Has the FDA Bought the Winston Cup: A Takings Analysis of the Proposed Ban on Sports Sponsorships by Tobacco Companies as Applied to NASCAR

Andrew B. Dzeguze

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A Takings Analysis of the Proposed Ban
on Sports Sponsorships by Tobacco
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by
ANDREW B. DZEGUZE*

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Introduction

On August 28, 1996, the Department of Health and Human Services announced a final rule regulating tobacco advertising to limit children's' exposure to its influence. One of the central provisions of this rule is an absolute prohibition of the sponsorship of sporting events, except in the corporate name. The rule gave the Food and Drug Administration jurisdiction to enforce the tobacco advertising regulations. While adding new complexities to the national controversy over tobacco and leading to litigation, this rule calls for new legislation to supersede this rule, and attempts at compromise.

3. Id.
4. Even before this announcement, a number of tobacco companies sued for injunctive and declaratory relief against the FDA in the Federal Court for the Middle District of North Carolina. Under the consolidated title Coyne Beahm, Inc. v. FDA, the court granted partial summary judgment for the tobacco companies on April 25, 1997. Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997). As discussed later in this note, Judge William Osteen's ruling recognized the FDA's right to regulate tobacco and restrict its sale, but found the proposed restraints on advertising and promotion were beyond the statutory authority of the agency. In doing so, the court failed to address both the First Amendment and takings claims. Both the government and the tobacco companies have appealed this ruling, and the Fourth Circuit heard oral arguments on August 11, 1997 under the title Brown and Williamson Tobacco Corp. v. FDA, No. 97-1604. The briefs on the motion for summary judgment and appeal are available at the Department of Justice website. See Department of Justice, Tobacco Litigation (visited Mar. 3, 1998) <http://www.USdoj.gov/civil/cases/tobacco.html>. The plaintiffs' initial complaint in the case is available in LEXIS, Hottop Library, Extra, Extra Archives, Recent Tobacco Cases File.
5. During the first session of the 105th Congress, Senator Ford of Kentucky introduced the Tobacco Products Control Act of 1997. S. 201, 105th Cong. (1997). This legislation encompasses some of the restrictions on advertising called for under the rule, most noticeably those provisions related to advertising near schools. Id. At the same time, the legislation would avoid FDA regulation and permit tobacco advertising at sporting events where children make up less than 25% of the audience. Id. Since the major study relied on by Health and Human Services quantified attendance by children at motor sports events at about 7%, this would void almost any ban on tobacco sponsorship as it related to NASCAR. See J. Slade, Tobacco Product Advertising during Motor Sports Broadcasts: A Quantitative Assessment, presented at the Ninth World Conference on Tobacco and Health, Oct. 10-14, 1994 (cited at Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,332 n.225 (1995) (Aug. 11, 1995)).
between state governments and the tobacco industry.\(^6\) Much of the debate in law reviews has centered on First Amendment protection of commercial speech\(^7\) and whether the FDA has authority to regulate tobacco at all.\(^8\) It is understandable that the companies and commentators wish to either defeat or uphold the regulations in full. However, a looming question remains—if the government can and does ban the use of tobacco product names in sports, what will the tobacco giants do? Will companies just rename their events and move on, as the law allows?\(^9\) At least one commentator thinks so, positing that the Winston Cup might become the R.J. Reynolds or Nabisco Wafers Cup.\(^10\) However, the cost of this sponsorship alone is prohibitive enough (estimates range from $30 to $40 million per year)\(^11\) to make any changes hard for even R.J. Reynolds to swallow.\(^12\)

As an alternative, the industry has alleged that this regulation constitutes a taking of their property, requiring compensation under

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6. Perhaps prompted by the unsettling nature of Judge Osteen's ruling, the five major tobacco companies and 40 state attorneys general reached an agreement in principal on June 20, 1997. See Felix H. Kent, Reviewing 1997: Tobacco Settlement, N.Y. L.J., Dec. 19, 1997, at 3. This settlement has been roundly criticized as not going far enough, but would implement many of the same restrictions the FDA has proposed, including those on sports. See, e.g., Peter Hanauer, Dealing With the Devil, RECORDER, July 2, 1997, at 5.


12. Overall, the tobacco industry spent almost $185 million on sponsorships and advertising of motorsports in the United States in 1995. Gary Mihoces, Ban has Fans Smokin' Mad: Long Tussle Looms as Sponsors Begin to Contest Rule in Court, USA TODAY, Sept. 11, 1996, at 3C.
the Fifth Amendment. The goal of this note is to analyze this latter possibility, using the particular situation of the Winston Cup sponsorship as its model. This note begins with an introduction to NASCAR and the role of tobacco within the sport. Next it looks at the current controversy and postulates why takings doctrine, rather than any First Amendment protection or claims that the FDA lacks jurisdiction, may be more appropriate to this situation. This note then applies the takings doctrine to the Winston Cup, to determine if a compensable taking has occurred. This note concludes that the prohibitions are probably Constitutional, but courts should require the government to pay for what it has taken, if an amicable compromise is not forthcoming.

