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Mandatory Country of Origin Labeling: Unconstitutional and Short-Sighted

I. Introduction

a. What is mCOOL?

Mandatory Country of Origin Labeling (mCOOL) requires "covered" retail meat products to bear label indicating the country of origin for the meat product.

This is a significant departure from the standard country of origin labeling regime for most consumer products. Until 2009, meat and meat products were, subject to the general rule which governs country of origin labeling for foods and non-food products, which is that the point at which a product most recently underwent a substantial transformation is its "country of origin." For cattle and swine, the point of slaughter has always been regarded as a substantial transformation from "animal" to "meat," and hence the product's point of origin. *See* 19 U.S.C. § 1304; 19 C.F.R. §§ 134.1, 134.11.

b. Covered Products

mCOOL labeling requirements apply to: (1) **muscle cuts of beef, lamb, chicken, goat, and pork**; (2) **ground beef, ground lamb, ground chicken, ground goat, ground pork**; (3) perishable agricultural commodities (fresh and frozen fruits and vegetables); (4) peanuts; (5) macadamia nuts; (6) pecans; and (7) ginseng

i. What is not covered?

mCOOL provides two broad exceptions from its labeling requirements. This may ultimately prove troublesome under the First Amendment analysis (discussed below). Food service establishments (restaurants, cafeterias) are not required to comply with mCOOL labeling requirements. 7 C.F.R. § 65.300(b). Also, covered commodities that are ingredients in processed food (sandwich meats, hot dogs, bacon, jerky, prepared foods) are excluded. 7 C.F.R. § 65.300(c).

c. Categories

(A). United States Country of Origin – Product derived form an animal that was exclusively born, raised, and slaughtered in the United States

(B). Multiple Countries of Origin – Product derived from an animal that was not exclusively born, raised, *and* slaughtered in the United States, and was not imported for immediate slaughter. For Category B product, AMS *may* designate the country of origin as all of the countries in which the animal was born, raised, and slaughtered.

(C). **Imported for Immediate Slaughter** – Product derived from animal that was imported to the United States for slaughter (within 2 weeks). Origin is country where born & raised, and United States.
(D). **Foreign Country of Origin** – Animals not born, raised, and slaughtered in the United States.

d. What is in dispute?

A WTO arbitrator ordered the United States to re-write its mCOOL rule to comply with US WTO treaty obligations, primarily the WTO Agreement on Technical Barriers to Trade. AMS responded by finalizing a rule that requires packaged muscle cuts and ground meat to bear a label indicating where the source animal was born, raised, and slaughtered. One of the primary effects of the rule is that it bans the practice of commingling meat by country of origin.

The new rule has drawn substantial criticism. Packers, especially those that operate near our borders, are being forced to segregate product by its country of origin. This entails segregating livestock in holding pens ante-mortem, segregated production runs by mCOOL categorizations, segregated packaging, and segregated storage. Retailers will also have to develop separate Stock Keeping Unit labels (SKUs) for each mCOOL categorization. Given these complications, many retailers will demand that packers provide them with one consistent mCOOL SKU. In turn, this will incentivize packers to discriminate against livestock from Canada and Mexico.

The mCOOL Rule is being fought on three fronts: the federal court system, the WTO, and Congress.

American Meat Institute v. USDA, No. 13-5281 (D.C. Cir.) – On July 8, 2013, a coalition of associations representing packers and processors, livestock producers (US, Canada, Mexico), and feedlots associations filed a complaint in the U.S. District Court for the District of Columbia seeking the court to set aside the 2013 mCOOL Rule and the statutory language underlying the rule. On July 25, 2013, the group sought a preliminary injunction to enjoin the 2013 Rule. This motion was denied on September 11, 2013. The decision was appealed to the D.C. Circuit Court of Appeals. Party briefing on the appeal will be complete by November 1, 2013. Oral arguments will be heard in January 2014.

Several groups that support mCOOL have intervened in the matter or are participating as *amicus curiae*, these include: U.S. Cattlemen's Association, National Farmer's Union, American Sheep Industry Association, Consumer Federation of America, Food & Water Watch, Inc., Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA), South Dakota Stockgrowers Association, Western Organization of Resource Councils, Humane Society of the United States, Organization for Competitive Markets, United Farm Workers of America, American Grassfed Association, Fox Hollow Farm, Fulton Farms, and Marshy Meadows Farm.

