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Association of National Advertisers, Inc. v. Lungren: Green Marketing and Its First Amendment Implications: An Honest Approach

Christine Gower Mooney

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ASSOCIATION OF NATIONAL ADVERTISERS, INC. v. LUNGREN:
GREEN MARKETING AND ITS FIRST AMENDMENT
IMPLICATIONS: AN HONEST APPROACH

The following Note considers the decision of the Federal District Court for the Northern District of California in Association of National Advertisers, Inc. v. Lungren.1 This decision was appealed and affirmed by the United States Court of Appeals for the Ninth Circuit in November, 1994.2 The United States Court of Appeals for the Ninth Circuit affirmed both the holding and the rationale of the district court.

Because the district court's opinion provides an instructive statutory analysis of the distinction between commercial and private speech, an analysis approved by this Ninth Circuit, this Note primarily focuses on the original decision by the district court. However, in an addendum to this Note, the author summarizes the decision of the Ninth Circuit, including its expansion of the district court's rationale.

I. INTRODUCTION

Environmental issues have become increasingly important to American consumers over the past several years.3 As a result, environmental concerns are often reflected in consumers' purchasing behavior, with shoppers seeking products which have a limited negative impact on the environment.4 Studies have shown that many consumers are willing to switch brands and even pay more for products which they believe possess more "environmentally friendly"

4. Wynne, supra note 3, at 785-86. "Environmentally conscious shoppers seek products that pose fewer threats to the environment. They want goods and packaging that use fewer resources and less energy to produce, whose production generates less pollution, and whose disposal will not contaminate the environment or aggravate the nation's landfill crisis." Id.
qualities than others. In view of this heightened consumer interest in environmentally desirable products, manufacturers have responded through a phenomenon commonly referred to as "green marketing."

To accommodate the public's increased demand for products which do not harm the environment, or at least harm it less, manufacturers have been fiercely competing for the environmentally conscious market share. Some manufacturers have been attracting environmentally conscious consumers through honest attempts to improve the environmental quality of their products. Other manufacturers, however, have simply changed their advertising in order to mislead the public into believing they have modified their products to make them more environmentally appealing.

5. Jamie A. Grodsky, Certified Green: The Law and Future of Environmental Labeling, 10 YALE J. ON REG. 147, 149 (1993) (citing 1990 poll conducted by Gerstman & Meyers, Inc.). One poll showed that 78% of those consumers surveyed were willing to pay 5% more for products with increased environmental qualities and 47% indicated they would pay up to 15% more. Id. at 150. n.1 (citing Gerstman & Meyers, Inc., CONSUMER SOLID WASTE: AWARENESS, ATTITUDE, AND BEHAVIOR STUDY III 8 (1991)). "Other surveys indicate that over ninety percent of Americans are willing to pay more for products that they believe are environmentally benign." Ciannat M. Howett, Note, The "Green Labeling" Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims, 11 VA. ENVTL. L.J. 401, 401 (1992) (citing 137 CONG. REC. S3034 (daily ed. Mar. 12, 1991) (statement of Sen. Lautenberg)).

6. Manufacturers' marketing strategy of claiming that their product contains beneficial environmental qualities is known as "green marketing." Association of Nat'l Advertisers, Inc., v. Lungren, 809 F. Supp. 747, 750 (N.D. Cal. 1992), aff'd, 44 F.3d 726 (9th Cir. 1994), cert. denied, 116 S. Ct. 62 (1995). Although this strategy can be informative to consumers when used honestly, there are many examples of deceptive claims. Id. The number of products making "green" claims more than doubled between 1989 and 1990. Selling Green, CONSUMER REPORTS, Oct. 1991, at 687. During this same period, the use of green marketing claims in televisions and print advertising more than quadrupled. Id.


many manufacturers have been forced to choose between engaging in similarly deceptive advertising or losing business to competitors that do.\textsuperscript{9}

As a result of the effort to satisfy consumer demand for products which are environmentally safer, terms such as “ozone friendly,” “recyclable,” and “biodegradable” are appearing in advertisements with increasing frequency.\textsuperscript{10} The problem with these terms is two-fold: their definitions are not clear, and it is uncertain whether the definitions are the same from product to product. Manufacturers use these terms to describe products with characteristics which differ greatly from other products described in similar terms.\textsuperscript{11} The consumer, unequipped to distinguish between the products, is left to guess which ones are, in fact, truly better for the environment.\textsuperscript{12}

\textsuperscript{9} As a result of fraudulent and misleading green claims, consumers were switching to products which were no better than the ones they were using. The consumers' decisions were uninformed, and non-deceptive advertisers “saw themselves losing sales to products promoted through deception.” Stephen Gardner, \textit{How Green Were My Values: Regulation of Environmental Marketing Claims}, 23 U. Tol. L. Rev. 31, 32 (1991). The advertising industry itself acknowledged the need to protect manufacturers making legitimate environmental claims against competing fraudulent claims. Howett, \textit{supra} note 5, at 403 (citing Webster Industries, Remarks at the FTC Public Hearings on Environmental Marketing and Advertising Guides 4 (July 18, 1991) (unpublished statement, on file with the Virginia Environmental Law Journal); Polystyrene Packaging Council, Inc., Remarks at the FTC Public Hearings on Environmental Marketing and Advertising Guides 3 (July 17-18, 1991) (unpublished statement, on file with the Virginia Environmental Law Journal)).

\textsuperscript{10} Howett, \textit{supra} note 5, at 401-02. One survey revealed that 26% of the 12,000 new products marketed in 1990 made some environmental claim. \textit{Id.} (citing Jaclyn Fierman, \textit{The Big Muddle in Green Marketing}, \textit{FORTUNE}, June 3, 1991, at 91).

