

FDA Takes It On The Chin Again In First Amendment Case

November 8, 2011

This opinion involves cigarette warnings, so we have to be careful, since Dechert represents tobacco companies. We recommend that our readers interested in First Amendment issues take a look at R.J. Reynolds Tobacco Co. v. FDA, No. 11-1482 (RJL), [slip op.](#) (D.D.C. Nov. 7, 2011), with an eye towards the court's analysis of "compelled commercial speech." Although the facts are (we hope) extreme, the court's discussion of the Zauderer "purely factual and uncontroversial information" test for compelled speech leaves us with some interesting hypotheticals to consider. Remember, after New York Times v. Sullivan, private tort claims are on par with other forms of governmental restrictions on speech for purposes of the First Amendment. Query whether plaintiffs demanding warnings about supposed causal relationships that are anything but "uncontroversial" might be running afoul of the First Amendment. Or query further whether the FDA's regulations, which at some points appear to require warning changes based on less than an established causal relationship ([more about that here](#)) might also be subject to First Amendment challenge.

We're not in a position to answer these questions. But we think they're worth asking.