U.S. HEALTHCARE V. BLUE CROSS OF GREATER PHILADELPHIA: THE CHILLING OF THE FIRST AMENDMENT

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> "We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."
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> - John Stuart Mill

I. INTRODUCTION

Over the past decade the federal judiciary has assumed an increasingly conservative posture regarding the interpretation of rights guaranteed under the Constitution. The breadth of these rulings has spawned such disparate areas as civil antitrust litigation[1] and criminal procedure.[2] These decisions have become increasingly narrow regarding the specific application of law to situations undergoing Constitutional review. An excellent example of this trend is the Third Circuit's recent decision in U.S. Healthcare v. Blue Cross of Greater Philadelphia[3] which held that comparative advertising between two health care providers was commercial speech and as such the first amendment did not entitle this form of speech to a heightened level of scrutiny.[4]

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'S* Atlantic Richfield Co. v. USA Petroleum, 110 S. Ct. 1884 (1990).

'S«e County of Riverside and Cois Byrd, Sheriff of Riverside County v. Donald Lee McLaughlin, *tt at.,* Ill S.CL 1661.

*898 F.2d 914 (3rd Cir. 1990).

•*id.*

This article reviews the judicial and intellectual history of first amendment interpretations, as they relate to commercial speech, including a thorough review of the *U.S. Healthcare* opinion. The article argues that unless some protection is afforded to comparative advertising there is a significant risk that such speech can be chilled. As a consequence of this the public loses potentially valuable decision-making information and the fundamental rationale for the commercial speech doctrine, as it is applied to first amendment interpretation, is no longer viable. It argues further that advertisers contemplating future comparative "advertising" campaigns should be extremely careful in the developments of such marketing strategies until the courts have had the opportunity to sort out the numerous legal ramifications of the *U.S. Healthcare* decision.

II. THE DOCTRINE OF DEFAMATION AND FIRST AMENDMENT PROTECTIONS

Defamation is a tort which creates a cause of action for injury to the plaintiffs reputation rather than to his physical being. Thus, this tort is a relational one. A "defamatory communication" to a third party is defined as that which "tends to injure the reputation in the popular sense, to diminish esteem, respect, goodwill or confidence in which the plaintiff is held within society."[3] However, as much as society has an interest in allowing the individual to protect his reputation this right does not exist in a vacuum. More to the point, society also has an interest in the protection of freedom of speech and press.[6]

Given these countervailing interests, the Supreme Court has often been in a position to weigh these two philosophies. Generally the Court has ruled in favor of preserving open and free public debate. The Court's overarching fear in its opinions in this area has been that restrictions on free speech might not only deter false speech but honest speech as well.[7] Yet, the decisions of the Court are far more developed than this simple proposition would indicate. A brief overview of the type of analysis which the Court has produced can be divided into two areas of examination of allegedly defamatory speech. The first level concerns the examination of the status of the parties. This determination will show if the parties are public figures (of any type) or private figures. The 'public-ness' of the person (plaintiff) helps to determine the level of first amendment protection that will be afforded to the defendant. The second portion of the analysis deals with the content of the speech. This

[5]W.P. KEETON. THE LAW OF TORTS, 773 (5th Ed. 1984).

*[6]*Id.* at 805.

[7]898 F.2d 914, at 929.

theory is closely intertwined with the first level. The second question is whether the topic/speech involved is a matter of public or private concern. The answer to this question is of equal importance and is sometimes contingent upon the answer to the first. That is, while some persons may be a public figure for all contexts, others may be a limited purpose public figure, thereby limiting the scope of issues which may be addressed under the guise of public interest. Issues which are determined to be of public concern have greater value and are more deserving of heightened protection under the first amendment. Issues which are determined to be private (including those commercial in nature) are found to be of less protective importance.® However, as clear as this framework of analysis may appear, quick and easy determinations do not necessarily lead to the expected results. In fact, these determinations can be quite subjective; and though they may fulfill the requirements and appear to entitle a party to heightened protection, the Court has created enough leeway that the totality of the circumstances might not warrant it.

