

Remarks on the Significance of Nike v. Kasky¹
Tamara R. Piety
University of Tulsa College of Law
AALS Annual Meeting – Jan. 6, 2004

Introduction

At the outset I would like to thank Tom McGarity of the University of Texas who first contacted me about this case and got me involved with him in drafting an amicus brief on behalf of the Sierra Club. I was very happy to contribute on a subject that I have written about and feel fairly strongly about. The Sierra Club's interest in the case sprang from its concern about the government's ability to regulate what is known as "greenwashing" – that is, holding one's product or service out, either explicitly or implicitly, as being produced through or in conjunction with environmentally sound practices or in some other way being environmentally "friendly."

Like the rest of the panel and many commentators, I was somewhat surprised by the Supreme Court's 11th hour decision to decline jurisdiction and throw the ball back to the California court. However, given the initial ramifications for the plaintiff, that the trial could continue, one might be forgiven for thinking that this was a victory for those interests supporting Kasky. However, quite apart from the rather disappointing settlement, there are indications that although Kasky may have won his battle, he those who support him may be on the verge of losing the war. I view that as a bad thing, not only for democracy, but also for consumers and ultimately for the efficient and effective functioning of the market. So I welcome this opportunity to talk about this case and to say why I find that so alarming.

¹ The following is an approximation of my remarks delivered at the 2004 AALS Annual Conference - TRP

Commercial Speech - Background

First let me start with the background. This case arose in the following context. The commercial speech doctrine has been under assault almost from its inception in (depending how you look at it Bigelow or Virginia Pharmacy or, if you're Judge Alex Kozinski or Prof. Stuart Banner, Valentine v. Chrestensen). This is understandable since by its terms the commercial speech doctrine turns traditional 1st amendment doctrine on its head and extends to the government the power to regulate the *truth* of the *protected* speech, precisely what it *cannot* regulate with respect to political speech. Moreover, since pursuant to the doctrine, in order to qualify as *protected* commercial speech (as opposed to *unprotected* commercial speech) that speech must first be truthful and not misleading, the circularity of this formulation has proven troublesome.

However, in the last decade or so the opposition to the doctrine has picked up steam. And there have been a number of commercial speech cases before the Court resulting, not surprisingly, in a number of amicus briefs filed critical of the commercial speech doctrine, with some going so far as to advocate its abolition altogether in favor of treating commercial advertising like political speech. Moreover, both Justices Thomas and Scalia have indicated, with varying degrees of specificity, their skepticism about the legitimacy of the commercial speech distinction, giving additional heart to the proponents of this position.

However, in framing the issue as one of whether to keep the doctrine as it is or to treat commercial speech just like political speech another option appears to have dropped

off the radar screen altogether – thus skewing the debate. That alternative is to go back to the regime under which the Court in Chrestensen thought it was operating, no 1st amendment protection *at all* for commercial speech. That is a regime in which it is taken for granted and unproblematic that the government can regulate commercial speech.

That is the context in which Kasky was presented to the Court. And indeed many of the *amici* made arguments to the Court that the doctrine ought to be abandoned altogether and commercial speech treated simply as “speech.” Putting aside that there is no “simply” about it, given the amount of speech that is not protected under the first amendment, the more conservative approach of other Nike *amici* was that the commercial speech doctrine was fine, it just didn’t cover Nike’s remarks since they were, by virtue of their content, the context in which they occurred and the medium in which they appeared, clearly speech on a matter of public concern that ought to be entitled to full first amendment protection. Those were the positions staked out on behalf of Nike. Against those positions were amici in support of Kasky that claimed the California Supreme Court’s decision fell squarely and appropriately within the parameters set out by the Supreme Court in its commercial speech cases and thus that there was no reason to interfere, while a few went further arguing for a more regulation of commercial speech than is currently permitted.

By accepting cert. the Court certainly encouraged the perception that this debate may have come to a boil so to speak and that it was ready to revisit the doctrine. And then it said, in effect, “Never mind.” So, what happened and, more importantly, why do I

think we (meaning the Sierra Club and others who supported Kasky's position) may be on the verge of losing the war in the battle about commercial speech?