I

Background

A. NASCAR, Tobacco and Money

NASCAR, or the National Association for Stock Car Automobile Racing, was founded in 1947 by Bill France, Sr. It began as a family enterprise, and still is—perhaps the only major sporting league or association in America where one family has absolute control. Many people may scoff at the idea of characterizing anything as quintessentially "redneck" as stock car racing "major," or even a sport. Nonetheless, NASCAR certainly is ambitious. As one observer has remarked, "NASCAR wants to be considered in the same breath with the NFL and the NBA." It also has proven to be a lucrative business, bringing in approximately $2.2 billion in revenue in 1995.


16. NASCAR is actively trying to shed this image. See Bruce Horovitz, Fine-tuning an Image: New Breed of Sponsors Race to NASCAR, USA TODAY, Apr. 5, 1996, at 1B.

17. Id. (comment of Ernie Saxton, publisher of Motorsports Sponsorship).
alone,¹⁸ and increasing the France family fortune to over $500 million.¹⁹

Perhaps the first seminal moment in the history of NASCAR came in 1959. In that year, Bill France, Sr. completed the Daytona Motor Speedway.²⁰ Every February the most famous—and many would say the most important—race of the NASCAR season is run: the Daytona 500.²¹ Despite occurring early in the racing season, winning Daytona is likened to winning the Super Bowl.²² The legendary clashes on that course are a large part of the mystique of the circuit, much as the Indy 500 is to Indycar racing.²³

During this formative period, drivers survived mainly through financial and product support from car product companies.²⁴ There was no concept of team sponsorship until 1969, when the support of the car product companies unexpectedly disappeared.²⁵ Bill France sought out many companies that he thought were suitable, but there were few takers. Finally, in early 1971, hoping to get some desperately needed financial support, Junior Johnson went to the board of R.J. Reynolds.²⁶ He knew they had been banned from advertising tobacco products on television and radio, and thought they might be interested.²⁷ They refused to sponsor his car, in part due to concern about the violence associated with automobile racing.²⁸ At the same

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¹⁸ Id.
¹⁹ Oliver, supra note 15, at 71.
²⁰ Id. at 72. The France family runs Daytona, along with Talledega and two other race tracks, as a wholly separate, publicly traded company, International Speedway Corp., of which they own 61% of the stock. Id.
²¹ HUFF, supra note 14, at 34.
²² Id. at 38.
²³ NASCAR has even tread on the sacred ground of Indianapolis Motor Speedway, running the Brickyard 400 on the famous oval for the last two years. See Oliver, supra note 15, at 73.
²⁵ Id. at 43.
²⁶ Id. at 109 (interview with Junior Johnson). Junior Johnson is considered one of the icons of NASCAR, having won the second Daytona 500 in 1960. Id. at 107. Since 1966, he has been one of the most consistently successful team owners on the NASCAR circuit. Id. at 106.
²⁸ Id. at 84 (interview with Jim Foster, President, Daytona Motor Speedway).
time, they had an enormous amount of money earmarked for advertising. To allay their fears, Bill France convinced them to sponsor one event that first year, naming it after Reynolds' chief brand, Winston cigarettes. The result was positive enough that the company agreed to sponsor the overall point championship for the next year, becoming the Winston Grand-National Championship; after several years of sponsorship, the circuit was renamed Winston Cup.

The rest, as they say, is history. R.J. Reynolds' involvement led to the involvement of other tobacco and beer companies, which led to other forms of corporate sponsorship. Today, such diverse companies as McDonald's, QVC, and Helig-Myers Furniture have sponsored cars. It would be naive to claim that this was out of some desire to further the sport—the obvious lure for sponsors is exposure. Sponsorship in NASCAR has become especially popular since it was reported in the early 1990's that fans of the circuit were more product loyal than any other sport. At the same time, the popularity of NASCAR has grown to become a national presence.

The France family has been quick to profit from this new popularity. There are no fewer than 100 officially licensed NASCAR products. Some of the more exotic ones include both video games and "virtual" races, sport parks featuring "geared-down, sub-compact Winston Cup clones," and NASCAR Thunder stores. The Frances have also sought out sponsors with broader fan appeal. One of the newest, and most popular, is the Cartoon Network.

29. Id. at 109. Johnson reports the figure as $300 million, although that seems hard to believe. Even a fraction of that was far more than anyone else was offering.
30. Id. at 84.
31. Id.
32. Id.
33. Horovitz, supra note 16, at 1B.
34. For example, marketing analysts state that McDonald's $5.3 million dollar sponsorship of Bill Elliot in 1995 paid off in $15 million in television exposure. Id.
35. Oliver, supra note 15, at 75. The survey, conducted by Performance Research, revealed that over 70% of fans say they favor sponsor's products.
37. Horovitz, supra note 16.
38. Buckley, supra note 36, at 1A.
39. Horovitz, supra note 16. Within six months of becoming a sponsor, the Cartoon
obviously targets young people, a new generation of fans. In a perfect world, this sponsorship could be separated from tobacco’s involvement in the sport. However, some people see the natural attraction of sporting events, coupled with the influence of television, causing children to link Fred Flinstone, NASCAR and tobacco, thereby encouraging teen smoking. There is some evidence which indicates that some tobacco manufacturers have targeted under-age audiences through sports in the past.

