint on the ground that Nike's speech was noncommercial, and the California Court of Appeal affirmed this ruling. A sharply divided California Supreme Court held that Nike's statements could be classified as commercial because (1) Nike and its executives are engaged in commerce, (2) the statements were likely to reach potential customers, and (3) the statements described "business operations, products, or services" and were made in part to sustain sales of Nike's products. If left standing, the court's holding would mean that Nike may be held liable, irrespective of fault, for such statements that are false or have "the tendency to deceive or confuse the public."[9]

California Court Expands Commerical Speech

The implications of this decision are staggering. Although courts traditionally have assumed that commercial speech is limited to product advertising and labels, the California Supreme Court's three-part test for identifying commercial speech encompasses almost all business speech. Businesses exist to make money; nearly every word they utter is likely to reach potential customers and is intended, at least in part, to advance pecuniary interests.

Even more alarming, as the three dissenters pointed out, the majority expressly found it irrelevant that Nike was responding to charges publicly raised by others and was thereby participating in a public debate on the ethics of using labor in less developed countries. The decision allows Nike's critics to level charges with relative impunity but hinders the company's opportunity to respond, and thus "handicap[s] one side of this important worldwide debate."[10] The mere fact that Nike participates "not only in the marketplace of ideas, but also in the marketplace of manufactured goods," noted one dissenter, should not strip it of the "breathing room" that all others enjoy when engaging in public discussion.[11]

The U.S. Supreme Court will hear oral arguments on this case in the spring, and a decision is expected by the end of the Term this summer.

What Is Commercial Speech?

The California Supreme Court's decision exposes—or exploits—two muddled areas of commercial speech law that the U.S. Supreme Court urgently needs to clear up.

First, perhaps because the U.S. Supreme Court has never laid down a firm definition of "commercial speech," the California Supreme Court essentially invented a new one. The U.S. Supreme Court has "usually defined [commercial speech] as speech that does no more than propose a commercial transaction."[12] However, in its landmark decision in *Central Hudson Gas & Electric Co. v. Public Service Commission*,[13] in which it elucidated the test for the permissibility of commercial speech regulations that it still follows today, the Court stated that commercial speech is "expression related solely to the economic interests of the speaker and its audience." In another case, the Court held that speech is commercial if the speaker utters it with an economic motivation and it refers to a specific product in an advertising format.[14]

The problem is that Nike's speech in this case does not satisfy *any* of these tests. None of it proposed a commercial transaction. None of it referred to specific products. The speech related to far more than the economic interests of Nike and its audience. It was made in the context of a social debate concerning globalization, and the California Supreme Court acknowledged that it was made in part to influence potential legislation concerning overseas investment and production.

Second, even if bringing Nike's public statements within the outer limits of the commercial speech doctrine arguably comports with the letter of the U.S. Supreme Court's definitions of commercial speech, it is difficult to understand why Nike's speech should be so tightly regulated. But the U.S. Supreme Court has been less than clear on this point as well. The Court stated on one occasion that commercial speech may be regulated in order to "protect[] consumers"[15] and to "prevent[] commercial harms."[16] These explanations, at worst, are utterly circular. At best, they mean that states may regulate commercial speech to prevent businesses from misleading consumers regarding the nature of their products and services. But even this interpretation leaves one quite unsure where tangible effects to consumers end and expressive influence on society at large begins. Thus, the California Supreme Court's refusal to explain why companies should be allowed to participate in public debates

about their own products only on the pain of strict liability fails to attract the attention that it should.

What Commercial Speech Is Not

Given that it seems so hard for the U.S. Supreme Court to explain what should constitute commercial speech, perhaps the best place to start in this case is by defining what *cannot* constitute commercial speech. It is hornbook law that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values,"[17] and that such speech may not be regulated unless it is made, at a minimum, with constitutional actual malice.

