CASE 4.2

Bad Frog Brewery, Inc. v. New York State Liquor Authority

United States Court of Appeals, Second Circuit, 134 F.3d 87 (1998).
www.findlaw.com/casecode/index.html[a]

BACKGROUND AND FACTS • Bad Frog Brewery, Inc., makes and sells alcoholic beverages. Some of the beverages feature labels that display a drawing of a frog making the gesture generally known as "giving the finger." Bad Frog's authorized New York distributor, Renaissance Beer Company, applied to the New York State Liquor Authority (NYSLA) for brand label approval, as required by state law before the beer could be sold in New York. The NYSLA denied the application, in part, because "the label could appear in grocery and convenience stores, with obvious exposure on the shelf to children of tender age." Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against the denial of the application. The court granted summary judgment in favor of the NYSLA. Bad Frog appealed to the U.S. Court of Appeals for the Second Circuit.

IN THE LANGUAGE OF THE COURT

Jon O. *NEWMAN*, Circuit Judge:

* * * *

* * * To support its asserted power to ban Bad Frog's labels [NYSLA advances] * * * the State's interest in "protecting children from vulgar and profane advertising" * * *.

[This interest is] substantial * * *. *States have a compelling interest in protecting the physical and psychological well-being of minors* * * *. [Emphasis added.]

* * * *

* * * NYSLA endeavors to advance the state interest in preventing exposure of children to vulgar displays by taking only the limited step of barring such displays from the labels of alcoholic beverages. *In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree.* [Emphasis added.]

* * * If New York decides to make a substantial effort to insulate children from vulgar displays in some significant sphere of activity, at least with respect to materials likely to be seen by children, NYSLA's label prohibition might well be found to make a justifiable contribution to the material advancement of such an effort, but its currently isolated response to the perceived problem, applicable only to labels on a product that children cannot purchase, does not suffice. * * * A state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity.

* * * *

* * * Even if we were to assume that the state materially advances its asserted interest by shielding children from viewing the Bad Frog labels, it is plainly excessive to prohibit the labels from all use, including placement on bottles displayed in bars and taverns where parental supervision of children is to be expected. Moreover, to whatever extent NYSLA is concerned that children will be harmfully exposed to the Bad Frog labels when wandering without parental supervision around grocery and convenience stores where beer is sold, that concern could be less intrusively dealt with by placing restrictions on the permissible locations where the appellant's products may be displayed within such stores.

DECISION AND REMEDY • *The U.S. Court of Appeals for the Second Circuit reversed the judgment of the district court and remanded the case for the entry of a judgment in favor of Bad Frog. The NYSLA's ban on the use of the labels lacked a "reasonable fit" with the state's interest in shielding minors from vulgarity, and the NYSLA did not adequately consider alternatives to the ban.*

WHAT IF THE FACTS WERE DIFFERENT? • *If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court's ruling likely have been the same? Why or why not?*

THE LEGAL ENVIRONMENT DIMENSION • *Whose interests are advanced by the banning of certain types of advertising?*

a. Under the heading "US Court of Appeals," click on "2nd Circuit Court of Appeals." Enter "Bad Frog Brewery" in the "Party Name Search" box and click on "search." On the resulting page, click on the case name to access the opinion.

CASE CONTINUES

CASE 4.2 CONTINUED

CASE 5.2 Commercial Speech

Mainstream Marketing Services, Inc. v. Federal Trade Commission and Federal Communications Commission

358 F.3d 1228, Web 2004 U.S. App. Lexis 2564 (2004)
United States Court of Appeals for the Tenth Circuit

"The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive."
—Judge Ebel

Facts

Pursuant to enabling statutes, two federal administrative agencies—the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)—created the national do-not-call registry. The national do-not-call registry is a list that contains the personal telephone numbers of telephone users who have voluntarily placed themselves on this list, indicating that they do not want to receive unsolicited calls from commercial telemarketers. Commercial telemarketers are prohibited from calling phone numbers that have been placed on the do-not-call registry. Telemarketers must pay an annual fee to access the phone numbers on the registry so that they can delete those numbers from their solicitation lists. The national do-not-call registry restrictions apply only to telemarketers' calls made by or on behalf of sellers of goods or services. Charitable and fundraising calls are exempt from the do-not-call registry's restrictions. Persons who do not voluntarily place their phone numbers on the do-not-call registry may still receive unsolicited telemarketers' calls.

Mainstream Marketing Services, Inc., and other telemarketers sued the FTC and the FCC in several lawsuits, alleging that their free speech rights were violated and that the do-not-call registry was unconstitutional. The FTC and FCC defended, arguing that unsolicited telemarketing calls constituted commercial speech that could properly be regulated by the government's do-not-call registry's restrictions. The separate lawsuits were consolidated for appeal.

Issue

Do unsolicited telemarketing calls constitute commercial speech that can be regulated by the do-not-call registry restrictions?

Language of the Court

Four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements. First, the list restricts only core commercial speech—i.e., commercial sales calls. Second, the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence. Third, the do-not-call registry is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers. Fourth, the do-not-call registry materially furthers the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of the calls that cause these problems.

A number of additional features of the national do-not-call registry, although not dispositive, further demonstrate that the list is consistent with the First Amendment rights of commercial speakers. The challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising. Moreover, they give consumers a number of different options to avoid calls they do not want to receive. Namely, consumers who wish to restrict some but not all commercial sales calls can do so by using company-specific do-not-call lists or by granting some businesses express permission to call. In addition, the government chose to offer consumers broader options to restrict commercial sales calls than charitable and political calls after finding that commercial calls were more intrusive and posed a greater danger of consumer abuse.

The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive. Just as a consumer can avoid door-to-door peddlers by placing a "No Solicitation" sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so. We are convinced that the First Amendment does not prevent the government from giving consumers this option.

For the reasons discussed above, the government has asserted substantial interests to be served by the do-not-call registry (privacy and consumer protection), the do-not-call registry will directly advance those interests by banning a substantial amount of unwanted telemarketing calls, and the regulation is narrowly tailored because its opt-in feature ensures that it does not restrict any speech directed at a willing listener. In other words, the do-not-call registry bears a reasonable fit with the purposes the government sought to advance. Therefore, it is consistent with the limits the First Amendment imposes on laws restricting commercial speech.

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