The final rule implemented by the FDA embraces the notion that sponsorship creates affiliations in young people between the lifestyle projected by sports and athletes, and the product involved. The rule’s stated purpose in this regard is to “break the link between tobacco brand-sponsored events and images and use of tobacco by young people.” Assuming for the moment that such a link exists, there are three challenges to this rule. It must be proven that the rule: 1) is within the scope of the FDA’s authority; 2) does not infringe upon the First Amendment rights of tobacco companies; and 3) does not constitute a taking of the tobacco companies’ property. The first two challenges seem surmountable, but the third might well make these rules prohibitively expensive.

B. The FDA, Regulation and the Current Debate

The concept of banning tobacco companies from sport sponsorship is not new. From 1987 to 1993, no fewer than seven bills were introduced in Congress that contained similar provisions. Noticeably, all failed. However, the past few years have revealed

Network, owned by Hanna-Barbara, was ranked among the top five in terms of merchandising revenue. Id.

40. Id.
41. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,529 (1996) (codified at 21 C.F.R. pt. 897) (discussing comments to proposed regulations citing Virginia Slim’s now discontinued sponsorship of tennis as targeting young females). See also 61 Fed. Reg. 44,484 (1996) (discussing prior findings as to United States’ Tobacco Company’s use of a “graduation strategy” to get young male consumers to progress from low nicotine to higher nicotine brands of smokeless tobacco, and the use of “macho imagery” and sports stars in that strategy).

42. 61 Fed. Reg. 44,396, 44,530.
43. Id. at 44,396.
44. Harder, supra note 8, at 403-04. (cataloging legislative proposals).
45. Id.
that tobacco consumption among young people has reached alarming proportions. Over four million young people are believed to use tobacco products. This is especially troublesome since the purchase of tobacco products by teenagers is illegal throughout the United States.

Still, the debate rages over whether the means employed by the government in this instance will achieve the desired end. While most Americans support the FDA's efforts to curb teen smoking, the final rules have been challenged as both beyond the FDA's capacity to regulate and in violation of the First Amendment. What follows is a brief discussion of those challenges, an analysis of the summary judgment ruling in Coyne Beahm and an argument for why the takings doctrine may provide the ultimate resolution of the situation.

1. Challenging the FDA's Power

The first argument raised by the tobacco industry is that the FDA has no authority to regulate tobacco. This claim is premised on clear congressional intent to exempt cigarettes from FDA control under the Federal Cigarette Labeling and Advertising Act ("FCLAA"). Several law review articles have echoed, although not as stridently, similar themes. At the same time, other commentators have advocated the FDA's position. On balance, it seems that there is enough strength in the latter argument to invoke judicial deference to the FDA's decision. This position is generally supported by Judge Osteen in his summary judgment ruling.

As noted above, much of the argument surrounds what Congress did or did not intend in the passage of the FCLAA. One

46. Id. at 400.
47. Id. at 399.
48. Id. at 399-400.
50. See supra notes 7, 8.
51. Plaintiffs' Complaint for Declaratory and Injunctive Relief at ¶ 1, Coyne Beahm, 966 F. Supp. at 1375.
52. Id. (citing 15 U.S.C. § 1331 (1996)).
53. See Noah & Noah, supra note 8, at 62; Whatley, supra note 8, at 135.
54. Harder, supra note 8, at 401.
55. See Coyne Beahm, 966 F. Supp. at 1388.
commentator, Michael Whatley, views the failure of attempts to specifically grant the FDA authority over tobacco, along with the passage of the FCLAA in 1965, as evidence of congressional intent to withhold such jurisdiction. Whatley also points to the 1972 statements of then FDA commissioner Charles Edwards that Congress had exclusive control over cigarette regulation. In addition, Whatley mentions that statements made in exempting tobacco from regulation as a toxic substance show that Congress felt that the FCLAA was a comprehensive act and that any other regulation would also require an act of Congress. Finally, he points out that Congress has acted to educate people about the dangers of smokeless tobacco while refusing to confer regulatory authority directly on the FDA.

Yet, after stating that "[a]s evidenced by numerous concessions of anti-tobacco forces, clear congressional legislative intent, and several findings by congressional committees, Congress has reserved for itself the right to regulate tobacco and tobacco products," Whatley is forced to admit that the decision to reject the regulations is not that simple. Specifically, he states that the doctrine of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. applies. Under the rubric of Chevron, great deference must be accorded to the FDA's position unless it can conclusively be shown that Congress "has directly spoken to the precise question at issue." In this case, a clear congressional directive is not obvious.

First, while the FCLAA is comprehensive within the limited sphere of cigarette labeling, that is not the issue at hand. Congress' stated goal was to:

establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

56. Whatley, supra note 8, at 123.
57. Id.
58. Id.
59. Id. at 124 (citing the 1984 enactment of the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. §§ 4401-4408 (1994)).
60. Id. at 125.
62. Whatley, supra note 8, at 135.
63. Chevron, 467 U.S. at 842.
(1) the public may be adequately informed about any adverse health
effects of cigarette smoking by inclusion of warning notices on each
package of cigarettes and in each advertisement of cigarettes...65

If only the first portion were read, then perhaps it could be said
that Congress pre-empted any further regulation of cigarette
advertising. It certainly has been used to pre-empt state law claims of
mislabeling of tobacco products.66 At the same time, the pre-emption
statement in the statute itself only bars the requirement of additional
statements related to smoking and health.67 The concept that this is a
narrow proscription is borne out by case law. This statute has proven
sufficient to strike down state requirements of further health messages
in cigarette advertising.68 It also has been used to strike down local
restrictions on in-store advertising.69 At the same time, restrictions on
the location of billboards have been upheld.70 Penn Advertising relied
on the distinction between regulation of location and regulation of
content.71 Similarly, most of the new FDA rules deal with location of
advertising and prohibition. Those that do regulate content arguably
do not deal with the advertisements' health messages. As such, under
Chevron, Congress has not specifically spoken on the issue.