III. THE ORIGIN AND HISTORY OF FIRST AMENDMENT PROTECTION BEFORE THE SUPREME COURT

There have been numerous dispositive cases which have established the doctrine in this area. The cases have spanned twenty years, with the first landmark decision in 1964.

1. New York Times Co. v. Sullivan[9]

The Supreme Court's decision in 1964 was the first type which involved a suit for defamation, where the defense invoked the protection of the first amendment.[10] In its decision, the Court gave Constitutional protection to speech which was allegedly defamatory of a public official (acting in his official capacity.).[11] A public official would be able to overcome this if he were able to show that the speech was made with "actual malice.[12] The term actual malice is defined as a statement made with knowledge of its falsity or reckless disregard thereof.

'*Id.* 933.
•376 U.S. 254 (1964).
'"R. SMOUA Law of Defamation. 1-13 (1991). "898 *F2d* 914, at 929.
"*Id.*

2. Curtis Publishing Co. v. *Butts and Associated Press* v. *Walker*[13]

In these two companion cases, the Supreme Court extended the use of the actual malice standard from public officials to persons who are considered public figures. The Court's belief was that such persons are no less important to the public interest and carry such influence no less or greater than public figures as well. As was clear in the *Times* case, it is the status of the parties which is significant as to the determination of the appropriate level of protection.

3. Rosenbloom v. *Metromedia, Inc.*[14]

This case represented a new approach that was subsequently developed in the next decision (*Gertz* v. *Robert Welch Inc.)* but has come back as a part of modem analysis. The Court held that the actual malice standard applied in this case which involved a private plaintiff and a media defendant. Previously, the absence of a public official/figure would have been insufficient to support the heightened protection. However, the Court felt that the subject matter in question was valuable to the public interest and should be protected. This case was the first which substantively viewed the content of the speech as significant as the status of the respective parties.

4. Gertz v. Robert Welch Inc[13]

In 1974 the Court sought to redefine the rules first set out in the *Times* case and to allow greater balancing of the two competing interests involved. The Court enumerated various "black letter" rules. First, where the plaintiff is a public official or figure and the speech is of public concern, the standard to defeat Constitutional protection is actual malice.[16] Second, if the plaintiff is a private figure and the speech is of a matter of public concern, a state may determine for itself what the standard of liability will be (though falsity must always be proven).[17] Third, the recovery of presumed and punitive damages always require a showing of actual malice. Moreover, the case further defined the concept of what constitutes a public figure. While a 'universal' public figure is open to comment on any subject and are public for all purposes, a limited purpose public figure is only public as to those subjects which it has "invited attention" to.[18]

[15]388 U.S. 130 (1967).
"403 U.S. 29 (1971).
[15]418 U.S. 323 (1974).
"R. SMOLLA, *rnpra* note 7, at 2-20.
[17]898 F.2d 914, at 929.
"R. SMOLLA, *supra* note 7, at 2-22.

5. Dun A Bradstreet, Inc. v. *Green moss Builders, Inc.*[19]

The basis of this case involved the applicability of *Gertz* in a matter where the content of the speech was not a matter of public concern *(Gertz* essentially ignored *Rosenbloom* and again focused on the status of the parties). This case involved a return to the examination of the content of speech. The Court held that where there is a private plaintiff, and the matter is of a purely private concern, presumed and punitive damages may be shown without proving actual malice.[20] Impliedly *Gertz* was restricted to only dealing with matters of public concern. The Court felt that matters of purely private concerns give rise to greater state interest in protecting the individual and warrant less first amendment protection.[21] In the Court's decision it viewed the credit report in question to be a private concern and of lower constitutional protection. Taking this a step further, the Court recognized certain types of speech which are "less central to the interests of the first amendment" one such type of speech identified was so-called "commercial speech."[22]

6. V'alentine v. *Chrestensen*[2J]

In this case, the Supreme Court first commented on the applicability of the first amendment to commercial speech. *Valentine* involved the distribution of advertising handbills for a submarine attraction. The city had a sanitation ordinance that forbid such distribution unless the advertising had to do with a public protest or was purely informational. On the back of the handbills was an additional protest of the city's refusal to allow Mr. Chrestensen access to a wharf to display his submarine. He was also restrained from distributing these handbills. The Court, upholding the restrictions as constitutional, held that although the streets are proper places for communicating information or disseminating opinion, the "Constitution imposes no...restraint on government as respects (regulation of) commercial advertising.[24]

'»105 S.CL 293 (1985).
*898 *F.2d* 914, at 930.
[a]R. SMOLLA, *supra* note 7, at 3-8.
"898 F.2d 914, at 932.
°316 U.S. 52 (1942).
% at 54.

