




2000

# The Tobacco Industry and the First Amendment - An Analysis of the 1998 Master Settlement Agreement

Lori Ann Luka

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>

 Part of the [First Amendment Commons](#), and the [Health Law and Policy Commons](#)

**How does access to this work benefit you? Let us know!**

---

## Recommended Citation

Note, The Tobacco Industry and the First Amendment - An Analysis of the 1998 Master Settlement Agreement, 14 J.L. & Health 297 (1999-2000)

This Note is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

THE TOBACCO INDUSTRY AND THE FIRST AMENDMENT<sup>1</sup>  
 AN ANALYSIS OF THE 1998 MASTER SETTLEMENT  
 AGREEMENT

I.	INTRODUCTION .....	298
II.	COMMERCIAL SPEECH DOCTRINE .....	299
	A. <i>The Supreme Court’s Traditional View on Commercial Speech</i> .....	299
	B. <i>Central Hudson’s Four-Prong Standard for Analyzing Commercial Speech</i> .....	300
	C. <i>Modifications to the Central Hudson Four-Prong Standard</i> .....	301
	D. <i>Recent Trends in First Amendment Law in Light of 44 Liquormart</i> .....	302
III.	EVALUATING THE MASTER SETTLEMENT UNDER CENTRAL HUDSON .....	304
	A. <i>Constitutional or Unconstitutional?</i> .....	304
	B. <i>Who is Empowered to Challenge?</i> .....	304
	C. <i>Assessing the Government’s Ability to Constitutionally Restrict Commercial Speech under Central Hudson</i> .....	305
	1. <i>Does the Speech Qualify for Constitutional Protection?</i> .....	305
	2. <i>Is The Government’s Interest Substantial?</i> .....	306
	3. <i>Do The Restrictions Advance The Government’s Interest “To A Material Degree”?</i> .....	307
	4. <i>Is There A Reasonable Fit Between The State’s Regulation And The Stated Interest?</i> .....	309
	D. <i>The Master Settlement Agreement’s Marketing and Advertising Restrictions</i> .....	310
	E. <i>Application of Central Hudson to Individual Restrictions of the Master Settlement Agreement to Determine Likelihood of Passing Constitutional Scrutiny</i> .....	311

---

<sup>1</sup>Hogan & Hartson, *Constitutional Issues In Proposed Tobacco Settlement* (visited Jan. 8, 1999) <<http://www.gate.net/~jcannon/acs.html>>.

IV. CURING THE UNCONSTITUTIONAL RESTRICTIONS..... 316

V. CONCLUSION..... 317

I. INTRODUCTION

Prior to 1995, the tobacco industry was an impenetrable fortress. The industry admitted nothing, denied everything, and successfully defended nearly every lawsuit filed against it.<sup>2</sup> Then, in 1995, a war was waged against the tobacco industry by both the federal and state governments. The war began on the federal level with President Clinton’s approval of federal legislation that declared nicotine an addictive drug and authorized the Federal Food and Drug Administration (FDA) to seek jurisdiction over tobacco products as “drug delivery devices.”<sup>3</sup> Additionally, the President announced broad executive action which sharply restricted the advertising, promotion, distribution and marketing of tobacco products with the goal of protecting children and adolescents from the dangers of tobacco products.<sup>4</sup>

Following President Clinton’s lead, U.S. Attorneys General from 46 states<sup>5</sup> joined forces to file a single lawsuit that has made the participating tobacco companies<sup>6</sup> willing to settle to terms that will change the tobacco industry forever.<sup>7</sup> This settlement is known as the Master Settlement Agreement. For example, banned are advertisements on billboards, in sports arenas and stadiums, shopping malls, buses and trains. Sales of T-shirts, caps and other merchandise are banned, as well

---

<sup>2</sup>Betty D. Montgomery, *Montgomery Announces Tobacco Settlement—Ohio Will Receive Hundreds of Millions Per Year* (last modified Nov. 18, 1999) <<http://www.ag.state.oh.US/pressrel/tobanni.htm>>

<sup>3</sup>President’s News Conference, 31 WKLY COMP. PRES. DOC. 1415 (August 10, 1995).

<sup>4</sup>FDA Regulations, 60 Fed. Reg. at 41,453

<sup>5</sup>Betty D. Montgomery, *Master Settlement Agreement* (visited Jan. 8, 1999) <<http://www.ag.state.oh.US/pressrel/tobanni.htm>> The Attorney Generals involved in the Master Settlement Agreement are from: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Officials from the following were also involved: American Samoa, District of Columbia, Guam, Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands of the United States.

<sup>6</sup>Montgomery, *supra* note 5, at 2. The 1998 Master Settlement Agreement participating companies are Philip Morris Inc., R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Corp., and Lorillard Tobacco Company.

<sup>7</sup>Clint O’Connor, *So Long, Marlboro Man: Tobacco Settlement Means End of Cigarette Billboards*, CLEVELAND PLAIN DEALER, March 7, 1999, at K-1. The Master Settlement Agreement reached in November of 1998 calls for \$206 billion to be paid to the participating states over the next 25 years. *Id.*

as promotion of tobacco products in movies, TV shows, theater productions, music performances, videos and video games.<sup>8</sup>

Because a number of the terms contained in the Master Settlement Agreement have sharply restricted the tobacco industry's ability to market and advertise its products, the settlement agreement has First Amendment commercial speech implications. Should challenges to the Master Settlement Agreement arise, the Supreme Court would employ the pathbreaking decision for determining when the government may restrict commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>9</sup> and its progeny to assess its constitutionality.<sup>10</sup>

This Note discusses and assesses the Government's likelihood of passing constitutional scrutiny with the Master Settlement Agreement's restrictions in light of the First Amendment case law. A majority of the restrictions will likely pass constitutional scrutiny because they meet the demanding requirements of *Central Hudson* and its progeny. The author believes that a few of the restrictions need to be more narrowly tailored in order to pass constitutional scrutiny. Suggestions on how to narrowly tailor the restrictions to comport with *Central Hudson* are proffered by the author.

Section II provides an overview of the history of First Amendment commercial speech jurisprudence. It discusses cases that foreshadowed the *Central Hudson* decision, the *Central Hudson* decision itself, the progeny of *Central Hudson* which has slightly refined the original four prong test for commercial speech, and addresses the possible trends in light of the progeny. Section III of the note addresses why the Master Settlement Agreement may have problems passing constitutional scrutiny and what parties may have standing to challenge the provisions. Section IV gives an in-depth look into how the restrictions will fare when analyzed under the *Central Hudson* four prong test, and individually assesses selected restrictions. Finally, Section V makes suggestions on how the government can cure the restrictions that may be found constitutionally infirm.

## II. THE COMMERCIAL SPEECH DOCTRINE

### A. *The Supreme Court's Traditional View on Commercial Speech*

In the early days of the commercial speech doctrine, the Supreme Court afforded no protection to "expression related solely to the economic interests of the speaker and its audience."<sup>11</sup> The Court stressed the "traditional view" that communications to which First Amendment protection would be given were not of a purely commercial nature.<sup>12</sup> The Supreme Court, however, rejected the traditional view that commercial speech was not subject to First Amendment protection when it decided

---

<sup>8</sup>*Id.*

<sup>9</sup>*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

<sup>10</sup>*Montgomery*, *supra* note 5, at 2.

<sup>11</sup>*Central Hudson*, 447 U.S. at 561.

<sup>12</sup>*New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).

*Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*<sup>13</sup> The Court held that speech that proposes no more than a commercial transaction can be protected under First Amendment law.<sup>14</sup> The Court refused to accept the State's paternalistic approach, forbidding it from completely suppressing the dissemination of concededly truthful information about entirely lawful activity because it was fearful of the information's effect upon its disseminators and its recipients.<sup>15</sup> The Court acknowledged that society has a strong interest in "the free flow of commercial information", including the "proper allocation of resources in a free enterprise system".<sup>16</sup> Therefore, the First Amendment can protect commercial speech from unwarranted governmental intrusion.<sup>17</sup>

*B. Central Hudson's Four-Prong Standard for Analyzing Commercial Speech*

After deciding *Virginia Pharmacy*, the Supreme Court determined *Central Hudson*,<sup>18</sup> thereby laying down a four-part test for determining whether a given regulation of commercial speech violates the First Amendment. The government is permitted to regulate commercial speech if the following four conditions are met: (1) the speech qualifies for protection in that it is neither misleading nor concerns an unlawful activity; (2) the asserted governmental interest in support of the restriction is substantial; (3) the restriction directly advances the interest; and (4) the regulation is not "more extensive than is necessary to serve that interest."<sup>19</sup> The third and fourth prongs of the *Central Hudson* test require consideration of the fit between the government's substantial interest and the means chosen to accomplish that objective.<sup>20</sup> These elements of the test have proven to be the most difficult to satisfy.

Applying the test to the facts of *Central Hudson*, the Court held that the utilities' promotional advertising was speech protected by the First Amendment. The State had two interests that the Court found to be substantial, conservation of energy and maintenance of a fair and efficient rate structure. Although, the Court found that there was a direct link between the ban and the substantial interest of energy conservation, the ban on energy conservation was more extensive than needed to further the state's interest and, therefore, the State failed to satisfy the fourth prong of *Central Hudson*.<sup>21</sup>

---

<sup>13</sup>*Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>14</sup>*Id.* at 762.

<sup>15</sup>*Id.* at 773.

<sup>16</sup>*Id.* at 765.

<sup>17</sup>*Id.* at 761-62.

<sup>18</sup>*Central Hudson*, 447 U.S. at 566 (1980).

<sup>19</sup>*Id.* at 566. For purposes of First Amendment analysis, examples of government interests that might qualify as "substantial" include preserving the reputation of professions, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); protecting the health, safety and welfare of citizens, *Rubin v. Coors*, 514 U.S. 476 (1995); and protecting the physical and psychological well-being of children, *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>20</sup>*United States v. Edge Broadcasting, Co.*, 509 U.S. 418 (1993).

<sup>21</sup>*Id.* at 431.

*C. Modifications to the Central Hudson Four-Prong Standard*

In *Edenfield v. Fane*,<sup>22</sup> the Supreme Court struck down a state ban against solicitation by certified public accountants (CPA's) for failure to satisfy the third prong of *Central Hudson*. The State of Florida imposed a blanket ban on direct, in-person, uninvited solicitation by CPA's who sought to communicate truthful non-deceptive information proposing a lawful commercial transaction.<sup>23</sup> The Court stated that the government identified certain interests in regulating solicitation in the accounting profession that are important and within its legitimate power, but that the government failed to provide substantial evidence to show that the regulation directly and materially advanced the state's purported interest.<sup>24</sup> Most importantly in *Edenfield*, the Court watered down the "not more extensive than is necessary" fourth prong of *Central Hudson*. Thus, the current requirement to satisfy the fourth prong "means-end fit" is that the means be "tailored in a reasonable manner" to serve the government objective.<sup>25</sup> In other words, some looseness in the means-end fit will be tolerated where what is regulated is commercial speech.<sup>26</sup>

Another important case in First Amendment commercial speech jurisprudence was *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.<sup>27</sup> In *Posadas*, the Court held that the government could ban advertising for casino gambling aimed at Puerto Rican residents because the commercial speech at issue concerned a lawful activity and was not misleading or fraudulent.<sup>28</sup> *Posadas* was significant because the Court's opinion stood for the idea that if an activity could be completely banned, advertising of the activity could be completely banned, or tightly regulated.<sup>29</sup> This holding gave state legislatures greater power to regulate the advertising of products that are lawful, but believed by the legislature to be harmful. Examples of such "vice" products are cigarettes, liquor, and gambling.

---

<sup>22</sup>*Edenfield v. Fane*, 507 U.S. 761 (1993).

<sup>23</sup>*Id.* at 763-64.

<sup>24</sup>*Id.* at 771.

<sup>25</sup>*Id.* at 767.

<sup>26</sup>*Id.* at 769. The fact that there may be some other means that would serve the government interest as well, while restricting the commercial speech less, will not be fatal. Some degree of looseness in the means-end fit will be tolerated when what is being regulated is commercial speech. *Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989).

<sup>27</sup>*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

<sup>28</sup>*Id.* at 340-41.

<sup>29</sup>*Id.* at 345-46. The majority stated in *Posadas* that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* This is also known in First Amendment jurisprudence as the "greater includes the lesser" theory. The theory posits that if a state can completely ban a particular product, it could instead choose to ban or tightly regulate advertising for that product because this would be a lesser intrusion. *Id.*

This theory, however, was rejected in *44 Liquormart v. Rhode Island*<sup>30</sup> by a number of Justices of the Supreme Court because “it is quite clear that banning speech may sometimes prove far more intrusive than banning conduct. . . .”<sup>31</sup> “[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes.”<sup>32</sup> In *44 Liquormart*, the Court indicated a willingness to apply a more stringent standard of review to government restrictions of commercial speech. The Court unanimously struck down a Rhode Island statute that provided for a blanket ban on all retail price advertising for alcoholic beverages on the ground that the state failed to establish a “reasonable fit” between the restriction and the stated goal of reducing alcohol consumption.<sup>33</sup> Specifically, the Court reasoned (1) that the state offered insufficient proof that the restriction would advance its interest, and (2) that alternative forms of regulation were available to the state to achieve its goals that would not involve a restriction of speech.<sup>34</sup> However, the Court refused to engage in “speculation or conjecture,” finding it an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State’s asserted interest.<sup>35</sup> Following *44 Liquormart*, it became clear that the majority of the Court intends to review stringently government regulation of accurate commercial speech regarding a lawful activity.

#### D. Recent Trends in First Amendment Law in Light of *44 Liquormart*

Two recent commercial speech cases decided by the United States Court of Appeals for the Fourth Circuit provide some insight into how restrictions on commercial advertising might be handled in light of *44 Liquormart*. Both *Penn Advertising v. Baltimore*<sup>36</sup> and *Anheuser-Busch v. Schmoke*<sup>37</sup> addressed Baltimore city ordinances covering commercial speech. *Penn Advertising* involved an ordinance prohibiting cigarette advertising on billboards located in designated areas of the city<sup>38</sup> and *Anheuser-Busch*<sup>39</sup> involved a similar ordinance prohibiting outdoor

---

<sup>30</sup>517 U.S. 484 (1996).

Posadas clearly erred in concluding that it was “up to the legislature” to choose suppression over a less speech-restrictive policy. The Posada’s majority’s conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available. *Id.* at 509-10.

<sup>31</sup>*Id.* at 511. Only three other Justices joined directly with Stevens in rejecting *Posadas*, but at least four, if not all five, of the remaining members seemed to agree that the reasoning in *Posadas* should no longer be followed. *Id.*

<sup>32</sup>*Id.* at 510.

