Regulating the Advertising and Promotion of Tobacco Products after the 2009 FDA Law

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The Tobacco Control Legal Consortium

A national legal network supporting tobacco control policy change.
What We Do

• Policy development
• Legal research, analysis, and interpretation
• Litigation support
• Education and training
FCLAA

1st Amendment
1. CAMEL
Smooth & Mellow Turkish Blend

2. Smoking causes fatal lung cancer

3. Smoking Isn't Cool.

4. SMOKING CAUSES TOOTH DECAY
QUIT SMOKING TODAY
CALL 311 OR 1-866-NYQUITS
www.nysmokefree.com

5. Marlboro

www3.hants.gov.uk/underagesales/underagesales-tobaccoretailers.htm

www.trinketsandtrash.org
The two hurdles: FCLAA and the First Amendment
Existing FCLAA:

Prohibits any state or local:

• requirement or prohibition
• based on smoking and health
• with respect to the advertising or promotion of any *cigarettes*
FCLAA

The NEW! FCLAA provision:

State or local governments may impose:

• specific bans or restrictions
• on the “time, place, and manner, ”
• “but not content, ”
• of the advertising or promotion of any cigarettes
FCLAA

“Time”
FCLAA

“Place”
FCLAA

“Manner”

www.tobaccoinaustralia.org.au
LUXURY TAKES A NEW SHAPE.
YOU’RE DISCERNING IN EVERYTHING YOU DO. IT’S ALL PART OF THE GRACEFUL STYLE THAT YOU HAVE CREATED. AND THE SOPHISTICATED DETAILS OF DAVIDOFF SLIMS CIGARETTES ARE A PERFECT COMPLEMENT TO YOUR ELEGANT PROFILE.

FOR A CLOSER LOOK, VISIT WWW.DAVIDOFFCIGARETTESUSA.COM/WELCOME.

NEWPORT PLEASURE!

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
<table>
<thead>
<tr>
<th>FCLAA</th>
<th>Summary</th>
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<tr>
<td><strong>Ok</strong></td>
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<tr>
<td>• Regulating time, place or manner of cigarette ads</td>
<td>• Regulating the content of cigarette ads</td>
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<tr>
<td>• Regulating non-cigarette tobacco</td>
<td>• Cigarette label requirements</td>
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The second hurdle: the First Amendment
The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
1st Amendment Protection Levels

Political or religious speech

Commercial Speech

Threats or Obscenity
1st Amendment

Commercial Speech:

“Speech related to the economic interests of the speaker”
1st Amendment

Commercial Speech

www.trinketsandtrash.org

www.snus-news.blogspot.com
1. Smoking Isn’t Cool.

2. Smoking causes fatal lung cancer.

3. Smoking Isn’t Cool.

4. SMOKING CAUSES TOOTH DECAY. QUIT SMOKING TODAY. CALL 311 OR 1-866-NYQUITS. www.nysmokefree.com

5. Smokeless tobacco products in a convenient vending machine.
1. Restriction on Commercial Speech
1. Restriction on Commercial Speech

*Central Hudson* test

1. The speech isn’t false, deceptive, or concerning illegal activities,

2. Substantial government interest,

3. Law directly advances the governmental interest, AND

4. Reasonable fit between the goal and means
1. Restriction on Commercial Speech

Central Hudson test

Example: Lorillard case

1,000 feet
1. Restriction on Commercial Speech

Central Hudson test

Example: Lorillard case
1. Restriction on Commercial Speech

*Central Hudson test*

Example: *Lorillard* case

1. Is the speech false, deceptive, or concerning illegal activities?

**No:**

- Tobacco is legal for adults
- The advertising wasn’t false or deceptive
1. Restriction on Commercial Speech

Central Hudson test

Example: Lorillard case

2. Substantial government interest?

Yes:

Government’s interest in protecting children’s health
3. Does the law *directly advance* the governmental interest?

For outdoor ads: **YES**

Evidence that the law advanced the government’s goal of reducing underage use of tobacco.
3. Does the law directly advance the governmental interest?

For indoor ads: **NO**

- Not all children are under 5’ tall and
- Those who are can look up
1. Restriction on Commercial Speech

Central Hudson test

Example: Lorillard case

4. *Reasonable fit* between the goal and means?

For outdoor ads: **NO**

The law restricted too much speech intended for adults
4. *Reasonable fit* between the goal and the means?

For indoor ads: **NO**

The restriction included advertising aimed at adults as well as children.
1. Restriction on Commercial Speech

Drafting tips

• Document the problem and how the law would impact commercial speech.
• Clearly state the government’s goal.
• The law must clearly advance the government’s stated goal.
• Say why this approach must be taken.
• Be sure that the new law restricts the least amount of speech possible, while still achieving the law’s goal.
2. Compelled *Factual* Speech

*Smoking causes fatal lung cancer*
2. Compelled Factual Speech

Zauderer test

The required warning is:

1. Strictly factual,

2. Not controversial (undisputed), and

3. Reasonably related to a legitimate government interest.
Just the facts, ma’am.
2. Compelled Factual Speech

Drafting tips

• Include only indisputable facts.
• Facts must be backed up by research.
• Warning or disclosure must be intended to protect citizens’ health.
• Show that consumers likely to be deceived or otherwise harmed without the factual warning.
Smoking Isn’t Cool.
3. Compelled Opinion Speech

Central Hudson test or...
3. Compelled Opinion Speech

Strict scrutiny test

1. The required speech is justified by a *compelling* government interest, and

2. The requirement is the *least* restrictive means for achieving that interest.
3. Compelled Opinion Speech

Drafting Tips

• The goal and reason for the law must be explained in detail (cite studies if possible).