It would seem necessary that any judge defer to the judgment of
the FDA in this matter. However, the Noahs argue that this is not
necessarily so.72 They contend that while deference should be shown
in how the FDA interprets its statutory authority, no such latitude is
necessary where the agency oversteps its jurisdiction.73 They claim
that the FDA's action on tobacco is simply one more example of the

65. Id.
68. See Vango Media v. City of New York, 34 F.3d 68 (2d Cir. 1994).
71. Penn Adver., 63 F.3d 1318.
72. Noah & Noah, supra note 8, at 8.
73. Id.
agency being “creative” in defining its mandate. They posit that defining tobacco and cigarettes as a drug under the Federal Food, Drug and Cosmetic Act is questionable. They also argue that Congress has not delegated full regulatory authority over cigarettes to any agency, and that the Federal Trade Commission (“FTC”) has the best claim to such power.

In support of their first argument, the Noahs examine the recent history of the FDA and the language of the FD&C Act. They concede that the FDA’s mandate has broadened over the last twenty-five years, but take issue with the methods employed. The Noahs argue this latest extension would divert too many of the FDA’s assets from its “core missions.” Other than this speculation and commentary, the thrust of the argument lies in the FD&C Acts requirement of intent to affect the human body to trigger FDA regulation. The article points out that customarily, such a determination is made based on product labeling or promotional claims. This rubric has been followed by the FDA on tobacco products in the past, and only those making health claims have been regulated. The only time regulation without such a claim has been previously considered was for “smokeless cigarettes.” The FDA eventually declined to rule on this product, as the manufacturer pulled it from the market due to poor consumer reception. Tobacco companies make no overt claims of this sort, and executives have even publicly stated that they do not believe tobacco is addictive. If this was the extent of the argument, the FDA could not regulate cigarettes.

74. Id. at 7.
77. Id. at 15-21.
78. Id. at 8-9 (describing such expansion as “self-serving and generous claims of power.”).
79. Id. at 9, n.28.
80. Id. at 10.
81. Id.
82. Id. at 10, n.34.
83. Id. at 11. Smokeless cigarettes heat tobacco without burning it, a process that provides nicotine without as many toxic by-products. Id.
84. Id.
85. Id. at 12-13.
However, the FDA has concluded that the tobacco companies really do intend cigarettes to affect the body.\textsuperscript{86} This is determination results from two evidentiary components. The first is a body of scientific studies linking nicotine use to addiction.\textsuperscript{87} By itself even this would not be enough to overcome the statements of the industry to the contrary.\textsuperscript{88} However, the FDA has also been the recipient of the tobacco industry’s internal documents. These damning volumes contradict the industry’s public claims, going so far as to compare nicotine to morphine and cocaine.\textsuperscript{89} This material also reveals an industry that not only knows what it is doing, but seeks to manipulate the amount of nicotine within cigarettes.\textsuperscript{90}

In the face of this evidence, the industry refuses to concede jurisdiction. Instead, they insist that only their public claims can be used against them.\textsuperscript{91} While endorsing this stance in general, even the Noahs admit that proof of nicotine manipulation could be enough to demonstrate intended use as a drug.\textsuperscript{92}

Still, this does not exhaust the Noahs’ argument against FDA authority. Next they attack the agency’s right to regulate in this field.\textsuperscript{93} Here the Noahs put forth the idea that because the FTC and not the FDA has primary jurisdiction over cigarette advertising, Congress meant to give the FTC primary jurisdiction over all cigarette-related matters.\textsuperscript{94} Ultimately the article concludes that neither agency has been delegated legislative authority in this area.\textsuperscript{95}

Most of the evidence of this argument is based on Congressional silence. First of all, the Noahs note the lack of a specific grant of authority to the FDA in this area.\textsuperscript{96} They interpret this as being in line with the FDA’s own prior position that they have only limited authority over tobacco.\textsuperscript{97} They also point out that several laws

\begin{itemize}
  \item \textsuperscript{86} Id. at 12.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} Id. at 13.
  \item \textsuperscript{90} Id. at 13-14.
  \item \textsuperscript{91} Id. at 14.
  \item \textsuperscript{92} Id. at 15.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id. at 21.
  \item \textsuperscript{96} Id. at 16.
  \item \textsuperscript{97} Id.
\end{itemize}
regulating tobacco advertising do not mention the FDA by name, but rather give control to the FTC. After reviewing these laws, regulations promulgated under them, and Congress' strict scrutiny of the same, the article concludes that no agency has been granted broad authority in this area. From this analysis, one can conclude that the FDA's current regulations lack validity.

