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by P. CAMERON DEVORE*

Since the Supreme Court decided the *Posadas*[1] case on July 1, 1986, it has been a time of turbulence for commercial speech — the first amendment doctrine protecting advertising. The hard question remains whether *Posadas* signals the demise of commercial speech as a separate first amendment category, or whether the case can be dismissed as an aberration whose exotic facts are distinguishable from almost any other imaginable type of advertising ban. Because commercial speech continues to hang in the balance, reevaluation of *Posadas*, one year later, is in order.

You will recall that *Posadas* upheld the constitutionality of a porous and strangely administered Puerto Rico statute prohibiting casino gambling advertising aimed at residents of Puerto Rico. Because almost every possible sort of gambling is legal in Puerto Rico, the case presented for the first time the ultimate regulatory question of whether — absent false or misleading content — advertising of an entirely legal product or service could be banned under the first amendment as applied by the *Central Hudson*[2] four-part test. Justice Rehnquist — long hostile to the commercial speech doctrine — rounded up a five-four majority with Justices Burger, Powell, O'Connor and White to uphold the statute. Justices Brennan and Stevens wrote sharp dissents, each in turn joined by Justices Marshall and Blackmun.

Aggressive state and federal regulators greeted *Posadas* as removing their first amendment shackles. This was dramatically illustrated in the second round of bitter debate last spring

* Partner, Davis Wright & Jones, Seattle, Washington. Remarks to Communications Law 1987 Practising Law Institute, New York City, Nov. 12, 1987. Footnotes have been added by the editors.

1. Posadas de Puerto Rico v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986).
2. Central Hudson Gas & Elec. v. Public Service Comm'n, 447 U.S. 557 (1980).

and summer over Representative Synar's H.R. 1272, the bill banning all forms of tobacco advertising. Sharply differing interpretations of *Posadas* have been a pivotal issue in the debate. To ban proponents, *Posadas* is the universal panacea, legitimizing any legislation aimed at reducing demand for a harmful product, even though sale of the product itself is completely legal. Opponents described *Posadas* as distinguishable on its facts, conceptually inconsistent with *Central Hudson* — whose four-part test would arguably be flunked cold by the Synar bill. The debate was at times acrimonious, and the interpretations of *Posadas* irreconcilable.

One year plus after *Posadas,* it continues to be obvious to me that the opponents have the better first amendment arguments. The case simply cannot be squared with *Central Hudson.*

If you cut *Posadas* free from its facts and construe it broadly as a rewriting of the four-part *Central Hudson* test, you really end up with no test at all. Let's quickly run through the four-part test as applied in *Posadas* to illustrate the point.

First, the Court quickly passed through the initial test: casino gambling is legal in Puerto Rico and its advertisement is not misleading — although Justice Rehnquist established a beachhead even at this point by observing that the casino ads were not misleading only "in the abstract."

Second, as for a substantial state interest, the Court picked up the assertion by the Puerto Rico trial judge that casino gambling by residents could harm their "health, safety and welfare" — a recognizable interest but one never expressed in 1948 when the law was enacted. In effect, the simple existence of the law was allowed to create a presumption of a legitimate and substantial legislative purpose. The internal inconsistencies in the law and with the otherwise pro-gambling laws of Puerto Rico, were not addressed. Given the inconsistencies and idiosyncrasies, Justice Brennan could discover no interest substantial enough to meet what all four dissenters saw as the state's first amendment burden. Justice Stevens simply observed that the law is "grotesquely flawed."

Third, as to whether the legislation directly advanced a governmental interest in reducing resident casino gambling — the Court again simply assumed this to be the case. There was absolutely no evidence before the Puerto Rico trial court of such direct advancement and none was required by the Supreme

Court. Once again the effect is to create a presumption of direct advancement from the fact that the legislature had seen fit to enact the statute and, amazingly, by the fact that advertisers had challenged it. A first amendment burden of proof requiring the state to show deterrence of crime or corruption was not even considered by the majority. The Court's logic here is Kafkaesque — you lose this argument because you have challenged the law; if the ban had not reduced casino gambling, you would not have sued!

