VERMONT LAW SCHOOL | CENTER FOR AGRICULTURE & FOOD SYSTEMS

LABELS UNWRAPPED ISSUE BRIEF
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HOW DOES THE FIRST AMENDMENT APPLY TO FOOD AND SUPPLEMENT LABELS?

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INTRODUCTION

The federal government has an interest in protecting consumers from false or misleading food and supplement labels. The government may enact laws that control what information is included on food labels, or prohibit certain statements outright. However, the First Amendment of the US Constitution limits the government's ability to legislate speech, including label statements. This issue brief explains how courts have interpreted the First Amendment in the context of food labeling laws.

For many consumers, food and supplement labels are the sole source of information about a product. To facilitate consumer knowledge and understanding, the federal government requires manufacturers and producers to disclose certain information on food labels to inform consumers about specific characteristics of the product, nutritional facts, and contact information.[1] Apart from these mandatory disclosures, producers can include additional voluntary statements related to the healthfulness of the food product, the presence or absence of certain ingredients, and production and growing methods, among other things, so long as those statements are not false or misleading and operate within the legal framework established for commercial free speech under the First Amendment.[2] While the First Amendment traditionally protects against government restrictions or compulsions of speech, the Supreme Court has determined that commercial speech, defined as speech that proposes a commercial transaction, is protected to a lesser extent.[3] Courts in the United States recognize speech related to food and dietary supplement product labels and advertising as forms of commercial speech.[4]

Two prominent Supreme Court cases address how and when the government can restrict or compel commercial speech: *Central Hudson Gas and Electric Corp. v. Public Service Commission (Central Hudson)*[5] and *Zauderer v. Office of Disciplinary Counsel (Zauderer)*.[6] Generally, courts turn to the *Central Hudson* test when the government attempts to **restrict** commercial speech.[7] With regard to labeling, this tends to come up when the government prohibits false and misleading claims on food or supplement labels.[8] Conversely, when the government is trying to **compel** information on a food or supplement label through a disclosure such as a disclaimer or a warning, courts typically review the required disclosure under the *Zauderer* test.[9] Government-compelled speech on food and supplement labels is common—examples include nutrition facts, ingredient lists, and safe handling instructions. This issue brief discusses how the First Amendment may prevent the federal government from restricting or compelling speech on food and dietary supplement labels.

RESTRICTING COMMERCIAL SPEECH: THE *CENTRAL HUDSON* TEST

Central Hudson lays out a four-part test for determining if, and to what extent, commercial speech is protected by the First Amendment.[10] It is important to establish whether the speech is protected because if it is, the First Amendment limits how the government may regulate the speech. In short, the four factors addressing commercial speech under *Central Hudson* are:

1. Whether the speech is protected at all
2. Whether the government has a substantial interest in controlling the speech
3. Whether the regulation advances the substantial government interest
4. Whether the government's regulation is necessary to serve that substantial interest

First, the court must determine whether the speech in question is protected commercial speech.[11] Protected commercial speech must "concern lawful activity and not be misleading."[12] If the speech is misleading or advocates illegal activity, it is not protected by the First Amendment and the government may restrict it.[13] For example, the Court decided that newspaper employment sections that separated listings by sex are not protected speech.[14] The Court upheld a law prohibiting newspapers from separating employment sections by sex because this would promote illegal activity, specifically, employment discrimination.[15] However, even if the commercial speech is honest and legal, it may still be regulated to some degree because commercial speech is less protected than noncommercial speech.[16] After establishing that the commercial speech is protected, the next step requires the court to determine to what extent the government can regulate the speech.

In the second part of the *Central Hudson* test, the government must show it has a substantial interest in controlling the speech.[17] A "substantial state interest" is an actual and pressing reason that justifies state action, as opposed to a presumed or hypothetical reason.[18] There is no specific list of substantial state interests, but the Court regularly holds that protecting consumers from fraud, deception, and coercion are substantial state interests, as well as promoting public health, safety, and welfare.[19] For example, the Court held that the government had a substantial interest in protecting public health by prohibiting brewers from marketing high alcohol percentages in beer advertisements.[20]

