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Hot Issues Alerts – Law Firms

The First Amendment, A Corporation's Most Fundamental Right

The Editor interviews ***Charles H. Moellenberg Jr****., Litigation Partner in Jones Day's Pittsburgh office*.

Editor: Would you please tell our readers about your practice area? Why have First Amendment rights become a key area of your thinking?

Moellenberg: My practice involves representation of major corporations that have been sued for mass torts and product liability claims. Typically, allegations are made that the companies have promoted products while concealing the harmful nature of those products or that they have conspired to suppress scientific and medical research. Defending those types of claims, along with business defamation actions, inspired my interest in the First Amendment. In many of those lawsuits the plaintiffs have been public officials, state attorneys general, mayors, or county officials. Since they have sworn to uphold both the federal and state constitutions, they should be particularly sensitive to the constitutional rights of the people whom they sue. Through the course of defending companies in litigation, I have found too many circumstances where public officials were out to punish them for the exercise of their First Amendment rights. As a result, I have been concerned that companies will become intimidated from exercising their First Amendment rights, such as joining trade associations, taking positions with legislators on proposed government policies, sponsoring research to develop better science, or criticizing what they believe to be bad science. We have seen instances of bad science, for example, in just the past few weeks with the Climategate charges or the new revelations coming out about whether vaccines cause autism. My concern both as a litigator and as a citizen is to make sure that corporations continue to feel free to express their views in any public debate and to promote lawful products without the fear of liability.

Editor: Please summarize the long history of First Amendment rights accorded corporations. Is there any difference as to the rights of an individual and those of a corporate person as regards protection under the First Amendment?

Charles H. Moellenberg Jr.

Moellenberg: While from the very beginning of our country there has been some antipathy toward corporations, which were government-granted monopolies then, they have been treated as persons having First Amendment and other legal rights for a long time in our constitutional history.(See *Dartmouth College v. Woodward* in 1819 conferring rights of contract on corporations.) The U.S. Supreme Court has recognized that the right of corporations to provide truthful commercial information is essential to our free market economy. Corporations have been treated as legal persons entitled to due process of law for at least 125 years. The rights of companies have developed in a variety of different ways under the First Amendment. While the rights of the press to speak freely are well established, sometimes the rights of other corporations are not appreciated. The right of association developed in the 1940s in cases involving unions and later civil rights organizers. In the 1970s and 1980s, the U.S. Supreme Court made it clear that corporations, like associations and unions, should be able to express their views on issues of public concern. The First Amendment stipulates that there is no such thing as a false opinion or idea. The Supreme Court also said that corporations can lawfully advertise their products as long as those products are not banned and the advertising is factually truthful. Likewise, we are all aware that government can impose reasonable time, place and manner restrictions on commercial transactions, like regulating where you can erect a billboard. There are restrictions on advertising tobacco close to schools, but the government cannot impose a total ban on advertising tobacco because it is a lawful product. Companies should be able to advertise their products, even if known to have some risk of harm, and to speak their views on such matters as global warming or energy policy because they can contribute information to the market and to the public debate. I believe the First Amendment still needs to be policed more rigorously in the courts. Too often corporations are viewed as second-class speakers within our courts of law. The judiciary along with the public officials who bring lawsuits in the first place need to be more sensitive to protecting the First Amendment rights of corporations that have important views as well as valuable products that consumers need to know about. An ad touting compressed natural gas or a new wind turbine informs consumers about a product, but also provides ideas for energy policy.

Editor: Some political officials are taking advantage of the reluctance of some courts to protect the rights of corporations to express their views under the First Amendment. Their aim is to impose massive tort liability on corporate defendants. Please tell our readers about the case of *Kivalina v. ExxonMobil*, decided by the court in the Northern District of California in 2008.

Moellenberg: In *Kivalina v. ExxonMobil,* public officials from small towns in Alaska sued a number of coal, oil, and utility companies alleging that they were contributing to global warming. They claimed that the companies through their trade associations had conspired to downplay the severity of global warming in order to provide services and sell products that contributed to greenhouse gas emissions. Asserting a public nuisance, the town officials claimed that the companies "conspired to create a false scientific debate about global warming in order to deceive the public." The public officials demanded that the defendants pay the cost of relocating their

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towns, which in their view would become uninhabitable owing to global warming. The suit has been dismissed by the federal trial court in California but will likely be going up on appeal. The problem from the First Amendment standpoint is that the lawsuit seems to be premised on suppressing companies' rights to express their viewpoints on global warming, to engage in scientific research that may challenge the "orthodox" view, or to offer their experience and expertise on how to mitigate global warming.

Editor: An equally egregious case involving a trampling of First Amendment rights was that brought by the Attorney General of Rhode Island against the Lead Industries Association in 2001. (*Rhode Island v. Lead Indust. Ass'n*, No. 99-5226, 2001 WL 345830). In July 2008 the jury verdict against the defendants was reversed by the Rhode Island Supreme Court, but without mention of First Amendment arguments. Why was this case such an unfortunate development in protecting the free speech of associations?

