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ADVERTISING THE ECONOMICS OF HIGH JURY AWARDS: THE INSURANCE INDUSTRY'S BID FOR PROSPECTIVE JURORS TO TIGHTEN THEIR PURSE STRINGS

"Advertise or go under."

-Dorothy Sayers, *Murder Must Advertise*

The triumphant return of a large money judgment for a personal injury plaintiff is at best a Pyrrhic victory for the jury. Large personal injury awards have contributed to the dramatic rise of insurance costs to the consumer.[1] Juries increasingly view tort defendants and their insurers capable of paying generous financial compensation in personal injury actions.[2] While jurors may reap a certain degree of satisfaction at the time of litigation from "making the wrongdoer pay,"[3] the jury, as a representative group of insurance policy holders and consumers, ultimately bears the cost of exorbitant verdicts.[4] This economic reality has become the subject of a recent insurance industry advertising campaign designed to reduce runaway jury awards.[5]

The insurance industry's advertising campaign criticizes the present tort recovery system and urges immediate reform.[6] By depicting a direct

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[1] Soaring insurance premiums, far beyond upward adjustments for inflation, can be partially attributed to the frequency of high jury awards. *See Why Everybody Is Suing*, U.S. NEWS AND WORLD REPORT, December 4, 1978 at 51. [hereinafter cited as *Everybody Is Suing*]. The growing rush to litigate increases the costs, resulting from legal services and insurance, of most products and services purchased today. The success of personal injury plaintiffs in receiving high damage awards costs government, business, labor and other institutions billions of dollars in both preventing and litigating lawsuits. *Id.* In 1971, juries in the United States gave out 11 damage awards of one million dollars or more, while in 1977, 56 verdicts of more than one million dollars were granted. *Id.* at 53. A sampling of the described jury awards reveals a high frequency of personal injury cases. ($128,466,280-auto gas-tank explosion; $21,766,000-plane crash; $13,355,000-rape and wrongful death; $9,341,683-seat-belt failure; $7,000,000-medical malpractice; $7,000,000-swimming-pool accident; $5,565,700-job accident; $5,200,000-football accident). *Id.*

[2] *See* FORBES, April 3, 1978, at 79. In describing its recovery from several years of profit losses, Aetna Life & Casualty Company explained that it had adjusted insurance premiums upward to account for what it described as "social inflation." *Id.* Juries had been making bigger damage awards, thinking "they were taking money from corporate fat cats to give to some poor unfortunate." *Id.* In reality, however, the insurance companies pass the cost of high jury awards back to the policy holders in the form of increased premiums. *Id.*

[3] *See Everybody Is Suing, supra* note 1, at 50.

[4] *Id.* at 50-53.

[5] *See generally* BUSINESS WEEK, July 31, 1978, at 39; *Insurance Company Ads Draw Trial-Lawyer Fire*, 64 A.B.A.J. 531 (1978) [hereinafter cited as *Insurance Company Ads*].

[6] After presenting its case that juries are granting windfall awards to undeserving plaintiffs, an Aetna advertisement asks the question "What can we do?" *See* Aetna Life & Casualty Company advertisement, *reprinted in Insurance Company Ads, supra* note 5, at 531.

correlation between high jury awards and rising insurance premiums,[7] the advertisements attempt to discredit the popular Robin Hood concept of rewarding personal injury plaintiffs from the pockets of "wealthy" insurance companies as an economically dangerous practice.[8] Understandably, the insurance industry's advertising campaign has drawn considerable attention from personal injury lawyers.[9]

Challenges to insurance company advertising require courts to balance the competing constitutional considerations of the civil litigant's right to a fair trial and the insurance company's right to free speech. Courts must determine the scope of the fair trial right and whether it must be held in balance with a fully protected first amendment right to free speech or perhaps a lesser, qualified privilege. Thus the balancing act begins with an examination of the right to a fair trial.

The seventh amendment of the United States Constitution guarantees the right of trial by jury to civil litigants.[10] While this amendment is not

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In response, the advertisement suggests that liability should not be assessed where there was no fault, juries should take into account a victim's own responsibility for his losses, and awards should realistically reflect only the actual loss suffered. A St. Paul Property & Liability Insurance advertisement criticizes the trend toward excessive jury awards and asks the public to write a letter to its legislators and be heard. *See* St. Paul Property & Liability Insurance advertisement, *reprinted in* Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 70 (1978)[hereinafter cited as Loftus] (sample ads); text accompanying note 7 *infra*.

[7] *See Insurance Company Ads, supra* note 5, at 531, and Loftus, *supra* note 6, at 70. (sample ads). Part of an Aetna advertisement reads: "When awarding damages in liability cases, the jury is cautioned to be fair and bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves." *Insurance Company Ads, supra* note 5, at 531. A St. Paul advertisement states: " 'Sue thy Neighbor' is fast becoming one of America's favorite pastimes. But who really foots the bill on the 'big pot' some lucky claimant wins? We *all* do." (emphasis in original). Loftus, *supra* note 6, at 70.

[8] *See Insurance Company Ads, supra* note 5, at 531, and Loftus, *supra* note 6, at 70. (sample ads). An Aetna advertisement urges that it is time to look hard at what windfall awards are costing. In a footnote, Aetna explains that not only are insurance premiums being driven up by high jury awards, but the skyrocketing insurance premiums of manufacturers, doctors, hospitals and other targets of high jury awards are causing higher prices for all goods and services. *Insurance Company Ads, supra* note 5, at 531. A St. Paul advertisement explains that insurance is a system of sharing risk among many, and that excessive jury awards cause everyone to pay more. Loftus, *supra* note 6, at 70.

[9] *See* BUSINESS WEEK, July 31, 1978, at 39. Plaintiffs' lawyers have filed actions with the insurance commissions of Connecticut, Nevada and Kansas, and instituted court cases in New York and Connecticut, claiming that Aetna's advertising campaign is deceptive and is a form of jury tampering. *Id. See also Insurance Company Ads, supra* note 5. Several complaints to the Federal Trade Commission have also been made. *See also* text accompanying notes 56-59 *infra*. Plaintiffs' lawyers in Connecticut and Kansas have succeeded in having both Crum & Forster, another insurance company, and Aetna sign consent orders with their respective state insurance commissions agreeing not to publish the advertisements. *See* Kronzer, *Jury Tampering-1978 Style*, 10 ST. MARY'S L. J. 399, 400 n.9 (1979)[hereinafter cited as Kronzer].

