ALL’S FAIR…POLITICAL ADVERTISEMENTS, DEFAMATION AND THE FIRST AMENDMENT
By Christine Walz

As Election Day approaches, television viewers and potential voters are bombarded with seemingly endless campaign advertisements. By October, promises of running a clean campaign have often been forgotten, and advertisements become more and more negative. Carefully timed attack ads are often credited as being a decisive factor in a close race.

It is well-established that political speech enjoys the greatest First Amendment protection because such speech promotes the “free flow of ideas and opinions on matters of public interest and concern.” And in political contests, such speech is protected even though statements made are often exaggerated, emotional, and even misleading.

Earlier this year, in Citizens United v. Federal Election Commission, the Supreme Court noted that government restrictions on speech close to an election are suspect because that is the time when political speech is most influential. But even after the Court’s decision in Citizens United, more than a dozen lawsuits were filed this year attempting to either prohibit candidates from airing advertisements or seeking damages for allegedly false and harmful advertisements.

These lawsuits raise interesting questions: Will candidates be held liable for defamatory statements made about third-parties in campaign ads? Can a media outlet that runs a paid advertisement be held liable for defamation? Do state laws restricting political advertisements violate the First Amendment?

DEFAMATION OF A THIRD-PARTY

During a Republican congressional primary in Tennessee, candidate Lou Ann Zelenik ran campaign advertisement alleging that a drug testing company owned by her opponent’s husband received $1 million in state contracts. In response, the company, Aegis Sciences Corp. (“Aegis”), brought a defamation lawsuit against Zelenik, claiming that the statements made in the advertisements were false. Aegis Science Corp. v. Zelenik, Case No. 10C2913.

To succeed on its claim, Aegis acknowledged that it would likely have to prove by clear and convincing evidence that the publication was false and a product of actual malice.

However, Aegis, recognizing the protections generally afforded political speech make it difficult to prevail in a defamation suit, attempted to distinguish the speech in Zelenik’s advertisement as commercial speech. Aegis’ complaint alleged that Zelenik’s false statements harmed its business interests and stated a cause of action for business slander under Tennessee law.

The court denied Aegis’ request for a preliminary injunction, saying that it would not limit campaign speech with less than 200 hours before the election, in part because it was impractical to make definite findings of fact in the short time frame. Accordingly, the advertisements in question ran throughout the primary campaign.

However, the court also said that Aegis could pursue a claim for damages. Following the primary election, the court ordered the lawsuit into mandatory mediation, saying that it remained
“very reluctant to interject [itself] into political disputes.” Although the congressional race has since been decided, the lawsuit between Aegis and Zelenik remains in mediation.

**THE MEDIA AS DEFENDANT**

While candidates often file suit for defamation directly against their opponents, the media has been a named defendant in some recent lawsuits. In one case, congressional candidate Jim Russell, filed suit against several journalists for defamation, claiming that he was falsely characterized as a racist in news articles describing an essay he wrote defending segregation and opposing interracial marriage. *Russell v. Colety*, Case No. 024375/2010. After these statements were published, Russell’s campaign lost financial support and eventually he lost the election. His defamation suit names as defendants journalists from the Journal News, Cablevision News 12, Salon.com, and Regional News Network and seeks $1 million in damages from each defendant.

But can a media outlet be named as a defendant for printing or broadcasting a paid advertisement containing allegedly defamatory statements? The answer depends on who is sponsoring the ad and whether the ad is printed or broadcast. In almost all cases, Federal Communications Commission rules bar broadcasters from censoring or rejecting candidate ads, even when the opposing candidate claims that the ad is defamatory. Because broadcasters cannot censor these advertisements, they are not liable for the content in the advertisements.

These rules do not extend to advertisements that are sponsored by non-candidates, including national political committees, labor unions, and corporations. For example, in mid-2009, a Virginia television station rejected an advertisement sponsored by the National Republican Congressional Committee against Congressman Tom Periello after receiving complaints that the ad was misleading. Because broadcasters are not required to accept advertisements sponsored by third-parties, they can be liable for an advertisement’s defamatory content.

Print media outlets are also not subject to the Federal Communications Commission rules regarding political advertising, and at least one court has allowed a suit against a newspaper sued for defamation for publishing statements made by candidates in paid advertisements to proceed. In 2008, two Texas newspapers were sued for defamation for publishing an allegedly false political advertisement, and the trial court found that there were material issues of fact in that case, such that it could not be dismissed on summary judgment. *Freedom Communications, Inc. v. Coronado*, 296 S.W.3d 790, 801 (Tex. App. 2009).

**CONSTITUTIONAL CHALLENGE TO A STATE ELECTION LAW**

In addition to state defamation claims, a number of states have enacted laws that prohibit false or “intentionally misleading” campaign advertising. The constitutionality of Ohio’s election law was challenged by a third-party group this year. Congressman Steve Driehaus, seeking re-election, filed a complaint with the Ohio Elections Commission against Susan B. Anthony List (“SBA List”) challenging SBA List’s attempt to erect a billboard that said Driehaus’s vote in favor of the health reform bill was a vote “FOR taxpayer funded abortion.”

Shortly before the election, the Ohio Elections Commission found probable cause that the advertisement violated Ohio’s election law. A full hearing on the issue was scheduled for after Election Day.
In response to the Ohio Elections Commission’s finding, SBA List filed a lawsuit in federal court, *Susan B. Anthony List v. Driehaus*, Case No. 1:10-cv-720 (S.D.Ohio 2010), asking that the court “enjoin the Commission from proceeding with its hearing on the ground that the Ohio statutory provisions [at issue] unconstitutionally chill Plaintiff’s First Amendment Rights.”

Less than a week before Election Day, the federal court declined to enjoin the Ohio Election Commission proceedings and stayed the federal case pending resolution of the underlying proceedings in the Ohio Elections Commission.

The billboards in question were never erected. Driehaus was defeated, and a few days after the election, he withdrew his challenge to the SBA List advertisement. The federal lawsuit challenging the constitutionality of the Ohio election law has not been dismissed.

In each of these cases, as in *Citizens United*, the timing of campaign advertisements and lawsuits challenging them limited the ability of courts to fully address these issues on the merits. Last minute challenges are often raised, and then cases are frequently dismissed after Election Day because “the litigants in most cases will have neither the incentive, nor perhaps the resources to carry on, even if they could establish that the case is not moot because the issue is ‘capable of repetition,’ yet evading review.”

However, the proliferation of lawsuits involving political advertisements in 2010 indicates that candidates see some value in seeking judicial intervention to limit negative advertisements, even though courts are reluctant to get involved in these political disputes. And in today’s political environment, plaintiffs may find it advantageous to pursue their claims beyond the traditional campaign season, giving courts the opportunity to fully consider some of the issues raised.

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1 Ms. Walz is a litigation associate in the Washington, DC, office of Holland & Knight LLP.
4 130 S.Ct. 876 (2010).
6 *Citizens United*, 130 S.Ct. at 895.