World Trade Organization – Canada requested the establishment of a WTO Dispute Settlement Board compliance panel. The Dispute Settlement Board has referred Canada and Mexico's complaints regarding the 2013 Rule to the original panel that handled their complaints against

the 2009 Rule. Brazil, China, the E.U., India, Japan, Korea, New Zealand, and Guatemala will also be participating in the panel as third parties.

2013/14/whenever Farm Bill – mCOOL's proponents and opponents are vigorously lobbying the Farm Bill conferees over whether mCOOL language should be stripped from the U.S. Code.

II. Why do we have COOL?

a. Background

Under typical country-of-origin labeling rules, a product's country of origin is typically the country wherein the product underwent its most recent "substantial transformation." If livestock could speak, they would assure us that slaughter is a substantial transformation, at least as far as they are concerned. As such, under the typical labeling regime for products sold in the United States, meat was labeled as having the country of origin of the country where it underwent final processing prior to packaging.

The U.S. meat industry is dynamic and dependent on global trade. In particular, the U.S., Canadian, and Mexican livestock industries are interdependent. (See Table 1). Under the pre-mCOOL labeling regime, meat processed in the United States could bear a "Product of the U.S" label even if the meat contained in the packaging was born or raised outside of the United States. Some pockets of the livestock industry, many of whom are members of the organizations that are intervening on behalf of UDA in this case, felt that labeling of meat as "Product of the U.S." when the meat could actually be from livestock born or raised in Canada or Mexico diluted the U.S. "brand."

Table 1: Meat & Livestock Trade (September 2012 to August 2013), USDA ERS

IMPORTS			**EXPORTS**		
Beef & veal			**Beef & veal**		
(1000 lbs)	Canada	472,231	(1000 lbs)	Canada	504,128
	Mexico	260,414		Mexico	336,111
	Rest of world	1,440,474		Rest of world	1,666,509
	Total	2,173,119		Total	2,506,748
Live Cattle			**Live Cattle**		
(head)	Canada	977,471	(head)	Canada	55,121
	Mexico	1,010,402		Mexico	-----
	Rest of world	-----		Rest of world	128,654
	Total	1,987,873		Total	183,775
Pork			**Pork**		
(1000 lbs)	Canada	666,301	(1000 lbs)	Canada	597,201
	Mexico	15,029		Mexico	1,179,124
	Rest of world	153,444		Rest of world	3,298,039
	Total	834,774		Total	5,074,364
Hogs			**Hogs**		
(head)	Canada	5,303,643	(head)	Canada	-----
	Mexico	-----		Mexico	19,053
	Rest of world	-----		Rest of world	21,627
	Total	-----		Total	40,680

These groups lobbied Congress to include mandatory labels indicating the country of origin for the meat products. Their argument was that the standard labeling regime would not allow consumers to distinguish between meat derived from U.S. livestock versus meat from imported livestock that was slaughtered and processed in the U.S.

This argument overlooked the lack of market demand for across the board labeling. Prior to the implementation of mCOOL, there were no prohibitions against accurate voluntary labels. Packers had the option to source-verify their meat products and label the products indicating where (country, state, county, township, farm) the animal that the meat is derived from was born, raised, slaughtered, and processed. There were such source-verified branded programs in place prior to mCOOL, but their failure to make major in-roads with consumers reflected the general lack in consumer demand for such information.

b. Relevant Legislation

Nonetheless, Congress included mandatory country of origin labeling in the 2002 Farm Bill and charged AMS with promulgating new regulations to implement the law. In 2003, AMS released proposed regulations that would have required labels to affirmatively identify where the source animal was born, raised, and slaughtered. 68 Fed. Reg. 61,944, 61,983 (Oct. 20, 2003). These regulations were not finalized because Congress suspended implementation of the mCOOL Rule in a 2004 omnibus appropriations act.

i. Farm Security and Rural Investment Act of 2002 (2002 Farm Bill)