[10] U.S. CONST. amend. VII provides, in pertinent part, that "In suits at common law . . . the right of trial by jury shall be preserved."

directly applicable to the states,[11] state constitutions include similar or identical provisions.[12] Unlike a criminal defendant's sixth amendment right to be tried by an impartial jury,[13] however, neither the seventh amendment nor its state constitution counterparts contain similar "fairness" language.[14]

Rather than a seventh amendment guarantee, the right to a fair civil trial is a basic requirement of the due process clause of the fourteenth amendment.[15] Since no person shall be deprived of property without due process of law,[16] civil litigants seeking property must prove their claims through a fair evidentiary trial process.[17] Where comment about pending litigation may seriously threaten the integrity of the judicial process, courts have held that the right to a fair trial takes precedence.[18] Relying on the due process requirements of the fourteenth amendment, the Supreme Court has described a fair trial as "the most fundamental of all freedoms."[19]

The due process analysis of the fair trial right is buttressed by similar holdings made without specific reference to the due process clause. In a

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[11] Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (seventh amendment right to trial by jury not privilege or immunity of national citizenship).

[12] *See, e.g.*, ARK. CONST. of 1874, art. II, § 7 (1928): "The right of trial by jury shall remain inviolate, and shall extend to all cases at law . . ."; MONT CONST. art. II, § 26: "The right of trial by jury is secured to all and shall remain inviolate."; N.Y. CONST. art. 1, § 2: "Trial by jury in all cases in which it has heretofore been granted by constitutional provision shall remain inviolate forever."

[13] U.S. CONST. amend. VI provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

[14] *See* text accompanying notes 10 & 12 *supra; Cf.*, LA. CONST. art. I, § 22: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation or other rights."

[15] *See In re* Murchison, 349 U.S. 133, 136 (1955). *Murchison* involved the propriety of a Michigan state court judge acting as both a "one-man grand jury" and the presiding judge in a contempt hearing. *Id* at 133-34. The Court identified this situation as one allowing a biased and interested judge to preside over an otherwise objective and neutral proceeding. *Id.* at 136-37. Due process, reasoned the Court, requires preventing even the possibility of unfairness in the trial process. *Id.*

[16] U.S. CONST. amend. XIV, § 1 provides, in pertinent part, that no State shall "deprive any person . . . of property without due process of law."

[17] *See* Conerly v. Flower, 410 F.2d 941, 944 (8th Cir. 1969)(court may not circumvent due process of seventh amendment by awarding damages without evidentiary trial on merits).

[18] *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975). The *Bauer* court interpreted the Chicago lawyers' desire to comment on pending litigation as an irreconcilable conflict between first amendment rights and the right to a fair trial. *Id.* The balance was struck in favor of the right to a fair trial, guaranteed to all persons by the due process requirements of the fourteenth amendment. *Id.*

[19] *See* Estes v. Texas, 381 U.S. 532, 540 (1965). *Estes* was a criminal trial involving a conflict between the first amendment guarantee of free press and the sixth amendment guarantee of a fair trial. *Id.* at 539. In discussing the fair trial right, the Court mentioned not only the due process requirements of the fifth amendment and the provisions of the sixth amendment, but also the due process clause of the fourteenth amendment. *Id.* at 540.

civil case, a presumption that extraneous communications with jurors are prejudicial may, absent rebuttal, require a new trial.[20] The Supreme Court has stated that the adjudication of controversies, both criminal and civil, must take place in the calmness and solemnity of the courtroom, based solely on evidence received in open court.[21] The Court has similarly found substantial pecuniary interest in the outcome of civil litigation inconsistent with the adjudicative process.[22]

The due process underpinnings of the right to a fair trial illuminate the sensitive area encroached upon by insurance company advertising. The message of the advertising campaign is that every potential juror has a pecuniary interest in the outcome of a personal injury suit.[23] Opinions formed on the basis of insurance company advertisements could result in verdicts based upon information received outside the evidence presented in open court.[24] Also, the insurance company advertisements might be regarded as extraneous communications with prospective jurors, raising a presumption of prejudice.[25] All of these considerations, however, are to be balanced against the insurance industry's freedom of speech. Whether insurance advertisements advocating lower jury awards are viewed as political, corporate or commercial speech, they are protected by the first amendment.

As statements urging reform of the tort recovery system and as commentaries on one segment of America's economy, insurance company advertisements constitute political speech. The Supreme Court consistently has interpreted the first amendment as a fortress for the protection of political expression. Adopting an historical approach to the first amend-

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[20] *See* Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 434 U.S. 924 (1978). *Krause* was an appeal from a suit for personal money damages on behalf of the personal representatives of those killed at Kent State on May 4, 1970. *Id.* at 565. During the course of the trial, one juror was physically assaulted and received threats on his life and the life of his family. *Id.* at 568. Under these circumstances, the court held that the party seeking to avoid a new trial had the burden of showing that the verdict was not affected by an extremely serious extraneous intrusion. *Id.*

[21] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). In *Sheppard*, the Court balanced the first amendment free press right with the sixth amendment fair trial right, and granted the petitioner's habeas corpus petition for a new trial. *Id.* at 363. The Court characterized press coverage of the murder trial as inflamatory and prejudicial, reasoning that extensive and unlimited media publicity surrounding the trial caused the jury to consider evidence outside the courtroom. *Id.* at 356-57. The Court stated that while freedom of discussion should be given the widest range compatible with the essential requirement of a fair trial, free discussion should not be allowed to interfere with the calmness and solemnity of the courtroom. *Id.* at 350-51. The *Sheppard* Court included both criminal and civil trials in its discussion of these competing constitutional considerations. *Id.*

[22] *See* Gibson v. Berryhill, 411 U.S. 564 (1973) (due process challenge successful in striking Alabama statute permitting those with substantial pecuniary interest in legal proceedings to sit as judges in such disputes).

[23] *See* text accompanying note 7 *supra*.

[24] *See* text accompanying note 21 *supra*.