\textsuperscript{11} Since terms such as “environmentally friendly” and “recycled” do not have universal definitions, consumers cannot distinguish between products which actually offer environmentally-beneficial attributes and those which do not. \textit{See generally} Israel, \textit{supra} note 7, at 307.

\textsuperscript{12} Consumers have indicated that they distrust many of these environmental claims. One survey revealed that 47% of consumers described manufacturers’ environmental claims as “mere gimmickry.” Howett, \textit{supra} note 5, at 402 (citing Fierman, \textit{supra} note 10, at 91) (quoting survey by Environmental Research Associates of Princeton, New Jersey); \textit{see also} Surveys Find Consumers Distrustful of Corporate Environmental Practices, \textit{GREEN MARKET ALERT}, Mar. 1991, at 5 (citing a 1990 survey conducted by Advertising Age and the Gallup Organization, in which 47% of 1,514 respondents indicated they were “not confident” that environmental advertising provided accurate product information). Green marketing claims pose unique problems for consumers because they are unable to independently substantiate these claims. “Although people can compare the taste of Coke and Pepsi, and observe their laundry after washing with Tide or Cheer, they generally cannot verify recycled content claims or statements about the ozone layer.” Grodsky, \textit{supra} note 5, at 150.
Because of the widespread potential for manufacturers to exploit public concern about the environment, many state legislatures have enacted laws regulating product advertisements that make environmental claims. In September 1990, the California legislature enacted one such regulation. The California regulation prohibits advertisers from describing their products as "ozone friendly," "biodegradable," "photodegradable," or "recyclable" unless they comport with the definitions contained in the regulation. Although advertisements containing environmental claims are restricted in at least twenty-two states, including California, Indiana, Maine, New Hampshire, New York and Rhode Island. Patka, supra note 8, at 43 n.8.

13. Advertisements containing environmental claims are restricted in at least twenty-two states, including California, Indiana, Maine, New Hampshire, New York and Rhode Island. Patka, supra note 8, at 43 n.8.

14. CAL. BUS. & PROF. CODE § 17508.5 (West Supp. 1991). Section 17508.5 provides:

Environmental Representations Relating to Consumer Goods: It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use of production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or brought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

Id.

15. Id. For the statutory definitions of "ozone friendly," "biodegradable," "photodegradable" and "recyclable," see supra note 14.
this regulation does not correct all abuses, it does provide some consistency when describing the environmental characteristics of products.\textsuperscript{16}

In \textit{Association of National Advertisers, Inc. v. Lungren},\textsuperscript{17} a group of manufacturers and advertisers challenged the California legislation, claiming it was an unconstitutional infringement on their First Amendment rights.\textsuperscript{18} The District Court for the Northern District of California addressed this challenge by first examining whether commercial speech was deserving of any First Amendment protection at all.\textsuperscript{19} After acknowledging that a limited amount of constitutional protection was warranted, the court held that the regulation generally provided for by the statute did not infringe on the plaintiffs' First Amendment rights. The court limited its holding, however, by finding that the statutory definition of the term "recyclable" was not sufficiently precise.\textsuperscript{20} Accordingly, the court severed that portion of the statute and upheld the remainder as constitutional.\textsuperscript{21}

This Note will first outline the facts of \textit{Lungren}. Next, the Background section will present a brief synopsis of the relevant cases the court relied on in its First Amendment analysis of commercial speech. A discussion of the court's First Amendment analysis and its holding will follow the background section. The final section will address the impact of the court's decision in \textit{Lungren}, arguing that it was a correct and appropriate decision which not only protects consumers from deceptive environmental claims, but also furthers the policy of encouraging public responsibility and involvement in environmental issues.

\section*{II. Facts}

In March 1990, a task force consisting of the attorneys general for ten states conducted public hearings to investigate the problems presented by the widespread existence of false environmental

\begin{itemize}
\item \textsuperscript{16} See \textit{Lungren}, 809 F. Supp. at 750. The court stated that "[b]oth environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive advertising practices. . . . [T]he words commonly used in environmental marketing . . . have no clear, uniform meaning. Different manufacturers use the terms to promote different environmental benefits." \textit{Id.}
\item \textsuperscript{17} \textit{Lungren}, 809 F. Supp. at 747.
\item \textsuperscript{18} \textit{Id.} at 749.
\item \textsuperscript{19} \textit{Id.} at 750.
\item \textsuperscript{20} \textit{Id.} at 762.
\item \textsuperscript{21} \textit{Lungren}, 809 F. Supp at 762.
\end{itemize}
claims in advertising. On the basis of these hearings, the task force concluded that companies were responding to the heightened public awareness of environmental issues by increasingly addressing these concerns in their advertisements for consumer products. The task force found that a growing number of manufacturers were making claims about the environmental qualities of their products in an effort to satisfy these consumer concerns. Moreover, many companies were using the same terms to describe products with substantially different qualities.

On the basis of these findings, the task force determined that these claims were misleading consumers as to the alleged beneficial effects of different products on the environment, and that consumers were changing their purchasing preferences based on this misleading information. The California legislature responded to this problem by enacting section 17508.5 of the California Business and Professions Code. This statute defines some of the environmental terms most widely used in advertising, and restricts their use to products whose characteristics conform to the outlined definitions. On a motion for summary judgment, the plaintiffs in Lungren challenged section 17508.5 on two levels, alleging, first, that the statute violated their First Amendment rights and, second, that it was unconstitutionally vague.