The Decision and the Opinions

First, it is clear that we cannot take too seriously the Court's stated reason, lack of jurisdiction, to decide this case. There are simply too many instances where the Court has had no apparent difficulty justifying such an action if its members felt inclined to do so – Worldwide Volkswagen and other disputes over personal jurisdiction come to mind. So it seems fairly obvious that they didn't want to do so. Why not? Well it could be because they shied away at the last minute from the potential repercussions of doing away with the commercial speech doctrine or the problems in trying to navigate through the factual complexities of the case without doing so. And certainly, in many respects, this case did not represent an ideal one on the facts, perhaps from *either* side's perspective. So perhaps that is the answer. But whatever their motivation for declining this case, the inclinations represented by the concurring and dissenting opinions represent, I submit, that the Court is inclining in the direction of the proponents of *less* rather than more regulation. Here's why I say that.

We already know that Thomas and perhaps Scalia represent votes for doing away with the commercial speech distinction altogether in favor of treating commercial speech more like political speech. Added to the positions of those two here we heard from the following: Justice Stevens wrote a concurring opinion, that is, an opinion concurring in the decision to decline jurisdiction. And Justices Ginsberg and Souter joined him in this

opinion. On other occasions both Stevens and Ginsberg have indicated some impatience with the commercial speech doctrine. The Stevens concurrence fairly unequivocally reflected acceptance of the argument put forward by Nike and some *amici* that the speech at issue was a “blend” of protected and unprotected speech. While this finding is not necessarily fatal to Kasky’s claim since the California Supreme Court had said essentially the same thing, it rejects by implication what one could call the “strong Kasky” position that since all of Nike’s communications were in aid of selling its products it all fell under the rubric of “commercial speech.”

Second, Kennedy dissented from the decision to dismiss, that is, he would have been in favor of deciding the case, but he dissented without opinion and so it is hard to say why, although from his record I would hesitate to assume that he would have favored Kasky’s arguments. Third, Breyer wrote a dissenting opinion in which O’Connor joined. They too would have preferred to decide the case. And judging from the Breyer opinion, it would not have been in a manner that would have been hospitable to Kasky’s claim since the opinion adopts the “fairness” and “balance” arguments put forward by both Nike and various *amici*, mostly prominently the media *amici*.

Thus, even if one assumes that those in the concurrence would be willing to uphold the commercial speech doctrine in some fashion what I think we have here is a “tilt” in favor of the arguments that are *more* protective rather than *less* protective of commercial speech, whether they are willing to go all the way and do away with the commercial speech doctrine or not. And I think that the ramifications of this tilt should

be explored given that this decision has postponed the resolution of it so that what is at stake is clear.

Procedural Posture

In order to understand clearly what is at stake we have to understand the procedural posture of the case. Kasky sued Nike under California's Unfair Trade Practices and False Advertising laws claiming that its representations regarding its labor practices overseas were false and misleading. Nike had undertaken to make claims about its labor practices because it had been under fire, both in the media and at the grassroots level, for its labor practices that allegedly involved exposing workers to toxic fumes, excessive hours, "slave" wages, sexual harassment of workers and other unfair labor practices or conditions. Kasky claimed, in essence, that these representations, some made directly to potential consumers such as athletic directors at major universities, some to newspapers via letters to the editor, some through press releases or website postings, were nothing more than window dressing intended to influence buyers to have a positive feeling about the Nike brand and thus to continue (or resume) purchasing Nike products despite the fact that the company knew (or should have known) that none of what it said was true. Simply put, Kasky claimed Nike lied.