[25] *See* text accompanying note 20 *supra*.

ment which afforded free speech the broadest possible protection,[26] the Court emphasized in *Brandenburg* v. *Ohio*[27] that political advocacy must be directed to producing imminent lawlessness, and be likely to produce such action, before it could be suppressed.[28] This sweeping view of free political expression, particularly as it relates to insurance company advertising, is supported by *New York Times Co.* v. *Sullivan*.[29]

Viewed as political expression in the form of paid advertisements, insurance company advertisements are in the precise posture of the edito-

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[26] In a series of dissents which began with the free speech issues growing out of World War I, Justice Oliver W. Holmes, Jr. managed to eventually convince the majority of the Court that first amendment protection is extremely broad. In Abrams v. United States, 250 U.S. 616 (1919), the defendants were convicted for violating provisions of the Espionage Act of Congress by printing and distributing circulars which advocated resistance to the draft and overthrow of the United States government. The majority of the Court affirmed their convictions, finding that the plain purpose of their propaganda was to incite, during wartime, diasaffection, riots, and revolution. *Id.* at 623. In dissent, Justice Holmes stated that Congress could not forbid all effort to change the mind of the country, *id.* at 628, and that no intent to cripple or hinder the United States in the prosecution of the war was proved. *Id.* at 626. Holmes argued that the free marketplace of ideas is the very theory of our Constitution, stating that the best test of the truth of an idea is to allow that idea to compete with others, and over the passage of time, either to gain acceptance and belief or to fall impotent and powerless. *Id.* at 630.

The defendant in Gitlow v. New York, 268 U.S. 652 (1925), was a member of the Left Wing Section of the Socialist Party and helped author and publish a "Manifesto" which advocated revolution. He was convicted of criminal anarchy under New York State law. *Id.* at 654. The majority viewed such language as "The Communist International calls the proletariat of the world to the final struggle!" as language of direct incitement, and affirmed the conviction. *Id.* at 665, 672. Justice Holmes again dissented, stating that every idea is an incitement, and that ideas manifesting no clear and present danger of unlawful activity must be given an opportunity for acceptance in the intellectual community. *Id.* at 673.

Justice Brandeis joined Holmes in Whitney v. California, 274 U.S. 357 (1927), in fowarding the view that only an emergency could justify suppression of speech and that Americans have a duty to make public criticism. The defendant in *Whitney* was convicted, as an organizer of the Communist Party in Oakland, California, for violating California's Criminal Syndicalism Act. *Id.* at 359, 363. Upholding the conviction, the majority of the Court reasoned that criminalizing teachings to overthrow the government was within the legitimate police power of the State. *Id.* at 371. Concurring, Justice Brandeis, joined by Justice Holmes, affirmed the conviction under a clear and present danger analysis. *Id.* at 379. He strenuously urged, however, that only extreme circumstances justify suppression of speech, and that a healthy democracy depends upon the free expression of unpopular opinions. *Id.* at 377.

[27] 395 U.S. 444 (1969)(per curiam).

[28] *Id.* at 449. The defendant in *Brandenburg* was a leader of a Klu Klux Klan group, and was convicted under the Ohio Criminal Syndicalism statute for advocating lawless activity. *Id.* at 444-45. The Court regarded Brandenburg's activites as the mere abstract teaching of resort to violence. *Id.* at 448. Reversing Brandenburg's conviction, the Court held that incitement to imminent lawless action, not mere advocacy, was required for the suppression of speech. *Id.* at 448-49. On *Brandenburg's* adoption of developing first amendment theory, *see* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975).

[29] 376 U.S. 254 (1964).

rial advertisement protected in the *Sullivan* case.[30] The *Sullivan* Court stated that paid advertisements are an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities, but who nevertheless wish to exercise their freedom of speech through the press.[31] Moreover, the *Sullivan* case stands for the proposition that the first amendment's protection of public criticism is vital to the functioning of a democratic society.[32]

The political statements embodied in insurance company advertisements also bear the label of corporate speech. Corporate speech contributing useful information to society received full and unqualified protection in the Supreme Court's recent decision in *First National Bank of Boston* v. *Bellotti.*[33] In *Bellotti,* the Court struck down a Massachusetts statute prohibiting corporate speech on issues unrelated to the corporation's business.[34] The *Bellotti* Court stated that the first amendment, whether applied to individuals, the press, or corporations, does not allow a limitation of "the stock of information from which members of the public may draw."[35] If a corporation wishes to contribute information for society's edification, the Supreme Court concluded that the first amendment protects such expression.[36]

Even if insurance company advertisements are labeled as purely "commercial speech,"[37] they still retain full first amendment protection

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[30] *See id.* at 266. *Sullivan* involved the issue of the extent to which freedom of the press protects a newspaper against libel actions. *Id.* at 256. Respondent alleged that he was libeled by a full-page advertisement, carried in the *New York Times,* which held respondent partly responsible for a "wave of terror" in opposition to the civil rights movement. *Id.* at 256-57. The advertisement also solicited financial contributions for the defense fund of Dr. Martin Luther King, Jr. *Id.* The Court stated that, although this speech was in the form of a paid advertisement and included a solicitation for financial contributions, "[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* at 266.

[31] *Id.*

[32] *See* Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment",* 1964 SUP. CT. REV. 191 (1964).

[33] 435 U.S. 765 (1978). *See generally The Supreme Court, 1977 Term, Constitutional Law,* 92 HARV. L. REV. 163 (1978).

[34] 435 U.S. at 776. *Bellotti* involved an attempt by banking associations and business corporations to spend money for the purpose of publicizing their view on a proposed constitutional amendment which was a ballot question at a general election. *Id.* at 769. The Attorney General of Massachusetts charged the business groups with violating MASS. GEN. LAWS ANN., ch. 55, § 8 (West. Supp. 1977), a statute prohibiting corporate contributions or expenditures for the purpose of affecting the vote on any issue other than one materially affecting the property, business or assets of the corporation. 435 U.S. at 768.

[35] 435 U.S. at 783.