<sup>33</sup>*Id.* at 505-06.

<sup>34</sup>*Id.*

<sup>35</sup>*44 Liquormart*, 517 U.S. at 507.

<sup>36</sup>*Penn Adver. v. Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated*, 116 S. Ct. 2575 (1996), *on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

<sup>37</sup>*Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated*, 116 S. Ct. 1821 (1996), *on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

<sup>38</sup>*Id.* at 1321.

advertising of alcoholic beverages. Both ordinances included an exception for permitting outdoor advertising in certain commercially and industrially zoned areas of the city.<sup>40</sup> Applying the *Central Hudson* test in *Anheuser*, the United States Court of Appeals for the Fourth Circuit upheld the restriction on the advertising of alcoholic beverages and determined that the ordinance directly and materially advanced the city's interest in promoting the welfare and temperance of minors<sup>41</sup> and that the relationship between the restriction and the purported government objective "falls well within the range tolerated by the First Amendment"<sup>42</sup> for the regulation of commercial speech. The United States Court of Appeals for the Fourth Circuit reasoned that because adults could still receive advertising messages and information through other media, and commercial and industrial zones were exempted from the billboard ban, the ordinance was not more extensive than necessary to serve the governmental interest.<sup>43</sup> Similarly, in *Penn Advertising*, the Court of Appeals held that the asserted public interest in preventing the purchase and consumption of cigarettes by minors was directly advanced by the billboard restrictions and that the advertising regulation was narrowly tailored to comply with the First Amendment.<sup>44</sup>

*Penn Advertising* and *Anheuser-Busch*, decided prior to *44 Liquormart*, were vacated and remanded by the Supreme Court for reconsideration in light of that decision. On remand, the Fourth Circuit Court of Appeals affirmed its decision, holding that the ordinances were constitutional time, place, and manner restrictions, not a blanket ban like that in *44 Liquormart*.<sup>45</sup> The Supreme Court denied certiorari in both cases.<sup>46</sup>

Another recent case, *Reno v. American Civil Liberties Union*,<sup>47</sup> addressed the constitutionality of the Communications Decency Act ("CDA"), a federal law aimed at protecting minors from indecent materials transmitted over the Internet. The Supreme Court found the CDA to be unconstitutional because "in order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."<sup>48</sup> The Court held that the CDA's burden on adult speech was unacceptable because it was possible that "less restrictive alternatives would be at least effective in achieving the legitimate purpose that the statute was enacted to

---

<sup>39</sup>*Id.* at 1309.

<sup>40</sup>*Penn Adver.*, 63 F.3d at 1321; *Anheuser-Busch*, 63 F.3d at 1309.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 1317.

<sup>43</sup>*Id.*

<sup>44</sup>*Penn Adver.*, 63 F.3d at 1325-26.

<sup>45</sup>*44 Liquormart*, 101 F.3d at 330.

<sup>46</sup>*See Penn Adver.*, 117 S. Ct. 1569 (1997); *See Anheuser-Busch*, 117 S. Ct. 1569 (1997).

<sup>47</sup>*Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>48</sup>*Id.* at 2346.



serve.”<sup>49</sup> The government failed to explain why less restrictive alternatives would not be as effective as the CDA, therefore the law was struck down.<sup>50</sup>

### III. EVALUATING THE MASTER SETTLEMENT UNDER CENTRAL HUDSON

#### A. *Constitutional or Unconstitutional?*

In order to accurately assess the constitutionality of the Master Settlement Agreement’s marketing and advertising restrictions, one must keep in mind the Government’s substantial, if not compelling, interest in preventing and reducing youth smoking. Most restrictions on marketing and advertising contained in the Master Settlement Agreement will be upheld as being constitutional because the Government will be able to demonstrate that it has complied with *Central Hudson’s* four-prong test, thus permitting the Government to constitutionally restrict the tobacco companies commercial speech.<sup>51</sup> The constitutionality of the restrictions is further supported by the fact that even though smoking is a lawful activity for adults to engage in, the purchase and consumption of tobacco products by minors is unlawful.<sup>52</sup> Even if the tobacco companies are able to demonstrate that the advertising and marketing of their products is lawful and nonmisleading in order to qualify for some level of First Amendment protection, narrowly tailored restrictions on such advertising and marketing designed to protect minors may be both justified and constitutional.<sup>53</sup>

#### B. *Who is Empowered to Challenge?*

Before assessing the constitutionality of the restrictions on marketing and advertising contained in the Master Settlement Agreement, a reviewing court must first determine if the party or parties bringing suit have proper standing to appear before the court.<sup>54</sup> Pursuant to the Master Settlement Agreement, the participating tobacco companies have agreed to waive their right to constitutionally challenge the provisions of the Master Settlement Agreement.<sup>55</sup> Courts have upheld the voluntary waiver of constitutional rights, including the right to free speech protected by the First Amendment, that was obtained through a settlement agreement.<sup>56</sup> However,

---

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 2348.

<sup>51</sup>*See* Hogan & Hartson, *supra* note 1.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.3.1 (2d ed. 1994). “Standing is the determination of whether a specific person is the proper party to bring a particular matter to a federal court for adjudication.” *Id.* The Supreme Court has declared that “[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Id.* (Chemerinsky quoting the *U.S. Supreme Court in Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>55</sup>*See* Montgomery, *supra* note 5 at XV. Voluntary Act Of The Parties.

<sup>56</sup>*Wilkicki v. Brady*, 882 F. Supp. 1227, 1232-38 (D.R.I. 1995).

this will not be enough to insulate the Master Settlement Agreement from constitutional challenges by other parties that have an interest in the lawsuit.

Even though participating tobacco companies may not constitutionally challenge the Master Settlement Agreement, there are several other possible parties that may attain standing to challenge the restrictions as unconstitutional infringements on their First Amendment rights. The Master Settlement Agreement does not specifically state that the settlement provisions apply to the non-participating tobacco companies, making it highly likely that these companies will seek standing to obtain a favorable ruling on the settlement's restrictions.<sup>57</sup> Also, new tobacco companies that were not party to the contractual agreement may also seek standing to challenge the restrictions.<sup>58</sup> Additionally, consumers may challenge the settlement provisions as an infringement of their right to receive information on tobacco products.<sup>59</sup> Furthermore, billboard advertising and media companies may also gain standing to challenge the restrictions.<sup>60</sup> It is likely that some party will have standing to challenge the restrictions on marketing and advertising contained in the Master Settlement Agreement.<sup>61</sup>

*C. Assessing the Government's Ability to Constitutionally Restrict Commercial Speech under Central Hudson*

1. Does the Speech Qualify for Constitutional Protection?

The constitutional inquiry of *Central Hudson* begins with determining whether the commercial speech qualifies for constitutional protection. Commercial speech which is misleading or deceptive, or which proposes an illegal transaction is not entitled to First Amendment protection.<sup>62</sup> Although the use of tobacco products by adults is not illegal, the advertising and marketing directed at use and consumption by minors does relate to unlawful conduct.<sup>63</sup> The sale of tobacco products to minors is unlawful in all 50 states, and a majority of those states prohibit the purchase, possession or use of tobacco by minors.<sup>64</sup> This is the argument that the FDA has forwarded to implement restrictions on the tobacco companies rights to advertise. A number of the FDA's restrictions have been incorporated into the Master Settlement Agreement.<sup>65</sup> "Thus, to the extent that tobacco advertising is aimed at children and

---

<sup>57</sup>See Hogan & Hartson, *supra* note 1.

