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Health Care Industry's Comparative Advertising Campaign Not Entitled to Heightened Constitutional Protection

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Automobile Warranties

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the Consent Order did not preempt New York's Lemon Law.

Dissenting Opinion

The dissent noted that under the Lemon Law the consumer was required to participate in the manufacturer's arbitration procedure, if any existed. Thus, the Lemon Law conflicted with the Consent Order because the Lemon Law made mandatory the arbitration established as voluntary under the Order. Moreover, according to the dissent, the Better Business Bureau not only trained its arbitrators to reach a common sense decision, but also specifically directed them not to apply the substantive law of any particular jurisdiction. Because New York's Lemon Law required arbitrators to apply Lemon Law standards, it was in conflict with the FTC-GM Consent Order. The dissent concluded that this conflict required a holding that the Order preempted the Lemon Law.

Sean J. Hardy

**HEALTH CARE
INDUSTRY'S
COMPARATIVE
ADVERTISING
CAMPAIGN NOT
ENTITLED TO
HEIGHTENED
CONSTITUTIONAL
PROTECTION**

In *U.S. Healthcare v. Blue Cross-Blue Shield of Greater Philadelphia*, 898 F. 2d 914 (3d Cir. 1990), the United States Court of Appeals for the Third Circuit held that allegedly defamatory, scare-tactic, multi-media health care advertising was commercial speech and therefore was not entitled to heightened protection under the first amendment to the United States Constitution. Moreover, although both parties had invited controversy and had the means to respond to the other's advertising, neither was considered a "public figure" and there-

fore the advertising did not warrant heightened constitutional protection.

Background: A Comparative Advertising War

For many years, Blue Cross of Greater Philadelphia and Pennsylvania's Blue Shield ("Blue Cross-Blue Shield") dominated the health insurance industry in southeastern Pennsylvania; the company offered "traditional" medical insurance coverage that allowed the consumer to choose among hospitals and physicians. A competitor, U.S. Healthcare, offered as an alternative a health maintenance organization ("HMO"), both as an insurer and as a direct provider of medical services. An HMO offers more comprehensive services than traditional insurance, but a primary health care provider must determine when treatment is necessary and from whom it may be obtained. In just over ten years, U.S. Healthcare grew to 600,000 members; Blue Cross-Blue Shield membership dropped by over 1% each year. A majority of those leaving Blue Cross-Blue Shield opted for U.S. Healthcare.

Faced with this loss of enrollment, Blue Cross-Blue Shield engaged in an aggressive, \$2.175 million multi-media advertising campaign. In print, radio, television, and direct mail advertisements, Blue Cross-Blue Shield touted its Personal Choice program and attempted to make less attractive the HMO option. For example, several printed advertisements emphasized that a Personal Choice patient may see a specialist upon demand, but that an HMO physician has a disincentive to make such referrals because "it could take money directly out of his pocket."

Most of the Blue Cross-Blue Shield advertisements contrasted the features of Personal Choice and the HMO plan and emphasized that HMO patients had fewer choices with regard to physicians and hospitals. The majority of the advertisements were innocuous. One television spot, however, seemed to suggest that HMO membership was an invitation to disas-

ter. The advertisement depicted a grief-stricken woman stating, "The hospital my HMO sent me to just wasn't enough. It's my fault."

U.S. Healthcare responded quickly by instituting its own aggressive \$1.25 million multi-media advertisement campaign. The advertisements took aim at the Blue Cross-Blue Shield message that HMOs sacrificed quality care for greater profits and highlighted the fact that Personal Choice doctors had fewer admitting privileges than HMO doctors. Two of the printed advertisements contained the following headlines, emphasizing that fewer hospitals were available to Personal Choice subscribers: "When It Comes To Being Admitted To A Hospital, There's Something Personal Choice May Not Be Willing To Admit" and "If You Really Look Into 'Personal Choice,' You Might Have A Better Name For It." One of the television commercials played funeral music while showing a patient's anguished family members standing around a hospital bed. While a voice discussed Personal Choice's various shortcomings, a pair of hands pulled a sheet up over a Personal Choice brochure resting on the pillow of the hospital bed. U.S. Healthcare called the advertisement "Critical Condition."

Within a week after Blue Cross-Blue Shield initiated its advertising campaign, U.S. Healthcare filed in a Pennsylvania state court a lawsuit for commercial disparagement, defamation and tortious interference with contractual relations. At a later date, U.S. Healthcare re-filed its state claims in the United States District Court for the Eastern District of Pennsylvania. In the district court, the health care organization added a claim under section 43 (a) of the Lanham Act, 15 U.S.C. § 1125 (a) (1982), which creates a cause of action for any false or misleading representations of a product. Blue Cross-Blue Shield filed a counterclaim on essentially the same theories of liability stated in U.S. Healthcare's complaint.