7. Beard v. Alexander[25]

Nine years later the Court upheld a criminal conviction for the solicitation of magazine subscriptions from door to door. In a prior case the Court had reversed a similar conviction where leaflets publicizing a religious demonstration had been distributed door to door.[26] However, unlike the earlier case the court held that the transaction in *Beard* was subject to greater restriction because of the commercial aspect to the transaction.[27]

8. Bigelow v. *Virginia*[23]

In this case, the Court rejected the argument that an advertisement in a newspaper about the availability of abortions was unprotected merely because it was an advertisement. The Court ruled that simply because speech was related to the marketplace does not make it valueless as an idea. Labeling something as "advertising" does not mean that first amendment protection will be unable to encompass it.[29]

9. Virginia Pharmacy Board v. *Virginia Consumer Council*[30]

This case focused upon the constitutionality of a Virginia law that restricted advertisement of prescription drug prices. The defendants argued that the advertisement of drug prices was outside the protection of the first amendment because it was commercial speech. The Court rejected this argument, reasoning that the "consumer's interest in the free flow of information may be as keen if not keener by far, than his interest in the day's most urgent political debate.[31] The Court further explained that even though at times advertising may seem tasteless and excessive, it still involves the dissemination of information, and that it is in the public interest to allow the free flow of commercial information to keep the consumer well informed.[32]

The Court was careful to point out, however, that it was not holding that commercial speech could entirely escape some form of regulation. The Court emphasized that in *Virginia Pharmacy* there was no claim that the price advertising was false or misleading. The Court stated that false speech was

"341 U.S. 622 (1951).
"Martin v. Struthers, 319 U.S. 141 (1943).
"341 U.S. at 642-43.
"421 U.S. 809 (1975).
[3]*Id.* at 825-26.
"425 U.S. 748, 770 (1975). Note that both of these cases are post Gertz.
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never protected for its own sake, and that there would also be permissible for a state to regulate commercial speech that was not absolutely false but perhaps only deceptive or misleading.“ The Court reasoned that there is a difference between commercial speech and other varieties. So even though it is vital to insure that the flow of commercial information is not impaired, commercial speech is by its own nature "hardy" enough to require a lower degree of protection such that inaccurate statements or speech in a form that is deceptive, though perhaps not strictly false, need not be tolerated.[34]

10. Ohralik v. *Ohio State Bar*[35]

This is a relatively recent ruling in which the Court reasoned that due to the "lower" position commercial speech holds in the ranking of first amendment values, it is entitled to only a limited measure of protection.

IV. U.S. HEALTHCARE V. BLUE CROSS OF GREATER PHILADELPHIA[54]

In *U.S. Healthcare*, the Third Circuit examined the issue of whether commercial speech in the form of a disparaging advertising campaign between two health care providers implicated any first amendment protection. In light of the Supreme Court precedent, the Third Circuit held that in such an advertising context the first amendment did not prescribe a higher level of scrutiny.