In response to this claim Nike demurred. Put in non-legal terms, in response to the claim it lied, Nike said, "So what?" One of the grounds for its demurrer was the claim that all its speech was protected by the first amendment. In other words, Nike was claiming that even if it *had* knowingly lied, and had done so with the intention of

misleading consumers as Kasky claimed, *there was nothing the government could do about it*. Note here that as Kasky didn't claim any *personal* damages but rather was suing as a private attorney general to vindicate a public interest he stood in the shoes of the government. The case might have had a rather different cast, and indeed so it has been argued today, had he been able to claim an injury. But the point is, given the posture in which he sued, if Kasky can't sue, then neither can the State of California. And, if Nike's argument were to prevail, neither could the federal government.

The Implications

Why do I think this is a problem? Well first we live in an environment saturated with advertising (although one hesitates to say "saturated" since every time one is sure that there can be no more, some other form emerges, or should I say, "pops up"). And most of that advertising is fairly immune from regulation in fact even if not in theory. This is because although the government may regulate advertising if it is "misleading" it has tended to do so only with respect to explicit, verbal claims, leaving untouched ads that don't make any explicit claim, even though the argument has been made that some ads that make no explicit claims may nevertheless be misleading (particularly with respect to drugs – alcohol, nicotine, etc.) as when an ad shows healthy young people smoking. So practically all "misleading" that occurs, as a result of non-verbal images is not regulated.

Moreover, there is so much of advertising, particularly when one includes those small print ads for weight loss products etc., that, combined with low levels of

enthusiasm for enforcement that date back to the Reagan era, as a practical matter, it seems that even a lot of what could be characterized as misleading explicit claims manages to get disseminated. But when consumers sue claiming they have been misled in fact, the puffing doctrine erects yet *another* obstacle to recovery, recovery that might provide an incentive for greater care with the statements made in advertising. My point is, the amount of regulation of commercial speech “on the ground” as it were is already pretty thin.

It may be that this does not strike you as a problem. Indeed, the Court itself in Virginia Pharmacy suggested that advertising was the *sine qua non* of a free market. And the rhetoric of some of the *amici* suggested that fundamental principles about fair play and justice, balance and the free play of the market supported Nike’s right to make these statements. However, before the rhetoric gets too overheated with respect to the “precious freedom of speech” we need to take a closer look at the positions staked out by, among others, such well-known “freedom fighters” as Exxon-Mobil and Microsoft Corp. We are not talking here about “the market place of ideas” here, but just *the market place*.

Fairness and Neutral Principles

Nike and many of the *amici* took the position that it was only “fair” for it to be able to “respond” to its critics. Considerations of “balance” in the public debate require immunity for Nike’s representations about its labor practices. But a lack of “balance” in the “debate” with respect to the public “information” already inheres in the distribution of resources. Nike already spends billions of dollars a year on “communicating” its

“message” to consumers. Nike’s opponents have access to nothing like the same sorts of resources to provide “counter speech.” It is a false sort of neutrality that pretends that a labor union is a “commercial enterprise” analogous to an entity like Nike or that Exxon-Mobil is like the NAACP. A rule prohibiting black people from marrying white people is not neutral simply because it also prohibits whites from marrying blacks.

But in addition to the money it already spend on promoting its “message,” Nike would like to be able to *lie* about its practices without any penalty and to claim that its freedom to do so is of constitutional stature. In other words, Nike would like to mobilize the protection of the government *in addition* to the advantages in market power it *already* enjoys. And for what purpose? To, according to Kasky (and remember, at this stage of the pleading we must take everything he says as true), inject *false* information into the marketplace!

Market Function

The reason the Supreme Court extended *limited* first amendment protection to commercial speech in the *first* place was because the Court saw the *value* of this speech as being the *information* to consumers that it represented. However, it also concluded that there was no value in false information being injected into the market. Quite the contrary. And this is part of the source of the Sierra Club’s concern. If anyone can claim their product is “green” but it is not possible to verify that the product is in fact “green,” then consumers will effectively be unable to make purchasing decisions on this basis, and will necessarily fall back on factors such as price and advertising or image. This would

mean that there would be no advantage for a company to attempt to position itself by its environmental practices since any manufacturer could conceivably “free ride” on such representations and gather market share on false claims. Without any way to discipline such false claims environmental practices drop out. That hardly seems to represent an “improvement” in market functioning.