22. Id. at 749. The task force found that products making environmental claims comprised 9% of all products introduced in the first half of 1990. Id. at 750 n.3. Based on its findings, the task force recommended the establishment of uniform definitions for all advertisers making environmental claims. Id. After issuing its report, the commission conducted another set of hearings to solicit input on their findings and recommendations. Id. at n.4. These findings were the impetus for § 17508.5 of the California Business and Professions Code. Lungren, 809 F. Supp. at 750.

23. Lungren, 809 F. Supp. at 750. The court stated that the phenomenon of “green marketing” has included attempts by some manufacturers to exploit consumer concern with the environment and make environmental claims “that are trivial, confusing or even misleading.” Id.

24. Id. at 750.

25. Id.

26. Id. The court found that “[b]oth environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive advertising practices.” Id.

27. Lungren, 809 F. Supp. at 750.

28. CAL. BUS. & PROF. CODE § 17508.5. For the text of § 17508.5, see supra note 14.

III. BACKGROUND

In its analysis, the Lungren court relied predominantly on three United States Supreme Court cases which addressed the issue of First Amendment protection as it relates to commercial speech. The court first examined Board of Trustees v. Fox,30 which involved a challenge by university students to a regulation restricting commercial speech in dormitories.31 After the university enforced the regulation against a company attempting to sell housewares at a student-hosted gathering in the dormitory, a group of students sued for a declaration that the regulation was unenforceable under the First Amendment.32 Their premise for seeking this declaration was based on the assertion that the speech at issue involved both pure and commercial speech which were "inextricably intertwined."33 Therefore, the students reasoned, all of the speech at issue should be afforded the greater protection under the First Amendment given to noncommercial speech.34 Rejecting the students' claim, the Supreme Court stated:

[T]here is nothing whatever 'inextricable' about the non-commercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.35

The Lungren court applied the Supreme Court's reasoning to reject the plaintiffs' argument that the advertisements could not be proscribed since they also contained editorial speech on environmental issues.

31. Id. at 471-73. The regulation provided: "No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." Id. at 471-72.
32. Id. at 472-73.
33. Id. at 474.
34. Fox, 492 U.S. at 474.
35. Id. The Court also stated that "communications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." Id.
The Lungren court also relied on Bolger v. Youngs Drug Products Corp., in which the United States Supreme Court outlined the framework for distinguishing between commercial and noncommercial speech. In Bolger, the Court explained that the mere concession that the speech at issue is an advertisement does not by itself render the speech commercial. The Court stated that though the speech at issue may be an advertisement, may refer to a specific product, or may be economically motivated, none of these factors by themselves render the speech commercial. Taken cumulatively, however, these factors were sufficient to persuade the Court to label the speech at issue as commercial. Specifically, the Court found that "[t]he mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues . . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."

The Lungren court also supported its analysis with Central Hudson Gas & Electric Corp. v. Public Service Commission, in which the Supreme Court applied a four-part test to determine when the regulation of commercial speech is constitutionally permissible under the First Amendment. The first step requires a determination of whether the speech warrants any First Amendment protection at all. The Court stated that "[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading." Next, the court must determine whether the governmental interest advanced is substantial. If the first two criteria are met, a court must then decide both whether the regulation "di-

37. Id. at 66-67.
38. Id. at 66.
39. Id. at 66-67.
41. Id.
42. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). Central Hudson involved an electrical utility's challenge to a law banning promotional advertising by the utility. The utility claimed that the law was unconstitutional under the First and Fourteenth Amendments. Id. at 558.
43. Id. at 566.
44. Id.
45. Id.
46. Central Hudson, 447 U.S. at 566.
rectly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."\(^{47}\)

In addition to these three cases, the \textit{Lungren} court looked to the Supreme Court's decision in \textit{Riley v. National Federation of the Blind of North Carolina}.\(^{48}\) In \textit{Riley}, the Court confronted a statute requiring professional fundraisers to disclose what percentage of solicited donations are actually given to a charitable organization. The Supreme Court found that the level of scrutiny to be applied depended on the "nature of the speech taken as a whole and the effect of the compelled statement thereon."\(^{49}\) The Court stated that financial motivation alone does not compel a finding that speech is commercial.\(^{50}\) Without deciding that the speech at issue was commercial, the Court found that even assuming it was, the speech did not retain "its commercial character when it [was] inextricably intertwined with otherwise fully protected speech."\(^{51}\) The Court found that in the case of the charitable fundraisers' speech, the commercial and noncommercial components could not be separated and that, therefore, the appropriate test was one for "fully protected expression."\(^{52}\)

\addcontentsline{toc}{section}{IV. Analysis}

\textbf{A. Determining Whether the Speech is Commercial}

In \textit{Lungren}, the district court began its analysis by examining the character of the speech at issue.\(^{53}\) The court noted that there are different standards for commercial and noncommercial speech.\(^{54}\) Infringement on noncommercial messages is subject to strict scrutiny and requires the government to show a compelling state interest.\(^{55}\) Constitutional tests of regulations that affect commercial speech, however, are less stringent, allowing commercial

\(^{47}\) Id.


\(^{49}\) Id. at 796.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Riley, 487 U.S. at 796. In its opinion, the Court cautioned that regulation of solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech ... , and for the reality that without solicitation the flow of such information and advocacy would likely cease." Id. (quoting Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980), reh'g denied, 445 U.S. 972).

\(^{53}\) Lungren, 809 F. Supp. at 751.

\(^{54}\) Id.

\(^{55}\) Id. (citing Consolidated Edison, 447 U.S. at 540).
speech to be regulated in a way that noncommercial speech could not.  

