



# Scholarly Articles

Protected by First Amendment

# Ony v. Cornerstone Therapeutics

720 F.3d 490 (2d Cir. 2013)

- Plaintiff challenged statements in study done by defendant, published in peer-reviewed journal.
- Advertiser put out press release describing article's findings.
- Second Circuit held that the article was not commercial speech, and the press release accurately stated the article's findings and therefore was truthful.

# Ony v. Cornerstone Therapeutics

720 F.3d 490 (2d Cir. 2013)

- Issue: Why would court rule that press release isn't commercial speech? Doesn't that contradict Nike v. Kasky, 539 U.S. 654 (2003)?
- Court got wrapped up in the fact that the journal articles related to an ongoing scientific controversy, and concern that the advertising allegations would interfere with the scientific process.
- The court's decision seemed to be premised on the subject matter, rather than the outlet or the purpose of the specific communication.

# Eastman Chemical v. Plastipure

775 F.3d 230 (2014)

- Developer of resin for plastic bottles did a study of available plastics, published in peer-reviewed journal. Then put out 3-page sales brochure describing study.
- Defendants argued that their statements were First-Amendment-protected scientific opinions, not actionable facts.
- Fifth Circuit held this does not extend to promotional statements based on those opinions.



# Eastman Chemical v. Plastipure

775 F.3d 230 (2014)

- This case shows the mischief created by the Ony decision.
- Sales brochures (and press releases) don't do much to advance scientific discourse.
- Too narrow to say they can only be false if they misrepresent the contents of a scientific paper.
- "It is of no moment that the commercial speech in this case concerned a topic of scientific debate. Advertisements do not become immune from Lanham Act scrutiny simply because their claims are open to scientific or public debate. Otherwise, the Lanham Act would hardly ever be enforceable ..."

# Tobinick v. Novella

No. 15-14889 (11<sup>th</sup> Cir. 2017)

- Dr. Tobinick developed a new treatment; Dr. Novella thought it was quack medicine, and wrote articles and blog posts debunking it.
- “Magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech subject to Lanham Act liability.”



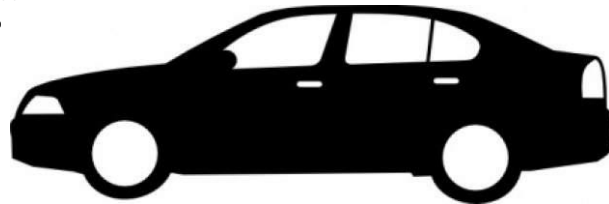
# Media Statements

Protected by First Amendment

# LA Taxi v. Uber

114 F. Supp. 3d 852 (N.D. Cal. 2015)

- Taxi company challenged statements by Uber representatives to journalists, quoted in news articles, regarding safety of Uber.
- “Statements made to the media and published in a journalist's news article concerning a matter of public importance are not commercial speech, and are protected under the First Amendment.”





# POM Wonderful, LLC

FTC Docket No. 9344

Initial Decision (May 17, 2012)

- Administrative Law Judge found that the following did not constitute advertisements:
  - Interview on Martha Stewart show.
  - Interview on The Early Show.
  - Interview in Newsweek magazine.
  - Interview on Fox Business News.
- Press releases regarding results of published scientific studies were accepted as advertisements.



# Media Reporting and Pinksliming



# Beef Products Inc. v. American Broadcasting Corp.

## No. Civ. 12-4183-KES (D.S.D.)

- ABC reported on BPI's production of "lean finely textured beef" (LFTI), which it called "pink slime" in its 2012 reports.
- Product is cow trimmings ground very fine, used to reduce fat content, because quite lean.
- BPI sued for defamation. Alleged that ABC was out to spread disinformation, had malice.
- ABC settled during trial for \$177 in August, 2017.

# Don't Even Say It!

- American Home Assurance Co. v. Cargill Meat Solutions Corp., No. 8:11CV270 (D. Neb. May 2, 2014).
- Granting pretrial motion in limine forbidding plaintiff from saying “pink slime” at trial because of how prejudicial it sounds; must use “lean finely textured beef” (LFTB).

