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Connecticut Consumers Protected Against Deceptively Advertised Manufacturer's Rebates

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expression through preferred agents with mini-taxing authority would destroy the free expression of ideas. Such channeling would replace the marketplace of ideas with corporate utility ideas subsidized with consumer funds. Thus, the court affirmed the order of the New York Supreme Court, Appellate Division.

Concurring Opinion

In his concurring opinion, Judge Titone stated that the challenged practice represented governmental acquiescence in private economic decision making and did not rise to the level of state action. However, in accepting the "law of the case" that state action was involved, Judge Titone concluded that the charitable contribution recoupment policy violated the ratepayers' constitutional rights, but not those guaranteed by the first amendment.

Judge Titone first reviewed the majority's analysis of *Abood*. He noted that *Abood* stood for the proposition that if a state impinged on first amendment rights, it must have a compelling interest and narrowly draft the law to meet its identified interest. He stated that unlike the union dues policy in *Abood*, the PSC policy did not implicate or impair the ratepayers' association rights in any manner. The concurrence maintained that in *Abood* the issue was whether non-union members could be forced to pay union dues and thus be forced to associate with the union against their will. The concurrence explained that in *Abood* a non-union member was forced to associate with the union by virtue of her payments to the union and the union's reciprocal duty to represent her. In contrast, Judge Titone noted that the utilities' rates did not infringe on Cahill's and other ratepayers' rights of association. The ratepayers freely associated with the utilities and merely paid for services received; no compulsory association arose from the ratepayers' payments of utility bills. Therefore, Judge Titone refused to apply *Abood* to Cahill's claim.

PSC Policy Constituted Taxation Without Representation

For the concurrence, the dispositive issue was whether the Constitution prohibited the government from taxing indirectly through private business entities. The concurrence disagreed with the majority's objection to the government channeling expression through preferred agents, noting that the government did this whenever it allowed a tax deduction or credit for private charitable contributions. Therefore, the problem with the regulatory scheme was not that it delegated the spending of taxable funds to a private entity but rather that the scheme delegated the power to impose a tax. The concurrence explained that the levy in this case was impermissible. Tax levies for the welfare of the entire community were only permissible if implemented directly by the government because only the government was directly accountable to taxpayers through the ballot box. Thus, Judge Titone concluded that the delegation of general taxing authority through the PSC policy was unconstitutional. The policy constituted taxation without representation rather than a violation of the first amendment.

Jonathan E. Barrish

CONNECTICUT CONSUMERS PROTECTED AGAINST DECEPTIVELY ADVERTISED MANUFACTURER'S REBATES

The Connecticut Supreme Court upheld a regulation restricting net price advertising in *Caldor v. Heslin*, 215 Conn. 590, 577 A.2d 1009 (1990). Net price advertising occurs when a retailer advertises a product for a price that is the final price the consumer pays after deeming the rebate from the manufacturer. The Connecticut Su-

preme Court found such advertising inherently misleading to consumers and therefore, not constitutionally protected.

Background

The dispute arose from a regulation promulgated under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110b(a) (1987). CUTPA prohibits deceptive practices in the conduct of any trade or commerce. In § 42-110b(c) of CUTPA, the Connecticut legislature authorized the Connecticut Consumer Protection Agency ("CPA") to promulgate regulations addressing unfair or deceptive business practices. However, the CPA authority was limited by § 42-110b(c) of CUTPA; no CPA regulation could be inconsistent with the rules and decisions of federal authorities in their interpretation of the Federal Trade Commission Act.

The CPA promulgated a regulation which provides that net price advertising constitutes an unfair and deceptive practice unless the retailer provides the manufacturer's rebate price to the consumer at the time of purchase. Conn. Agencies Regs. § 42-110b-19 (1988). The regulation also provides that if the retailer merely advertises the availability of a manufacturer's rebate and does not state the net price of the item, the retailer would not be expected to pay the rebate price to the consumer at the time of purchase.

Caldor, Inc. ("Caldor"), a New York corporation which operated retail stores in Connecticut, sued the CPA. Caldor sought a permanent injunction against the enforcement of the net price advertising restriction.