Finally, as to the fourth and normally toughest *Central Hudson* test, the Court had no trouble finding the law no more extensive than necessary because of its limitation to advertising aimed at residents. As for the classic first amendment argument that counter-speech is better than suppression, Justice Rehnquist observed that was a perfectly permissible choice for the legislature to make. (So much for speech as the primary value!) Justice Brennan was scornful of the assumption that Puerto Rico had succeeded *sub silentio* in showing that any protected interest could not be advanced by less intrusive regulation. He delivered a brief but classic first amendment lecture about the state's heavy burden in justifying speech regulation to prove that more limited means are insufficient, leaving to the courts their proper constitutional role of deciding under the first amendment whether the state's burden has been sustained.

Given the Court's repeated citation of *Central Hudson* it is hard not to join the dissenters' incredulity at the word games of the opinion. The contrasting approaches are, of course, exemplified by Justice Rehnquist's aside that it would be a "strange constitutional doctrine" which would forbid a legislature to pass laws dampening demand for a product when it has the power to ban the product itself,[3] and by Justice Brennan's tart identification of that "strange doctrine" as the one "called the First Amendment."[4]

The *Posadas* majority's insensitivity to established free speech analysis is most strikingly shown by its two key assumptions, "if you can ban conduct, you can ban speech about it,"[5] and "if you challenge the law, you simply prove that the law is

3. 106 S. Ct. 2968, 2979.

4. *Id.* at 2984.

5. *Id.* at 2979-80.

'directly advancing' what it was designed to do."[6]

Justice Rehnquist finally got his heart's desire about commercial speech, but it is hard not to feel real concern about the shifts in position of the judges who joined — especially Justice Powell, the author of *Central Hudson,* and Justice White, the author of *Zauderer.*[7]

So is *Posadas* simply one of the most striking examples of the power of the Supreme Court — what the Lord giveth, the Lord can take away? For all of you here who spend large parts of your practice tending the doctrinal development of the first amendment, the case continues to be one of the major "downers" of the Burger/Rehnquist era.

Nineteen-eighty-seven did not bring us the next major test of the commercial speech doctrine — although as I will discuss in a moment, the *San Francisco Arts & Athletics* case, decided on June 25, 1987, shows how commercial speech precedents can spill over and be used uncritically to support regulation of protected non-commercial speech.

But first, let's briefly revisit the tobacco ban controversy. I will also touch on the case in which R. J. Reynolds is defending its right to publish political advertising about cigarette smoking issues in the face of an intense and even emotional attack by FTC staff and anti-smoking partisans. The case supplied one of the few recent bright spots in commercial speech — but only because an FTC administrative law judge recognized in 1986 the fact that the Reynolds' commentary was *not* commercial speech, and thus not susceptible to FTC scrutiny and regulation.

In Congress, hearings were held in July and August 1987 on the Synar bill. On behalf of the proponents, Representative Waxman, Chairman of the Subcommittee on Health of the Committee on Energy and Commerce, argued that *Posadas* made it "perfectly clear that the constitutionality of an ad ban is no longer in question."

Earlier in the year, a major war had been fought at the American Bar Association (ABA) mid-year meeting in New Orleans, with voice vote rejection of a proposal that the ABA support the tobacco ad ban. A galaxy of constitutional scholars

6. *Id.* at 2976.

7. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).

was ranged on both sides. The ABA vote deprived ban proponents of a major argument that America's lawyers collectively construed *Posadas* as legitimizing the ban. The American Newspaper Publishers Association (ANPA) and the ACLU, among others, testified in Congress in support of first amendment protection for tobacco ads. ANPA distinguished *Posadas,* describing the Puerto Rico legislation as a "narrow ban" which effectively permitted an immense amount of advertising about casino gambling, both in and outside Puerto Rico, so long as it was not aimed directly at the citizens. It pointed out that the Court would necessarily have less trouble with prohibition of gambling advertising — as opposed to tobacco advertising — because casino gambling is illegal in all but three states, while tobacco products are universally legally sold and the chance of Congress' outlawing their sale is remote. ANPA also stressed the "unique" Puerto Rico cultural situation, alluded to by the Court in its opinion, and concluded that *Central Hudson* indeed survives *Posadas.* The ACLU made the intriguing argument that the Puerto Rico statute had improperly slipped through the first amendment as a mere time, place or manner regulation.

The fight over tobacco advertising is likely not over — although it has subsided in the 100th Congress, due in no small part to the strong first amendment opposition to the bill.