1. Amended Agricultural Marketing Act of 1946 (AMA) to require retailers of covered meat products to inform consumers of the product's "country of origin" – Pub. L. No. 1070171 § 282, 116 Stat. 134, 533 (2002).
    a. Purpose was to limit "United States" country of origin designations to meat from animals that were exclusively born, raised, and slaughtered in the United States.
    b. Congress allowed AMS to establish COOL categories

ii. Consolidated Appropriations Act, 2004

1. Pulled funding from COOL implementation for most covered meat products – Pub. L. 108-199 § 749, 118 Stat. 3, 37 (2004).
    a. In response to AMS proposal that resembles 2013 COOL Rule

Without funding for implementation, mCOOL remained in a state of purgatory until the 2008 Farm Bill. mCOOL was resuscitated with new language that defined the four categories of country-of-origin and language that appropriated the necessary funds for AMS to promulgate COOL regulations.

iii. Food, Conservation, and Energy Act of 2008 (2008 Farm Bill)

1. Congress defined the term "country of origin" for each conceivable country of origin combination (7 USC § 1638a(2)).
2. Congress authorized USDA audit system and $1000/violation fine

3. Congress authorized appropriations for promulgation of rules Pub. L. No. 110-234 § 11002, 122 Stat. 923, 1351 (2008).

c. Relevant Regulations

i. 2009 Rule – 74 Fed. Reg. 2658 (Jan. 15, 2009).

AMS promulgated the 2009 Rule, which we operate under until November 23, 2013, in response to the directives of the 2008 Farm Bill. The rule required labels of "Product of the U.S." for Category A meat. Category B and C meat was labeled "Product of the U.S. and _____." Meat from packers or production runs that commingled product was labeled as "Product of U.S. and _____" to prevent disruptions in production lines.

1. Notable Components

- **a.** Allowed for "commingling," did not require packers to sort by origin, lessened discriminatory effect on foreign livestock
- **b.** Label must read:
  - **i.** "Product of U.S." if born, raised, and slaughtered in the U.S.
  - **ii.** "Product of U.S./Canada (or Mexico)" if commingled
  - **iii.** "Product of Canada (or Mexico)" if final processing outside of U.S.
  - **iv.** Ground meat packaging must bear a label indicating the country (or countries) where the source animals either originated or countries where it is reasonably possible that the source animals originated from

Canada and Mexico filed a complaint with the WTO's Dispute Settlement Body alleging that the 2009 mCOOL Rule violated the WTO Agreement on Technical Barriers to Trade by discriminating against foreign livestock. A WTO panel held, and the WTO Appellate Body affirmed, that mCOOL impermissibly discriminated against imported livestock by creating an incentive to favor domestic livestock. A WTO arbitrator order the United States to bring the mCOOL regulations into WTO compliance by May 23, 2013.

ii. 2013 Rule – 78 Fed. Reg. 31,367 (May 24, 2013)

Per WTO's order, USDA promulgated a new rule. USDA followed the WTO's deadline, but did not follow the instruction to label such that it did not discriminate against foreign livestock. It assigns labeling by the four (A – D) categories and proscribes commingled packages. The ban on commingling adds substantial costs to packers that depend on foreign livestock to make up for seasonal supply variances. The compliance costs are burdensome to the point that market forces will discriminate against foreign livestock.[1]

1. Notable Components

[1] *See* Meatingplace, "Tyson no longer accepting Canadian cattle shipped to U.S. plants," October 24, 2013. *Available at* www.meatingplace.com.

- **a.** Banned "commingling" – mCOOL rule effectively requires separate production runs based on labeling category
- **b.** Each category labeled separately
- **c.** Label must read:
  - **i.** Category A – Born, Raised, and Slaughtered in the United States
  - **ii.** Category B – Born in X, Raised and Slaughtered in the United States; or Born in X, Raised in Y, Slaughtered in the United States
  - **iii.** Category C – Born and Riased in X, Slaughtered in the United States
  - **iv.** Category D – Product of X.
- **d.** Ground meat packaging must bear a label indicating the country (or countries) where the source animals either originated or countries where it is reasonably possible that the source animals originated from.
- **e.** "A small tail wagging a very big dog" – compliance requires fundamental changes to meat processing value chain
  - **i.** Segregated production runs
  - **ii.** Segregated packaging, segregated storage, smaller loads
  - **iii.** Requires retailers to accommodate multiple SKUs where one previously sufficed
  - **iv.** Disincentives use of foreign livestock

III. mCOOL and the First Amendment

One of the primary disputes in the mCOOL litigation is whether:
(1) mandatory labeling of country-of-origin labels is compelled commercial speech that violates the First Amendment OR
(2) mCOOL is permissible as a disclosure that is reasonably related to the government's interest in preventing consumer deception.