In the late 1970’s and early 1980’s, Blue Cross/Blue Shield (hereinafter Blue Cross), as a traditional insurer, faced a drop in enrollment due to challenges for participants from U.S. Healthcare, a health maintenance organization (HMO). In order to combat the decline, Blue Cross introduced a competitive program called a preferred provider program (PPO).[37] As a part of the introduction of it new program, Blue Cross launched a competitive advertising campaign that was specifically directed at the HMO program.[3]* This 2.175 million dollar campaign utilized television, radio, print media and direct mailings in an attempt to "reduce the attractiveness of (HMO’s).[39] The advertisements included direct comparisons of the two programs,

”*Id.* at 771.
"Id. at 772.
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emotional appeals and choice values that cast the HMO's in an unfavorable light.[40]

U.S. Healthcare responded by filing suit in the Philadelphia County Court of Common Pleas, alleging commercial disparagement, defamation, and tortious interference with contractual relations.[41] Additionally, U.S. Healthcare initiated its own advertising campaign to counter the effects of Blue Cross's attack using the same media.[42] This counter-campaign similarly used direct comparisons of the two programs, but contained only one emotional appeal.[43] U.S. Healthcare next added a claim under section 43(a) of the Lanham Act in the District Court for the Eastern District of Pennsylvania, and refiled its pendant state claims there as well.[44] Blue Cross counter-claimed on all the same basis of liability and added malicious prosecution and abuse of process, although these two additional claims were dismissed prior to trial.[45]

After a lengthy jury trial, a mistrial was declared. Before adjourning the case, the judge called upon the jurors to express their opinions about the proceedings. After discovering that the jury was nearly unanimous on the counterclaims, the judge sent the jury back to deliberate further. Subsequently the jury returned with a verdict against Blue Cross on the counterclaims. The judgement was entered and a new trial was scheduled on U.S. Healthcare's claims.[46]

Instead, Blue Cross filed a motion requesting that a judgement be entered in its favor on the grounds that the applicable standard of proof was the actual malice standard set forth in *Times v. Sullivan."* The district court determined as a preliminary matter that the controversy before them involved a topic that was in the public interest and further involved parties that were public figures. The court then granted the motion of Blue Cross and held that in order for U.S. Healthcare to prevail they would have to prove the actual falsity of the advertisements and further show that Blue Cross published these advertisements with knowledge of, or reckless disregard for, their falsity.[4]* U.S. Healthcare appealed this decision to the Third Circuit.

The court began by examining the specific advertisements used by each party to determine what was and was not actionable. First, the court examined the advertisements that either made no reference to the other's

"*Id.*
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"*Id.* at 919-20.
"*Id.* at 920.
45*Id.*
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"898 F.2d at 930.

product or merely constituted "puffing" because they were so innocuous.[49] The court held that no action could lie against these advertisements, of which there were three.[10] The second group that the court examined were those advertisements which directly compared the two programs. Of these advertisements, the court found that at least one of these was actionable against Blue Cross under the Lanham Act for misrepresentation of its own product, i.e., its PPO program[51] The third group examined were those advertisements that either compared the products on one or more points or simply criticized the competing plan without detailing the virtues of their own plan.[52] The court determined that these types of advertisements might be actionable under the Lanham Act for misrepresentation, commercial disparagement, and tortious interference with contract but *not* defamation.[55] The fourth and final group consisted of those advertisements that appealed to the emotions of the consumer, particularly those ads that inferred medical tragedy as a result of the use of one plan over the other.[54] Also those which implied that physicians in a certain plan placed financial benefit over the welfare of its patients.[55] The court found that these claims were not actionable as commercially disparaging since the statements were aimed at the providers and not the programs, however actions would lie under the Lanham Act, as well as for defamation and tortious interference with both existing and prospective contractual relations.[54]

Once the court determined that some of the advertisements were actionable under state and federal law, the court examined the application of the first amendment and its affect on the appropriate standard of proof. With regard to first amendment jurisprudence and regulation by state authority, the court recognized that two distinct lines of cases existed. (Those cases that involved defamation, and those which involved regulation of commercial speech.) Since *U.S. Healthcare* involved allegedly defamatory statements in a comparative advertising campaign, the case presented a defamation action that involved expression that could be properly characterized as commercial speech. Such a hybrid situation had never been examined before.