"Speech on public issues" receives this high level of protection in part because public debates take place over an extended time period. While these debates are ongoing, the media scrutinize each speaker's claims and typically place potentially misleading statements into context. The public is presented with competing viewpoints and has time to reflect. Even false statements can make valuable contributions to the process, since they can bring about "the clearer perception and livelier impression of truth, produced by its collision with error."[18] Accordingly, in Justice Brandeis's famous words, "the remedy to be applied" to false speech in public debates "is more speech, not enforced silence."[19]

This procedure of debate and reflection is a far cry from that which occurs concerning product labels or typical product advertising. Such speech often affords consumers little time or ability to scrutinize its truthfulness. When a company asserts that its product contains a certain ingredient, for example, that claim may not provide any realistic opportunity for factual or ideological debate. Consumers often factor the information into their purchasing decisions without obtaining any counterspeech on the topic. What's more, particularly in the realm of professional services, the Court has noted that the public often "lacks sophistication" or access to the information necessary to evaluate a business's claim, even if it tried to do so.[20]

The danger, therefore, that the commercial speech doctrine is designed to prevent is that of "uninformed acquiescence,"[21] or, as Justice Stevens has put it, the possibility that consumers "may respond to false advertisements before there is time for more speech and considered reflection to minimize the risks of being misled."[22] The government may regulate such advertisements because regulation is the only way to protect consumers if a product fails to perform as promised in an advertisement.

Nike's Speech Is Not Commercial Speech

Viewed through this lens, it becomes apparent why Nike's speech in this case cannot be characterized as commercial speech. Nike's speech pertained to an extended and widely covered public debate concerning the ethics of its overseas labor practices. Although Kasky seeks to hold Nike liable for allegedly false and misleading elements of its press and public relations releases, he acknowledges in his own complaint that "[t]he media have continued to expose Nike's actual practices." Perhaps even more remarkably, he attaches several newspaper articles that are extremely critical of Nike.[23]

The decision allows Nike's critics to level charges with relative impunity but hinders the company's opportunity to respond.

A review of contemporaneous press coverage of the Nike overseas labor debate, in fact, reveals that Kasky is right: Every one of Nike's allegedly misleading statements either was never publicly reported or was challenged by counterspeech in the same media outlet that reported the statement. The marketplace of ideas operated just as it should. This, of course, is exactly what one would expect regarding an issue of intense public concern.

But the media's extensive and contemporaneous coverage of Nike's statements leaves one utterly at a loss as to why state regulation is necessary or appropriate in this area. A company's personnel and labor policies are not the same as tangible qualities of their products. But even if they were, potential consumers who wished to factor Nike's labor practices into their purchasing decisions would have been aware that serious allegations had been leveled against the company and that Nike's credibility on these issues was being questioned. Consumers had an array of competing information against which to test Nike's claims and ample time to reflect on the ongoing controversy. In the classic mode of public discourse on a controversial issue, the media ventilated competing claims and provided people with information that allowed them to debunk any potentially misleading corporate press releases.

The California Supreme Court's decision, however, short-circuits the entire process. It holds that the moment a company sends a press release or letter to the media that offers a potentially misleading portrayal of the company's business operations, the company may be sued and held liable. It does not matter whether the media ever print the company's statements or, if they do, whether they place those statements in context or with assertions that refute them.

This holding impermissibly substitutes state regulation of the content of public debate for media scrutiny and counterspeech. It also impermissibly handicaps the business side of all public debates regarding corporate issues by permitting critics to level flimsy or incendiary allegations, while requiring the targets of this speech to respond under pain of strict liability in California concerning any tendency in their statements to mislead. Especially in these circumstances, the U.S. Supreme Court has held, "the First Amendment is plainly offended."[24]

One-Sided "Debates"

Indeed, if the U.S. Supreme Court were to permit consumer protection plaintiffs to use the commercial speech doctrine in this context to curtail and punish corporate speech, the resulting chilling effect on vital public issues would be enormous. We live in a time in which corporations, in some ways, are more powerful and influential than ever. Their practices affect not only our satisfaction as consumers but also our individual civil rights, our environmental quality, and our country's economic and political health. Reporting on business operations is essential to monitor corporate integrity and develop sound public policy.