The jurisprudence in this area stems from two cases: *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 US 626 (1985).

Central Hudson stands for the proposition that commercial speech is protected under the First Amendment, but to a lesser extent than other forms of protected speech, such as individual political speech and expression. The *Central Hudson* decision provides four-part test to determine whether a government's restriction or compulsion of commercial speech is allowed under the First Amendment. The *Central Hudson* test asks:

1. Is the commercial speech misleading or related to unlawful activity?
2. Does the government have a "substantial interest" in restricting/compelling the commercial speech?

a. The government must bears the burden of proving a "substantial interest"
b. Courts examine with "substantial interest" with an intermediate level of scrutiny

3. Does the restriction/compulsion directly advance the substantial government interest?
4. Could the government's substantial interest be achieved by a more limited restriction on commercial speech? Is the restriction/compulsion overbroad?

In contrast, *Zauderer* stands for the proposition that the First Amendment allows governments to require purely factual and non-controversial disclosures of information that are "reasonably related" to the government's interest in preventing consumer deception.

There are several cases in the *Central Hudson*/*Zauderer* sphere that illustrate the boundaries of the First Amendment as it relates to commercial speech. Brief summaries and selected headnotes of *Central Hudson*, *Zauderer*, and the related cases are included below:

***Central Hudson Gas v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980)**

Electrical utility brought suit in New York State court to challenge the constitutionality of a regulation of the New York Public Service Commission which completely banned promotional advertising by the utility. The regulation was upheld by the trial court and at the intermediate appellate level, 63 A.D.2d 364, 407 N.Y.S.2d 735. On appeal by the utility, the New York Court of Appeals, 47 N.Y.2d 94, 417 N.Y.S.2d 30, 390 N.E.2d 749, sustained the regulation, concluding that governmental interests outweighed the limited constitutional value of the commercial speech at issue. The utility appealed, and the United States Supreme Court, Mr. Justice Powell, held that: (1) the fact that the electrical utility held a monopoly over the sale of electricity in its service area did not mean that its promotional advertising was unprotected commercial speech; (2) the state's asserted interest in preventing inequities in the utility's rates did not provide a constitutionally adequate reason for restricting protected speech where the link between the advertising prohibition and the utility's rate structure was, at most, tenuous; and (3) though the state of New York had a legitimate interest in energy conservation and though that interest was directly advanced by the Commission's order, the Commission's complete suppression of speech ordinarily protected by the First Amendment was more extensive than necessary to further the state's interest in conservation and thus violated the First and Fourteenth Amendments.

1. The First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.

2. Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

3. In the context of commercial transactions, the state retains the power to ensure that the stream of commercial information flows cleanly as well as freely.

4. The Constitution accords a lesser protection to commercial speech than to other constitutionally protected expression.

5. The constitutional protection that is available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

6. The First Amendment's concern for commercial speech is based on the informational function of advertising and, therefore, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.

7. The government may ban forms of commercial communication that are more likely to deceive the public than to inform it or are related to illegal activity.

8. The two features of commercial speech that permit regulation of its content are that commercial speakers have extensive knowledge of both the market and of their products and are thus well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity and that commercial speech, being the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.

9. If a commercial communication is neither misleading nor related to unlawful activity, the government's power to restrict such communication is circumscribed and must be supported by a substantial interest.

10. If the government seeks to restrict commercial communications that are neither misleading nor related to unlawful activity, the regulatory technique used must be in proportion to the interest to be served by the restriction and the limitation on expression must be designed carefully to achieve the state's goal.

