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Japanese Supreme Court Rules on Regulations against Unverified Claims in Advertising

- The Validity of Regulatory Design Affirmed (Legal Landscape, Constitutionality and Review Standard)

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Context:

How unverified claims in advertising can be regulated is a developing legal issue in Japan. What makes this issue complicated is its bearing on the freedom of speech. Depending on how one feels about the degree to which the freedom of speech should extend to commercial speech, there can be various ways to regulate suspected unverified advertisements.

Japan is in the process of legislating this issue with a specific approach: if the government agency sees a problematic advertisement that is suspected to be ill-supported by facts, it can ask the business operator to show cause for the veracity of the advertisement made by presenting evidence to reasonably support the advertised claim during a response period. See, Act on Prevention of Inappropriate Rewards and Expressions (the "Prevention Act"), Article 7, Para. 2. If the business operator fails to submit the relevant evidence, the advertisement is conclusively deemed to be an unethical (misleading) expression. Since this is a legal presumption, the operator will be precluded from making a defense based on the truthfulness of the advertisement later on. There are also other developing statutes and regulations that incorporate the same review mechanism for unethical expression. See, e.g., Act on Specified Commercial Transactions, Articles 52-2 and 54-2.

In a recent case, the Supreme Court (In re *Dainichi-do*, [Supreme Court, March 8, 2022](#), Hanta 1500 at 76) ruled on the validity of this review mechanism in light of an advertiser's constitutional claims based on freedom of speech and freedom of enterprise.

Facts:

The business operator (a manufacturer of health supplements) that was cited to show cause for a claim in an advertisement (that the supplement product provided clear vision) by the Consumer Bureau failed to submit relevant evidence supporting the claim. On the basis of the statutory presumption, the government assessed injunction and penalty. The operator challenged the orders.

The Chief of Consumer Bureau denied the challenge, and the business operator sued in court. Both the District Court and the High Court denied the claims. The operator appealed to the Supreme Court on the basis of, among others, the statutory provision being unconstitutional by violating the freedom of speech and freedom of enterprise.

Supreme Court's discussion (summary):

The purpose of Article 7, Item 2 of the Prevention Act is to protect the consumers' interest in not having his ability to make voluntary and rational commercial choices interfered with, and to remove

attempts to so interfere in a time-efficient manner. Such legislative purpose is in line with the principle of public welfare.

As to the appropriateness of the regulatory mechanism, the consumer's expectation would be that advertised goods/services will be of the quality advertised. Failing this, the consumer would be deprived of a voluntary and rational choice to purchase. Thus, it is reasonable to require the business operator to show a reasonable basis for his advertised claims.

This court regards the mechanism of Article 7, Item 2 of the Prevention Act to be reasonably constrained and not overbroad, given unethical advertising would only arise as a result of a failure to submit evidence that is reasonable and objective to support the claim made.

In light of the purpose above, the provision does not restrict the making of the same advertisement in the future, so long as reasonable backup evidence is retained in order to make that claim.

It follows then that this regulatory design is necessary and reasonable to regard advertising to be unethical only in the absence of reasonable evidence. We conclude that this regulatory design is not beyond the reasonable discretion of the legislature.

Discussion:

Japan's FTC argues that unverified advertisements call for appropriate regulations for the following reasons: if a claim for superior quality in goods and services would likely induce the consumer to purchase the same product again, the operator should have reasonable justification for the claim in advance, without which it is fair to deem that advertisement to be lacking in support; and it is necessary to provide a timely procedural mechanism to deter the consumer from being victimized by an unverified advertisement, which is difficult to achieve by simply prompting the consumer to prove a lack of verification.

While there are ongoing debates in Japan, it is generally regarded that commercial speech is within the right of freedom of speech, albeit at a different level of protection. In commercial speech, the level of restriction could be more relaxed than in non-commercial speech, given that it has less bearing on the right of self-autonomy.

It is noteworthy that this regulation does not restrict the content of commercial speech. Rather, it discusses whether there is reasonable and objective support for the claim made. In that sense, it is content-neutral and less likely to seriously interfere with the underlying speech itself.

The business operator had also argued that the measures to be assessed for violation should be limited to less restrictive means than injunction or penalty, e.g., advisement and recommendation. The court seems to have disposed of this argument by considering the illegal nature of the speech that is called into question.

Takeaways:

1. It is necessary to have reasonable and objective evidence to support an advertised claim, without which the claim is deemed conclusively unverified. If found unverified, injunction and monetary penalty can be assessed.
2. This type of regulatory design in commercial speech, based on an order to show cause and legal presumption of illegality in its absence, is expanding. This Supreme Court case provided constitutional underpinning for this mechanism for the first time.
3. Any provider of products or services in Japan to general consumers should adjust their business methods to adhere to the verification standard above.



If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings lawyer:



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