This argument is both too narrow and too broad. It attempts to argue that the field of tobacco related concerns is so uniform as to allow legislation in one limited area to pre-empt the field. While it is true that the labeling acts did confer limited power to the FTC, they were narrowly tailored to meet certain limited goals. No judgment was handed down classifying tobacco as a drug and giving power over its regulation to the FTC. The mere fact that the FDA had not previously determined all cigarettes to be within its ambit did not mean that on proper evidence they could not be. That evidence, unavailable in 1964 or 1984, now strongly suggests that tobacco companies knew all along that they were in the drug business. In light of these revelations, it seems only logical to place their regulation within the power of the FDA.

Intriguingly, Judge Osteen's ruling generally disagrees with both the Noahs and Whatley, and yet reached the ultimate result that the regulations on advertising were improper. The bulk of the ruling explains why no legislation demonstrates that Congress either intended to exempt tobacco from FDA regulation or confer this jurisdiction elsewhere. Specifically, he rejects the contention that the FCLAA constitutes a delegation of authority to the Federal Trade Commission. Rather, he finds that there have been only sporadic and specific delegations of power to other agencies.

Moreover, Osteen's ruling flatly denies that the FDA's former opinion controls the administration's ability to issue future regulations. Citing *Chevron*, he states that the agency is permitted to change their mandate to reflect altered circumstances or

98. *Id.* at 17.
99. *Id.* at 17-21.
100. *See* Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374, 1397 (M.D.N.C. 1997).
101. *Id.* at 1379-97.
102. *Id.* at 1385.
103. *Id.* at 1384-87.
104. *Id.* at 1383-84.
evidence. Based on this, he finds that tobacco can be regulated as a drug, and that cigarettes can qualify as delivery devices. As such, Osteen has no problem with the bulk of the regulations passed by the FDA, dealing with restricting sales to minors and labeling on cigarette packets.

Yet while he rejected every challenge to the FDA's general authority, Osteen refused to recognize that the controls on advertising and promotion were within the FDA's jurisdiction. Rather, he found that section 360j(e) of the Federal Drug and Cosmetics Act justified restrictions on sales, but defined that term narrowly to encompass only the act of direct merchant-consumer interaction. This was not based on any legal precedent, but on Osteen's own interpretation of the phrase "sale," coupled with the existence of certain specific procedures for regulating advertising in other sections of the act.

This portion of the ruling seems destined for reversal. First, it seems to run afoul of the very deference CVS commands. While allowing the FDA to fully restrict actual legitimate purchases, it stops the only agency that has tried to stem the tide of teenage demand for tobacco in this country. Second, similar restrictions imposed by the City of Baltimore were upheld by the Fourth Circuit Court of Appeals. It is unlikely they will reach a contrary result in this case. Finally, the structure of this part of the ruling at most creates a temporary setback to the imposition of such regulations. The court in Coyne Beahm acknowledges that the FDA can restrict misleading advertising under sections 352(q) and 352(r) of the same act. The FDA could recast these same provisions as new regulations by applying the previously compiled data and findings to declare that virtually all tobacco advertising is inherently misleading and alluring to children. Moreover, under CVS, a reviewing court would be

106. Id.
107. Id. at 1388-95.
108. Id. at 1400.
109. Id. at 1397-99.
110. Id. at 1398.
111. Id.
compelled to uphold such an attempt. Thus, it would seem this ruling is at most an opening salvo in the debate over these regulations. Without Congressional action to pass the settlement legislation, the ability of the FDA to regulate tobacco and restrict its advertising and promotion appears vindicated.

2. The First Amendment

If the tobacco giants lose round one of this epic battle, they will claim that the FDA regulations violate their First Amendment rights to free speech.\footnote{114} While a full discussion of the issues involved is beyond the scope of this note, a brief overview seems necessary.\footnote{115} The issue has commentators split. Whereas even critics of FDA regulation concede its constitutionality under current case law,\footnote{116} various doctrines are proposed to limit its applicability.\footnote{117} Without foreclosing the possibility that a new doctrine will come out of this controversy, it seems prudent to review the issue strictly under current standards for commercial speech. This standard is delineated under the four-part analysis of Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.\footnote{118}

The first requirement of the Central Hudson analysis requires that the regulated speech must pertain to lawful activities and be accurate for it to have any First Amendment protection.\footnote{119} This might be difficult for the tobacco industry to prove. While selling cigarettes in general is lawful, targeting underage consumers is not. To qualify for First Amendment protection, the industry will have to demonstrate that their advertising does not target children. While

\begin{footnotes}
\item[114] Plaintiffs' Complaint for Declaratory and Injunctive Relief at ¶ 95, Coyne Beahm, 966 F. Supp. 1374.
\item[115] The articles listed in supra note 7 provide an introduction to a more thorough discussion of the commercial speech doctrine and its application to this topic.
\item[116] Noah & Noah, supra note 7, at 59.
\item[117] Richards challenges the regulations for their dampening effect on the debate over tobacco and "viewpoint discrimination." Richards, supra note 7, at 1185-89. Redish similarly states that this does not comport with traditional notions of free speech under the commercial speech doctrine. Redish, supra note 7, at 589. Others wish to use this debate as a vehicle for eradicating the Commercial Speech Doctrine entirely. See, e.g., Scott Joachim, Note, Seeing Beyond the Smoke and Mirrors: A Proposal For the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations, 19 Hastings Comm/Ent L.J. 517 (1997).
\item[118] 447 U.S. 557 (1980).
\item[119] Id. at 566.
\end{footnotes}
many aspects of tobacco advertising are facially neutral, characters such as Joe Camel and promotions such as trading point incentives may prove tough for the tobacco industry to justify.