After a fourteen day trial, the jury was deadlocked on all issues of liability and damages. The judge declared a mistrial and, before

excusing the jury, asked the jury to discuss the trial. Upon learning that the jury was close to unanimity on the counterclaims, the trial judge requested further deliberations. Eventually, the jury returned a verdict against Blue Cross-Blue Shield. Blue Cross-Blue Shield moved that the judge disregard the jury's verdict and to direct a judgment in its favor on U.S. Healthcare's claims because Blue Cross-Blue Shield's advertisements were protected by the first amendment to the United States Constitution.

The district court determined that the objects of the advertisements were "public figures" and the advertising debate between the parties focused on the issue of spiraling health care costs, a matter of great public interest. Consequently, the court agreed that heightened constitutional protection under the first amendment for commercial speech attached to the advertisements. Under the heightened evidentiary standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), for either party to prevail it would have to prove by clear and convincing evidence that the other side's statements were false and were made with reckless disregard for the truth. According to the court, neither U.S. Healthcare nor Blue Cross-Blue Shield had proven actual malice or falsity by this standard of proof. Therefore, the district court granted Blue Cross-Blue Shield's post-trial motion.

Both parties appealed. U.S. Healthcare appealed the district court's post-trial entry of judgment in favor of Blue Cross-Blue Shield; Blue Cross-Blue Shield appealed from the verdict in favor of U.S. Healthcare on its counterclaims. Blue Cross-Blue Shield filed a counterclaim on essentially the same theories of liability stated in U.S. Healthcare's complaint.

United States Court of Appeals: Which Standards Apply To State and Federal Claims?

Before addressing the effect of the first amendment on the burden of proving liability, the Court of Appeals determined whether the statements made in the various

advertisements were actionable. In addressing the substantive claims, the court analyzed each cause of action to determine whether there was a material issue of fact such that the district court erred in directing a judgment for Blue Cross-Blue Shield. The court concluded that several of the advertisements were actionable under both Pennsylvania and federal law.

The Lanham Act. With regard to the federal claims, the court noted that the Lanham Act, as recently amended, prohibits materially misleading statements about another's products or services. To be material, there must be either actual deception or at least a tendency to deceive a substantial number of people so as to influence their purchasing decisions. Finally, there must be a likelihood that the plaintiff will suffer harm by losing business or goodwill. The court stated that "there could be a question" under the Lanham Act as to whether Blue Cross-Blue Shield television commercials misrepresented how frequently it paid for routine check-ups.

Defamation and Disparagement. As to the defamation and disparagement claims, the court emphasized the distinctiveness of these two causes of action. Although similar, they have different objectives. A defamatory statement is one that tends to harm the reputation of another, resulting in a loss of esteem in the community or even outright ostracism. In contrast, commercial disparagement results when statements attack the quality of another's goods so as to make them less marketable. The court noted that it is sometimes difficult to determine which of the two causes of action applies in a given case, but that disparagement crosses the line to defamation when the statement goes beyond insulting the actual service or product and imputes to the business entity itself dishonesty or reprehensible conduct.

The court found that a cause of action for commercial disparagement might lie for the group of advertisements that compared the competing plans. On the other hand, because those advertisements did not impute to the com-

petitor dishonesty or reprehensible conduct, the defamation claims failed. The defamation claim did not fail, however, with regard to the Blue Cross-Blue Shield advertisements that suggested that HMO physicians profited from not referring patients to specialists. According to the court, this claim went far beyond comparing the relative merits of each plan. Also capable of a defamatory construction was the Blue Cross-Blue Shield television commercial that featured the grief-stricken woman who blamed herself for some tragedy because she had chosen the HMO, and the U.S. Healthcare spot that visually juxtaposed a death scene with a Blue Cross-Blue Shield brochure. The point of both commercial announcements was to insult the competition rather than to criticize its products and services.

Tortious Interference with Contract. The court next addressed the tortious interference with contract claims. An action for tortious interference with contractual relations may lie if the advertisements intentionally induce or cause a third person not to enter into or to perform a contract with the competition, thereby causing the competitor to suffer economic loss. The court held that the advertisements that compared the competing plans or merely criticized the competitor's plan could have had that intentional effect.

