

Under a state law, a drug company that makes a false factual claim about a prescription drug is strictly liable in tort to any user of the drug.

In an advertisement promoting sales of a particular drug, a drug company claimed that the drug was safe for children. Suit was filed against the company on behalf of a child who allegedly was harmed as a result of taking the drug. At the time the child took the drug, the available medical studies supported the company's claim that the drug was safe for children, but later research proved that the drug actually was harmful to children. The company has moved to dismiss the suit on First Amendment grounds.

Should the court grant the motion?

- A. No, because false or misleading commercial speech is not constitutionally protected.
- B. No, because the drug business is subject to extensive health and safety regulation.
- C. Yes, because liability cannot be imposed for false statements without a showing of actual malice.
- D. Yes, because the company's claims about the drug were a matter of public concern.

Explanation:

Commercial speech is speech that does no more than propose a commercial transaction (eg, advertisements). Although this type of speech is afforded some **First Amendment protections**, these protections **do not extend to commercial speech** that (1) is **false or misleading** or (2) concerns **unlawful activity**—even if these statements are made without knowledge or reckless disregard of their falsity or illegality (ie, without actual malice) **(Choice C)**.

Here, the company's advertisement innocently claimed that its drug was safe for children. But this advertisement lost any First Amendment protections when later research proved that the company's drug safety claim was false. Therefore, the company's motion to dismiss the false advertisement suit on First Amendment grounds should be denied.

(Choice B) The fact that the drug business is subject to extensive health and safety regulation does not exclude its speech from First Amendment protections.

(Choice D) Commercial speech that is false or misleading (as seen here) *or* concerns unlawful activity never receives First Amendment protection, regardless of whether that speech pertains to a matter of public concern.

Educational objective:

The First Amendment does not protect commercial speech that (1) is false or misleading or (2) concerns unlawful activity—regardless of whether the speaker knew (or recklessly disregarded) that the speech was false, misleading, or unlawful.

References

- Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (explaining that false and misleading commercial speech is not protected by the First Amendment).

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First Amendment speech protections