Assuming the vast majority of advertising qualifies for First Amendment protection, the second prong of the Central Hudson analysis asks if the proposed restrictions further a substantial state interest. Arguing that the state's interest in preventing teen smoking is insubstantial would seem futile since the purchase of cigarettes by teenagers is in itself illegal. Banning the advertising that promotes such an illegal activity is only a logical extension of the state's interest in enforcing its laws. Furthermore, the Federal Government asserts a substantial interest in protecting public health.

The next phase of the analysis concerns the means the state adopted to further its interest. These means must have a direct impact on the interest advanced, and must not be excessively restrictive of speech to accomplish those ends. It is clear that the new regulations are designed, as a package, to directly affect the rate of teenage smoking in America. It is somewhat speculative as to what the direct impact on consumption would be as a result of bans on advertising and crackdowns on underage purchases. Still, this is hardly the sort of indirect effect the Court discussed in Central Hudson. There the Court noted such items as complete bans on advertising by professionals to maintain the ethics and standards of the profession as unconstitutional indirect effects.

The only real hope for defeating these regulations is to find that they are not narrowly tailored to achieve the state's goals. It might be argued that restrictions on purchase should suffice. It has also been argued that raising taxes on cigarettes could make them so prohibitively expensive as to make purchase and consumption by teens less likely. Furthermore, these regulations are not explicitly

120. Id. at 564.
122. Central Hudson, 447 U.S. at 564.
limited to advertising directed at children. However, the extent of the problem of teen smoking, coupled with specific fact-finding by the FDA, will most likely lead the court to uphold these regulations as sufficiently narrow.

3. Why a Takings Challenge Works Better

A better argument to rescind the FDA restrictions would be to claim that the restrictions constitute a taking of intellectual property. Although dismissed as one of "various and sundry other constitutional arguments," a takings claim has many advantages. Unlike arguing a lack of FDA authority, a takings claim requires no challenge to the current trend towards agency deference. It also does not require the adoption of a new doctrine or severe changes in current Supreme Court precedent, as a First Amendment challenge would. At the same time, the compensation due would probably be sufficient to deter the government from implementing certain aspects of the regulations, while allowing all sides to claim that they are furthering the cause of reducing teen smoking. As an alternative, the existence of such a claim could provide the impetus to ratify the attorney's general settlement. The following section examines the requirements of a takings claim and applies it in the context of the Winston Cup.

II
Analysis

A takings claim has three requirements. First, the property must be within the meaning of the doctrine. Second, the government must have taken the property for public use. Third, the owner of the property must be paid just compensation. This section analyzes the applicability of a takings claim to the Winston Cup under the new regulations.

125. Id. at 58.
126. Id. at 57 & nn.242-44 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,466-69, 44,475-95).
127. Id. at n.228.
128. U.S. CONST. amend. V.
A. The Property Interest at Stake

Certainly, no taking can occur without property being involved. Takings of intangible property pose particular problems in this regard, since no title is conveyed, and no land is physically occupied. As such, it becomes critical to properly identify the property rights involved and determine whether the doctrine applies to it at all. Several otherwise protectable interests may not be sufficiently severable for the purposes of this doctrine. Furthermore, interests recognized as property for procedural due process claims might not qualify under a takings analysis.

In the current case, the property involved is the name of the race series, Winston Cup. It is not the sponsorship itself, since that is only being restrained rather than destroyed. R.J. Reynolds can still sponsor racing, just not under any tobacco brand name. Furthermore, the interest implicated is not the tobacco products in question. While this restriction may reduce purchases, tobacco companies will still make a decent return on their money. Indeed, were profit the measure of a takings claim this would prove a futile effort, since a tobacco giant like R.J. Reynolds might actually benefit from a lack of advertising by their competitors.

However, the phrase Winston Cup has been rendered completely useless. It cannot be used to sponsor any event or appear on any merchandise or advertising. As such, its value is reduced from at least $30 million, what R.J. Reynolds reportedly pays NASCAR for the sponsorship, to nothing. It is also a separate interest. R.J. Reynolds’ right to sponsor car races exists separately from its rights to possess, use, and exclude others from using the term Winston Cup. Still, it remains to be shown that this fact matters. If this right is not a property interest recognized by the Supreme Court as subject to takings claims, loss of value does not matter.

130. See Pittman v. Chicago Board of Education, 64 F.3d 1098 (7th Cir. 1995) (finding public employment, while property under Due Process, did not come within the meaning of the takings clause).
132. Id.
133. See supra notes 10-12.
In recognizing property rights, the Court has rejected an overly narrow reading of 'property' in the clause itself. 134 Rather than limiting it to the:

vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law... it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. 135

In light of this, it seems that things that have the qualities of property, intangible or tangible, can qualify for takings clause protection. Here, the term Winston Cup possesses these qualities. R.J. Reynolds possesses it, uses it, and could dispose of it if it chose to do so.