The traditional defamation analysis begins with a determination of the status of the parties involved, that is, whether they are public or private figures.[57] The next, and very closely related issue, is whether the nature of

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the speech itself is public or private in determining the gravity of any first amendment interests that might exist.[3]* However, because of the unique set of facts presented in *U.S. Healthcare,* the court initially examined whether the speech at issue could properly be characterized as commercial speech.[39] The court reasoned that although commercial speech is entitled to the protection of the first amendment, it is entitled to less extensive protection than non-commercial speech.[60] The court felt that if the speech involved in *U.S. Healthcare* was commercial speech then it would not be entitled to heightened constitutional protection.[61]

The court relied upon *Bolger v. Youngs Drug Prods. Corp.*[62] to broadly define commercial speech as "expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services."[63] *Bolger* sets out three factors in determining whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech.[64] To the extent that the speech at issue meets all three of these criteria, there is "strong support" for the proposition that the speech is in fact commercial.[65]

The court determined that first there was no question that the statements at issue were advertisements since they were disseminated as part of an extensive and professionally run promotional campaign.[66] Second, the speech specifically refers to a product when it compares the relative merits of one type of health care delivery system to a competing system.[67] Third, financial concerns motivated the speech.[6]* Blue Cross initiated its campaign to recoup its share of the health insurance market, while U.S. Healthcare countered in order to protect its new market share.[69] Affirmative answers to all three of the *Bolger* factors supported the court's conclusion that the speech was commercial.[70]

After having determined that the speech at issue was commercial, the next step was to evaluate the level of protection that the first amendment should provide, since even commercial speech is protected under the

"*Id.* and *st** *supra* note 8.
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"463 U.S. 60 (1983).
°*Id.* at 66-67.
"Id.
"*Id.* at 67.
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"Id. at 935.
"Id.
™*Id.*

constitution. The court, relying primarily upon *Central Hudson Gas Electric v. Public Service Commission*[71] held that while the speech in *U.S. Healthcare* was protected, it "require(d) no higher standard of liability than that mandated by the substantive law for each claim."[72]

Blue Cross attempted to argue that its advertisements educated the public about the differences between the financing and delivery of health care thereby insuring informed purchasing decisions.[73] But although the court recognized "that the quality, availability, and cost of health care are among the most important and debated issues of our time"[74] they are not automatically insulated. The court reasoned that advertisers are not permitted to use false or misleading product information by simply including references to public issues in order to invoke first amendment protection.[75] Advertising that "links a product to current public debate is not thereby entitled to the constitutional protection afforded non-commercial speech."[76] Although every advertiser is entitled to the full protection of the first amendment when directly addressing public issues, when such statements are made only in the context of commercial transactions, no similar constitutional protection is warranted.[77]

The court further determined that the speech at issue in *U.S. Healthcare* had all the characteristics that make commercial speech durable and therefore not likely to be chilled or in need of the heightened protection that is normally extended to more valuable types of speech.[78] The thrust of all the advertisements was to gather more business for its particular health care delivery system. Since the basis for this speech was economic self-interest, and is confined to the promotion of specific services, the promotions "add little information and even fewer ideas to the marketplace of healthcare thought.[79] Similarly, the court reasoned that because of the huge financial interest that each provider had at stake, it would be highly unlikely that the corporations "would be chilled from speaking about the comparative merits of their products."*[0] The court felt that subjecting them to libel suits would be insignificant as far as impacting their use of such speech.*[1]

Finally, the court dealt with the status of the claimants. The court quickly determined that the parties were not public figures for all contexts,

[71]447 U.S. 557 (1980).

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"*Id.* at 937.

[v]*Id.* (dting to Bolger, 463 U.S. at 68).

'Vd. (dting Central Hudson, 447 U.S. at 563).

[T]*ld.* at 936

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nor were they involuntary public figures. Therefore, the only possibility was "limited purpose" public figures.'[2] The fact that both providers had considerable access to the media, and that their entry into the controversy was voluntary, were both strong indicia that they were limited purpose public figures." Nevertheless, the court found that the providers were not public figures for the limited purpose of commenting on health care in this case.®[4] (A limited public purpose figure is one who has thrust himself to the forefront of particular public controversies in order to influence the resolution of the issues involved.)[85] The court reasoned that although some of the advertisements touch on matters of public concern, the primary thrust was still commercial.[86] Therefore the parties were acting primarily to generate revenue by influencing customers, not to resolve the issues involved.[87]