Third, the court decides whether the regulation directly advances the government's stated substantial interest.[21] To directly advance an interest, the law must provide direct and material support to the state's interest.[22] For example, in the *Pearson v. Shalala* case, the court held that FDA violated dietary supplement manufacturers' First Amendment commercial speech rights when the agency prohibited the manufacturers from making certain health claims on their supplements.[23] While the court determined that FDA had a substantial interest in protecting the public health, it did not uphold the agency's argument that prohibiting health claims that were unsubstantiated by a certain degree of scientific agreement provided a common sense means by which to protect public health and safety.[24] The court was unpersuaded because the prohibition was, at best, an indirect means to address potential threats to health, rather than a direct material way to advance public health.[25] While FDA has discretion to suppress misleading statements, especially those affecting public health, the court held that FDA "must still meet its burden of justifying a restriction on speech—here the FDA's conclusory assertion f[ell] far short."[26]

Finally, the scope of the regulation must be necessary to serve the government's interest.[27] This means that the government must ensure that the law does not "burden substantially more speech than necessary."[28] However, because commercial speech is less protected than other speech, the government need not use the *least* restrictive means.[29] Put another way, the government must show "a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable."[30] Returning to the *Pearson* case mentioned above, the court found that FDA's outright prohibition was not a reasonable means to achieve the government's interest in consumer protection, especially where a disclaimer included on the label would accomplish the stated goal.[31] The court reasoned that a total prohibition on health claims was unreasonably extensive because a disclosure (a less restrictive means) would adequately address FDA's concerns.[32]

In sum, the courts often rely on the *Central Hudson* test when companies challenge restrictions of commercial speech. To succeed in a challenge against a law or regulation, the challenger must first establish that the commercial speech is truthful and not misleading.[33] Then, the government has the burden of supporting the law. The government must show that it has a substantial interest in restricting the speech.[34] Next, the government must prove that the restriction actually and materially advances its stated interest.[35] Finally, the government must show that the scope of the regulation is reasonable in light of the government interest; it is not overly extensive, but not necessarily the least restrictive means.[36] If the government cannot satisfy any part of its burden, the law is unconstitutional under the First Amendment.

COMPELLING COMMERCIAL SPEECH: THE *ZAUDERER* TEST

If the government mandates a disclosure to combat misleading commercial speech, the disclosure does not violate the First Amendment where the "disclosure requirements are reasonably related to the government's interest in preventing deception of consumers."[37] For a mandatory disclosure to be permissible under the First Amendment, the *Zauderer* test requires it to be *reasonably related* to a government interest and to be purely *factual and uncontroversial* information.[38] Further, the government must prove that the disclosure is not unjustified or unduly burdensome to the speaker.[39]

In *Zauderer*, the Supreme Court failed to clearly define what constituted "purely factual" or "uncontroversial" information, leaving the meaning of these terms open to interpretation and litigation. Some have argued that "uncontroversial" refers to whether the information within the disclosure is undisputed, while others believe that "uncontroversial" refers to controversy around the required disclosure.[40] For example, in a 2018 Supreme Court case the Court appeared to take the latter position that "uncontroversial" refers to the subject matter of the disclosure, stating that the statement at issue was "anything but an uncontroversial topic" as it had to do with abortion rights.[41] The dissenting opinion in the case took the former view of the term. The dissent claimed that the *factual* information in the disclosure—that the state had medical resources available for pregnant women—was plainly true and there could be no controversy as to its truth.[42] However, the Court ultimately decided that *Zauderer* did not apply to the case at hand, leaving the meaning of "uncontroversial" unclear.[43] The Court noted that the *Zauderer* standard applies **only** where the required disclosure is "purely factual and uncontroversial information."[44] For this reason, courts may instead apply the *Central Hudson* test to mandatory disclosures where the *Zauderer* test is found inapplicable.

Because courts have also occasionally elected to rely on *Central Hudson* instead of *Zauderer* on cases regarding compelled speech, there is additional confusion about how to evaluate compelled disclosures. For example, the Court in *International Dairy Foods Ass'n v. Amestoy* relied on *Central Hudson* in invalidating a Vermont law requiring dairy manufacturers to disclose whether the synthetic hormone rBST had been used during production.[45] Although not from the Supreme Court, the case is still good law and binding on the Second Circuit. This lack of clarity may contribute to greater unpredictability in food labeling lawsuits.