Moellenberg: The Attorney General of Rhode Island sued a number companies that many decades ago had made lead pigments for paints. The Attorney General claimed that a trade association to which some of the lead manufacturers had belonged had lobbied to oppose regulation of lead paints and had attempted to challenge particular medical studies as part of a continuing conspiracy to conceal health risks of lead paint. The problem is that the Attorney General attempted to hold corporations liable simply because they belonged to a trade association. A well-established First Amendment principle holds that members of an association are not liable simply because they are members, particularly when the association has lawful goals, whether to advance civil rights or to promote products. The unfortunate consequence would be that the public would be deprived of the corporation's knowledge and expertise in areas where it has unique know-how.

Editor: Why does it matter that some courts have failed to recognize rights of corporations to free speech? What chilling effect results from this attitude by the courts?

Moellenberg: It would impede social and economic progress and a free flow of information to consumers if corporations were to censor themselves for fear of liability. Corporations are vital to fund scientific research and to contribute expertise to government. They are needed to challenge the stampede of orthodox views in government and science.

Editor: Why should there be limits on speech or associations by corporations? Justice Holmes spoke about shouting "fire" in a crowded theatre. What should be the limitations on some corporate speech?

Moellenberg: Obviously, a corporation, like an individual, cannot engage in or incite a criminal act. Likewise, there should not be a knowing misstatement of facts, such as a fraudulent advertisement. The courts have to be careful, however, not to allow permissible regulation to spill over into banning the promotion in a lawful way of lawful products.

Editor: What is the solution to preventing harmful claims by plaintiffs and prosecutors against corporations? Who is responsible for raising claims of First Amendment rights early in litigation?

Moellenberg: It begins with the attorneys who are involved in bringing the litigation, particularly when those plaintiffs are public officials. They should think very carefully about the First Amendment rights of the corporations that they are suing. The next step is with the attorneys representing the defendants, who should assert their First Amendment rights as defenses in the litigation. Judges have a particular obligation to protect everyone's First Amendment rights.

First Amendment defenses can be aired very early in a litigation through motions to dismiss or expressed later in motions for summary judgment or jury instructions. The Supreme Court has said that the courts have a "special obligation to protect First Amendment rights," which are "fragile enough without the additional threat of destruction by lawsuit." All of the attorneys and judges involved in these types of suits should be put on special notice of the obligation to pay attention to and protect First Amendment rights. Courts should require particularized pleadings of fact and proffers of proof from plaintiffs before they are allowed to introduce the evidence and make the arguments that we too often see in this type of mass tort litigation today. The judiciary should not allow a jury to punish unpopular commercial speech. So when an attorney argues, as in the Rhode Island case, that the company should be liable because it joined an association, paid dues and didn't speak out to challenge what the association was doing – normal lobbying and promotion – that is exactly the opposite of well-established First Amendment law, and the judge should intervene. Unfortunately, in the Rhode Island lawsuit the judge did not instruct the jury that the state's argument violated the First Amendment.

Editor: What is the duty of the Supreme Court? What heightened pleading requirements should it promote?

Moellenberg: The Supreme Court has been relatively active in this area and I suspect that it will continue to be active given its recent ruling in *Citizens United*. First Amendment rights need to be protected and spelled out in the product liability and mass tort arena just as they have been in other areas, such as defamation. A heightened pleading standard is important to protect First Amendment rights at the very outset of litigation. Something like a Rule 9(b) requirement, which requires fraud to be pled with specificity, would be helpful in the First Amendment area, too. The heightened burden of proof for fraud claims of clear and convincing evidence should be applied as well when First Amendment rights are implicated. The Supreme Court needs to instruct trial judges to enforce those rules and to have a healthy skepticism when they are assessing product liability and tort claims premised on First Amendment protected activities.

Editor: Do you think that the recent case of *Citizens United vs. Federal Election Commission* relating to corporate contributions will have a salutary effect on courts that have been inclined to inhibit corporate speech?

Moellenberg: I do. The Supreme Court in *Citizens United* was addressing the rights of corporations and other associations to spend money to influence the election of candidates – an area treated differently from the area of commercial speech. The Supreme Court went back to first principles to rely on the First Amendment rights of corporations to speak. It recognized that corporations have much to contribute in the area of the public debate. It rejected the notion that First Amendment rights turn on the speaker's wealth or form of organization. It rejected the notion that the judiciary should play referee in equalizing the relative power of various voices. *Citizens United* is well based. It is ironic to see criticism from those who most rely on the First Amendment – media corporations, advocacy groups and public officials! I believe *Citizens United* should have a beneficial effect in protecting the First Amendment rights of corporations to speak their views in matters of public concern and also to go about their business in promoting their products and services without fear of government censorship through litigation.