Applying "classic" commercial speech analysis to Representative Synar's text, there is an obvious question as to whether — given the immense structure of laws subsidizing and favoring the tobacco industry — the governmental interest in banning advertising meets the second or "substantiality" test under *Central Hudson.* Given the broad possibility of counter-speech and other less intrusive regulations, it is also highly questionable under "classic" analysis whether the proposed bill is not broader than necessary. Also, as to whether "direct advancement" would occur, advertising industry spokesmen submitted evidence that bans on advertising in other countries have had no apparent effect on tobacco consumption, and that tobacco advertising does not convert non-smokers and is important almost entirely for brand switching.

Of course, a first amendment challenge to a tobacco advertising ban would confront the Supreme Court with a real test of the continuing reach of the commercial speech doctrine. Given the intense public debate, the conflicting evidence, and the like-

lihood that Congress would be subjected to a heavier burden of justification than was the Puerto Rico legislature in *Posadas*, I find it hard to believe that the tobacco ban would withstand first amendment scrutiny — unless the court overturned not just *Central Hudson,* but *Virginia Pharmacy,*[8] and the other key precedents. However disquieting from the perspective of first amendment consistency, I suspect the tobacco case would be merely one more example of the continuing rise and fall of cases on the commercial speech rollercoaster.

Meanwhile, what does the 1987 San Francisco Arts case[9] tell us about commercial speech and the general status of the first amendment in the Rehnquist court? The case seems to show how the attitudes of the Justices reflected in *Posadas* can blur the edges of first amendment analysis on both commercial speech and fully protected speech. The decision did not get much media coverage. Trademark law usually is a somewhat peripheral field for media lawyers. Congress granted trademark rights beyond normal Lanham Act trademark protection to the United States Olympic Committee (USOC), a private nonprofit corporation, strongly protecting the word "Olympic."[10] The Supreme Court held that this protection did not violate the first amendment — even though statutory protection goes beyond commercial uses to promotional and, arguably, political speech. The case was brought by San Francisco Arts & Athletics, a nonprofit group attempting to promote a "Gay Olympic Games" — a use which the USOC succeeded in having enjoined by the district court and affirmed by the Ninth Circuit.

Justice Powell wrote the opinion, for Justices Rehnquist, White, Stevens and Scalia. Justices Brennan and Marshall dissented on first amendment grounds, and also on equal protection grounds. Justices Blackmun and O'Connor concurred in the majority's first amendment analysis, but joined in the dissenters' equal protection analysis.

In another result-oriented opinion, the Court slip-slides around both commercial speech and political speech precedents. As for commercial speech, if the Olympic statute were

8. Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

9. San Francisco Arts and Athletics v. U.S. Olympic Comm., 107 S. Ct. 2971 (1987).

10. 36 U.S.C. § 380.

limited to regulating confusing commercial uses of the word, it would likely pass muster under *Central Hudson.* However, because the Court construes the Act *not* to require proof of confusion, it goes beyond the trademark rationale. The Court cites *Central Hudson* to say that a restriction on nonmisleading commercial speech may be justified, but then cites as the only justification Congress' "great interest" in encouraging the financial viability of the USOC, which it characterizes in one gulp as substantial, directly advanced, and the restriction no more extensive than necessary.[11]

As for non-commercial speech, the Court fuzzes the distinction, stating that the Act applies "primarily" to commercial speech — and thus, that the overbreadth doctrine applied by Justice Brennan in dissent to the Act's obvious non-commercial applications, does not apply. The Court says there is "no reason in the record to believe that the Act will be interpreted or applied to infringe *significantly* on non-commercial subjects."[12]

All in all, this is a slippery and troublesome analysis. The Court broadly defines commercial speech as "strictly business" speech — as opposed to speech specifically limited to proposing a commercial transaction. As we all worried before *Greenmoss*[13] was decided, "business" is not a constitutionally viable watershed between commercial speech and fully protected speech, and sweeps in far too much of the latter. As in *Posadas,* the Court simply repeats the *Central Hudson* litany without analysis, citing both *Posadas* and *Central Hudson.*

Justice Brennan has no problem in finding governmental action, and thus a violation of equal protection. Focusing on the apparent non-commercial speech applications of the statute, he applies classic first amendment overbreadth analysis to statutory prohibition of use of "Olympic" to "promote any theatrical exhibition, athletic performance, or competition."[14] He characterizes the Court's "justifications of these infringements of First Amendment rights" as "flimsy."[15] He skewers the Court's citation of *United States v. O'Brien*[16] to justify the regulation, and, applying *Central Hudson,* cannot see any governmental