FALSE OR MISLEADING STATEMENTS ON LABELS

As discussed above, label claims can be considered commercial speech. However, false or misleading claims are *not* protected by the First Amendment. FDA is bound by the First Amendment, and cannot exceed those bounds when regulating food labeling. At the same time, FDA has the statutory obligation to protect the public from harmful food and drugs.[46] FDA has the authority to regulate the content of most food labels through the Federal Food, Drug, and Cosmetic Act (FFDCA).[47] Under the FFDCA, it is illegal to "misbrand" food.[48] Misbranded food includes food with a false or misleading label.[49] If FDA finds that certain claims are misleading, this may mean the food is "misbranded" and in violation of the FFDCA. It is important that FDA establish that a claim is actually misleading before prohibiting it, otherwise FDA may be violating the producer's First Amendment rights. Additionally, as discussed in the *Pearson* case mentioned above, even where the speech may be misleading, FDA may have to determine whether a curative disclaimer or some other means might clarify the language before resorting to an outright prohibition.

There are several standards for evaluating whether a statement is misleading. The most common is the "reasonable consumer standard." Simply put, this standard means that if an ordinary consumer acting reasonably would be misled by a label, then the label is misleading as a matter of law.[50] Courts often forgo this standard to decide food labeling cases (leaving the question of whether something is misleading to the jury), but recently courts have begun applying the reasonable consumer standard more frequently to dismiss food labeling lawsuits.[51] In applying this standard, courts have been inconsistent when considering what the "reasonable" consumer looks like. Standards evaluating which consumers should be protected under the law range from the "least sophisticated consumer"[52] to the diligent and informed consumer who "knows the devil is in the details."[53]

Plant-based products have been a recent target for questioning the bounds of "misleading."[54] Plant-based products imitating meat or dairy have come under fire (primarily from meat and dairy corporations) for misleading claims on their labels by including terms such as "milk" or "burger" (e.g., "almond milk," "soy cheese").[55] Claiming consumer confusion, some states have also passed laws preventing plant-based producers from using terms like "burger," "sausage," and "meat."[56] However, courts have generally held against plaintiffs claiming these terms will lead customers to believe that they are eating meat or dairy, recognizing that a consumer ordering a veggie "burger" is unlikely to believe that what they have ordered will include meat.[57] Food labels are meant to provide information to consumers about what a product is, and when a plant-based product is meant to provide a substitute for a dairy alternative, the use of a word such as "milk," "cheese," or "burger" can be helpful to the consumer.[58]

Historically, First Amendment challenges to government restrictions on what a producer may or may not include on a label have been centered on health and nutrient content claims.[59] Many companies insist that the First Amendment allows them to make a variety of health claims regarding their products, and the courts have largely confirmed this assertion.[60] Provided that the information included on a food or supplement label is not false or misleading, food companies are permitted to state correlations between certain vitamins in foods and their predicted health effects, so long as companies also state that the claims have not been reviewed by the federal government.[61]

CONCLUSION

As new food and supplement options continue to change the landscape of the market and producers convey certain attributes of the products to differentiate them, there may be more First Amendment lawsuits between manufacturers and the government regarding product labels. Consumers should understand that the First Amendment may prevent the government from either requiring or prohibiting certain label claims even where there is the potential for the language to be confusing or misleading to some.

About the Center for Agriculture and Food Systems at Vermont Law School

Vermont Law School's Center for Agriculture and Food Systems (CAFS) uses law and policy to build a more sustainable and just food system. In partnership with local, regional, national, and international partners, CAFS addresses food system challenges related to food justice, food security, farmland access, animal welfare, worker protections, the environment, and public health, among others. CAFS works closely with its partners to provide legal services that respond to their needs and develop resources that empower the communities they serve. Through CAFS' Food and Agriculture Clinic and Research Assistant program, students work directly on projects alongside partners nationwide, engaging in innovative work that spans the food system.

For more information visit the Labels Unwrapped website at http://labelsunwrapped.org/

ENDNOTES

1 Dept. of Health and Human Serv., A Food Labeling Guide: Guidance for Industry 4 (Jan. 2013), https://www.fda.gov/media/81606/download.

2 *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425. U.S. 748, 770 (1976).(finding that while commercial speech is protected under the First Amendment, it may also be regulated when the government has a significant interest in doing so).

3 *Id.*

4 Ruben v. Coors Brewing Co., 514 U.S. 476, 481 (1995) (acknowledging that information on a beer label constituted commercial speech).

5 Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).

6 Zauderer v. Office of Disciplinary Counsel 471 U.S. 626 (1985).

7 *See e.g.* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002).