[36] *Id.*

[37] The "commercial speech" label is significant with relation to a series of cases which suggested that commercial speech is entitled to a lesser degree of first amendment protection than non-commercial speech. *See generally* Heller, *The End of the "Commercial Speech" Exception-Good Riddance or More Headaches for the Courts?,* 67 KY. L. J. 927 (1978-79); Roberts, *Toward a General Theory of Commercial Speech and the First Amend-*

absent the dissemination of false information.[38] The Supreme Court's recent decisions in the commercial speech area afford full first amendment protection to truthful commercial advertising, vindicating the public's right to make informed decisions on the basis of widely disseminated commercial information. In *Bigelow* v. *Virginia,*[39] the Court upheld a publisher's right to carry advertisements of available abortion services in a magazine distributed within a university community.[40] The Supreme Court in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*[41] similarly allowed for the advertisement of prescription drug prices so as to allow the public to make well-informed decisions on the basis of accessible commercial information.[42] Public access to the commercial information contained in "for sale" and "sold" real estate signs received free speech protection in *Linmark Associates, Inc.* v. *Wil-*

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ment, 40 OHIO ST. L.J. 115 (1979); Comment, *Constitutional Law-First Amendment-Commercial Speech*-Linmark Associates, Inc. v. Township of Willingboro, 24 N.Y.L.S. L. REV. 225 (1978). The Supreme Court initiated the commercial speech doctrine in Valentine v. Chrestensen, 316 U.S. 52 (1942). The respondents in *Valentine* were circulating pamphlets advertising a submarine tour. Finding they were in violation of New York's antilitter ordinance, respondents printed a political protest on the reverse side of their advertisement. *Id.* at 53. The Court recognized this as an attempt to circumvent the ordinance and therefore implied that the pamphlet was essentially economic in purpose rather than political, and could be regulated by New York's ordinance prohibiting the distribution of commercial advertising. *Id.* at 54-55.

A difference in constitutional protection for commercial as opposed to non-commercial speech was reiterated in Breard v. Alexandria, 341 U.S. 622 (1951). The Court held that a homeowner's right to privacy outweighed whatever freedom of speech entitlements the petitioner derived from the commercial solicitation of magazine subscriptions. *Id.* at 644. New York Times Co. v. Sullivan, 376 U.S. 254 (1964), also distinguished between commercial speech and fully protected political expression. *See* text accompanying note 30 *supra.*

[38] Recent decisions of the Supreme Court indicate no first amendment barrier to the regulation and control of false or misleading speech; *see* text accompanying notes 50-55 *infra.*

[39] 421 U.S. 809 (1975).

[40] *Id.* at 819-22. *Bigelow* involved a Charlottesville publication, the *Virginia Weekly,* distributed predominantly to students at the University of Virginia. A New York City organization, offering persons desiring an abortion assistance with placement in accredited hospitals and clinics in New York, where abortion is legal, placed an advertisement in the *Virginia Weekly. Id.* at 812. The paper's editor, Bigelow, was convicted and fined $500 for violating a Virginia statute prohibiting advertisements encouraging abortion. *Id.* at 811. The Supreme Court of Virginia affirmed the conviction, specifically relying on the commercial speech exception to first amendment protection. *Id.* at 813. The United States Supreme Court reversed, according full first amendment protection to the abortion services advertisements since they contained information concerned with an issue of interest to the general public. *Id.* at 819-22.

[41] 425 U.S. 748 (1976).

[42] *Id.* at 765. In *Virginia State Board of Pharmacy,* plaintiffs challenged a Virginia statute prohibiting pharmacists from advertising prescription drug prices. Although the Court acknowledged the unquestionable commercial character of the speech, *id.* at 761, 765, the first amendment was held to protect public access to the drug price information. *Id.* at 765.

lingboro,[43] and *Bates* v. *State Bar of Arizona*[44] granted first amendment protection to truthful advertisements concerning the availability and prices of routine legal services.[45]

The Supreme Court's commercial speech decisions indicate that insurance company advertisements, to the extent that they communicate truthful commercial information to the public, are protected by the first amendment. Insurance company advertisements have been attacked, however, as deceptive and inaccurate for a number of reasons.[46] Certain tort recovery incidents depicted in some of the advertisements are either unsubstantiated or completely fictitious.[47] The omission of material facts and mitigating circumstances also lessens the veracity of the advertisements' content.[48] Inaccurate statistics on the number of tort suits filed each year create the impression that a crisis situation exists in the tort recovery area.[49] Proof of false information in insurance company advertisements raises the issue of first amendment protection of false information and the possibility of action by the Federal Trade Commission (FTC).

Although the Court in *Virginia State Board of Pharmacy* allowed advertisements listing prescription drug prices,[50] the majority stated that commercial speech, whether wholly false or only deceptive and misleading, lies outside the protection of the first amendment.[51] In *Friedman* v. *Rogers,*[52] the Court upheld a Texas statute prohibiting optometrists from using a trade name in connection with their business.[53] The Court found

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[43] 431 U.S. 85, 97-98 (1977). *Linmark Associates, Inc.* involved the commercial speech inherent within "for sale" and "sold" signs displayed on real estate. The Town of Willingboro was experiencing a "white scare" from the community. To curb the growing number of white families selling their homes, and to promote and preserve a more racially integrated community, the town passed an ordinance prohibiting "for sale" and "sold" signs from being publicly displayed on all real estate except model homes. *Id.* at 86-87. The Supreme Court struck down the ordinance, upholding the realtor's first amendment right to communicate information to the public. *Id.* at 97-98.

[44] 433 U.S. 350 (1977).

[45] *Id.* at 384.

[46] *See* Kronzer, *supra* note 9, at 409-10.

[47] *Id.* Incidents recounting substantial damage recoveries by tort victims who used a lawnmower as a hedgeclipper and who swallowed a safety pin are unsubstantiated by any actual case. *Id.*

[48] *Id.* An Aetna advertisement describing the substantial damage recovery claimed by a truck driver "without brake lights" failed to disclose facts about the driver's actual injuries, or the fact that the litigants eventually settled the case for a figure lower than that indicated. *Id.* at 410 n.55.

[49] *Id.* at 410. Many of the advertisements repeatedly state that over one million product liability suits are filed each year. The Insurance Service Office, however, places the figure at 140,000 for 1977. *Id.*

[50] *See* text accompanying notes 41-42 *supra.*

[51] 425 U.S. at 771-72. The Court in *Virginia State Board of Pharmacy* stated that the first amendment does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. *Id.*

[52] 440 U.S. 1 (1979).