<sup>58</sup>*Id.*

<sup>59</sup>Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 757.

<sup>60</sup>*Penn Adver.*, 63 F.3d 1318 (4th Cir. 1995).

<sup>61</sup>See Hogan & Hartson, *supra* note 1.

<sup>62</sup>*Virginia Bd. of Pharm.*, 425 U.S. at 762.

<sup>63</sup>See Hogan & Hartson, *supra* note 1.

<sup>64</sup>*Id.*

<sup>65</sup>FDA Regulations, 61 Fed. Reg. at 44,471.

adolescents, or at least at contemplating under age use, the FDA argues that its restrictions on advertising and promotion of tobacco products are constitutional.”<sup>66</sup>

Despite the efforts of the FDA to have tobacco advertisements categorized as “relating to an unlawful activity” and “inherently misleading” thereby falling out from under the umbrella of First Amendment protection, the Supreme Court is likely to determine that tobacco advertisements are entitled to constitutional protection because they reach adults in addition to minors. “Established First Amendment doctrine makes clear, however, government may not reduce adults to the status of children, by regulating expression directed primarily at adults on the grounds that minors may be exposed to it.”<sup>67</sup> “The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”<sup>68</sup>

It has also been argued that tobacco advertisements are inherently misleading because no advertisement gives adequate warning of the wide range of serious and life threatening diseases that may be caused by ordinary use of the tobacco products.<sup>69</sup> This argument is likely to fail because “unlike advertising for virtually any other lawful product, tobacco advertising is already required by government to place a variety of explicit warnings concerning the dangers of smoking.”<sup>70</sup> Adults are completely capable of reading the warnings on labels and counter-balancing the pleasures of engaging in the activity with the dangers.<sup>71</sup> The Court is likely to dismiss the “inherently misleading” argument because it has already ruled in *Virginia State Board of Pharmacy*<sup>72</sup> that the government may not restrict speech for paternalistic reasons.

Since tobacco companies have a lawful interest in advertising their products to adults, and provided that the advertisements are found truthful and nonmisleading, the Court is likely to find the advertisements entitled to First Amendment protection.<sup>73</sup> The Government’s restrictions must also survive the next three prongs of *Central Hudson* to pass constitutional scrutiny.

## 2. Is The Government’s Interest Substantial?

Assuming that Prong 1 of *Central Hudson* is satisfied and that the commercial speech qualifies for at least some protection, the government must now forward a substantial interest to justify the restrictions contained in the Master Settlement Agreement. One of the main objectives of the settlement is to reduce children’s use of tobacco products<sup>74</sup> which has been labeled a “health epidemic problem.”<sup>75</sup> The

---

<sup>66</sup>*Id.*

<sup>67</sup>Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 608 (1996).

<sup>68</sup>*Reno*, 521 U.S. at 875 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

<sup>69</sup>Redish, *supra* note 67.

<sup>70</sup>*Id.* at 609. The warnings appear at 15 U.S.C. § 1333.

<sup>71</sup>*Id.*

<sup>72</sup>*Virginia State Board of Pharm.*, 425 U.S. at 773.

<sup>73</sup>Hogan & Hartson, *supra* note 1.

<sup>74</sup>Montgomery, *supra* note 2.

Supreme Court is likely to find the government's interest in protecting the nation's youth from the harms of tobacco use a substantial, if not compelling interest, because the Court has repeatedly recognized that the protection of children deserves special solicitude when considering a restriction that implicates the First Amendment.<sup>76</sup> The government should not have difficulty meeting the second prong of *Central Hudson*.

### 3. Do The Restrictions Advance The Government's Interest "To A Material Degree"?

When *Central Hudson* was originally decided, the third prong required that the regulation of commercial speech be "no more extensive than necessary" to achieve the government's objective.<sup>77</sup> But *Central Hudson's* progeny has relaxed the means-end fit, requiring that the means be "designed in a reasonable way" to serve the government objective (i.e. that the means advance the objective in a "direct and material way.")<sup>78</sup> The fact that there may be some other means that may serve the government interest as well, while restricting the speech less, will not necessarily be fatal. Some degree of looseness in the means-end fit will be tolerated when commercial speech is being regulated.<sup>79</sup>

Satisfaction of this prong may pose some difficulty for the government to satisfy because "the quantity and quality of evidence that the courts should require in order to uphold a restriction on commercial speech is unsettled and reflects disagreement among Supreme Court justices."<sup>80</sup> In *Florida Bar v. Went For It, Inc.*,<sup>81</sup> a survey prepared by the state bar association was sufficient to support a ban on targeted direct-mail solicitation by attorneys, despite certain methodological shortcomings. The dissent insisted that the bar association should have conducted the survey in accordance with basic standards of social science research. In *Burson v. Freeman*,<sup>82</sup> the Court declared that some decisions are justified based on "simple common sense." However, most recently in *44 Liquormart*,<sup>83</sup> Justice Stevens asserted that "anecdotal evidence and educated guesses" are insufficient to satisfy the government's burden to show that the ban on price advertising would "materially" reduce alcohol consumption.

In light of the more stringent evidence that *44 Liquormart's* holding seems to require, it is important that the Attorneys General maintain that their goal is to reduce children's use of tobacco products. They must run the same offensive as the FDA, that cigarette advertising is directed at youth, who could not be legal buyer's of the

<sup>75</sup>Office on Health and Smoking, U.S. Dep't. of Health and Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General (1994)* at foreword.

<sup>76</sup>*New York v. Ferber*, 458 U.S. 747 (1982) (protecting the physical and psychological well-being of children represents a compelling state interest).

<sup>77</sup>*Central Hudson*, 447 U.S. at 572.

<sup>78</sup>*Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

<sup>79</sup>*Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989).

<sup>80</sup>*Hogan & Hartson*, *supra* note 1.

<sup>81</sup>515 U.S. at 618.

<sup>82</sup>*Burson v. Freeman*, 504 U.S. 191, 211 (1992).

<sup>83</sup>517 U.S. at 505.

product and should therefore be restricted. The other alternative, the “discourage consumption” objective which portrays that tobacco is bad and that less advertising will mean less consumption, was disfavored in *44 Liquormart*.<sup>84</sup> In that case, the government presented no findings of fact, or any evidentiary support whatsoever to suggest that its speech prohibition [would] significantly reduce market-wide consumption.<sup>85</sup> The Court refused to engage in such “speculation or conjecture” which is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the government’s asserted interest.<sup>86</sup> The safer argument for the Attorneys General to make is that the restrictions will directly and materially reduce the use of tobacco products by children because there are findings to support such a substantial interest.

The third prong of *Central Hudson* requires the government to demonstrate that the restrictions contained in the Master Settlement Agreement “directly and materially advance”<sup>87</sup> the substantial governmental interest in reducing children’s use of tobacco products. “To meet this burden, the government must show that tobacco advertising ‘plays a concrete role in the decision of minors to smoke’ and that the restrictions will ultimately contribute to protecting the health of children.”<sup>88</sup> The government can demonstrate that the means-end fit is tailored in a reasonable manner by providing evidence and findings of fact that demonstrate that there is an association between tobacco advertising and underage smoking.<sup>89</sup> There is a substantial amount of evidence, both direct and indirect, that supports this link. Many different well-respected institutions, including the American Medical Association,<sup>90</sup> have conducted thorough studies, in accordance with basic standards of social science research, that affirmatively link tobacco advertising with youth smoking. These studies have found that nearly 3,000 Americans start smoking every day, and most of these new smokers are children or adolescents.<sup>91</sup> Studies also show that over ninety percent of those who become long-term smokers begin smoking as children or adolescents.<sup>92</sup> A person who does not start smoking as a minor is unlikely to become a smoker later on in life.<sup>93</sup> It is no secret that children are aware

---

<sup>84</sup>*Id.* at 506.