Accurate and useful reporting, however, depends on considering all sides of an issue. When a public debate con-

cerns a company's business operations, attaining such a complete picture requires newsgatherers to get information not only from interest groups and the company's detractors but also from the company itself. Reporters who fail to obtain corporate statements on issues involving their businesses may overlook key aspects of those issues, rendering their stories incomplete. Reporters may even shelve such stories for fear of publishing something that is too one-sided. At a minimum, news stories that fail at least to impart the view of each opposing party are more likely to be deemed untrustworthy or biased.

The *Kasky* strict liability doctrine would seriously hamper the media's ability to obtain these critical business-oriented statements. To take but a few examples:

- Civil rights groups recently have alleged that several companies' practices of stocking different merchandise or requiring different forms of payment in predominantly minority communities amounts to invidious racial discrimination. Businesses' reasons for doing so are central to determining whether these corporate "red-lining" policies are wrong and should be prohibited.
- Environmental groups have called on consumers to boycott certain foods, such as swordfish and sea bass, on the ground that these species are not being harvested from our oceans in a sustainable manner. Information from the fishing industry regarding its self-imposed quota system is vital to deciding whether regulation needs to be enhanced in this area.
- Financial groups contend that the accounting industry is incapable of policing corporations upon which it depends for its paychecks. The public needs to understand how the accounting industry operates in order to assess whether its conflict-of-interest rules need to be revamped.

In each of these situations, the California Supreme Court's decision would force companies to contribute to the public debate at their own peril. When contacted by reporters, corporate spokespersons would be liable for any factual inaccuracies that they inadvertently include in their statements. Even when it would be possible for businesses to take the time to verify factual uncertainties and to craft their own press releases, they would still be liable for any part of their releases that a jury later determines has the capacity to mislead the public. This risk of liability is simply too great to bear, and the alternative of keeping quiet is simply too easy to embrace.

A Bang or a Whimper?

Given the stark incompatibility of the California Supreme Court's decision with the First Amendment's overarching concern with fostering robust debate on issues of public concern, it is quite possible that the biggest question in the *Kasky* case is not whether the U.S. Supreme Court will reverse, but whether it will do so with a bang or a whimper. The Court could take this opportunity finally to issue a clear definition of commercial speech. It could even follow the prior suggestions of some Justices and prominent commentators and reconsider whether it any longer makes sense to reduce the level of First Amendment protection afforded to commercial speech.

But it is equally likely that the Court will do nothing more than issue a narrow reversal. Like its recent opinions concerning gambling and tobacco regulations, such a decision would not make any significant new law. It would leave the commercial speech doctrine in place and its outer parameters uncertain. But it almost certainly would garner a substantial majority, and that may well be the Court's highest priority come June.

Although we generally want courts to deal only with the facts of cases before them, cases before the U.S. Supreme Court are somewhat different. The Court's limited resources allow it to consider particular issues quite infrequently, often allowing years to pass between pertinent decisions. At the same time, individuals, businesses, and courts across the country look to the Court's opinions on a daily basis for direction in a variety of situations. As Justice Frankfurter once remarked, when the Court's prior standards in an important area do not afford clear guidance, "the Court should not rest on [its] first attempt at an explanation for what sound instinct counsels. It should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued."[25] In this respect, a tight, fact-bound reversal in this case would be somewhat unfortunate, for it would leave difficult questions unanswered and the potential for chilling a substantial band of legitimate business speech in place.

If, for instance, the Court holds that the commercial speech doctrine does not apply to Nike's speech here because the speech did not refer to any specific Nike product, would such a holding mean that the commercial speech doctrine could apply to a company's public statements concerning the health or safety of its products? The public is keenly interested in the health effects of foods, and companies frequently tout their products as having health benefits or defend them as not contributing to weight gain or disease. Similarly, public debates often arise concerning whether products are safe to use. Tobacco and tires are recent examples. Clear language from the Court on this subject would greatly assist companies in deciding when to speak on these topics, and it would greatly help the media in covering them.