[53] *Id.* at 19.

that trade names can be deceptively associated with price and quality information, thus manipulating the public into misleading impressions.[54] Consequently, the Court determined that restrictions imposed on false, deceptive and misleading commercial speech were entirely permissible.[55]

False and misleading advertising is subject to regulation by the FTC. The FTC is authorized to prevent any unfair or deceptive act or practice in or affecting interstate commerce.[56] The Commission determines findings of fact and, if supported by evidence, these fingings are conclusive upon review in the United States Courts of Appeals.[57] Legal determinations that certain advertising is deceptive, however, and appropriate remedies are circumscribed by the Supreme Court's recent decisions in the commercial speech area.[58] An FTC challenge to insurance company advertising would involve the Commission's own administrative determination of facts relating to falsity and deception, the same determination which governs substantive constitutional law interpreting the first amendment as articulated by the Supreme Court. Thus, an FTC decision that an advertisement is unfair or deceptive is, in effect, a constitutional determination that the advertisement has no first amendment protection. The propriety of an administrative agency making constitutional decisions remains an open issue.[59]

Insurance industry advertising can thus gain first amendment protection if it is viewed as political, corporate, or, absent falsity and deception, commercial speech. Once first amendment protection attaches to the insurance company advertisements, the doctrine of prior restraint weighs heavily on the side of insulating the insurance company advertisements from competing considerations. Prior restraint means the suppression of a publication before it is published. The doctrine embraces the concept that freedom of speech and of the press principally means immunity from prior restraints or censorship.[60] The Supreme Court has championed this

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[54] *Id.* at 12-13.

[55] *Id.* at 9.

[56] 15 U.S.C. § 45(a) (1976).

[57] *Id.* § 45(c) (1976); Beneficial Corp. v. FTC, 542 F.2d 611, 616-17 (3d Cir. 1976)(tendency of advertising to deceive established by substantial evidence as whole).

[58] *See* text accompanying notes 39-45, 51-55 *supra;* Warner-Lambert Co. v. FTC, 562 F.2d 749, 758 (D.C. Cir. 1977) (FTC has special responsibility to order corrective advertising so as not to trench on first amendment rights); National Comm. on Egg Nutrition v. FTC, 570 F.2d 157, 164 (7th Cir. 1977)(first amendment does not permit remedy broader than that which is necessary to prevent deception).

[59] *See* Beneficial Corp. v. FTC, 542 F.2d 611, 620 (3d Cir. 1976)(Commission's broad construction of § 5 authority cannot survive demise of commercial speech exception to first amendment). *See generally* Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?* 61 MINN. L. REV. 705 (1977).

[60] *See* Near v. Minnesota, 283 U.S. 697, 716 (1931). The *Near* Court invalidated a Minnesota statute which allowed courts to enjoin the publication of "malicious, scandalous and defamatory" newspapers. At the core of the Court's argument was the proposition that malicious and scandalous publications are punishable under the laws of libel and slander. *Id.* at 713-14. Every newspaper publisher accepts the consequence of what he prints, *after* publica-

idea by holding that any system of prior restraints of expression bears a heavy presumption against its constitutional validity.[61] This burden resulted in the prohibition of an injunction restraining the peaceful distribution of pamphlets and leaflets, no matter how offensive, which publicly criticized an individual's business practices.[62] When the United States sought to enjoin the *New York Times* and *The Washington Post* from publishing "The Pentagon Papers," the heavy presumption against the constitutional validity of prior restraints caused the Court to disallow the injunction.[63]

The Supreme Court's most recent pronouncement on the doctrine of prior restraint arose in the fair trail-free press setting. *Nebraska Press Association* v. *Stuart*[64] involved a sensational murder in a small, rural Nebraska community.[65] The crime immediately attracted massive news media coverage,[66] and the trial court entered an order restraining the publication or broadcasting of accounts concerning the confessions or admissions made by the accused, or facts strongly implicating the accused.[67] Although the Court acknowledged that pervasive pretrial publicity threatened the defendant's right to a fair trial,[68] a previous restraint on first amendment freedoms could not be tolerated.[69] The Court stated that prior restraints on speech and publications are the most serious and the least tolerable infringement on first amendment rights.[70] The Court suggested change of trial venue, postponement of the trial, searching *voir dire* examination of prospective jurors, the use of emphatic and clear jury

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tion. *Id.* at 714. Previous restraints upon publication, however, are the very essence of censorship, and are inconsistent with our own experience as a nation and the concept of the first amendment. *Id.* at 717.

[61] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[62] *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971). The respondent in *Keefe* was a real estate broker in the Austin neighborhood of Chicago. Petitioner was a racially integrated community organization in the same neighborhood. *Id.* at 415-16. The petitioner distributed leaflets and pamphlets criticizing respondent's real estate practices in a shopping center and among the respondent's fellow-parishoners and neighbors. *Id.* at 417. Denying an injunction of petitioner's activities, the Court recognized peaceful pamphleteering as a form of communication protected by the first amendment. *Id.* at 419.

[63] *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971)(per curiam).

[64] 427 U.S. 539 (1976). *See generally Symposium,* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 383 (1977).

[65] 427 U.S. at 542-43. Six members of one family were found murdered in their home in Sutherland, Nebraska, a town of approximately 850 people. *Id.* at 542. The charges against the defendant, amended to reflect the autopsy report, stated that the defendant committed the murders in the course of a sexual assault. *Id.* at 543.

[66] *Id.* at 542.

[67] *Id.* at 541.

[68] *Id.* at 562-63. In reviewing the pretrial record, the Court stated that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning the case, and that such publicity might impair the defendant's right to a fair trial. *Id.*

[69] *Id.* at 570.

[70] *Id.* at 559.

instructions, and sequestration of the jury as alternatives to prior restraint in a trial court's effort to protect the defendant's fair trial right.[71]

The constitutional dilemma posed by insurance company advertising thus appears in bold relief. First amendment protection of insurance company advertisements stands in opposition to the civil litigant's right to a fair trial.[72] The judicial response to insurance company advertising has been a liberal view toward protecting the fair trial right through *voir dire* examination. Ardently preserving the insurance industry's right to free speech, courts have rejected the remedy of injunctive relief to prevent publication.