<sup>85</sup>*Id.* (citing *Edenfield*, 507 U.S. at 770).

<sup>86</sup>*Id.* at 507.

<sup>87</sup>*Edenfield*, 507 U.S. at 771.

<sup>88</sup>Hogan & Hartson, *supra* note 1 (quoting FDA Regulations, 61 Fed. Reg. at 44, 474).

<sup>89</sup>*Id.*

<sup>90</sup>Joseph R. DiFranza et al., *RJR Nabisco’s Cartoon Camel Promotes Camel Cigarettes to Children*, 266 J. AM. MED. ASSOC. 3149-50 (1991). A recent study published by the American Medical Association demonstrated that more pre-school age children can match Joe Camel to cigarettes than Mickey Mouse to Walt Disney.

<sup>91</sup>Ronald M. Davis, *Reducing Youth Access To Tobacco*, 266 J. AM. MED. ASSOC. 3186 (1991).

<sup>92</sup>*Health-Care Provider Advice on Tobacco Use To Persons Aged 10-22 Years*, 44 MORBIDITY AND MORTALITY WEEKLY REP. 826 (1995).

<sup>93</sup>Peter Rheinstein & Thomas McGinnis, *Children and Tobacco: The Clinton Administration Proposal*, 52 AM FAMILY PHYSICIAN 1205 (1995).

of, respond favorably to, and are influenced by cigarette advertising.<sup>94</sup> The evidence demonstrates that a strong correlation exists between tobacco advertising and consumption by minors.<sup>95</sup>

In addition, the government must continue to develop the record that concretely establishes findings of fact and evidence that links tobacco advertising directly with underage tobacco product usage. The government will then be prepared to demonstrate to a court that the regulation's means-end fit is "tailored in a reasonable manner" to accomplish the government's substantial interest.<sup>96</sup> Development of the record is essential in demonstrating compliance with *44 Liquormart's* recent scrutiny of the nexus between speech restrictions and the advancement of the government interest.<sup>97</sup>

#### 4. Is There A Reasonable Fit Between The State's Regulation And The Stated Interest?

The fourth prong of the *Central Hudson* test requires the court to examine whether a "reasonable fit" exists between the limitations placed on commercial speech and the government's substantial interest.<sup>98</sup> The restrictions on speech must not be "more extensive than necessary".<sup>99</sup> This test requires a "fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."<sup>100</sup> The government need not employ the "the least restrictive means to accomplish its goal, the fit between the means and ends must be 'narrowly tailored'."<sup>101</sup>

When the Court applied this standard in *44 Liquormart*, it concluded that the government could have used other, less restrictive, non-speech means to "promote temperance" than banning price advertisements. For example, the government could have accomplished its objective by establishing a minimum price, raising the sales tax, instituting educational campaigns, or placing per capita limits on purchases.<sup>102</sup>

The Court struck down the outright ban on advertising because it interfered with the core informational function of commercial speech, the advertising of "who is

---

<sup>94</sup>Federal Regulations, 61 Fed. Reg. at 44, 475.

<sup>95</sup>*Id.* at 44,474, 44,488.

<sup>96</sup>*Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

<sup>97</sup>Hogan & Hartson, *supra* note 1.

<sup>98</sup>*Edenfield*, 507 U.S. at 769.

<sup>99</sup>*44 Liquormart*, 517 U.S. at 528-29. (O'Connor, J., plurality opinion) When *Central Hudson* was first decided, the fourth prong required that the regulation be "not more extensive than necessary" to serve the government interest. However, several post-*Central Hudson* cases show that the Court has watered down the "not more extensive than necessary" to "least restrictive means to accomplish its goal". Today, all that is required of the means-end fit is that the regulation be "narrowly tailored" to serve the governmental interest.

<sup>100</sup>*Id.* (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. at 480).

<sup>101</sup>*Id.*

<sup>102</sup>*See* Hogan & Hartson, *supra* note 1 (quoting *44 Liquormart*, 517 U.S. at 528).

producing and selling what product, for what reason, and at what price.”<sup>103</sup> The majority of the restrictions contained in the Master Settlement Agreement are distinguishable from the outright ban the Court struck down in *44 Liquormart*. The Master Settlement Agreement adopts narrowly tailored restrictions that will serve the government’s asserted interest. The narrowly tailored restrictions have virtually no effect on the tobacco companies’ ability to advertise the core informational commercial speech.

In applying the fourth prong of *Central Hudson* to determine if the restrictions are narrowly tailored enough in relation to the reduction of tobacco consumption by minors, it is important for the government to demonstrate to the courts that less restrictive alternatives than banning speech have already been employed and found lacking. State governments have enacted laws that banned the sale of cigarettes to minors, and employed “stings” and identification checks in order to reduce underage smoking.<sup>104</sup> These non-speech, least restrictive alternatives have not shown much progress in reducing underage smoking; therefore, restrictions on speech are justified as a last resort.<sup>105</sup> The Master Settlement Agreement incorporates numerous non-speech-restrictive options<sup>106</sup> in addition to commercial speech provisions in hopes that a comprehensive scheme will achieve the government’s stated purpose of reducing underage tobacco use. This multifaceted approach to reducing youth tobacco use will be helpful when a court analyzes the fit between the particular speech restrictions and the goals of the legislation.”<sup>107</sup>

#### *D. The Master Settlement Agreement’s Marketing and Advertising Restrictions*

The 1998 Master Settlement Agreement contains a number of marketing and advertising restrictions. For purposes of this Note, the author has chosen to discuss the following eight marketing and advertising restrictions contained in the 1998 Master Settlement Agreement that directly implicate First Amendment commercial speech rights.<sup>108</sup>

- A requirement that tobacco product advertising be limited to black text on white background except for advertising in adult-only facilities and in “adult publications”<sup>109,110</sup>

---

<sup>103</sup> *44 Liquormart*, 517 U.S. at 496.

<sup>104</sup> See Hogan & Hartson, *supra* note 1, at 15.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 16. Some of the non-speech-restrictive provisions include licensure of retail tobacco product sellers, restrictions on access to tobacco products, and the “look back” provisions. “Look back” provisions set specific targets for the reduction in current levels of underage smoking and use of smokeless products over the next ten years. *Id.*

<sup>107</sup> Hogan & Hartson, *supra* note 1, at \*16.

<sup>108</sup> See Montgomery, *supra* note 5 at III. Permanent Relief. The listed restrictions in this article are in no way exhaustive of all the restrictions contained in the 1998 Master Settlement Agreement. See *id.* at III. Permanent relief, (a)-(r).