• Analyze how the law would impact speech.

• Say why this approach must be taken.

• Require the least amount of speech possible, while still achieving your goal.
SMOKING CAUSES TOOTH DECAY
QUIT SMOKING TODAY
CALL 311 OR 1-866-NYQUITS
www.nysmokefree.com
4. Government Speech

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.
The Surgeon General Says:

Smoking Isn’t Cool.
4. Government Speech

No test!!

But it must be VERY clear the government is the one giving the message.
4. Government Speech

SMOKING CAUSES TOOTH DECAY
QUIT SMOKING TODAY
CALL 311 OR 1-866-NYQUITS
www.nysmokefree.com
4. Government Speech

Drafting tips

- Warning must clearly be coming from the government.
- Say how the government made its conclusions about the health effects of using tobacco.
- It doesn’t matter if the law requires the manufacturer or retailer to pay for the ad.
5. Conduct—Compelled or Restricted
5. Conduct—Compelled or Restricted

Why was the law enacted?
5. Conduct—Compelled or Restricted

O’Brien test

1. Government has authority,

2. Substantial government interest,

3. Unrelated to suppressing free expression, and

4. The incidental restriction on speech is no broader than necessary.
5. Conduct—Compelled or Restricted

O’Brien Test

Example: Lorillard

1. Did the government have authority?

YES

2. Did the law further a substantial government interest?

YES: keeping tobacco away from minors
5. Conduct—Compelled or Restricted

O’Brien Test

Example: Lorillard

3. Was the restriction *unrelated* to the suppression of free expression?

**YES:**

- Goal was protecting children by preventing shoplifting
- Making the packages harder for customers to see was incidental
5. Conduct—Compelled or Restricted

O’Brien Test

Example: Lorillard

4. Was the restriction on speech broader than necessary?

No:

• Alternate methods to communicate with customers

• E.g., having empty packs available for customers to inspect.
5. Conduct—Compelled or Restricted

Drafting Tips

- Clearly state the need for the law.
- Purpose can’t be to limit communication.
- Meet goal without unnecessary impact on expression.
- Findings can’t suggest that the real purpose is to suppress speech.
The FCLAA and First Amendment hurdles can be overcome with careful drafting!
Does the law* compel or restrict activity?

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*Chart assumes the expression regulated is commercial and is not preempted by FCLAA.

**The Supreme Court in Lorillard v. Reilly didn’t expressly hold that self service tobacco displays constitute expressive conduct, but was willing to assume so.
Is what is compelled expression?

Expression
- Is the expression speech or conduct?
  - Speech
    - Is the speech from the government?
      - YES: No 1st Amendment Concern
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          - Zauderer test
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  - Expressive Conduct
    - Example: Requiring tobacco packages to be shelved so the tax stamp is visible
    - O’Brien test
  - Not Expression
    - Not Expression
      - Example: Excise tax

Not Expression
- Example: Excise tax

No 1st Amendment Concern
- Example: Ban on sale of menthol cigarettes
- Example: Ban on advertising and other tobacco marketing

Does the law compel or restrict activity?

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RESTRICT
- Is what is restricted expression?
  - Yes: 1st Amendment Concern
  - No: Example: Restricting advertising and other tobacco marketing

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Example: Excise tax

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Example: Requiring tobacco packages to be shelved so the tax stamp is visible

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Does the law* **compel** or **restrict** activity?

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COMPEL

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**Expressive Conduct**
Example: Ban on self service tobacco displays**

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The Supreme Court in *Lorillard v. Reilly* didn’t expressly hold that self service tobacco displays constitute expressive conduct, but was willing to assume so.
Perspective

- Great Information About The First Amendment
- How Do You Keep It All In Perspective?
  - Moving Parts
  - Tools at Your Disposal
  - Impact of Federal Law
  - Advantages of State Action
Legal Tools At Your Disposal

• Tools Available Before the FDA Law

• New Tools Available Post-FDA Law
Pre-FDA Law Tools

• Regulate through:
  — Taxation
  — Smokefree Laws
  — Sales to Minors
Pre-FDA Law Tools

• Regulate Through:
  — Sale, distribution or possession of tobacco entirely or in part
  — Locations/Selling Points
  — Age of Buyers

* Avoid the Federal Domain
Post-FDA Law Tools
Factors to Consider

• Existing and Anticipated Authorities
  — Laws (FCLAA; FDA Law; PACT Act)
  — Regulations
  — Judicial Opinions
Commonwealth Brands

• At Trial:
  – Win a Few
  – Lose a Few

• Being Appealed
Commonwealth Brands

Tobacco Industry Wins:

- Blanket ban on color/graphics
- Ban on referencing FDA approval
Commonwealth Brands

Government Wins on:

- Sponsorship of athletic, social, cultural events
- Placing tobacco ads on other merchandise
- New warning labels
Commonwealth Brands

Government Wins on:

- Modified Risk Products
- Outdoor Ads
- Free Samples
Wait Until The Law Is Settled?

NO!

— Goal Of The Tobacco Industry
— The Law Will Never Be Completely Settled
— Current Challenges
— New Lawsuits
Advantages of Local Action

• Speed
• Customization
• Direct Enforcement
• Less Influence from Tobacco Lobby
Conclusion

• Keep an Eye on Federal Laws, Rules, Lawsuits
• Continue to Pass Strong Laws
• Obtain Legal Input Early and Often
Q & A
Thank you!

Leslie Zellers  
Elisa Laird-Metke  

Website:  
www.phlpnet.org/tobacco-control  

Questions:  
www.phlpnet.org/tobaccoquestions

Maggie Mahoney  
David Schaibley  

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Questions:  
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