Based upon this reasoning, the court held that the district court erred in applying a heightened level of scrutiny to the claims in *U.S. Healthcare.* The court held that the proper standard of proof was that which was necessary to establish the substantive claims that were applicable under federal and state law. Accordingly, the court reversed the judgement of the district court and remanded for further proceedings consistent with its holding.[88]

V. SHOULD THE FIRST AMENDMENT APPLY TO DISPARAGEMENT IN THE CONTEXT OF COMPARATIVE ADVERTISEMENTS

What is the proper way to characterize comparative advertisements that involve the disparagement of a competitor's products in order to better sell the products of the advertiser? Perhaps clever, catchy, innovative, or effective come to mine in support of such advertisement, but uninformative, misleading or in poor taste may also be appropriate. The level of protection, if any, that such speech deserves depends upon an individual's view as to the potential benefits or misuses of such advertisements.

The first problem with analyzing this type of speech is that the comparison is often misleading, rather than actually factually false. The argument against imposing common law, tort-like, liability for such "merely" misleading speech is that the first amendment bars imposing liability on

[a] *Id.* at 933.
[°] H. at 938.
[''] *Id.* at 939.
[“] W. (citing Gertz, 418 U.S. at 345). *''Id.*
[n] *Id.* [u] *Id.*

anyone for speech that is not proven "false".®[9] The reasoning is predicated upon an application of the *Gertz* case,[90] previously discussed, which provided that "there is no such thing as a false idea" for first amendment purposes.[91] The idea being that a statement of an opinion, such as in a disparaging advertisement, embodies an idea more clearly than does a statement of fact, therefore it cannot be actionable in tort.[92] Under this view, the advertisement would have to be *materially* false before it would lose the protection of the constitution and become actionable in tort.

The response to this argument, however, is the one made by the court in *U.S. Healthcare,* i.e., the speech which is at issue in a comparative disparagement case is commercial speech and therefore not necessarily protected by the Constitution when speech is determined to be misleading or deceptive.[95] Although commercial speech is entitled to some first amendment protection, the argument goes to the extent that it is misleading or deceptive, that it is valueless and therefore outside the scope of the first amendment.[94] Despite the fact that there is nothing materially false with the advertisements, this reasoning maintains that to the extent the ideas it contains are misleading, the first amendment should present no bar to any lawsuits that seek to recover for the damages caused by the advertisements.[95]

Another aspect of the issue is that even though commercial speech is entitled to a lower level of constitutional protection, it nonetheless is within the scope of the first amendment.[96] Arguably, even if misleading, comparative advertisements are properly characterized as commercial speech, they may still be entitled to some level of constitutional protection, and courts should establish what the standard of protection ought to be.[97]

It should be noted that valid arguments exist for providing some level of protection even for misleading commercial speech in the comparative advertising context. For example, an action in tort against an advertiser for misleading advertising, at one level, seems to establish an important weapon with which the damaged seller or provider can combat the deception and

"S*e Hayden, *A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common Law Tortious Unfair Competition,* (Henceforth Comm. *Disparag.)* 76 IOWA L. REV. 67, 90 (1990).

[K] *Supra* note 15.

Id. and see *Comm. Disparag.,* at 91. [n] *Id.*

[n] *See supra* note« 9-35 for summary of Supreme Court cases on commercial speech and the applicable first amendment protection.

"Id.

[K] *Comm. Disparag.,* at 96.

"Id.

[r] *See Lanham Act Revision Provides Relief For Misleading Comparative Advertisements: Does It Go Too Far?, 68* WASH. L Q. 707 (1990).

ostensibly protect the consumer.[9]* However, instead of this role of protector, a lawsuit can also be used as a powerful weapon by established sellers or providers to force litigation costs upon rivals, with particularly damaging effect upon new sellers or providers attempting to enter the market.[99]

Likewise, if comparative advertising that is factually truthful, could still be actionable because it may be misleading, there is potential to chill comparative types of advertisements that may be beneficial to the public. For example, it is conceivable that an advertiser could be held liable for what is *not* said just as easily as for what is said. An omission of a material fact could theoretically render a competitor using comparative advertising liable in tort.[100] An advertiser might then decide to not use a comparative advertising campaign fearing that it might leave out a material fact about the competitor's product.[101] In its place, the competitor might simply use advertisements that merely praise its own products rather than giving performance or quality information, fearing an attack on the reliability of those claims.[102] Such chilling of comparative advertisements could prevent the consumer from accessing valuable decision-making information.