<sup>109</sup> *FDA Format and Content Requirements for Labeling and Advertising of Cigarettes and Smokeless Tobacco*, 21 C.F.R. § 897.32(a)(2) (1996). As defined in the FDA’s 1996 rule’s, “adult-only publications” are defined as those: (1) whose readers that are 18 or older constitute 85 percent or more of the publication’s total readership, or (2) that are read by two

- A ban on sponsorships, including sponsorship of concerts and sporting events, in the name, logo or selling message of a tobacco brand;<sup>111</sup>
- A ban on all non-tobacco merchandise, including caps, jackets and bags, bearing the name, logo or selling message of a tobacco brand;<sup>112</sup>
  - A ban on all outdoor advertising of tobacco products as well as a ban on advertising indoors when the advertising is directed outside;<sup>113</sup>
  - A ban on the use of human images and cartoon characters in tobacco advertising (e.g. Joe Camel and the Marlboro Man)<sup>114,115</sup>
  - A ban on all tobacco product advertising on the Internet that is accessible from the U.S.;<sup>116</sup>
  - A ban on direct and indirect payments for tobacco images in movies, television programs and video games;<sup>117</sup>
  - A prohibition on youth targeting in the advertising, promotion or marketing of tobacco products.<sup>118</sup>

*E. Application of Central Hudson to Individual Restrictions of the Master Settlement Agreement to Determine The Likelihood of Passing Constitutional Scrutiny*

It has been demonstrated that under the first prong of *Central Hudson*, the tobacco advertisements will likely be granted First Amendment protection provided that the advertisements are found to be truthful and nonmisleading, because the tobacco companies have a lawful interest in advertising their products to adults. It has also been demonstrated that the Court will likely find that the government has a substantial interest in reducing children's use of tobacco products. Therefore, this article now focuses on evaluating each individual restriction's ability to pass the third and fourth prongs of *Central Hudson*. If a restriction is able to pass these prongs, it is likely to pass constitutional scrutiny by the courts and be upheld. If a

---

million or fewer people under age 18. Based on current readership estimates, publications such as *Rolling Stone* and *Sports Illustrated* would be limited to text-only advertisements, whereas *Time* and *Newsweek* would not be subject to the restriction. *FDA Regulations*, 61 Fed. Reg. at 44, 514 (1996).

<sup>110</sup>See Montgomery, *supra* note 5 at III. Permanent Relief (c).

<sup>111</sup>*Id.* at (c).

<sup>112</sup>*Id.* at (f).

<sup>113</sup>*Id.* at (d).

<sup>114</sup>See O'Connor, *supra* note 7, at K-1.

[D]avid McLean, an actor that played the Marlboro Man in TV commercials, died of lung cancer in 1995. His widow sued Philip Morris and eight other tobacco companies for wrongful death. The suit claimed that McLean was sometimes required to smoke five packs of Marlboro's per photo session to 'get the ashes to fall a certain way, the smoke to rise a certain way and the hand to hold the cigarette in a certain way.' The case is still pending."

<sup>115</sup>See Montgomery, *supra* note 5 at III. Permanent Relief (b).

<sup>116</sup>*Id.* at (e).

<sup>117</sup>*Id.* at (e).

<sup>118</sup>*Id.* at (a).



restriction fails these prongs, the government may need to reconsider the restriction in light of *Central Hudson* and its progeny and tailor the regulation appropriately.

1. Requirement that Tobacco Product Advertising Be Limited to Black Text on a White Background Except for Advertising in Adult-Only Facilities and Adult Publications

The restriction requiring that tobacco product advertising be limited to black text on a white background except in adult-only facilities and publications is likely to be upheld as constitutional because it is narrowly tailored to limit children from exposure to tobacco advertisements. These restrictions are designed specifically to limit children's exposure to commercial messages relating to a product that is unlawful for them to purchase. Additionally, these restrictions in no way interfere with the tobacco companies ability to advertise core information about their products to adults as described in *44 Liquormart*.<sup>119</sup> This restriction carves out least restrictive exceptions that only allow an adult's right to receive product information to be abridged if a certain percentage of the readership is adolescent. This restriction will likely be upheld under *Central Hudson* because it directly advances the government's interest in the least restrictive manner and therefore satisfies prongs three and four.

2. Restriction on Sponsorships, Including Sponsorships of Concerts and Sporting Events in the Name, Logo, or Selling Message of a Tobacco Brand

The government may have some difficulty meeting the requirements of *Central Hudson* with this restriction because it is less focused on the asserted interest. This restriction is sweeping because its application completely extinguishes speech to both adolescent and adult audiences.<sup>120</sup> However, the government may be able to craft an argument that centers around the "ubiquitous nature" of tobacco sponsorship.<sup>121</sup> It may be difficult, if not impossible, to construct less restrictive alternatives that continue to adequately protect children from harmful messages.<sup>122</sup> "[T]he limitations appear to satisfy the *Reno* standard, which permits the limitation of adult speech if less restrictive alternatives would not be at least as effective in achieving the government's ends."<sup>123</sup> All that is required of the fit between the means and end is that the means be "reasonably tailored" to serve the governmental interest, some looseness being tolerated in the means-end fit where what is regulated is commercial speech.<sup>124</sup> The courts may grant the government some leeway because the restrictions advance the government's interest in a "direct and effective."<sup>125</sup> It appears that this restriction will also be able to pass constitutional scrutiny under *Central Hudson*.

---

<sup>119</sup>517 U.S. at 496.

<sup>120</sup>See Hogan & Hartson, *supra* note 1, at \*11.

<sup>121</sup>*Id.* at \*17.

<sup>122</sup>*Id.* at \*11.

<sup>123</sup>*Id.* at \*17.

<sup>124</sup>See *Edenfield*, 507 U.S. at 770.

<sup>125</sup>*Id.* at 773.

### 3. Restriction Banning All Non-Tobacco Merchandise, Including Caps, Jackets and Bags, Bearing the Name, Logo or Selling Message of a Tobacco Brand

This restriction is another one of the more sweeping provisions contained in the Master Settlement Agreement because it will completely ban all merchandise bearing the name, logo or selling message of a tobacco brand. Again, the “ubiquitous” nature of tobacco advertising makes the crafting of less restrictive alternatives that will not sacrifice the government’s goal of reducing youth smoking almost impossible.<sup>126</sup> If this merchandise is permitted to be marketed, it will undoubtedly end up in the hands of a child and undermine the government’s substantial interest. The government will be able to use the nature of tobacco advertising against the tobacco companies and substantiate with evidence that a complete ban is the least restrictive alternative possible to obtain the government’s objective. The Court is likely to determine that adult speech may be limited because the *Reno* standard has been satisfied; in other words, less restrictive alternatives would not be at least as effective in achieving the government’s ends.<sup>127</sup>

### 4. Restriction on All Outdoor Advertising of Tobacco Products As Well As A Ban On Advertising Indoors When the Advertising is Directed Outside

This restriction on all outdoor advertising is another of the more sweeping provisions of the Master Settlement Agreement. This means the end of all cigarette billboards.<sup>128</sup> The ordinances considered by the Court in *Penn Advertising* and *Anheuser-Busch* permitted outdoor advertising in certain commercial and industrial zones. In contrast, the restriction contained in the Master Settlement Agreement makes no exceptions of this nature but instead eliminates all outdoor advertising of tobacco products. Further, in *44 Liquormart*, the Court stated that “if alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable.”<sup>129</sup> The Master Settlement Agreement, on a whole, “forecloses multiple avenues of speech, the [Master] Settlement [Agreement’s] ban on all outdoor advertising will likely be scrutinized more carefully than similar restrictions standing alone.”<sup>130</sup> Some sources seem to believe that “if an adequate factual record is developed, it may be possible to demonstrate that there are no less restrictive alternatives that achieve a reduction in youth smoking.”<sup>131</sup> However, it is more likely, discerning from the trends in the aforementioned cases, that this restriction must be more narrowly tailored to pass constitutional muster.