Furthermore, the Court has often reiterated that for the purposes of takings claims, "[property] interests... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." 136 *Ruckelshaus v. Monsanto* recognized that Missouri state law protects trade secrets as intangible property interests under the takings clause. 137 In making this determination, the court focused on how similar intangible pieces of property were treated under the clause. 138 There is no reason why a protectable name should not also be recognized as a property interest.

In addition to state law and precedent, custom and usage can create a property right. 139 *Nixon* recognized a property interest of a former President in his official papers, using the customary practice of other presidents to determine that such a right existed. 140 In the current case, it is obvious that sponsors treat their sponsorship names as their property. They license advertising and souvenirs with their

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135. Id.
137. Id. at 1003.
138. Id. (citing protection of Materialman's liens, real estate liens, and valid contracts).
140. Id.
sponsorship title, exclude others from using it, advertise their product through it, and reap the benefits of its use.

Under all of these analyses, Winston Cup would seem to qualify for takings clause protection. The next hurdle, though, is establishing that the current regulations operate as a taking, either in a physical or regulatory sense.

B. Does the New Regulatory Scheme Constitute a Taking Requiring Compensation?

Determining whether a taking has occurred can be difficult. Classic condemnation actions are easy to determine, and rarely create conflict. However, regulations that cause partial physical occupations or are simply too restrictive are much harder to identify. A partial invasion does not eliminate all use of the property, but does eliminate the use of a portion of the property. For that reason, regulations requiring such invasions have been deemed per se takings with regards to that portion of the property.\(^{141}\) By comparison, regulatory takings are really just situations where the regulation of property "goes too far."\(^{142}\) As a result, the court engages in "essentially ad hoc, factual inquiries" to determine if the regulation in question goes beyond the pale.\(^{143}\)

An argument can be made that under either of the latter two categories a taking has occurred. If the current action can only be found to be a taking in the last regulatory category then a "police power" defense might insulate the FDA’s action. However, a slight adjustment in Court doctrine there could result in a tobacco victory.

1. The Current Regulatory Scheme as a Per Se Taking

If a regulation requires a "property owner to suffer a physical 'invasion' of his property" it is a taking requiring compensation.\(^ {144}\) This is true regardless of how small the invasion is, or what state interest motivates it.\(^ {145}\) As a result, even the smallest permanent


\(^{142}\) See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).


\(^{144}\) See Lucas, 505 U.S. at 1015.

\(^{145}\) See id.
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Dispossession, such as requiring an easement of a few cubic feet for cable transformers, requires compensation.\footnote{See id. (discussing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).}

Applying the above reasoning to the term Winston Cup might seem facetious at first. After all, the requirement of a per se taking is generally a physical invasion. This might seem impossible in light of the intangible nature of the property involved. However, this category of taking has not been limited to real property, despite the physical invasion requirement.\footnote{See id., 978 F.2d at 1284.} In \textit{Nixon}, the D.C. Circuit asserted that “in \textit{Loretto}, the Court based the per se takings rationale on a passage from Professor Michelman’s seminal article on takings.”\footnote{See id. at 1285 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 n.5 (1982) (quoting Frank I. Michelman, \textit{Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law}, 80 HARV. L. REV. 1164, 1184 (1967))).} This passage states “[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, ‘regularly use,’ or ‘permanently’ \textit{occupy}, space or a thing which theretofore was understood to be under private ownership.”\footnote{Michelman, \textit{supra} note 148, at 1184 (emphasis added).} In \textit{Nixon}, this passage was cited as support for the recognition of a taking of personal property, namely former President Nixon’s Presidential papers, under the per se doctrine.\footnote{\textit{Nixon}, 978 F.2d at 1287.}

There is no reason why intangible property cannot also be subjected to a per se taking through regulation. Certainly, if a piece of advertising was used by the government for a public advertisement, that would constitute a taking. Furthermore, if all physical manifestations of a previously legal advertising campaign were surrendered to the government, and all such future manifestations banned, that property would be under as complete government control as Nixon’s papers were under the Presidential Recorded Materials Act.\footnote{Id. at 1285.} It was this control, coupled with the loss of rights associated with ownership, that caused the D.C. Circuit to find a taking in Nixon’s case.\footnote{Id. at 1285-86.
Similarly, R.J. Reynolds has lost both the control of and ownership rights to the Winston Cup name. Once the regulations go into effect, they will not be able to use Winston Cup or its associated rights in any meaningful fashion. The loss is even more complete for intangible property created for a very limited purpose than if the property possessed some independent, tangible value. Additionally, the company could not sell Winston Cup and its associated rights, since all physical manifestations of the phrase run afoul of the regulations if they are attached to any event. Finally, their power to exclude others from using Winston Cup is severely diminished in a practical sense. Under these regulations, the company has no reason to try to stop others—what value will be lost by any such use?