The advertiser plaintiffs in Lungren asserted that the statute restricted their right to express their policy views in the form of editorials or informational advertisements. The court rejected this argument, noting that the statute in question applied only to manufacturers and distributors of consumer goods who made claims about their products. The fact that the statute was contained within the subsection of the California Business & Professional Code entitled “False Advertising in General” was another factor in the court’s determination that the statute governed advertising claims alone.

Plaintiffs further claimed that, although the advertisements they were producing made environmental claims, these claims were intermingled with speech which “educat[ed] consumers on current environmental issues.” Claiming that their commercial speech was “inextricably intertwined” with noncommercial speech, the plaintiffs argued that, as mandated in Riley, the court was required to apply the strict scrutiny test for noncommercial speech. The Lungren court again rejected the plaintiffs’ contentions, citing Fox for the proposition that in cases where the noncommercial elements in speech are not required to be combined with the commercial elements, these elements are not “inextricably linked” so as to require the greater deference afforded to noncommercial speech.

56. Id. “Our jurisprudence has emphasized that commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” Id. (quoting Fox, 492 U.S. at 477).

57. Lungren, 809 F. Supp. at 751. Specifically, plaintiffs argued that § 17508.5 prohibits them from expressing policy views and publishing editorials and informational advertisements to invite public activism. Id.

58. Lungren, 809 F. Supp. at 751. The court noted that the first sentence of § 17508.5, which states “[i]t is unlawful for any person to represent that any consumer good which it manufactures or distributes,” clearly indicates that it applies solely to manufacturers and distributors of consumer goods. Lungren, 809 F. Supp. at 751.


60. Id. at 752.


63. Lungren, 809 F. Supp. at 752-53. The court compared § 17508.5 to the legislation upheld in Fox and noted that like that legislation, § 17508.5 does not require the combination of commercial and noncommercial speech. Id. Any noncommercial messages such as those found in information advertisements are not
Relying on *Bolger*, the court reasoned that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." In *Lungren*, the plaintiffs attempted to shield their advertisements from regulation by claiming that statements concerning environmental policy transformed their advertisements into noncommercial speech. The *Lungren* court found that since section 17508.5 regulated speech only in advertisements, the statute did not restrict plaintiffs' right to editorialize or comment on environmental issues in general.

Finally, the court applied the three-factor test from *Bolger* to classify the advertisements as commercial speech. The court first noted that the speech was in the form of an advertisement. Second, the speech referred to a specific product. Finally, there was an economic motive behind the speech. Since the advertisements covered by the statute contemplated a commercial transaction, and since they were not "inextricably intertwined" with noncommercial speech, the court concluded that the speech was indeed commercial.

B. The Appropriate Level of Protection for Section 17508.5

After determining that the speech was commercial, the court next considered whether section 17508.5 was a permissible restriction on commercial speech. The court applied the four-part analysis set out in *Central Hudson* to decide this question. The first step was to decide whether the speech was entitled to First Amendment protection. In order to garner First Amendment protection, necessary in order to market the product. Therefore, the court concluded that "since the commercial and noncommercial messages are not 'inextricably linked' under *Fox*, section 17508.5 applies only to commercial speech." *Id.* at 753.

64. *Bolger*, 463 U.S. 60. For a discussion of *Bolger*, see *supra* notes 36-41 and accompanying text.
66. *Id.*
67. *Id.* at 754.
68. *Id.* For a discussion of *Bolger*, see *supra* notes 36-41 and accompanying text.
70. *Id.*
71. *Id.*
72. *Id.*
74. *Id.* For a discussion of *Central Hudson*, see *supra* notes 42-47 and accompanying text.
75. *Id.*
tion, the speech "must concern lawful activity and not be misleading."\textsuperscript{76} The court found that although the type of advertisements in question were potentially misleading, they, nonetheless, were deserving of some First Amendment protection.\textsuperscript{77}

In the second part of the test, the court examined whether the asserted government interest was substantial.\textsuperscript{78} Here, the asserted governmental interest was to "en[ sure] truthful environmental advertising and encourag[ e] recycling and environmentally sound packaging."\textsuperscript{79} The court quickly dispensed with this part of the test because both parties agreed that this governmental interest was substantial.\textsuperscript{80}

Under the third prong, the court needed to consider whether the regulation in question "directly advance[d]" the asserted governmental interest.\textsuperscript{81} The court looked at the underlying goal behind section 17508.5 of reducing consumer confusion about the meaning of terms like "ozone friendly," "photodegradable," "biodegradable" and "recyclable."\textsuperscript{82} By requiring advertisers to conform to precise definitions of these terms, the court reasoned that consumers would at least know that the terms had a uniform meaning.\textsuperscript{83} Therefore, the court determined that section 17508.5 met

\textsuperscript{76} \textit{Id.} The court stated that any First Amendment protection for commercial speech "is rooted in the informational function of advertising." Consequently, there is nothing unconstitutional about prohibiting deceptive advertising. \textit{Id.} at 754-55.

\textsuperscript{77} \textit{Id.} at 756. Although unwilling to characterize the advertisements as purely deceptive, the court noted:

In recent years we have seen an increase in questionable ‘environmental’ advertising . . . being utilized with virtually no scientific support . . . . Environmental claims are similar to the ‘health’ claims made for elixirs in the Old West. There was no scientific or medical basis for the claims, but there was also no basis for disproving them! Thus, the claims were made, and consumers relied upon those claims in making product choices without knowing of the total absence of credible evidence to support the claims. \textit{Id.} at 755 (citing letter from Assembly member Byron Sher to Governor Deukmejian).