Comparative commercial speech like that in *U.S. Healthcare* may even deserve greater protection than other forms of commercial speech since, unlike ordinary advertisements, they do not merely praise a single product, but evaluate one product with reference to another.[103] Comparisons can help a consumer choose between products or services,[104] and to the extent such value can be attributed to comparative advertising as a form of free speech, then it ought to be entitled to heightened first amendment protection.[105]

The court in *U.S. Healthcare* may have been correct in concluding that by allowing the actions to lie in tort, without increased first amendment protection, would not serve to chill comparative advertisements. However, it is vital that the degree of protection such speech should receive be seriously considered in each case individually.

It is important to note that once the courts determined the advertisements at issue were properly characterized as commercial speech, the analysis of the applicable level of protection was done in an almost cursory fashion. The skyrocketing costs of healthcare is a vital public concern, and

"Sœ also Replacing Skepticism: An Economic Justification for Competitor's Actions for False Advertising Under Section 43(a) of The Lanham Act, 77 VA. L. REV. 563 (1991).

"Id.

[la0]*Supra* note 97 at 726.

[M]*Id.*

[m]*Id.*

[m]*Id.* at 724.

""*Id.*

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though the providers in the *U.S. Healthcare* case were unlikely to be chilled from using this form of speech, perhaps a different scenario would have developed had one of the parties been a smaller provider with significantly less resources. Should such a smaller, and perhaps more efficient, provider be dissuaded from using this form of speech, we may in fact find that commercial speech is not as chill proof and durable as had been previously theorized. The entrenched seller or provider with the greater resources will profit, while the loser will be the consumer who misses the opportunity to make an informed purchasing decision.

From a more pragmatic, and less theoretical viewpoint, the legal implication of this decision is that in developing comparative advertising campaigns advertisers are vulnerable to lawsuits which allege defamation and false representation of their competitor's product. They can neither rely on the defense that malice was not intended nor that they were 'public figures", which of course would afford immunity to prosecution.

Therefore, when involved in comparative campaigns, advertisers should now be forewarned that they may be the targets of litigation and that several traditional defenses to such actions are no longer available. It would thus appear that the proactive and prudent plan of action would be to eliminate subjective statements which cannot be readily proven. The focus of such ads should be upon the increased use of clearly objective statements which can be readily substantiated. Examples of such statements would include surveys, testimonials or any statistical information which would be easily validated before a jury. Concomitantly, if the advertiser of health care services feels uncomfortable about its ability to prove the veracity of the statements made during the course of the campaign, it would be wise to avoid such statements in utilizing such a potentially dangerous strategy at this time.

One final note, although this decision is based upon what might appear to be a rather narrow set of circumstances, the cautious manager should seriously study the assertions made in *any* comparative campaign. The decision iterated in the *U.S. Healthcare* case may in time be expanded to other circuits and, more importantly, to *other* forms of comparative advertising. Given the increasingly conservative nature of the federal judiciary, this is not an entirely implausible hypothesis. Thus, while it is theoretically possible to make some subjective statements that tend to place a competitor's product in less than a favorable light, the risk is now present that the courts will expand upon the *U.S. Healthcare* decision. This, in turn, could impose *significant* liability on unsuspecting advertisers. Therefore, until the courts have had the opportunity to sort out the legal ramifications of the *U.S. Healthcare* decision, it would be ill-advised to test the limits of that doctrine. Discretion is definitely the better part of valor.