A fair trial presupposes an impartial, indifferent jury.[73] *Voir dire* examination, the questioning of prospective jurors about their biases and prejudices,[74] is the principal device used to secure an impartial jury.[75] The proper scope of *voir dire* inquiry, however, has been a continual problem in civil litigation involving insurance companies.[76] Traditionally, the presence or absence of insurance has been considered irrelevant in tort suits because the legal and factual determinations concern the duties and behavior of individual parties.[77] Since knowledge of insurance coverage may influence a jury's determination of liability and damages, some courts view the unnecessary injection of the subject into the trial as prejudicial error requiring a new trial.[78] An opposing view is that practically all jurors have automobile insurance themselves, and the rule against mentioning insurance in a trial assumes an unwarranted naievete on the part of the jury.[79] A moderate approach suggests retention of the traditional rule, with the determination of whether a mistrial is necessary being made on a case-by-case basis.[80]

In *King* v. *Westlake*,[81] the defendant on appeal questioned the propri-

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[71] *Id.* at 563-64.

[72] *See* text accompanying notes 15-22, 26-45 *supra.*

[73] Irvin v. Dowd, 366 U.S. 717, 722 (1961).

[74] *See* FED. R. CIV. P. 47. Under the Federal Rules of Civil Procedure, *voir dire* examination may be conducted by the parties or their attorneys, or by the court itself. *Id.*

[75] *See generally* Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry Into Prejudice*, 48 U. COLO. L. REV. 525 (1977); Note, *Exploring Racial Prejudice On Voir Dire: Constitutional Requirements And Policy Considerations*, 54 B.U. L. REV. 394 (1974).

[76] *See generally* Hatchell, *Insurance Advertising-Much Ado About Nothing*, 10 ST. MARY'S L. J. 427, 428-39 (1979); Kronzer, *supra* note 9, at 401-07, 416-22.

[77] *See* RESTATEMENT (SECOND) OF TORTS (1977) § 920A & § 925 comment h.

[78] *See, e.g.*, Chavin v. Cope, 243 A.2d 694, 696-97 (Del. 1968)(juror's knowledge of insurance coverage held to be prejudicial to defendant); Johnson v. Hansen, 237 Or. 1, 389 P.2d 330, 331 (1964)(insurance coverage is irrelevant and unnecessary injection of subject into trial is prejudicial).

[79] *See* Causey v. Cornelius, 164 Cal. App.2d 269, 275-77, 330 P.2d 468, 473 (1958)(rule that knowledge of insurance coverage will lead to excessive verdicts is unrealistic and no longer justified).

[80] *See* Muelebach v. Mercer Mortuary & Chapel, Inc., 93 Ariz. 60, 378 P.2d 741, 744 (1963)(mere mention of the word "insurance" will not always require mistrial).

[81] ___ Ark. ___, 572 S.W.2d 841 (1978).

ety of plaintiff's *voir dire* inquiry into whether prospective jurors had liability insurance, and whether they believed that the size of jury verdicts in personal injury cases affects automobile liability insurance premiums.[82] Prior to the trial, insurance company advertisements appeared in a newspaper and several periodicals.[83] All but two of the jurors admitted seeing one or more of the advertisements.[84]

The *King* court held that *voir dire* of the jury was apparently in good faith and was proper.[85] Relying on a previous ruling,[86] the Supreme Court of Arkansas held that *voir dire* examination of prospective jurors respecting their interest in or connection with liability insurance companies is permissible if counsel is making a good faith effort to ascertain whether there is ground for challenge of a juror for cause, or for a peremptory challenge.[87] Since the defendant could not demonstrate that plaintiff-counsel's questions on the effect of insurance company advertisements inevitably indicated to jurors that the defendant was insured,[88] the court affirmed the judgment.[89]

Borkoski v. *Yost*[90] also involved the permissible limits of *voir dire* examination with respect to insurance company advertising. In a medical malpractice and wrongful death action,[91] plaintiff-appellant Borkoski was denied permission to examine prospective jurors on the influence of a national campaign by leading insurance companies with regard to jury awards.[92] Borkoski argued that disallowance of this *voir dire* inquiry

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[82] *Id.* at 842. The plaintiff-appellee, Harry Westlake, obtained a $15,000 judgment in an action arising out of a rear-end automobile collision. Defendant-appellant Wanda King had only $10,000 of liability insurance and consequently appealed. *Id.*

[83] *Id.* at 843-44.

[84] *Id.* at 844.

[85] *Id.*. On *voir dire*, plaintiff's counsel explained that it was improper for either side to imply or suggest that the defendant does or does not have insurance. He explained that his questions concerned insurance premiums, not insurance. *Id.* The jury responded affirmatively to the question of whether jury verdicts affect insurance premiums. When asked if they could put aside the knowledge that whatever verdict they rendered might affect their own financial interest, so that a fair verdict would be returned, all jurors responded in the affirmative. *Id.*

[86] Dedmond v. Thalheimer, 226 Ark. 402, 290 S.W.2d 16 (1956)(purpose of *voir dire* is to ascertain possible grounds for challenge, and good faith inquiries respecting potential juror's interest in or connection with liability insurance companies allowable).

[87] 572 S.W.2d at 844.

[88] *Id.*

[89] *Id.*

[90] 594 P.2d 688 (Mont. 1979).

[91] *Id.* at 689. Defendants in the original malpractice and wrongful death action were St. Patrick's Hospital and doctors Yost and Gouax. Dr. Gouax carried his malpractice insurance with Aetna Life & Casualty Company, a participant in the insuance industry advertising campaign conducted during the time of the 1977 trial. Plaintiff Borkoski settled with St. Patrick's Hospital for $90,000 prior to trial. *Id.*

[92] *Id.* at 690. According to an affidavit filed by the attorney for defendant-doctors Yost and Gouax, Borkoski did inquire as to whether each juror felt any prejudice against this type of case, and whether the determination would be affected by any articles or advertisements about this type of case. *Id.* at 690.

abridged his right to a fair trial.[93]

On appeal, the *Borkoski* court considered the conflicting authority on the proper scope of *voir dire* questioning concerning insurance and insurance companies,[94] and ultimately adopted the reasoning of *King* v. *Westlake*.[95] By presenting evidence that institutional advertising at the time of trial was calculated to bias jurors against granting large damage awards to personal injury plaintiffs, the court reasoned that Borkoski should have been permitted a line of inquiry desiigned to uncover this possible bias.[96] Mindful of the equal responsibility to protect the defendant's fair trial right, the court set out guidelines for conducting such *voir dire* examination.[97] Before proceeding with questions directly related to a potential juror's possible prejudice arising from insurance company advertisements discrediting excessive jury verdicts, an attorney must first ask whether a prospective juror has heard about or might regularly come into contact with these advertisements.[98] A negative response requires abandonment of the insurance advertising line of questioning.[99]