8 Victoria L. Killion, Cong. Res. Serv., The First Amendment: Categories of Speech 1, 1 (2019), https://fas.org/sgp/crs/misc/IF11072.pdf.

9 *Id.*

10 Central Hudson, 447 U.S. at 564.

11 *Id.*

12 *Id.*

13 *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 388 (1973).

14 *Id.*

15 *Id.*

16 *See* Virginia State Board of Pharmacy, 425. U.S. at 770.

17 Central Hudson, 447 U.S. at 565.

18 Edenfield v. Fane, 507 U.S. 761, 768-69 (1993).

19 *Id.* at 768; Rubin v. Coors Brewing Co., 514 U.S. 476, 484 (1995).

20 Rubin, 514 U.S. at 484 (holding that promoting the public health from increasing alcohol content was a substantial state interest, though ultimately finding the law unconstitutional on other grounds).

21 Central Hudson, 447 U.S. at 565.

22 *Id.*; Edenfield, 507 U.S. at 771.

23 Pearson v. Shalala, 164 F.3d. 650 (D.C. Cir. 1991).

24 *Id.* at 655-56.

25 *Id.* at 656.

26 *Id.* at 659.

27 Central Hudson, 447 U.S. at 565.

28 Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 478 (1989).

29 *Id.* at 479.

30 *Id.* at 480 (*quoting* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986), *overruled by* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)) (internal quotations omitted).

31 *Id.* at 658.

32 *Id.* at 659.

33 Central Hudson, 447 U.S. at 564.

34 *Id.*

35 *Id.* at 565.

36 *Id.*

37 Zauderer, 471 U.S. at 651.

38 *Id.*

39 Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2377 (2018) (citing Zauderer, 471 U.S., at 651).

40 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (suggesting that "uncontroversial" applies to whether the speaker disputes the factual claims in a mandatory disclosure) ("Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information, [. . .] outside that context it may not compel affirmance of a belief with which the speaker disagrees.").

41 Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018).

42 *Id.*

43 *Id.*

44 *Id.*

45 Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996).

46 21 U.S.C. § 343.

47 *Id.*

48 21 U.S.C. § 331(a).

49 21 U.S.C. § 343.

50 *See* R. Trent Taylor et al., *Food Labeling Litigation; Trends to Watch in 2019,* McGuire Woods (Jan. 3, 2019), https://www.mcguirewoods.com/client-resources/Alerts/2019/1/food-labeling-litigation-trends-2019.

51 *Id.*

52 *See* Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993)(holding that the New York consumer protection law was intended to protect "the ignorant, the unthinking and the credulous").

53 In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig., 275 F. Supp. 3d 910, 923 (N.D. Ill. 2017) (quoting Workman v. Plum Inc., 141 F. Supp. 3d 1032, 1035 (N.D. Cal. 2015)).

54 The Good Food Inst., Producers' First Amendment Right to Use Clear Labels on Food 1, 1 (2018), https://www.gfi.org/images/uploads/2018/05/FirstAmendmentFactsGFI.pdf.

55 *Id.*

56 *See* Lexi Pitz, *What's the Beef? Controversy Surrounding the Labeling of Plant-Based and Cell-Based Meat,* Minn. L. Rev. Blog (Feb. 23, 2020), https://minnesotalawreview.org/2020/02/23/whats-the-beef-controversy-surrounding-the-labeling-of-plant-based-and-cell-based-meat/?utm_source=rss&utm_medium=rss&utm_campaign=whats-the-beef-controversy-surrounding-the-labeling-of-plant-based-and-cell-based-meat.

57 *See* Ang v. Whitewave Foods Co., Civ. No. 13-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013) (holding that the term "soy milk" would not lead consumers to believe it had dairy in it); *id.* at *1-2 (clarifying that just because a standard of identity for milk exists does not preclude other companies from using the term "milk" for non-dairy beverages); Painter v. Blue Diamond Growers, Civ. No. 17-2235 (C.D. Cal. May 24, 2017) (dismissing a lawsuit alleging that almond milk marketing was misleading).

58 *See* Producers' First Amendment Right to Use Clear Labels on Food., supra note 54.

59 *See* Newsletter from Nicole E. Negowetti, Brookings Institute, Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority (Jun. 2016), https://www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf.

60 *See e.g.* Shalala, 164 F.3d. at 656.

61 21 U.S.C. § 343(r)(6); 21 C.F.R. § 101.93(f) (2019).