\textsuperscript{78} \textit{Lungren}, 809 F. Supp. at 756.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.} In analyzing commercial speech regulation, the court noted that "[i]neffective or remote support" is insufficient to sustain the government’s asserted goal. \textit{Id.} at 756.

\textsuperscript{82} \textit{Lungren}, 809 F. Supp. at 756. For the statutory definitions of "ozone friendly," "photodegradable," "biodegradable" and "recyclable," see supra note 14.

\textsuperscript{83} \textit{Id.} The statute was intended to assist consumers in assessing the reliability of advertisers’ environmental claims about their products. "Given the confusion over what advertisers mean when they state, for example, that a product is recyclable or biodegradable, the legislature sought to level the playing field for all adver-
the third prong of the test because it directly advanced the governmental interest.\textsuperscript{84}

Under the final prong of the test, the court had to consider whether the regulation was more extensive than necessary to further the governmental interest.\textsuperscript{85} The court found that section 17508.5 satisfied this prong as well.\textsuperscript{86} In making this determination, the court discussed the development of this standard and quoted the Supreme Court's majority opinion in \textit{Fox} that "the fourth prong of the \textit{Central Hudson} test imposes upon government the burden of establishing that a reasonable fit exists between the government's interest and the means chosen to advance that interest."\textsuperscript{87}

Plaintiffs argued that because section 17508.5 prohibited them from accurately describing their products' environmental characteristics when these characteristics differed from the prescribed definitions, it did not pass the fourth prong of the \textit{Central Hudson} test.\textsuperscript{88} In responding to this argument the court noted that plaintiffs might have succeeded had the fourth prong been interpreted as a "least-restrictive-means" test.\textsuperscript{89} The court acknowledged that while the dicta in past decisions may have suggested that this test was to be the standard, this construction was rejected in \textit{Fox}.\textsuperscript{90} In \textit{Fox}, the Supreme Court held that the government satisfied the fourth prong of the \textit{Central Hudson} test "by demonstrating that a commercial speech regulation [was] 'not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective.'"\textsuperscript{91}

\begin{footnotes}
\item 84. \textit{Id.} at 756-57.
\item 85. \textit{Id.}
\item 86. \textit{Lungren, 809 F. Supp.} at 758.
\item 87. \textit{Id.} at 757-58. In its rejection of the "least-restrictive-means-test" the court noted "the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the legislative and executive branches needed leeway in [the commercial speech field]." \textit{Id.} at 758.
\item 88. \textit{Id.} at 757. The fourth prong of the \textit{Central Hudson} test requires that the regulation "is not more extensive than necessary to serve th[e] [governmental] interest." \textit{Central Hudson, 447 U.S.} at 564 n.6.
\item 89. \textit{Lungren, 809 F. Supp.} at 757.
\item 90. \textit{Id.} For a discussion of \textit{Fox}, see \textit{supra} notes 30-35 and accompanying text.
\item 91. \textit{Lungren, 809 F. Supp.} at 758 (quoting \textit{Fox, 492 U.S.} at 480). In order to show that § 17508.5 did not pass the fourth prong of the test, the plaintiffs offered several alternatives for the court's consideration which were less restrictive. The court dismissed these alternatives noting that a legislature is free to adopt a more specific law which is already covered by a more general one. \textit{Id.} at 758-59.
\end{footnotes}
C. Section 17508.5 and the Appropriate Vagueness Standard

Plaintiffs' second line of attack was that section 17508.5 was an unconstitutionally vague statute. To analyze this question, the court needed to first determine the vagueness standard for a commercial speech regulation. While recognizing that no distinction had previously been made between commercial and noncommercial speech for purposes of analyzing vagueness, the court reasoned, nevertheless, that because commercial speech was afforded less constitutional protection than noncommercial speech, the standard for vagueness should also be less rigorous.

The Lungren court relied on two distinguishing features of commercial speech to justify this lesser standard. First, because commercial speakers are more sophisticated, they are uniquely capable of "assess[ing] the accuracy of their advertising claims and the lawfulness of their activity." Second, because commercial speech is economically motivated, it is less vulnerable "to being silenced by imprecise regulation."

Despite the lesser protection that the court afforded to commercial speech, the court weighed this standard against the fact that section 17508.5 imposes criminal sanctions. The court reasoned that because the price of noncompliance is higher, "the standard of certainty required in criminal statutes is more demanding than in noncriminal statutes." The court therefore found that the appropriate standard for a commercial speech regulation imposing criminal sanctions was "whether the law affords fair notice to a business person of ordinary intelligence as to what conduct is illegal."

After determining the appropriate standard for analyzing constitutional vagueness, the Lungren court proceeded to consider plaintiffs' vagueness claims. Plaintiffs asserted that two sections of

92. Id. at 759.
93. Lungren, 809 F. Supp. at 759. When dealing with a criminal statute, due process requires that the statute give "adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Id. (quoting Buckley v. Valeo, 424 U.S. 1, 77 (1976)).
94. Id.
95. Id. at 760.
96. Id.
97. Lungren, 809 F. Supp. at 760 (citing Central Hudson, 447 U.S. at 564 n.6). The court reasoned that one justification for punishing violations of statutes which are somewhat unclear is that business people are able to clarify the legislation with governmental administrators. Id.
98. Id. at 761.
99. Id.
100. Id.
the regulation were unconstitutionally vague.\textsuperscript{101} First, in the definition for "ozone friendly," plaintiffs claimed that the phrase "or any like term" was vague.\textsuperscript{102} The court disagreed, however, and found that this phrase "clearly refers to the modifying phrase ‘which connotes that stratospheric ozone’ is not being depleted."\textsuperscript{103} The court emphasized that manufacturers of ordinary intelligence would be aware of whether their products contained substances which would damage the ozone layer when released.\textsuperscript{104}