<sup>126</sup>See Hogan & Hartson, *supra* note 1, at \*17.

<sup>127</sup>*Id.*

<sup>128</sup>See O’Connor, *supra* note 7. Pursuant to the Master Settlement Agreement, all billboards must be removed by April 22, 1999. Among the brand name cigarette billboard’s that will become extinct are Marlboro, Winston, Salem, Kool, Newport, Virginia Slims and other brands.

<sup>129</sup>517 U.S. at 529-30. (O’Connor, J., plurality opinion) See also *Anheuser-Busch*, 101 F.3d at 329 (Court noted approvingly that Baltimore’s restriction did not foreclose plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors).

<sup>130</sup>See Hogan & Hartson, *supra* note 1, at \*17.

<sup>131</sup>*Id.* at \*17. See *Reno*, 521 U.S. at 875.

5. Restriction Banning the Use of Human Images and Cartoon Characters in Tobacco Advertising (e.g. The Marlboro Man and Joe Camel)

This is one of the Master Settlement Agreement's more sweeping restrictions because it will completely extinguish speech when applied.<sup>132</sup> The Marlboro Man and Joe Camel will no longer be permitted to appear on billboards and in advertisements. The government claims that the use of cartoon characters and human images are inherently more appealing to children than they are to adults. It is true that the Court has held that First Amendment interests may be reduced when minors are involved.<sup>133</sup> But, the Court has also held that speech aimed at adults may not be restricted for fear that minors will be affected as well.<sup>134</sup> While the government's interest in deterring smoking by minors is clearly a 'substantial' one, it is not nearly as clear that the prohibition of cartoon characters meets the final two elements of the *Central Hudson* test. "In order to satisfy the elements, the government will have to establish both that the prohibition 'directly advances' the interest in deterring smoking by minors and that there exists a reasonable fit between the means chosen and the desired ends."<sup>135</sup>

The government needed to concretely demonstrate that a significant contributing reason for teen smoking is the tobacco companies' use of cartoon characters and human images. This is where the findings of fact and evidence that the government and FDA have collected will come into play to provide the necessary link between cartoon characters and teen smoking, possibly allowing the government to establish that the restriction is the least restrictive alternative. Again, the nature of tobacco advertisement will make constructing less restrictive alternatives that protect children from harmful messages difficult, if not impossible. The Court is likely to determine that the *Reno* standard is satisfied, thus allowing the limitation of adult speech if less restrictive alternatives would not be at least as effective in achieving the government's ends.<sup>136</sup> Provided that the government keeps developing the record of evidence to support the least restrictive alternative argument, it is likely that the courts will find that this restriction accords with all prongs of *Central Hudson*.

6. Restriction On All Tobacco Advertising On The Internet That Is Accessible From The U.S.

The Master Settlement Agreement's restriction on advertising on the Internet raises many constitutional questions. Internet advertising is not posted in public places and visible to all, including children, but rather requires the user to seek out Internet access. Also, access to Internet advertising can be regulated by the age of

---

<sup>132</sup>*Id.*

<sup>133</sup>*New York v. Ferber*, 458 U.S. 747 (1982).

<sup>134</sup>*Michigan v. Butler*, 352 U.S. 380, 383 (1957) (holding unconstitutional a statute making it an offense to make available to the general public materials found to have a potentially harmful influence on minors because the statute is "not reasonably restricted to the evil with which it is said to deal.")

<sup>135</sup>*See Redish*, *supra* note 67, at 630.

<sup>136</sup>*See Hogan & Hartson*, *supra* note 1, at \*17.

the user.<sup>137</sup> This restriction is equivalent to a blanket ban on commercial speech that was struck down in *44 Liquormart*. The Court has reviewed such blanket bans with “special care mindful that speech prohibitions of this type rarely survive constitutional review.”<sup>138</sup> The blanket restriction on Internet advertising will affect access to the Internet by both children and adults, therefore “censoring speech addressed to adults in situations where it may be possible more narrowly to tailor the restrictions to meet the objective of protecting children.”<sup>139</sup>

In *Reno*,<sup>140</sup> the Court struck down the Communications Decency Act (“CDA”) as unconstitutional because in order to deny minors access to indecent material over the Internet, it “suppresses a large amount of speech that adults have a constitutional right to receive and address to one another.”<sup>141</sup> The Court held that the “the burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”<sup>142</sup>

Similarly, the Court will likely find this blanket restriction on Internet access unconstitutional because less restrictive alternatives are available that will be as effective in achieving the government’s ends. The government needs to more narrowly tailor this restriction so that it materially advances the government’s interest in reducing children’s use of tobacco products.

#### 7. Restriction on Direct and Indirect Payments for Tobacco Images in Movies, Television Programs and Video Games

Insofar as the restriction concerns advertising on television programs and video games, the Court is likely to consider the restriction to be narrowly tailored because of the “invasive nature of the broadcast medium and the ease with which children can view television advertising.”<sup>143</sup> The restriction seems to be the least restrictive alternative available to the government to serve the interest in reducing children’s use of tobacco products.

With respect to the restriction on advertising in movies, the restriction appears to be tailored too broadly to achieve the government’s substantial interest. Movies with ratings of “R” and “NC-17” are restricted to adult audiences only, therefore this type of commercial speech regulation will not be sustained because it provides “only ineffective or remote support for the government’s purpose.”<sup>144</sup> The government will have to narrowly tailor this restriction carefully in order to pass the third and fourth prongs of *Central Hudson*.

---

<sup>137</sup>*Id.*

<sup>138</sup>*44 Liquormart*, 517 U.S. at 504.

<sup>139</sup>*See Hogan & Hartson, supra* note 1, at \*17.

<sup>140</sup>521 U.S. at 875.

<sup>141</sup>*Id.*

<sup>142</sup>*Id.*

<sup>143</sup>*See Hogan & Hartson, supra* note 1, at \*17.

<sup>144</sup>*44 Liquormart*, 517 U.S. at 505.

#### 8. Restriction on Youth Targeting in the Advertising, Promotion and Marketing of Tobacco Products

The Attorneys General have accused the tobacco industry of unconscionably targeting youth with their use of cartoon characters and human images in the advertising and marketing of their products. This restriction goes to the government's stated substantial interest in reducing the number of youth that smoke. The government will need to demonstrate with a vast amount of evidence that the tobacco companies have in fact, over the years, intentionally targeted youth with their tobacco campaigns. Provided that an accurate factual record is developed, the government will likely be able to convince the Court that the restriction on youth targeting directly advances the government's interest in reducing youth smoking.

#### IV. CURING THE UNCONSTITUTIONAL RESTRICTIONS

Under recent Supreme Court precedent, some of the restrictions contained in the Master Settlement Agreement may well be found to be overbroad and unconstitutional.<sup>145</sup> It is therefore recommended by the author that these "restrictions be more narrowly tailored to create a closer nexus between the limitations and the government's interest in reducing youth smoking."<sup>146</sup> The government must demonstrate to the Court that it has made an attempt at crafting the least restrictive alternative possible and that the restriction on speech is necessary to directly and materially advance the government's interest in reducing youth smoking.