11. A restriction on commercial speech that is neither misleading nor related to unlawful activity must directly advance the governmental interest involved and may not be sustained if it provides only ineffective or remote support for the government's purpose; additionally, if the governmental interest could be served as well by a more limited restriction on the commercial speech, excessive restrictions cannot survive.

12. The First Amendment mandates that restrictions on speech be narrowly drawn.

13. The "overbreadth" doctrine permits invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity

14. The doctrine of overbreadth derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review.

15. The state cannot regulate commercial speech that poses no danger to the state interest assertedly underlying the regulation nor can it completely suppress information when narrower restrictions on expression would serve the state's interest just as well.

16. Regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy are subject to review with special care since, in those circumstances, a ban on speech could screen from public view the underlying governmental policy.

17. In a commercial speech case, the court must first determine whether the expression is protected by the First Amendment and must next ask whether the asserted governmental interest is substantial; if both inquiries yield positive answers, the court must determine whether the regulation directly advances the governmental interest asserted and whether it is more extensive than is necessary to serve that interest.

18. Fact that electrical utility held a monopoly on the sale of electricity in its service area did not establish that advertising by the utility was unprotected by the First Amendment; monopoly over the supply of a product provides no protection from competition with substitutes for that product and, for consumers in those markets in which electrical utilities compete with suppliers of fuel oil and natural gas, advertising by utilities may be just as valuable as advertising by unregulated firms.

19. Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.

20. The New York Public Service Commission's laudable concern over equity and efficiency of electrical utility's rates did not provide a constitutionally adequate reason for restricting the utility's protected commercial speech where the link between the Commission's prohibition on advertising by the utility and the utility's rate structure was, at most, tenuous and the impact of promotional advertising on the equity of the utility's rates was highly speculative.

21. Contingent and remote eventualities could not justify silencing electrical utility's promotional advertising.

22. In view of fact that there is an immediate connection between advertising and demand for electricity and since electrical utility would not contest advertising ban unless it believed that promotion would increase its sales, there was a direct link between the interest of the state of New York in energy conservation and an order of the New York Public Service Commission which completely banned promotional advertising by the utility.

23. Regulation, promulgated by the New York Public Service Commission, which completely banned promotional advertising by an electrical utility, was more extensive than necessary to further the state's interest in energy conservation and thus violated the First and Fourteenth Amendments where the Commission's order reached all promotional advertising, regardless of the impact of the advertised service on overall energy use and where the regulation prevented the utility from promoting electric services that would reduce energy use and the Commission did not demonstrate that its interest in conservation could not be adequately protected by more limited regulation of commercial expression.

24. Administrative bodies that are empowered to regulate utilities have the authority and indeed the duty to take appropriate action to further the national interest in energy conservation; when, however, such action involves the suppression of speech, the Constitution requires that the restriction be no more extensive than is necessary to serve the state interest.

***Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 US 626 (1985)**

In a disciplinary proceeding, the Supreme Court of Ohio held that violations of certain disciplinary rules of Ohio warranted public reprimand, 10 Ohio St.3d 44, 461 N.E.2d 883. On appeal, the Supreme Court, Justice White, held that: (1) discipline for advertising geared to persons with specific legal problem could not be justified; (2) substantial interest justifying ban on in-person solicitation could not justify discipline for content of newspaper advertisement; (3) attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding legal rights of potential clients; (4) illustration in the advertisement which was accurate representation of intrauterine device and had no feature likely to deceive, mislead or confuse reader, could not provide basis for discipline; but (5) application of requirement that an attorney advertising his availability on contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful was proper where advertisement made no mention or distinction between "legal fees" and "costs."

1. A ruling that any of various findings of violation of disciplinary regulations by attorney was sustained did not necessarily warrant affirmance of public reprimand, even though

such discipline would be the least severe discipline that could be imposed under Ohio's rules, in view of fact that the public reprimand incorporated opinion of Supreme Court of Ohio as well as report of Board of Bar Commissioners and thereby constituted public chastisement for each offense specified.

2. What has come to be known as "commercial speech" is entitled to protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech."

3. Commercial speech doctrine rests heavily on the "common-sense" distinction between speech proposing commercial transaction and other varieties of speech.