The court next examined plaintiffs’ assertion that the section 17508.5 definition of "recyclable" was unconstitutionally vague.\textsuperscript{105} This definition provides that a product may not be described as recyclable unless it can be "conveniently recycled" in California counties with populations greater than 300,000.\textsuperscript{106} The statute does not, however, define the term "conveniently."\textsuperscript{107} The court noted that this term was capable of several interpretations.\textsuperscript{108} In light of the potential criminal sanctions afforded by the statute, the court decided that the absence of a clear meaning of the term "conveniently" rendered this portion of the statute void for vagueness.\textsuperscript{109}

The \textit{Lungren} court recited the well-established rule that a statute may be constitutional in part and unconstitutional in part, and that the constitutional part may stand alone if the two parts are capable of separation.\textsuperscript{110} In California, this question is determined by deciding "whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen

\textsuperscript{101} \textit{Lungren}, 809 F. Supp. at 761.
\textsuperscript{102} \textit{Id}.
\textsuperscript{103} \textit{Id} (quoting \textit{CAL. BUS. & PROF. CODE} § 17508.5(a)). Despite the court’s confidence that the meaning of "ozone friendly" is clear to manufacturers, it stated that any uncertainty can be clarified by referral to the Federal Trade Commission Guidelines “which explain that ozone depleting materials include those substances listed ... in Title VI of the Clean Air Act, Amendments of 1990, Pub. L. No. 101-549, or others subsequently designated by the Environmental Protection Agency as ozone-depleting substances." \textit{Id}.
\textsuperscript{104} \textit{Id}.
\textsuperscript{105} \textit{Lungren}, 809 F. Supp. at 761.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} \textit{Id} “Section 17508.5(d) refers to section 40180 of the Public Resources Code which unambiguously defines ‘recycled.’ However, an equally lucid explication of ‘conveniently’ is wanting.” \textit{Id}.
\textsuperscript{108} \textit{Lungren}, 809 F. Supp. at 762. The court suggested several problems with interpreting this definition. For example, would a manufacturer incur liability for advertising that a product is recyclable if recycling is only possible in remote sections of the country or on limited days of the month? These questions led the court to conclude that it was not reasonable to expect manufacturers to determine what the statute’s limits were with respect to “convenient” recycling. \textit{Id}.
\textsuperscript{109} \textit{Lungren}, 809 F. Supp. at 762.
\textsuperscript{110} \textit{Id}.
the partial invalidation of the statute."\textsuperscript{111} The court concluded that the California legislature clearly would still have enacted the statute had it been aware that the definition of "recyclable" was invalid.\textsuperscript{112} Therefore, the court held that only subsection (d) was invalid and upheld the remainder of the statute.\textsuperscript{113}

V. IMPACT

Section 17508.5 represents California's first step toward its goal of reducing consumer confusion about environmental claims in advertising. Despite a long history of precedent establishing that commercial speech is afforded much less stringent First Amendment protection than noncommercial speech, the court performed a methodical step-by-step analysis of every facet of that question. While many commentators have predicted that First Amendment challenges to regulations on environmental claims in advertising would meet with little success,\textsuperscript{114} the Lungren case provides the judicial analysis for the justification. As a result of the Lungren court's analysis, the only potential constitutional issues likely to succeed will be those which challenge a regulation on the grounds of vagueness.

This is an appropriate interpretation of the protection of commercial speech under the First Amendment. It is well documented that the public's concern with environmental issues is at an unprecedented level. However, the effect of misleading environmental claims in advertising is not limited to consumer deception. Instead, these deceptions and the accompanying consumer cynicism also have a negative impact on consumer attempts to make environmentally-responsible choices.\textsuperscript{115} If consumers are misinformed about

\textsuperscript{111} Id. at 762 (quoting Metromedia, Inc. v. City of San Diego, 649 P.2d 902 (Cal. 1982)).

Under California law, the ability to sever an invalid portion of a statute depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute or constitutes a completely operative expression of the legislative intent and [is] not so connected with the rest of the statute as to be inseparable.

\textsuperscript{112} Id.

\textsuperscript{113} Lungren, 809 F. Supp. at 762.

\textsuperscript{114} See, e.g., Grodsky, supra note 5, at 184 (stating that case law shows First Amendment attacks on commercial speech are not likely to succeed). "The durability of existing labeling rules suggests that courts generally defer to regulatory limitations on commercial speech that fall short of comprehensive bans on advertising." Id. at 185.

\textsuperscript{115} Although "green marketing" can be a positive force in educating consumers about the impact of their buying habits on the environment, much of this
products' environmental qualities, they will either make erroneous choices and purchase products which are not beneficial to the environment, or disregard the claims entirely and purchase products without considering their environmental qualities.\textsuperscript{116}

The only legitimate challenge to regulations aimed at truthful green marketing is on the ground of vagueness. Manufacturers and advertisers are indeed entitled to be clearly informed of the parameters of the laws regulating their advertising and should not be expected to interpret the legislature's intentions at their own risk. Additionally, clear regulations serve the purpose for which they were enacted, namely that of providing uniformity among the manufacturers' use of the defined terms.