Or if the U. S. Supreme Court holds that the commercial speech doctrine does not apply to Nike's speech here because it was not offered in a traditional advertising format, would that mean that the doctrine could apply to a company's advertisements promoting its social or environmental practices? *Time* magazine recently observed that as public concern about environmental sustainability grows, "there is an increasing acceptance in executive suites that industrial reform can be good for the environment and good for profits."[26] Thus, companies like BP have begun to purchase space on billboards and the like to promote their good corporate citizenship. The ads say nothing at all about the companies' products, and they certainly do not propose any commercial transaction. Clear language from the Court, once again, would help companies understand when they may offer a positive spin on their social practices without setting themselves up for a consumer protection lawsuit.

If the Court considers these issues in this case, or in future ones, it should realize, at the very least, that it must limit the commercial speech doctrine to speech that promotes the tangible qualities of a product in a traditional advertising format. Although consumers' purchasing decisions may be influenced by a corporation's labor or environmental

practices, misleading statements regarding those practices—as Ronald Collins recently pointed out—do not involve the actual performance of products.[27] Even when companies attempt to raise or defend their corporate social image in traditional advertising arenas, they are not exhorting the public to buy their products in a way that triggers the need to punish corporations for any misleading messages that they convey. Finally, when the performance qualities of a product or service become an issue of public concern, its purveyor ought to be able to respond to media inquiries and issue press releases with the full protection of the First Amendment.

It is possible that the Court will even conclude that it needs to scrap the *Central Hudson* test in the advertising context altogether and give up the experiment of watering down the First Amendment protection afforded in this area. (Whether it would also need to do so in the product label context is another matter.) Advertising today is more and more an art form instead of a direct proposal to do business. This makes separating the tangible aspects of products from their less meaningful elements increasingly a doomed enterprise. Justices on the Court may join Justice Thomas in concluding that we would all be a lot better off if state laws would direct their undivided attention toward protecting consumers from defective products, not from misleading corporate image campaigns.

Conclusion

It is a promising sign that the U.S. Supreme Court viewed the *Nike* decision as sufficiently important to warrant immediate review. Now we must hope that the Court is willing to use the case to clarify the parameters of the commercial speech doctrine and to ensure, as consumers and the press become more attuned to corporate social responsibility issues, that the doctrine is not used as a weapon to silence one side of these public discussions. Two-way debates that include some misleading statements are far preferable to unanswered accusations or no information at all.

Endnotes

1. 425 U.S. 748, 762 (1976).
2. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
3. 45 P.3d 243 (Cal. 2002).
4. Bob Herbert, *Nike's Bad Neighborhood*, N.Y. TIMES, June 14, 1996, at A29.
5. *Nike*, 45 P.3d at 248.
6. *Id.*
7. *Id.* at 258 (additional emphasis).
8. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
9. *Nike*, 45 P.3d at 250 (quoting Leoni v. State Bar, 704 P.2d 183, 194 (Cal. 1985)).
10. *Id.* at 263 (Chin, J., dissenting).
11. *Id.*
12. United States v. United Foods, 533 U.S. 405, 409 (2001).
13. 447 U.S. 557, 561 (1980).
14. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66–67 (1983).
15. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978).
16. City of Cincinnati v. Discovery Network, 507 U.S. 410, 426 (1993).
17. Connick v. Myers, 461 U.S. 138, 145 (1983) (quotation omitted).
18. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (Blackwell ed. 1947)).
19. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
20. *In re* R.M.J., 455 U.S. 191, 200 (1982) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977)).
21. Edenfield v. Fane, 507 U.S. 761, 774–75 (1993).
22. Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring).
23. First Amended Complaint ¶ 19 & Exhibits F-L, Kasky v. Nike, Inc., Case No. 994446 (Cal. Super. Ct. July 2, 1998) (reproduced in petitioners' lodging to the U.S. Supreme Court).
24. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978).
25. Sherman v. United States, 356 U.S., 369, 379 (1958) (Frankfurter, J., concurring).
26. Eric Roston, *New War on Waste*, TIME, Aug. 26, 2002, at A28.
27. Ronald K.L. Collins, *Let Nike Talk*, LEGAL TIMES, Jan. 6, 2003, at 36–37.