The Trial Court's Decision

Caldor argued that the CPA regulation exceeded the agency's authority under CUTPA. In addition, Caldor asserted that the net price advertising restriction was arbitrary and capricious and thus violated substantive due process. Finally, Caldor contended that the

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Deceptive Rebates

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restriction violated its right to free speech under federal and state constitutions.

The trial court, in determining the validity of Caldor's three claims, examined the nature of net price advertising. The trial court found that retailers frequently use net price advertising to "grab the attention" of the consumer. Such advertising often consists of the net price in large, bold type, and the regular price and manufacturer's rebate information in small type. Net price advertising is factually untrue in that the consumer incurs additional costs such as postage costs in obtaining the rebate from the manufacturer. Furthermore, net price advertising might mislead the consumer into believing that the net price could be obtained from the retailer; such pricing information could therefore affect the consumer's decision to purchase the item. For these reasons, the trial court concluded that net price advertising is inherently misleading and deceptive as a matter of law.

Because the practice was deceptive, the trial court held that the CPA acted within statutory guidelines in promulgating the regulation. In addition, the trial court held that the state and federal constitutions did not protect net price advertising due to its misleading character. Caldor appealed. The Connecticut Supreme Court heard the appeal directly.

The Supreme Court of Connecticut Affirms

On appeal, Caldor claimed that the trial court erred in upholding the validity of the regulation on the basis that net price advertising was deceptive as a matter of law. Net price advertising would not be classified "deceptive" if the trial court had properly applied Federal Trade Commission ("FTC") standards. The Connecticut Supreme Court focused on the validity of the regulation, rather than the nature of Caldor's advertising in ad-

ressing Caldor's claims. The court emphasized that its review of the CPA regulation was very limited and that it would only decide whether the CPA acted unreasonably or arbitrarily.

The supreme court applied a three-part test to determine whether net price advertising was a deceptive practice and therefore subject to regulation by the CPA. The test required that 1) the practice must be likely to mislead a consumer, 2) the consumer had reasonably construed the message and 3) the misrepresentation or omission was material such that it would presumably affect the consumer's decision making. After investigating consumer complaints regarding manufacturers' rebate programs, the CPA concluded that net price advertising was inherently misleading. Likewise, the court determined that the practice was "deceptive" under the three-part test. Therefore, the court held that the CPA promulgated the regulation in accordance with the express language of § 42-110b of CUTPA.

The court noted that the regulation did not conflict with FTC rules and regulations or federal court interpretations of the Federal Trade Commission Act. The federal authorities had neither found net price advertising deceptive nor adopted any rules or regulations inconsistent with the Connecticut regulation; the federal authorities simply never addressed the question of net price advertising. The court stated that a legislative regulation review committee did approve the net price advertising regulation. However, the court held that the CPA properly used its consumer protection expertise and did not abuse its discretion with its approval of the net price advertising regulation.

The supreme court then considered Caldor's claim that a prohibition on net price advertising was a violation of the right of free speech under the constitutions of the United States and Connecticut. Net price advertising falls within the category of "commercial speech." The court applied the first prong of a four-prong test to decide

the validity of the CPA's restrictions on commercial speech. The first prong of the test requires that the commercial speech used not be misleading in order to qualify for constitutional protection. The Connecticut Supreme Court had already affirmed the trial court's finding that Caldor's net price advertising was misleading. As such, the regulation of net price advertising failed to meet the requirements of the first prong of the test. Thus, the supreme court affirmed the trial court's decision that the regulation did not violate Caldor's rights to free speech under the federal and state constitutions.

The Dissent

In his dissent, Justice Covello focused on the majority's conclusion that net price advertising was not constitutionally protected. Justice Covello claimed that this conclusion was based on a factually unsupported determination that net price advertising is inherently misleading. He noted that there was no evidence at trial of consumers having been misled by the advertising; the CPA had not received any complaints regarding the inability of consumers to receive a rebate in the store or to receive the net price at the time of purchase. Consumers merely complained about the actual rebate process. In addition, the FTC had not determined that net price advertising was unfair or deceptive. Justice Covello concluded that this type of commercial speech should be protected every bit as much as other kinds of speech. Therefore, the CPA's restrictions on such commercial speech directly violated the constitutional rights to free speech guaranteed by the first amendment.

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