Commercial Speech and the First Amendment

- Commercial speech (advertising products, etc.) does enjoy certain free speech rights, although it is not protected to the same extent as political speech.
  - Initially, the Supreme Court had ruled that purely commercial speech enjoyed no First Amendment protection.
  - Through the 1960s and 1970s, the Court started recognizing First Amendment protection for commercial speech whose message (or whose message was being targeted) involved political issues as well.
  - In the mid 1970s, the Court finally ruled that commercial speech is protected by the First Amendment, although it can be (and is) heavily regulated.
Regulating Commercial Speech

• Unlike political speech, all forms of false commercial speech may be prohibited and punished.
  – There is no “actual malice” requirement or any equivalent for commercial speech.
• Four part test for whether commercial speech can be regulated:
  – 1) Is the expression a commercial expression?
  – 2) Does the government have an interest in regulating the expression?
  – Does the regulation directly advance the government’s regulation?
  – 4) Is the regulation narrowly drawn?
What is Protected Commercial Speech?

• Any communication designed to help sell a product or service is commercial
  – The fact that a political message is mixed in with the communication does not make it any less commercial.
  • And so such ads don’t get the protection of political speech.

• Only commercial speech promoting a lawful product or service is protected!
  – Communications that violate laws, like the Fair Housing Act or FCC rules, may lose their protection for this reason.

• False, deceptive or misleading advertising is not protected and may be prohibited and punished by the government.
  – Also, in the legal field, more types of advertising can be stopped, but not all forms of legal advertising can be stopped.
The Elements of Regulating Commercial Speech

• Legitimate Government Interest
  – This is easy to meet, as most regulations can be easily shown to be designed to help public safety, health, morals, aesthetics, etc.
  – It’s rare that a law would be struck down on this ground.

• Direct Advancement of the Interest
  – This may, for example, bar the prohibition of an entire industry and limit the ban to only companies that produce products that would impinge on the state interest.
  – The courts will often require the government to show how the regulation advances the interest.

• Narrowly Drawn
  – This is the toughest element to meet.
  – Still, the Court has ruled that the rule need not be the “least restrictive” manner possible in dealing with the government concern.
Unfair and Deceptive Advertising

• The Federal Trade Commission Act gives the FTC (Federal Trade Commission) the authority to regulate and ban unfair and deceptive advertising. Other agencies are often also involved, such as the:
  – Department of Justice;
  – Food and Drug Administration;
  – Environmental Protection Agency;
  – Consumer Product Safety Commission; and
  – State agencies such as the attorney general’s offices.

• Unfair and deceptive advertising can also be regulated under various state laws, including ordinary tort laws such as fraud.
Unfair Advertising

- Advertising can be banned as being “unfair” if it is likely to cause consumer injury such as:
  - Unjustified mid-contract fee increase (even if allowed under the contract);
  - A product which is likely to cause injury to consumers;
  - Failing to warn consumers about a danger in a product; or
  - Ads that infringe on the privacy of the consumer.
    - This is especially relevant when it comes to internet advertising.
    - The courts have upheld mandatory privacy notifications for websites.
    - Federal law protects some level of privacy from advertising and information collection over the internet, especially when it comes to gathering information on children.
Deceptive Advertising

• The FTC outlaws deceptive advertising, which means any ad that is likely to mislead a reasonable consumer:
  – “Likely to mislead” just means it’s capable of misleading or has a tendency to do so.
  – A reasonable consumer just means it’s likely to mislead a substantial number of people.
    • It also depends to whom the ad is targeted. If it’s targeted towards a more vulnerable group, it may be held to a higher standard.
• To be deceptive advertising, an ad must be “material” to the decision of the consumer.
• Any express falsehood in an ad is very likely to be “deceptive.”
Implied Falsehood

• These are also deceptive advertising and applies when an implication (based on the context, visual images, etc.) is false
• This rule includes:
  – Reasonable Basis Implication rule
    • Claims of objective information (scientific studies, research, etc.) must have a reasonable basis for the assertion to be allowed.
  – Proof Implication
    • An ad is deceptive if it created the implication that evidence supports the claim, when in fact, it does not.
  – Demonstration Implication
    • False demonstrations; i.e., demonstrations that are doctored so that they don’t really show what they appear to show, are deceptive.
Implied Falsehood (continued)

– No qualification Implication
  • This applies if the ad omits a necessary qualification on a claim.
– Ineffective Qualification Implication
  • The qualification isn’t presented so that people will read or understand it.
– Significance Implication
  • This is where the ad touts positives that are really insignificant.
– Expertise and Endorsement Implication
  • The ad must not imply that someone endorses the product when s/he does not.

• Exception: mere “puffing,” when it’s obvious that’s all a statement is, is allowed.
• State regulation of deceptive advertising exists in these areas as well as federal regulation under the FTC.
Federal Remedies for Deceptive Advertising

• The FTC and other federal and state agencies have a variety of methods to regulate, stop and punish wrongful advertising.
• These Include:
  – Prospective remedies
    • These are devices that the FTC uses to prevent the wrongful advertising practice in the first place.
  – Stopping the Wrongful advertising
    • These are devices by which the FTC can stop a company engaging in such wrongful conduct.
  – Punishing or Remedying Damage from illegal advertising
Prospective Remedies

• Staff Opinion Letters
  – These can be written by FTC staff to companies who inquire as to a particular advertising question of issue.

• Advisory Opinion
  – Similar to staff opinion letter, but more formal.

• Industry Guides
  – These are publications and guidelines published regularly by the commission regarding a host of advertising issues.

• Rules
  – The FTC has the power (under Congressional mandate) to actually write enforceable agency rules. These have the force of federal law.
Stopping Wrongful Advertising Conduct

- **Consent Decrees**
  - The FTC and the “offender” may agree to a compromise or that the offender will stop the offending conduct.

- **Cease and Desist Orders**
  - The FTC will send such a letter to try to stop the conduct.

- **Injunctions**
  - The FTC can seek an injunction, preventing the continuing of the offending ad.

- It can also require that the offender put out certain language to prevent past misleading ads. This can be:
  - Affirmative disclosure; and/or
  - Corrective advertising.
Other Remedies for Deceptive Advertising

• Many remedies can be brought, not only by the FTC, but also by competitors that are hurt by the false advertising.
• The federal Lanham Act allows competitors to sue for false advertising within the same industry even if it doesn’t affect the plaintiff’s product directly. Remedies can include:
  – Injunction; and/or
  – Monetary awards.
• Racketeering
  – RICO and state racketeering rules provide federal remedies for patterns of illegal conduct, which can include breach of advertising rules. Because of the generous remedies available under RICO, it is sometimes used in this context.