4. Whatever else the category of "commercial speech" might encompass, it included newspaper advertisement by attorney, and same was true though the advertising contained statements regarding legal rights of persons injured by intrauterine device that, in another context, would be fully protected speech.

5. States and federal government are free to prevent dissemination of commercial speech that is false, deceptive or misleading, or that proposes illegal transaction, but commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in service of substantial governmental interest, and only through means that directly advance that interest.

6. Blanket bans on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice are impermissible, but rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible.

7. Principle that it is preferable that constitutional attacks on state statutes be raised defensively in state court proceedings rather than in proceedings initiated in federal court is as applicable to attorney disciplinary proceedings as it is to criminal cases, and it was perfectly appropriate for attorney to refrain from anticipatory challenge to Ohio's rules and to assert his First Amendment rights in disciplinary proceedings.

8. State may not prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

9. State's power to prohibit advertising that is "inherently misleading" could not justify Ohio's decision to discipline attorney for running advertising geared to persons with specific legal problem.

10. Where attorney's statements, in advertisement, were not false or deceptive, state had burden of establishing that prohibiting use of such statements to solicit or obtain legal business would directly advance substantial governmental interest.

11. Because printed advertisement of attorney, unlike personal encounter initiated by attorney, is not likely to involve pressure on potential client for immediate yes-or-no answer to offer of representation, substantial interests justifying ban on in-person solicitation did not justify Ohio disciplinary rules forbidding the soliciting or accepting of legal employment through advertisements containing information or advice regarding specific legal problem.

12. State's application of prophylactic rule to punish attorney notwithstanding that his particular advertisement had none of the vices that allegedly justified the rule could not be justified on the ground that there existed a problem of distinguishing between deceptive and nondeceptive legal advertising, different in kind from problems presented by advertising generally, in view of fact that statements in advertisement in question were in fact easily verifiable and completely accurate.

13. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding legal rights of potential clients.

14. Commercial illustrations are entitled to First Amendment protections afforded verbal commercial speech, and restrictions on use of visual media of expression in advertising must survive scrutiny under the test of *Central Hudson*.

15. Advertiser's First Amendment rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

16. Because First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, strict "least restrictive means" analysis is not applicable in determining whether requirement that advertiser disclose certain information infringes on advertiser's First Amendment rights.

17. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied, and the right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right.

18. Application of Ohio disciplinary rule requiring that an attorney advertising his availability on contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful passed muster under applicable "reasonable relation" standard in view of fact that particular advertisement in question made no mention or distinction between "legal fees" and "costs."

***R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012)**

R.J. Reynolds Tobacco Co. and other tobacco companies objected to a statute and FDA regulation that required cigarette packs to feature graphic images that were designed to promote smoking prevention and cessation.

1. Standard that was akin to rational-basis review did not apply to First Amendment free speech claim brought by tobacco companies against Food and Drug Administration (FDA) challenging final rule requiring display of graphic warnings about negative health effects of smoking, since warnings had not been designed to correct any false or misleading claims made by cigarette manufacturers and consumers likely would not be deceived by packaging in future absent disclosure.

2. Both the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind protected by the free speech clause of the First Amendment.

3. Any attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny under the free speech clause of the First Amendment.

4. Under the free speech clause of the First Amendment, the general rule that the speaker has the right to tailor the speech applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid; this holds true whether individuals or corporations are being compelled to speak.

5. In the commercial speech context, purely factual and uncontroversial compelled disclosures are permissible under the First Amendment free speech clause if they are reasonably related to the State's interest in preventing deception of consumers, provided the requirements are not unjustified or unduly burdensome, and restrictions on commercial speech are subject to less stringent review than restrictions on other types of speech.

6. For a statute burdening commercial speech to survive under the First Amendment, the government must affirmatively prove that (1) its asserted interest is substantial, (2) the

restriction directly and materially advances that interest, and (3) the restriction is narrowly tailored.

7. Under the First Amendment free speech clause, a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident, or at least potentially real, danger that an advertisement will mislead consumers.