Underlying the holding in *Borkoski* was the court's belief that the insurance company advertisements had a decided impact on potential jurors.[100] The court reasoned that the insurance industry's massive advertising campaign threatened every plaintiff's right to an impartial jury,[101] and viewed its liberal interpretation of the proper scope of *voir dire* ex-

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[93] *Id.*

[94] *See* Kiernan v. Van Schaik, 347 F.2d 775, 782-83 (3d Cir. 1965)(*voir dire* inquiry as to prospective jurors' possible belief that high jury awards result in larger insurance premiums constitutes reversible error); Fowler v. Burks, 52 Ala. App. 14, 288 So.2d 798, 799 (1974); Kath v. Brodie, 132 Colo. 338, 287 P.2d 957, 958 (1955); Hoston v. Highwater, 111 Ga. App. 87, 140 S.E.2d 525, 526 (1965); Barrett v. Morris, 495 S.W.2d 100, 103 (Mo. App. 1973)(inquiry as to whether prospective jurors have financial interest or connection with insurance business as stockholders or employees, and whether they are insurance policyholders in a particular company is permissible); Barton v. Owen, 71 Cal. App.3d 484, 508, 139 Cal. Rptr. 494, 508 (1977); Murrell v. Spillman, 442 S.W.2d 590, 591 (Ky. 1969); Butcher v. Main, 426 S.W.2d 356, 360 (Mo. 1968); Maness v. Bullins, 19 N.C. App. 386, 198 S.E.2d 752, 753 (1973); Brockett v. Tice, 445 S.W.2d 20, 22 (Tex. Civ. App. 1969).

[95] 572 S.W.2d 841 (Ark. 1978); *see* text accompanying notes 82-89 *supra*.

[96] Borkoski v. Yost, 594 P.2d at 694.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 690. The court cited a study on the impact of insurance company advertisements on potential jurors. Loftus, *supra* note 6 at 69-70. The researchers based the study on an experiment in which the subjects, during the course of two one-hour sessions, were exposed to various reading material including advertisements. Half of the subjects had an insurance company advertisement included in their materials and half did not. After the two sessions were over, all the participants in the experiment were asked to act as jurors and assess damages in a hypothetical automobile injury case. Dramatically, those subjects which were exposed to a single insurance company advertisement gave a lower average jury award than those who had not been exposed to the advertisements. *Id.*

[101] 594 P.2d at 694. The court stated that insurance company advertisements threatened the right to a fair trial by injecting the issue of insurance into the consciousness of every potential jury. *Id.; see* text accompanying notes 74-78 *supra*.

amination as a necessary prophylactic measure for protecting the fair trial right.[102] Ironically, Borkoski's arguments, accepted by the court, failed to win him a new trial.[103] The court reasoned that insurance advertisements speak only to damages, not liability, and since the jury found defendants not liable, any errors commited regarding the influence of the advertisements on the trial were harmless and not grounds for reversal.[104]

The plaintiff sought to enjoin insurance company advertising in *Rutledge* v. *The Liability Insurance Industry*.[105] An attorney who regularly represented personal injury clients sued, on his own behalf,[106] the entire class of insurance companies who participated in the most recent advertising campaign.[107] Rutledge sought to enjoin publication of certain insurance industry advertisements on the grounds that an attempt by the insurance companies to improperly influence jurors to award lower amounts in damages encourages jurors to consider impermissible facts and, therefore, prevents a fair trial.[108] On alternative motions for dismissal or summary judgment,[109] the defendant insurance companies argued that an injunction against publication of the advertisements would constitute an unconstitutional prior restraint on their freedom of speech.[110]

The propriety of enjoining insurance company advertising in *Rutledge* rested on the competing constitutional considerations of first amendment protection of free speech[111] and the right to a fair trial.[112] Although the insurance company advertisements had a "commercial aspect,"[113] the

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[102] 594 P.2d at 694; *see* text accompanying notes 11-23 *supra*.

[103] 594 P.2d at 695.

[104] *Id.*

[105] No. 78-1506 (E.D. La. 1979).

[106] The *Rutledge* court did not address the issue of a personal injury lawyer's standing to sue the liability insurance industry. Federal courts, however, have repeatedly allowed third parties to sue on behalf of the constitutional rights of others. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 513-14 (1925)(though constitutional rights involved were those of children and their parents, parochial school allowed to attack statute requiring public education for all children); Brewer v. Hoxie School District No. 46, 238 F.2d 91, 104-05 (1956)(school board allowed to obtain injunction barring conduct that would have interfered with the right of school children to be free from segregation).

[107] No. 78-1506, slip op. at 5 (E.D. La. 1979). Plaintiff named the liability insurance industry as defendant. This class was represented by The Travelers Insurance Company, St. Paul Companies, Inc., Aetna Casualty & Surety Company, Employers Insurance of Wausau and Crum & Forster. *Id.* Advertisements by Employers Insurance of Wausau and Crum & Forster, directed to businessmen and urging legislative reform, did not fall in the category of advertisements attacked by plaintiff. *Id.* at 7-8. The motions by Employers Insurance of Wausau and Crum & Forster for summary judgment therefore were granted. *Id.*

[108] *Id.* at 5.

[109] *Id.* All five class representatives sought dismissal under FED. R. CIV. P. 12 (b)(6) or, alternatively, summary judgment. *Id.*

[110] *Id.*; *see* text accompanying notes 60-71 *supra*.

[111] *Id.* at 8; *see* text accompanying notes 26-45 *supra*.

[112] *Id.*; *see* text accompanying notes 10-25 *supra*.