The government must begin by more narrowly tailoring the restriction that deals with outdoor advertising of tobacco products. As the Court has indicated in the past, blanket bans on commercial speech are not looked upon very fondly.<sup>147</sup> The government must keep in mind the facts and holdings of *Penn Central Advertising* and *Anheuser-Busch*. The ordinances upheld in these cases were found to be narrowly tailored because they included exceptions for outdoor advertising in certain commercially and industrially zoned areas of the city.<sup>148</sup> The government must allow for such exceptions in this Master Settlement Agreement provision. Perhaps, no outside advertising should be permitted within a designated distance of school zones, playgrounds and residential areas. However, allowances must be made for advertising in commercial and industrial zones that are removed by a designated distance from the above mentioned areas. This would be a less restrictive alternative to a complete ban on commercial speech that would still allow the government's interest to be achieved.

The government must also find a way to cure the restriction that deals with tobacco product advertising on the Internet that is accessible in the U.S. The Internet and the law that pertains to it is currently under development. The courts are just now beginning to become involved in the regulation of the Internet. The blanket ban on advertising on the Internet is too broad because it restricts speech that adults are constitutionally entitled to receive and address to each other.<sup>149</sup> There are a

---

<sup>145</sup> See Hogan & Hartson, *supra* note 1, at \*11.

<sup>146</sup> *Id.*

<sup>147</sup> *44 Liquormart*, 517 U.S. at 504.

<sup>148</sup> *Penn Adver.*, 63 F.3d at 1321. *Anheuser-Busch*, 63 F.3d at 1309.

<sup>149</sup> *Reno*, 521 U.S. at 845.

number of less restrictive alternatives that may be constructed to more narrowly tailor this restriction while at the same time be at least as effective in achieving the government's objective. The Court in *Reno* found that currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing material which the parents believe is inappropriate will be widely available.<sup>150</sup> Other possible alternatives discussed in *Reno*, were requiring that indecent materials be "tagged" to facilitate parental control, making exceptions for materials with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently than others.<sup>151</sup> The Internet restriction should also be careful to include a provision that subjects the Internet to the no use of cartoon characters and human images restriction so the government's interest will not be completely undermined.<sup>152</sup> As has been demonstrated, the government has a number of avenues it can take in order to more narrowly tailor the Internet restriction so that it complies with *Central Hudson*.

The last restriction that needs to be cured is the ban on direct and indirect payments for tobacco images in movies, television programs and video games. This provision can be more narrowly tailored without much difficulty. Tobacco advertisements shall not be permitted at movies that are rated with a "G" or "PG-13", but shall be permitted at "R" and "NC-17" movies because these movies are to be viewed by adults or with parental discretion. This least restrictive alternatives strikes the proper balance because it will allow the government to achieve its objective without trampling on the commercial speech rights of adults.

This restriction should also include video tapes of movies (e.g. VCR tapes, movie rental tapes) in its provision because children may be able to gain access to video tapes that are rated "R" and "NC-17" that are laying around the house and be subjected to tobacco advertisements. This would directly undermine the government's substantial interest in reducing youth smoking.

It is further recommended by the author that the government keep up its fact finding mission and continue to develop the record in order to be able to clearly establish the link between youth smoking and tobacco advertising. It is clear that the Supreme Court's trend is towards concrete evidence, rather than "speculation or conjecture" when it comes to assessment of commercial speech restrictions.<sup>153</sup>

## V. CONCLUSION

This Note discusses the First Amendment implications of the marketing and advertising restrictions contained in the Master Settlement Agreement between the U.S. Attorneys General and the participating tobacco industry. The commercial speech doctrine, including the path breaking decision of *Central Hudson* and its progeny, is discussed to provide the framework for analysis of the Master Settlement restrictions. Issues of constitutionality and standing were also assessed. After a

---

<sup>150</sup>521 U.S. at 844. The user-based software that the Court speaks of in *Reno* may currently be available, since *Reno* was decided on June 26, 1997. The author of this note does not profess to have an in depth knowledge of the Internet nor the software available in its use.

<sup>151</sup>*Id.*

<sup>152</sup>*See Hogan & Hartson, supra* note 1, at \*17.

<sup>153</sup>44 *Liquormart*, 517 U.S. at 507.

thorough evaluation of the Master Settlement provisions, this Note concludes that the compelling nature of the government's interest in protecting children and adolescents from the dangers of smoking and the narrowly tailored approach that a majority of the advertising restrictions adopt, much of the Master Settlement Agreement will likely withstand judicial scrutiny under the applicable legal standard.<sup>154</sup> Even the restrictions that are constitutionally infirm at present, can be more narrowly tailored and saved if the government follows the suggestions contained in this note. Based on the high stakes that are involved in this Master Settlement Agreement for many parties that did not participate in the settlement negotiations and final agreement, it is likely that a party will seek standing to challenge the restrictions contained in the Master Settlement Agreement. The government must continue to develop the record, adhere to its substantial interest in reducing youth smoking, and pay close attention to *Central Hudson* and its progeny in order to be prepared for the constitutional challenges to the Master Settlement Agreement.

When the reader evaluates the Master Settlement provisions and its implications, it is important to keep in the back of one's mind the politics that have historically surrounded the tobacco industry in order to more fully understand and assess the recent developments between the tobacco industry and state governments. It is "important not to allow the government to stifle communications aimed predominantly at adults under the guise of protecting children."<sup>155</sup> "Nowhere is this danger more serious than in attempts to regulate tobacco advertising. The asserted justifications for such regulation of the truthful promotion of a lawful product derive exclusively from a premise of governmental paternalism that is fundamentally inconsistent with both the purposes served by free speech and the democratic system of which free speech is a central element."<sup>156</sup> Some proponents of big tobacco believe:

The First Amendment interests threatened by the regulation of tobacco advertising are considerably more substantial than many have recognized. If the government is permitted to prohibit truthful advocacy of a lawful activity because of the fear that citizens will make unwise choices, there is no basis on which to distinguish government's efforts to do the same in other areas of public decisionmaking. Bluntly put, prohibition of tobacco advertising constitutes a governmental exercise in mind control of its citizens—hardly a course of action consistent with the letter, spirit or tradition of the First Amendment right of free expression.<sup>157</sup>

It has already been pointed out that the government may have some "not so substantial" motives for settling. But, what about big tobacco? What are they really hiding that entices them into settling for such one-sided restrictions? Clearly, the Master Settlement Agreement is not the straw that is going to break Joe Camel's back (or pockets), only his image. Or will the Master Settlement Agreement even do this?

---

<sup>154</sup>See Hogan & Hartson, *supra* note 1, at \*17.

<sup>155</sup>See Redish, *supra* note 67, at 638.

<sup>156</sup>*Id.* at 592.

<sup>157</sup>*Id.* at 639.

“Someone once said tobacco was American before America was American, which is true. It is one of our most enduring crops. Just like Marlboro is one of our most enduring ad campaigns. It just can’t play outside anymore?”<sup>158</sup> Big tobacco will find another way to continue on.

LORI ANN LUKA<sup>159</sup>

---

<sup>158</sup>See O’Connor, *supra* note 7, at 8-K.

<sup>159</sup>The author of this Note is currently employed as an Associate at the law firm of Kelley & Ferraro LLP and practicing in the area of Complex Litigation. The author of this Note would like to thank her father George, mother Ivana, and brother Christopher Luka for their love and support throughout her law school career. This Note is dedicated to my father who unfortunately was not able to live to see it go to print.