8. Intermediate standard of review applied to First Amendment free speech claim brought by tobacco companies against Food and Drug Administration (FDA) challenging final rule requiring display of graphic warnings that were intended to encourage current smokers to quit and dissuade other consumers from ever buying cigarettes.

9. Food and Drug Administration (FDA) did not provide substantial evidence that graphic warnings on cigarette advertising would directly advance its interest in reducing smoking rates to material degree, as required to pass scrutiny on intermediate level review of First Amendment free speech claim, based on two studies that did not purport to show that implementation of graphic warnings actually had led to reduction in smoking rates, and study that did measure cessation but demonstrated that rate of cessation due to graphic warning was not statistically distinguishable from zero.

10. Commercial speech receives First Amendment free speech protection only if it is a lawful activity and is not misleading or fraudulent.

11. Under intermediate standard of review of a law burdening First Amendment commercial speech, the government must first show that its asserted interest is "substantial"; if so, a court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

12. The party seeking to uphold a restriction on First Amendment commercial speech bears the burden of justifying it.

13. Under the intermediate standard of review of a law burdening First Amendment commercial speech, a court is not permitted to supplant the precise interests put forward by government with other suppositions.

14. A restriction on First Amendment commercial speech that provides only ineffective or remote support for the government's purposes is not sufficient, and the government cannot satisfy its burden by mere speculation or conjecture; the requirement that a restriction directly advance the asserted interest is critical, because without it, the government could interfere with commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

15. Under the First Amendment, the government must find and present data supporting its claims prior to imposing a burden on commercial speech.

***Spirit Airlines v. US DOT*, 687 F.33d 403 (D.C. Cir. 2012)**

Group of airlines sought judicial review of new DOT regulations. Of note, one of the regulations required airlines to prominently display the total cost of airfares, including the cost of taxes and fees.

1. Court of Appeals gives substantial deference to an agency's interpretation of its own regulations, according the agency's interpretation thereof controlling weight unless it is plainly erroneous or inconsistent with the regulation.

2. Department of Transportation's airline advertising rule, requiring airlines' print and online advertisements to display final total price most prominently, rather than separately listing airfare, taxes, and fees prominently or in same or larger size as total price, was reasonable change in enforcement policy to address consumer confusion, reasonable exercise of statutory authority to prevent unfair and deceptive practices in airline industry, and supported by substantial evidence including hundreds of consumers' comments on confusion from advertisements itemizing price components rather than displaying single total price.

3. Strict scrutiny applies to laws burdening political speech.

4. Intermediate scrutiny, as defined in *Central Hudson*, applies to laws regulating commercial speech.

5. Reasonableness review applies to laws requiring purely factual disclosures reasonably related to the state's interest in preventing deception of consumers by misleading commercial speech.

6. Advertising of prices is quintessentially commercial speech, protected under the First Amendment, insofar as the speech seeks to do no more than propose a commercial transaction.

7. Under the First Amendment, where speech cannot be characterized merely as proposals to engage in commercial transactions, the speech is nonetheless commercial in certain circumstances, for instance when it is an advertisement, refers to a specific product, and the speaker has an economic motivation for it.

8. Department of Transportation's airline advertising rule, requiring airlines' print and online advertisements to display final total price as most prominently listed charge, concerned commercial speech, even though airlines asserted that rule burdened their political speech informing customers of huge government taxes imposed on air travel, where airlines' speech regarding advertising of prices proposed commercial transaction, referred to specific product, and had economic motive.

9. Advertising which links a product to a current public debate is not thereby entitled to the First Amendment protection afforded noncommercial speech; rather, a company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.

10. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues in order to obtain more rigorous First Amendment protection.

11. Reasonableness review, rather than strict scrutiny applying to political speech or intermediate scrutiny applying to commercial speech, was appropriate standard to analyze Department of Transportation's airline advertising rule for alleged violation of airlines' First Amendment right to free speech, even though rule addressed commercial speech, where rule targeted misleading commercial speech and imposed disclosure requirement for accurate information about total price rather than significant affirmative restriction on airlines' ability to advertise itemized pricing information by less prominent means.