11. 107 S. Ct. at 2981 n.15.
12. *Id.* at 2981 (emphasis added).
13. Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).
14. 107 S. Ct. at 2993 (Brennan, J., dissenting).
15. *Id.* at 2994 (Brennan, J., dissenting).
16. 391 U.S. 367 (1968).

purpose that would not be effectively protected by giving the USOC a "strictly commercial trademark" which would be clearly limited to preventing confusing commercial uses. In short, he sees the Court's analysis as flawed under political speech cases, and under *Central Hudson* because its "restrictions on First Amendment freedoms are greater than necessary to further a substantial state interest."[17]

I suppose we can try to make ourselves feel better by viewing *San Francisco Arts,* like *Posadas,* as another minor episode in the great scheme of first amendment analysis. However, the storm signals are deeply troubling. One clearly tenable — yet hopefully temporary — conclusion is that a majority of the Court has all but abandoned the attempt to provide reasoned guidance in application of commercial speech doctrine. *Central Hudson* — again hopefully momentarily — is reduced to a four-part word game to be played through before reaching the predetermined result. In any case, the contrast to the *Bigelow*[18]-through-*Zauderer* line of commercial speech cases is dramatic.

After that somewhat pessimistic overview lets look quickly at major commercial speech developments during the year, and particularly at important pending cases:

1. *What Is — and Isn't — Commercial Speech.* In *R.J. Reynolds Tobacco Co.*[19] a 1986 Federal Trade Commission (FTC), administrative judge decision which I referred to earlier, Reynolds successfully argued that its editorial ad, "Of Cigarettes & Science," an attack on the methodology of a government study linking cigarettes with heart disease, was fully protected political speech and *not* commercial speech. The distinction is more than academic. The FTC simply has no jurisdiction over political speech.

The whole Federal Trade Commission heard argument in March, and has not yet announced a decision. The administrative law judge's persuasive opinion was subjected to hot criticism by FTC staff and various anti-smoking groups. We did an amicus brief for ANPA, supporting full first amendment protection of the ad copy. Given the increasingly sharp first amendment distinctions between fully protected speech and commercial speech, defining — and holding — the borderline is

17. 107 S. Ct. at 2981.

18. Bigelow v. Virginia, 421 U.S. 809 (1975).

19. R.J. Reynolds Tobacco Co., 51 ANTITRUST & TRADE REG. REP. (BNA) 219 (Aug. 6, 1986).

critical. *San Francisco Arts* illustrates the problems occurring when the line is blurred.

2. *How Much Advertising Law Enforcement Can Be Imposed on the Media?* It has always been seductive to federal, state and local regulators to impose on the media the job of screening illegal ads. Newspaper classifieds have been the usual target. Starting with *Pittsburgh Press,*[20] a line of cases has upheld the imposition of penalties on the media for knowingly aiding and abetting, for example, discriminatory real estate or employment ads. The first amendment has not been a viable shield to the media in these situations. Now, at last, a federal district court in Florida has blown the whistle. At issue was a fairly typical licensed contractor regulatory scheme, requiring the media to print contractor registration numbers in contractor ads, or in the alternative to obtain a certificate from the contractor as to why a number is not needed. The case is *News & Sun-Sentinel Co. v. Board of County Commissioners.*[21]

The court distinguishes *Pittsburgh Press* as a case involving the newspaper's own sexually discriminatory help wanted advertising layout. The court here strikes down the ordinance under the first amendment, citing *Arkansas Writers Project v. Ragland,*[22] the 1987 discriminatory tax case. The court says that the press may not be singled out to bear special burdens, even where there is no evidence of an "improper [state] censorial motive."[23] The court holds that the financial and editorial burdens of complying with the ordinance are an impermissible threat "to the institutional viability of the press as a whole."[24]

This is a great citation for newspapers which are arm-wrestling with government regulators who assert press exposure to liability under similar statutes, and under other "aiding and abetting" regulatory schemes.

3. *Publisher Tort Liability.* Courts have been extremely reluctant to impose liability on the media for damages alleged to flow from false and misleading ad copy, unless the media specifically prepared the incorrect copy or vouched for the product, *a la* the Good Housekeeping "Seal of Approval." Dow

20. Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

21. 14 MEDIA L. RPTR. 1477 (BNA) (S.D. Fla. 1987).

22. 107 S. Ct. 1722 (1987).

23. 14 MEDIA L. RPTR. at 1482.

24. *Id.* at 1483.