[113] *Id.* The court discerned one factor in the insurance company advertisements which gave them a commercial aspect. If the advertisements are successful, a reduction in jury awards would operate to the financial advantage of liability insurance carriers. *Id.* However,

Rutledge court concluded that they should not be characterized as "commercial speech."[114] Rather, the court viewed the advertisements as political statements on matters of public interest[115] and fully protected by the first amendment.[116] A prior restraint of first amendment speech carries a heavy presumption of unconstitutionality,[117] and as the advertisements were not directed to any specific case, their threat to a fair trial was remote and did not justify the extraordinary relief of a prior restraint of publication.[118] The court viewed *voir dire,* jury instructions and other unspecified safeguards in the trial process as sufficient to protect future plaintiffs.[119]

A New York federal district court dismissed an action to enjoin publication of insurance company advertisements in *Quinn* v. *Aetna Life & Casualty Co.*[120] Following a state court determination that a cause of action for enjoining Aetna's advertisements did exist,[121] the case was removed to federal court.[122] The federal court ultimately dismissed plain-

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the advertisements are not trying to "sell the product" in that no attempt to sell insurance or recommend a particular type of insurance is made. *Id.*

[114] *Id.* at 8-9. The court acknowledged the fact that insurance company advertisements reflected commercial and financial interests of the advertiser. However, the court viewed the advertisements as communicating information about the insurance industry and making available to the public that industry's opinion on matters of public concern, most specifically reform of the tort law. *Id.* at 9; *see* text accompanying note 6 *supra.* The court grounded its conclusion that the insurance company advertisements should not be characterized as "commercial speech" on First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Bigelow v. Virginia, 421 U.S. 809 (1975), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* text accompanying notes 29-36, 39-40 *supra.*

[115] No. 78-1506, slip op. at 9 (E.D. La. 1979).

[116] *See* text accompanying notes 26-32 *supra.*

[117] *See* text accompanying notes 60-63 *supra.*

[118] No. 78-1506, slip op. at 10 (E.D. La. 1979). The Supreme Court's recent decision in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) guided the *Rutledge* court in its prior restraint analysis. No. 78-1506, slip op. at 9 (E.D. La. 1979); *see* text accompanying notes 64-71 *supra.*

[119] No. 78-1506, slip op. at 10 (E.D. La. 1979).

[120] No. 78-1628 (E.D.N.Y. 1979).

[121] *See* Quinn v. Aetna Life & Casualty Co., 96 Misc.2d 545, 409 N.Y.S.2d 473 (1978). Reviewing Supreme Court explications of the commercial speech doctrine, *see* text accompanying notes 37-45, 50-55 *supra,* the *Quinn* court concluded that Aetna was engaged in commercial speech unprotected by the first amendment. 409 N.Y.S.2d at 478. New York's General Business Law, § 350-A, describes advertising which "fails to reveal facts material in light of such representation" as misleading, and the court reasoned that the failure of Aetna's advertisements to indicate that excessive jury awards may be reduced or set aside made the advertisements misleading. 409 N.Y.S.2d at 478. In striking a balance between what the court interpreted as unprotected false advertising, *id.* at 478-79, and the right to a fair trial, *Quinn* stated that an injunction against Aetna's advertisements, advertisements which unduly burden plaintiff's right to a fair trial, may constitutionally lie. *Id.* at 481.

[122] No. 78-1628, slip op. at 1 (E.D.N.Y. 1979). Quinn's original action, *see* text accompanying note 121 *supra,* was against Aetna as well as *New York Magazine* and *Newsweek,* carriers of Aetna's advertisements. Following the state court decision, Quinn consented to an order severing the claims against Aetna from those against *New York Magazine* and *Newsweek.* Complete diversity then existed between plaintiff Quinn and defendant Aetna

tiff's claim for injunctive relief as a constitutionally impermissible prior restraint of speech.[123]

The *Quinn* court viewed Aetna's advertisements as fully protected political expression rather than falling within the unprotected category of false and deceptive speech.[124] Political expression in the form of a paid advertisement[125] made by a corporation[126] does not lose its first amendment protection.[127] The *Quinn* court held that injunctive relief prohibiting further publication of Aetna's advertisements was not justified by the considerations necessary to overcome the strong constitutional presumption against a prior restraint of speech.[128]

These recent cases indicate that insurance company advertising aimed at lessening high damage awards continues virtually unabated. *Rutledge* and *Quinn* spotlight the constitutional tightrope between fair trial and free speech rights and the precarious position of prior restraints of publication in this area.[129] Liberal *voir dire,* as exemplified by *King* and *Borkoski,*[130] represents the trial lawyer's most effective tool against the effect of insurance company advertising on the plaintiff's right to a fair trial.

Institutional advertising by the insurance industry presents a unique challenge to the personal injury lawyer's craft. In our complex society of widely disseminated information, insurance company efforts to influence the public about the economics of high jury awards may seriously undercut the amount of damages future juries are willing to return. The fair trial rights of deserving plaintiffs may well be jeopardized. As first amendments speakers, however, the insurance companies enjoy an almost unqualified right to express their opinions. False or deceptive information contained within insurance advertisements can vitiate that right. Lawyers take on a seemingly undefeatible champion, however, when they seek the remedy of injunctive relief through restraints on protected first amendment speech. Against this backdrop, liberal *voir dire* examination serves as the best device for aiding the courts in their dual role of assuring a fair

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Life & Casualty Company. The case was removed to federal court pursuant to 28 U.S.C. §§ 1441 and 1446(b). No. 78-1628, slip op. at 1 (E.D.N.Y. 1979).

[123] No. 78-1628, slip op. at 5 (E.D.N.Y. 1979).

[124] *Id.; see* text accompanying notes 50-55 *supra.*

[125] No. 78-1628, slip op. at 5 (E.D.N.Y. 1979); *see* Buckley v. Valeo, 424 U.S. 1, 50-51 (1976)(regulation of political advocacy through newspaper advertising held unconstitutional); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964)(fact that advertisement constituting political expression was paid for is totally irrelevant to first amendment protection).

[126] No. 78-1628, slip op. at 5 (E.D.N.Y. 1979); *see* First National Bank of Boston v. Bellotti, 435 U.S. 764, 777 (1978); text accompanying notes 33-36 *supra.*

[127] No. 78-1628, slip op. at 5 (E.D.N.Y. 1979).

[128] *Id.* The *Quinn* court grounded its prior restraint argument on Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). *See* text accompanying notes 64-71 *supra.*

[129] *See* text accompanying notes 23-25, 26-45, 60-71 *supra.*

[130] *See* text accompanying notes 79-103 *supra.*

trial and protecting the insurance industry's right to free speech.

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