First Amendment: Lesser Degree of Protection for Commercial Speech

Having determined that U.S. Healthcare had actionable claims, the court next considered the effect of the first amendment on the standard of proof. The court noted that in evaluating first amendment interests, a balance must be struck between protecting individual reputations and safeguarding freedom of speech, particularly concerning matters of public interest. Given the "novel" facts in the case, the court determined that a somewhat different approach was required.

Defining "Commercial Speech." After tracing the development of American first amendment jurisprudence, the court determined, as

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Misleading Advertising

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a threshold issue, whether to characterize as commercial the speech in question. Commercial speech is less central to the first amendment than other forms of speech and therefore receives less constitutional protection. According to the court, there was "no question" that the advertisements were commercial. In applying the factors used to determine whether particular speech is commercial, the court first noted that the advertisements were part of an expensive marketing strategy to extol one competing product over another and were prompted by economic self-interest. Second, the court concluded that affording the parties' speech less constitutional protection would not "chill" freedom of speech. Given the highly competitive nature of the health care industry, an advertising restriction would not deter the companies from appropriately touting the relative merits of their products and services in the future. Moreover, both U.S. Healthcare and Blue Cross-Blue Shield were uniquely situated to verify the truthfulness of their own statements. Third, the information disseminated in the various advertisements added little to the "marketplace of ideas" so vital to a market economy.

Blue Cross-Blue Shield argued that even if the speech at issue was characterized as commercial, it should be afforded a heightened degree of protection because the subject of the advertisements—quality health care—was at the center of public debate. The court disagreed and held that advertisers should not be immunized from defamation actions merely by cloaking their objectionable speech in terms of public interest. Even though the advertisements concerned the quality and availability of health care, their primary aim was to sell a product. Because the statements were advertisements "pure and simple," the court concluded that a heightened evidentiary standard should not apply.

"Public" Versus "Private" Figure Protection. Next, the court con-

sidered the nature and weight of the state's interest in compensating the parties for injury to reputation. Blue Cross-Blue Shield argued that U.S. Healthcare was a "public figure" and therefore the state had a limited interest in protecting U.S. Healthcare's reputation. In determining whether the parties were "public" or "private" figures, two factors weighed heavily: the parties' access to the media and the manner in which the risk of defamation came about. With regard to the first factor, the companies had the ability to engage in extensive advertising and therefore lacked the vulnerability associated with private citizens. With regard to the second factor, because of their aggressive advertising, both companies had thrust themselves into a situation in which they invited controversy and reaction. Although both of these facts would support finding that the parties were "limited purpose public figures," the court concluded that the companies were not public figures. Because the parties were motivated by profit rather than a public figure's desire to resolve an issue of public debate, the speech did not warrant the heightened protection afforded comment on "public figures." Thus, the first amendment did not require a greater burden of proof than that required under the applicable state and federal laws.

As a final matter, the court held that the trial judge improperly had reconstituted the deadlocked jury after declaring a mistrial. The jurors, on the assumption that they would not be required to deliberate further, revealed why they were deadlocked. The court therefore vacated the jury's subsequent verdict and reinstated Blue Cross-Blue Shield's counterclaim.

Eileen B. Libby

BANK THAT RESTRICTED ITS CUSTOMERS' CASH MACHINE PRIVILEGES WITHOUT PRIOR NOTICE DID NOT VIOLATE THE ELECTRONIC FUND TRANSFERS ACT

In *Feinman v. Bank of Delaware*, 728 F. Supp. 1105 (D. Del. 1990), the United States District Court for the District of Delaware held that a bank did not violate the Electronic Fund Transfers Act, 15 U.S.C. §§ 1693a-1693r (1988) ("the Act"), when it temporarily restricted without notification customers' access to their account through automatic teller machines. The court also held that although the bank did violate the Act by failing to remove the restriction after the reasons for imposing it no longer existed, the customers could not recover damages because they failed to prove actual injury.

Background

Jeff and Consuela Feinman ("the Feinmans") maintained a Big Plus Account ("the account") at the Bank of Delaware ("the Bank"), which included a checking and savings account. The Feinmans could make withdrawals, deposits, and other transactions through automatic teller machines ("ATMs"), commonly known as cash machines, subject to certain terms and conditions of the account. The bank included these conditions in an initial statement the Feinmans received when they opened the account. The Feinmans' account also included overdraft protection, which permitted the bank to transfer funds from the Feinmans' savings account to their checking account to cover overdrafts. The Feinmans overdrew their checking account eight times in the fourteen months preceding the incident in question.

On Friday, February 19, 1988, the Feinmans cashed four checks and made two ATM withdrawals resulting in an overdraft of over