VI. A MODEST PROPOSAL

A workable approach for analyzing whether and when disparagement in comparative advertising ought to be actionable without offending first amendment values is presented by Paul J. Hayden.[106] Hayden first describes what he views as the two extremes that are possible approaches. The first would be a rigid requirement that a plaintiff would have to prove that a statement is "false" before the statement was actionable. This would make it virtually impossible for plaintiffs to get past initial motions to dismiss. The second approach would be to allow even factually truthful disparagement to be actionable. This would almost surely run contrary to the first amendment.

Hayden proposes that a better rule is a middle approach that would require a plaintiff to prove .... "that the representation is likely to deceive or mislead a significant number of prospective purchasers."[107] This approach models the new RESTATEMENT OF UNFAIR COMPETITION (3rd Ed.), to the degree that a representation would be actionable if likely to deceive or mislead either because it is literally false, or if the audience is likely to infer from the representations additional assertions that are false, even if the representations in the advertisements are literally true.[108]

Applying this standard to the U.S. Healthcare and Blue Cross advertisements, the following results can be observed, to wit: The first set of advertisements, which are merely identification pieces that contain no substantive information and that only represent actions preferencing one plan over the others, would not be actionable since they do not in any way mislead the public with respect to either the competitor's product or the advertiser's product.

The second group represents those advertisements that displayed doctors discussing efforts to provide the best possible treatment for their patients in this case. Again, these type of advertisements would not be actionable because no reference is made to the competitor's product unless the statements made with respect to their own product are false or deceiving.

The third group, which comprises the vast bulk of the advertisements, either compose the two health plans or just criticize the competitor's plan. These are the advertisements that are of the least value to the public because they provide minimal information with respect to exposition of the advertiser's own competing plan which, if available, might allow an informed choice to be made, and these types are also most capable of being deceptive. To the extent that the comparative statements are misleading or deceptive and adversely effect a competitor commercially, a course of legal action should he, even when the assertions are not literally false.

Supra note 89, at 66. [107]M. at 103.
[M]*Jd.*

The fourth and final group of advertisements are those that are even more clearly actionable. These are the ads that go beyond comparative quality of the product and suggest reprehensible conduct by employees or the competitor corporation itself, e.g., advertisements by Blue Cross that suggested that HMO primary care physicians had a financial interest in not referring patients to specialists, implying that patient care would have a lower priority and suffer as a consequence. This group would also include advertisements such as one in which a distraught woman stated that "The hospital my HMO sent me to wasn't enough," suggesting that her grief was the result of substandard care.

When comparing the actual outcome of the decisions under the proposed approach and the analysis of the court in *U.S. Healthcare,* the end result is probably the same. However, the court does not address the public policy behind its decision and the extent to which the commercial speech deserves first amendment protection. The approach proposed here attempts to encourage commercial speech that is intended to inform the public of the strengths of an advertiser's product, whether or not it contains a comparison to the product of the competitor, while concomitantly discouraging advertisements that attempt to give an audience a negative impression of the products of a competitor for the sole purpose of disparagement. This would appear to be a healthy balance of interests which would satisfy both the needs of advertisers to communicate the virtues of their product without undue or misleading puffery, while simultaneously providing society with maximum access to the free flow of information.

VII. CONCLUSION

The foundation for permitting false and misleading commercial speech used in comparative advertising to be actionable under common-law tort theory is that a consumer who is deceived by such speech is not informed by the speech. Hence it is valueless and deserves no constitutional protection. The argument postulates that a consumer exposed to such speech is not able to make an informed decision when making a purchase, and therefore competition to offer better quality and/or a lower price is not thereby enhanced.[109] However, unless some protection is afforded to comparative advertisers there is tremendous incentive for such speech to be chilled. Advertisers may forego using comparative ad campaigns for fear of liability that even though their statements are not materially false, they may be unintentionally misleading. If such speech is in fact chilled by this threat, the public loses potentially valuable decision-making information. In addition, the

"'*Supra* note 97 at 725.

very basis for providing commercial speech with a lower level of protection-that it is "chill-proof-no longer is, in reality, a viable rationale for avoiding the issue of first amendment application. Therefore, it is incumbent that future court decisions address what level of protection will sufficiently protect the valuable aspects of this form of speech, while simultaneously permitting suits against advertisers that choose to abuse it.