Jones won a good decision in the Ohio Supreme Court last year in *Gutter v. Dow Jones*,[25] concerning incorrect securities information in the *Wall Street Journal*. The Journal won again in a Louisiana Federal District Court decision, *Pittman v. Dow Jones*.[26] Suffice it to say that the court concludes that lesser first amendment protection of commercial speech does not undercut the rule that "the First Amendment strongly counsels against . . . [this] kind of liability . . . . Newspapers are instruments of the free flow of information, commercial and otherwise, in our society."[27]

Contra, if you will pardon the expression, is *Norwood v. Soldier of Fortune Magazine*,[28] a 1987 decision of a Federal District Court in Arkansas denying a first amendment summary judgment to the magazine which had run ads from mercenaries, one of whom allegedly had been hired to kill a member of the plaintiff's family. The decision simply does not cite governing law and, in any event, I suspect that you might find *Soldier of Fortune* distinguishable from the *Wall Street Journal*.[29]

4. *The Attack on the Postal Lottery Laws.* Let me close by telling you the latest developments in the two-pronged congressional and first amendment attack on the postal lottery laws. For roughly 100 years, it has been a crime to distribute by mail any matter which might in the opinion of the postal authorities promote gambling or games of chance. For daily metropolitan newspapers, whose mail circulation may be less than one percent of their total daily circulation, the physical impossibility of replating the paper to exclude ads about legal gambling activities from the mail portion of the press run means that such ads are not run at all, even in home-delivered newspapers and those sold on the streets. The tip of the tail wags the dog, and the public is deprived of information about these perfectly legal activities. The key word is "legal." As opposed to the casino gambling at issue in *Posadas* — legal in only three states — other common forms of gambling have been legalized in virtually *all* states. Charitable bingo has been the most commonly legalized activity — and repeated attempts to advertise it have

25. 490 N.E. 2d 898, 22 Ohio St. 3d 286 (1986).

26. 662 F. Supp. 921 (E.D. La. 1987).

27. *Id.* at 924.

28. 651 F. Supp. 1397 (W.D. Ark. 1987).

29. Belkin, *Magazine is ordered to Pay $9.4 Million for Killer's Ad*, N.Y. Times, Mar. 4, 1988, at 9, col. 1.

brought newspapers all over the country into confrontation with the Postal Service. Last year, two cases challenging the law were commenced, and both are at the summary judgment stage.

The *Aimes*[30] case involves a gambling information magazine, which includes information on activities which are legal in other nations, but may not be considered so in this country. A decision on summary judgment has been pending for over a year. Perhaps a more compelling first amendment case is the Minnesota Newspapers' suit against the Postal Service.[31] Summary judgment was argued to the Federal District Court judge in Minneapolis on September 18, 1987. Counsel for the Association reports that the judge sharply questioned the U. S. Attorney's application of *Posadas* as modifying *Central Hudson.* The judge indicated that he felt that *Posadas* might be factually distinguishable. If *Central Hudson* is indeed applied, the newspapers have made an excellent case that the mail prohibition of locally legal gambling flunks all of the last three *Central Hudson* tests. *Minnesota Newspapers* and *Aimes,* which may or may not be decided consistently, could provide both the first post-*Posadas* indication of where we stand in judicial response to *Posadas,* and the next cases which give promise of eventually confronting the Supreme Court with an issue that may provide the next major commercial speech ruling.[32] In the meantime, two bills were filed in the House of Representatives which would accomplish the same result sought in the court cases. The summary judgment rulings will no doubt be cited in the legislative process as well.

In short, while there is still considerable indecision in the Renquist Court about the status of commercial speech, the doctrine is still "alive" in the lower courts. However, *Posadas* and *San Francisco Arts* indicate that there may well be troubled

30. Aimes Publications v. U.S. Postal Service, No. 86-1434 (D.D.C. filed May 23, 1986).

31. Minn. Newspaper Ass'n v. Postmaster General, No. 86-806 (D. Minn. 1986).

32. On Jan. 6, 1988, the Minnesota Federal District Court upheld the constitutionality of the postal lottery laws as applied to wrapper advertising. The Postal Service and the U.S. Department of Justice filed a direct appeal with the United States Supreme Court, objecting to the District Court's decision striking down the statutory prohibition as applied to editorial content. The Association has filed a cross-appeal on the advertising issue. *Minn. Newspaper Ass'n,* No. 86-806 (D. Minn. 1986) (order granting summary judgment).

times ahead — both for commercial speech and for the first amendment in the Supreme Court.