Chilling effect

Nevertheless, Nike and many of its supporters suggested that a ruling upholding Kasky’s right to proceed with his claim would “chill” such “valuable information” from entering the public arena thus leading to imbalance in the public debate. And Nike even purported to offer support for this claim by showing that its executives were not making public statements, refusing requests to speak and the like. (Quite apart from the skepticism that such self-interested “evidence” engenders, one has to question whether the world would really be worse off without such input.) But I think we need not take this representation too seriously. If Nike felt the accusations about its labor practices hurt its sales, eventually I think it is safe to say it would resume attempts to burnish its image and to presumably recapture (or attempt to recapture) those sales. Moreover, if it wanted to continue doing business in Europe, it would have to produce some of the information that it declined to produce in the wake of this case since corporate responsibility statements are increasingly a requirement for corporations doing business in the European Union.

But even assuming for purposes of argument that Nike's "side" is not adequately represented by academics, commentators and politicians who contest the accusations leveled at Nike, why is it such an onerous burden to ask that Nike, who is in the best position to know or to verify what is going on in its business, be held to some level of accuracy in those statements? Indeed, with respect to matters regulated by the SEC it is *not* deemed an excessively onerous burden that their statements be true. Nor is this the case with statements to a court of law. These are *not* statements about whether or not globalization (whatever that is) is a good thing, but whether or not Nike workers receive minimum wage or above. In other words, these aren't opinions; they are (for the most part) facts that are subject to verification.² It does not seem unreasonable or oppressive to ask that it make some effort to ensure such public statements on such facts are true.

And indeed the Supreme Court in Virginia Pharmacy offered just this rationale for why regulation of commercial speech was unlikely to result in an undesirable "chilling effect." First it said the commercial enterprise has a compelling in getting the information out about its product such that regulation was unlikely to unduly chill it. And second, that because the firm was in the best position to know the facts it wasn't unfair to require that it use care in verifying those facts. It is difficult to see what has changed from that day to this that requires a different calculus.

Conclusion

If those forces arguing for the abolishment of the commercial speech doctrine have their way it seems it may well put in some jeopardy massive amounts of consumer

² Claims like whether or not Nike pays "a living wage" are more ambiguous.

protection law, securities regulation, truth-in-lending and other government interventions designed to serve as something of a counterweight to the phenomena of the intersection of the profit motive and the motive to misrepresent. Indeed, it is difficult to reconcile the impulses that generated Sarbanes-Oxley with those promoting “free commercial speech.” These maybe trends on a collision course. The regulation of for-profit entities seems essential to preserving *some* measure of *accuracy* in the market. It hardly seems that a market best operates in a world in which total skepticism about any representation by a manufacturer is the appropriate response.

In essence what Nike wants is to eliminate the consumer’s ability to discriminate amongst products on the basis of the labor or environmental practices under which they are produced while retaining the ability to shape those buying decisions along the lines of the psychological and emotional structures erected by traditional advertising and public relations. By its demurrer Nike claims the constitutional “right” to say whatever it wants, regardless of the truth or the market distorting impacts it may have. Given this position, for Nike to wrap itself in claims of freedom and opposition to censorship seems not only misplaced but positively offensive.

Nike would have us equate its claim with a bid for the instantiation of a precious freedom – free speech – and mobilizes our most lofty rhetoric in support of it. However, it pays to remember that England has no first amendment and arguably has a wider variety of available news sources and lower levels of self-censorship than exist in the United States. And the absence of a first amendment has not caused a slide into

despotism there. (And indeed the *presence* of one does not seem to have entirely prevented such slides *here* as we are witnessing with subpoenas and gag orders in the War on Terrorism). That is not to denigrate the first amendment or to suggest that its protection is trivial. To the contrary, I suggest that we trivialize that protection when we classify what Nike claims is its constitutional right to lie in order to sell sneakers as an *expression* of that freedom. Thank you.