The \textit{Lungren} court succinctly dispensed with all of the plaintiffs' First Amendment challenges which were based on contentions of an unfettered right to the use of environmental terms in advertising. The ability of states to exercise control over advertisers' manipulation of consumers' environmentally-motivated purchasing decisions is an excellent step toward rebuilding consumers' trust and enthusiasm for being environmentally responsible.

\textbf{Addendum to Note—The Ninth Circuit's Affirmance}

The \textit{Lungren} decision was appealed in November, 1994.\textsuperscript{117} The advertisers challenged the district court's decision on three grounds.\textsuperscript{118} First, the advertisers argued that the district court incorrectly concluded that section 17508.5 only applied to commercial value is lost when the claims are false or misleading. "The free market system can have a positive effect on the environment only if manufacturers provide consumers with accurate information about the environmental impact of their purchasing decisions." \textit{Israel, supra} note 7, at 304. For a discussion of the depth and impact of consumer confusion with respect to environmental claims in advertising, see \textit{supra} note 11 and accompanying text.

\textsuperscript{116} If consumers cannot be sure of the accuracy of environmental claims, they often simply dismiss them entirely. \textit{Patka, supra} note 8, at 43 (citing EPA Public Hearing Notice, 56 Fed. Reg. 49,992, 49,993 (1991)). Misleading environmental claims already \textsuperscript{[have]} led many consumers to dismiss green claims as pure advertising hype. Lack of regulation decreases competition among manufacturers to produce better, more environmentally sound products and increases consumer confusion. In the long run, if consumers cannot rely upon green marketing claims, these manufacturers will stop making them. This will greatly limit the positive effect of green consumerism on the environment.

\textit{Israel, supra} note 7, at 309.


\textsuperscript{118} \textit{Id.} at 728.
cial speech. Second, the advertisers argued that the statute at issue should have been analyzed under a strict scrutiny test and not an intermediate standard. Finally, even assuming that intermediate scrutiny was the appropriate standard to apply, the advertisers asserted that the district court incorrectly failed to consider "less restrictive alternatives" to the statute, and therefore, misapplied the standard.

The Ninth Circuit analyzed the advertisers' first and second challenges together. First, the court cited, with approval, the district court's finding that the speech regulated by section 17508.5 constituted commercial speech under the three-prong test set forth in Bolger. The Ninth Circuit noted that section 17508.5 regulates speech in advertisements concerning a "specific consumer good" and that the statute requires that the speech describe a product sold by the company affected by the statute. Moreover, the court observed that companies which promoted their products' environmental attributes were undoubtedly striving to "capture a portion of the 'green market.'"

The advertisers relied heavily on the United States Supreme Court decision in Cincinnati v. Discovery Network, Inc. for support of their challenge to the district court's decision. The Discovery Network opinion was issued subsequent to the district court's opinion in Lungren. Discovery Network involved a review of a "municipal ban on newsracks containing 'commercial handbills' which exempted newsracks containing 'newspapers' with non-commercial elements." The Supreme Court struck down this ban on the grounds that there was no "reasonable fit between the... ban and the city's legitimate interest in safety and esthetics, insofar as 'respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain."

The advertisers argued that the district court's holding in Lungren was at odds with the Supreme Court's requirement in Discovery Network that an intermediate scrutiny standard was appropriate only

119. Id.
120. Id.
121. Lungren, 44 F.3d at 728.
122. Id. For a discussion of Bolger, see supra notes 36-41 and accompanying text.
123. Id.
124. Id. For a discussion of the "green market" phenomenon and its impact on advertising, see supra notes 3-9 and accompanying text.
126. Lungren, 44 F.3d at 729-30.
127. Id. (citing Discovery Network, 113 S. Ct. at 1514).
“where the governmental interest [furthered by the restrictions] relates directly to the distinction between commercial and noncommercial speech.” The advertisers argued that it is inappropriate to distinguish between commercial and noncommercial speech when that distinction does nothing to further the state interest purported to be addressed by the statute in question.

Rejecting this argument, the Ninth Circuit declared that there was a stark contrast between “municipal beautification,” the asserted state interest in Discovery Network, and consumer protection, the asserted state interest in the case at issue. In Discovery Network, the Supreme Court reasoned that because the restriction at issue was “based on commercial content,” it bore no relationship to the asserted interest of aesthetic improvement “insofar as the attractiveness of a newsrack [is] unrelated to its contents.” In contrast, a distinction between commercial and noncommercial speech is entirely germane to the goal of “preventing commercial harms.” Finding support in the record for the California legislature’s belief that environmental claims in advertising strengthen consumer demand for environmentally beneficial products, the Ninth Circuit concluded that “the standardization of terms used in commercial representations about a product’s environmental attributes is directly related to California’s undisputedly substantial interests in truthful environmental advertising and conservation.”

In addition to affirming the district court’s analysis, the Ninth Circuit expanded the policy rationale for upholding the statute. The court reasoned that section 17508.5 leveled the playing field, so to speak, for both consumers and manufacturers of environmentally-beneficial products by “prevent[ing] the unscrupulous advertiser from capturing the green premium that ecologically-minded consumers are increasingly willing to pay for goods whose environmental bona fides they are ill-equipped to assess.”