12. Where laws are directed at misleading commercial speech, and where they impose a disclosure requirement rather than an affirmative limitation on speech, reasonableness review, rather than intermediate scrutiny under *Central Hudson*, applies; thus, an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

13. The First Amendment's concern for commercial speech is based on the informational function of advertising, so there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.

14. Under the First Amendment, the government may ban forms of communication more likely to deceive the public than to inform it.

15. If a communication is neither misleading nor related to unlawful activity, the government must assert a substantial interest to be achieved by restrictions on commercial speech.

16. Department of Transportation's airline advertising rule, requiring airlines' print and online advertisements to display final total price most prominently, rather than separately listing airfare, taxes, and fees prominently or in same or larger size as total price, was reasonably related to government's interest in preventing deception of consumers, and thus, rule did not deprive airlines of First Amendment protection for their commercial speech.

17. Intermediate scrutiny, under the *Central Hudson* test, asks three questions regarding commercial speech: (1) whether the asserted government interest in regulating the speech is substantial, (2) whether the regulation directly advances the governmental interest asserted, and (3) whether the fit between the government's ends and the means chosen to accomplish those ends is not necessarily perfect, but reasonable.

18. For purposes of intermediate scrutiny of commercial speech, under the *Central Hudson* test, the government's interest in ensuring the accuracy of commercial information in the marketplace is substantial.

19. Department of Transportation's airline advertising rule, requiring airlines' print and online advertisements to display final total price most prominently, rather than separately listing airfare, taxes, and fees prominently or in same or larger size as total price, directly advanced substantial government interest in ensuring accuracy of commercial speech in marketplace and was reasonably tailored to accomplish that end, and thus, rule did not deprive airlines of First Amendment protection for their commercial speech.

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

Dairy manufacturers brought action challenging constitutionality of Vermont law requiring labeling of products from cows treated with growth hormone. The United States District Court for the District of Vermont, J. Garvan Murtha, Chief Judge, 898 F.Supp. 246, denied manufacturers' motion for preliminary injunction, and manufacturers appealed. The Court of Appeals, Altimari, Circuit Judge, held that: (1) statute caused irreparable harm to manufacturers by requiring them to make involuntary statement when they sold their products, and (2) strong consumer concern alone was not a substantial state interest justifying restriction on commercial speech, and thus manufacturers showed likelihood of success on the merits as necessary for preliminary injunction.

1. Dairy manufacturers showed irreparable harm to First Amendment rights from statute requiring labeling of dairy products from cows treated with growth hormone, thus

satisfying first prong of test for preliminary injunction; statute required manufacturers to make an involuntary statement whenever they offered their products for sale.

2. "Irreparable harm," such as will satisfy first prong of test for entitlement to preliminary injunction, is injury for which a monetary award cannot be adequate compensation.

3. Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes "irreparable harm" so as to satisfy first prong of test for entitlement to preliminary injunction.

4. Right not to speak inheres in political and commercial speech alike, and extends to statements of fact as well as statements of opinion.

5. Dairy manufacturers were likely to succeed on merits of constitutional challenge to Vermont statute requiring labels for products from cows treated with bovine growth hormone, and thus met second prong of test for entitlement to preliminary injunction; Vermont demonstrated no cognizable harm from such products, but cited only strong consumer interest, and thus failed to show a substantial state interest as necessary for government restriction on commercial speech.

6. In order to determine whether a government restriction on commercial speech is permissible, court examines four factors: whether the expression concerns lawful activity and is not misleading, whether government's interest is substantial, whether restriction directly serves the asserted interest, and whether restriction is no more extensive than necessary.

7. In constitutional challenge by dairy manufacturers to Vermont law requiring labeling of products from cows treated with bovine growth hormone, Vermont bore the burden of justifying labeling law.

8. Governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree; mere speculation or conjecture does not satisfy burden of justifying restriction.

9. Strong consumer interest in whether dairy products came from cows treated with bovine growth hormone did not constitute a substantial state interest, as necessary to justify under First Amendment a statute requiring dairy manufacturers to label products from hormone-treated cows; manufacturers could not be compelled to disclose that information absent some indication that it bore on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern.

10. Consumer curiosity alone is not a strong enough state interest to sustain government's compulsion of even an accurate factual statement from a commercial seller.