Additionally, the Ninth Circuit envisioned a benefit to manufacturers whose products possessed relatively limited environmental

128. Id. at 730.
129. Id.
130. Lungren, 44 F.3d at 730-31.
131. Id. at 731 (citing Discovery Network, 113 S. Ct. at 1514).
132. Id.
133. Id. at 733.
134. Lungren, 44 F.3d at 733. The court acknowledged that the statute did not distinguish among the varying degrees of environmental desirability of products which pass the statutory minimum threshold. Notwithstanding this limitation, the court reasoned, the statute did at least “permit the ecologically-minded consumer to steer clear of products whose environmental attributes are de minimis.” Id.
attributes but nonetheless met the statutory requirements. By virtue of the statute's prescribed definitions, these manufacturers were provided with a "potential safe harbor in which . . . [to] truthfully represent their products [as] 'recycled' or 'biodegradable' while establishing a good faith defense against prosecution under more general statutes aimed at preventing consumer fraud."135

Furthermore, the court predicted that the statute would protect manufacturers with bona fide environmentally-friendly products from "unfair price competition."136 By prohibiting competitors without these environmental attributes from representing their products as "biodegradable" or "recycled," the court reasoned that the statute "directly discourages free riding by environmentally-disinclined firms on ecological gains funded by consumers in the form of higher prices paid for 'green' goods, and by other firms in the form of higher production costs unlikely to be recouped in a market of unregulated claims by lower-cost competitors."137

The court also viewed the statute as an incentive to manufacturers whose products did not meet the statutory definitions "to enhance the environmental attributes of their goods in order to capture the benefits of green labelling."138 The court viewed the existence of the statute as an advantage regardless of whether the manufacturers actually altered their products to fit with the statutory definitions. If manufacturers did enhance their products' environmental attributes, the court reasoned that the considerable burden on California landfills would be eased.139 If a manufacturer did not improve its product's environmental attributes, the court anticipated that a "considerable number of ecologically-oriented consumers may reasonably be expected to shift in substantial measure to the products of complying firms and thereby effect the same result."140

135. Id. at 734. An example of one such prohibition may be found in §§ 17500 and 17508 of the California Business and Professional Code, prohibiting false advertising. Id. For the full text of § 17508.5, see supra note 14.

136. Lungren, 44 F.3d at 734-35.

137. Id. For a discussion of the prevalence of false "green" claims in advertising, see supra notes 8-9 and accompanying text.

138. Lungren, 44 F.3d at 735.

139. Id. The court stated that if manufacturers adapted their products to obtain the minimum standards set forth in the statute, this would result in "less waste being dumped and dumped waste decomposing more rapidly." Id.

140. Id. For a discussion of consumer purchasing behavior with respect to environmentally beneficial products, see supra notes 3-6 and accompanying text.
In response to the advertisers' third challenge, which asserted that the district court had inappropriately failed to consider less restrictive means of achieving the state's asserted interest, the Ninth Circuit echoed the district court's reliance on Fox. Quoting the Supreme Court's opinion in Fox, the Ninth Circuit pointed out that in order for a restriction to be disallowed, it would have to be "substantially excessive, disregarding 'far less restrictive and more precise means.'"[142]

The advertisers presented two alternatives to the statute which, they contended, were "far less restrictive."[143] The first alternative was that false environmental marketing be regulated by a "case-by-case prosecution of spurious environmental claims under existing false advertising statutes."[144] The second alternative was a requirement that advertisements containing environmental terms which did not meet the definitions in section 17508.5 contain an explanation clarifying their meaning.[145]

In rejecting the advertisers' assertion that these alternatives were evidence that the district court inappropriately failed to consider less restrictive means, the court responded on two levels. First, the court determined that these alternatives were not only less burdensome than adherence to section 17508.5, but in addition, that "it [was] not apparent that use of the regulated terms with qualifiers would advance California's" interest in environmental protection.[146] Second, the court declared that even if these alternatives did accomplish the state's interests as efficiently as section 17508.5, a court "need not make finely calibrated determinations ... where the alternatives are closely balanced."[147]

141. Lungren, 44 F.3d at 735. For a discussion of Fox, see supra notes 30-35 and accompanying text.

142. Lungren, 44 F.3d at 735 (quoting Fox, 492 U.S. at 479 (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988))).

143. Id.

144. Id.

145. Id.

146. Lungren, 44 F.3d at 736. For a discussion of California's asserted interest, see text accompanying supra note 79.

147. Lungren, 44 F.3d at 736. Although conceding that there was "inevitably a degree of arbitrariness in the legislative determination" of the standards required by the statute's definitions, the court noted that as long as the requirements are not "unduly prohibitive and leave considerable room for both more privileged editorial commentary and, in the commercial context, alternative expressions conveying ... information about the modest environmental attributes of products not measuring up under section 17508.5," courts are not at liberty to second-guess these legislative determinations. Id.
Impact of Ninth Circuit’s Decision

The Ninth Circuit, while finding no flaw in the district court’s reasoning, buttressed the district court’s decision by providing additional policy reasons for its rationale. In addition to elevating this rationale to a circuit court level, the Ninth Circuit’s opinion also provided strong policy reasons for regulating environmental claims beyond protecting consumers from misleading marketing.

By predicting that the statute would further the goal of resource conservation by forcing manufacturers to either enhance their products to fit within the statutory definitions or risk losing their market share to manufacturers of products which do, the Ninth Circuit provided ample support for its finding that less restrictive alternatives would not accomplish the same results. Finally, the court’s characterization of the statute as a shield for manufacturers of environmentally beneficial products against “the unscrupulous advertiser” engaging in “unfair price competition” provides it with strong protection from attack.

If section 17508.5 protects the public from false environmental claims in advertising, serves as an incentive for manufacturers to enhance their products’ environmental attributes, gives consumers a reason to switch to more environmentally-beneficial products, promotes environmental conservation, provides a “safe harbor” for those manufacturers making legitimate environmental claims, and protects “ecologically-oriented” manufacturers from unfair price competition, who is left to complain except the “unscrupulous advertiser?”

Christine Cower Mooney