It will do no good for the government to argue that they are not using Winston Cup themselves. While true in a narrow sense, actual proactive use is not necessary. Mere occupation of the thing, as well as the use, can result in a taking. The government has occupied Winston Cup completely by eliminating any use by the current owner. They also are using the name in a broader sense. By taking the event out of the public eye, the government hopes to reduce teen smoking. It is the same as razing an eyesore to help property values, or condemning an unsafe building to prevent people from being injured when it falls. In each of these cases the owner of the property has lost something permanently. As in each of those previous cases, the owner should be compensated.

2. The Current Scheme as a Classic Regulatory Taking

If a court refuses to incorporate intangible property into the physical invasion category of per se takings, it might still find a regulatory taking as a classic, ad hoc factual determination. The best hope for this is the least likely—that the Supreme Court will expand *Lucas* to incorporate other forms of property as well as land that has lost all economically viable use. Otherwise, R.J. Reynolds will be hard pressed to show that the new regulations are not a justified use of the police power.

In *Lucas*, the Court recognized that any regulation which removes all economic value or use from land is categorically a taking requiring compensation. The Court rejected an argument that a property owner took title to land “subject to the ‘implied limitation’
that the State may subsequently eliminate all economically viable
use."¹⁵⁴ As a result, the police power could only serve to justify a
complete reduction in the land's economic value where the use
involved is a nuisance under pre-existing state property law.¹⁵⁵ At the
same time, the Court reiterated the notion that police power could be
a justification for refusing compensation in cases of personal property,
even where all economic value was lost.¹⁵⁶

However, the Court in *Lucas* did not elaborate a firm standard
for determining when this implied limitation justification could be
used. It did mention that the "State's traditionally high degree of
control over commercial dealings" justified an assumption that the
owners of goods used for "sale or manufacture for sale" are aware that
regulations can render their property valueless.¹⁵⁷ Furthermore, the
Court found that such an "implied limitation" on land use was
"inconsistent with the historical compact recorded in the Takings
Clause that has become part of our constitutional culture."¹⁵⁸ This
distinction seems artificial and cramped.

For one thing, title to land has been the exclusive creation of the
state since at least *Johnson v. M'Intosh*.¹⁵⁹ To argue that land is
somehow less susceptible to regulation by virtue of its sacred place is
either a vast oversimplification or anachronistic revisionism by the
court. Furthermore, individuals generally take any property, not just
land, with an expectation that the state is not going to unilaterally
declare it unusable. Perhaps the Court was right when it observed that
items specifically designed for sale or manufacture for sale are so
related to commerce that the possibility of *some* state regulation is
unavoidable. That even this property is taken with an understanding
that *all* value can be eradicated through regulation of a previously
lawful activity is far less certain.

It seems more prudent to use *Lucas'* underlying logic for other
property as well. Rather than focusing on whether something is real or
personal property, the emphasis properly should be on what

¹⁵⁴.  *Id.* at 1028.
¹⁵⁵.  *Id.* at 1029.
¹⁵⁶.  *Id.* at 1027.
¹⁵⁷.  *Id.*
¹⁵⁸.  *Id.* at 1028.
¹⁵⁹.  21 U.S. (8 Wheat.) 543 (1823).
"reasonable investment-backed expectations" the owner legitimately had with regards to the property in light of the prevailing law of the time. This is very similar to the more generalized rationale of "typical" regulatory takings, but the drastic impact of such regulations as proposed in _Lucas_ and here require a shift in emphasis. A reduction in value through new regulation might well be justified as a use of the police power, even where such action was not foreseen, with regard to both real and personal property. In the case of a complete loss of all economic value, however, only those foreclosures occurring where future eradication through regulation was reasonably foreseeable seem justifiable without compensation. This is true regardless of the type of property involved.

Of course, expectations with regard to property are more than "unilateral expectation[s] or . . . abstract need[s]." In _Ruckelshaus_, Monsanto was found to have no expectation of privacy in revealing trade secret information to the EPA under a new regulatory scheme. This was because Monsanto was well aware of the uses the EPA would put such information to, including disclosure. Thus, it must be shown that any expectation was legitimate.

Here, R.J. Reynolds has been using the same piece of intellectual property for twenty-five years. When they began to sponsor races, the FDA said publicly that it would not regulate tobacco. While this did not mean that the FDA could never assert such jurisdiction, as it has now, the public statement seems to create a reasonable expectation on the part of R.J. Reynolds that their sponsorship of the sport was not illegal. Furthermore, Congress had specifically delineated what media were off limits to tobacco in the previous decade. Overall, R.J. Reynolds had a reasonable expectation that this property would not be destroyed by the government, and has relied on that expectation by investing hundreds of millions of dollars in their sponsorship over the last quarter century. That would certainly seem to be a reasonable investment-backed expectation, which has been completely destroyed by new governmental regulation.

If despite all of this, a court still finds that police power can legitimize this sort of impact on intangible property, R.J. Reynolds is

162. 467 U.S. at 1006.
163. _Id._
likely to find itself without compensation. Although not specifically
designed for direct sale or manufacture for sale, Winston Cup is
directly tied to commerce. As such, a strong argument for complete
state control exists. At the same time, so much is subject to Commerce
Clause regulation at this point in history that legitimizing complete
reductions in value for personal property without compensation seems
to be an enormous grant of power.

III
Proposal

If a court refuses to find a taking here, then we really will have
two Takings Clauses. One will respect the absolute right in land,
thereby not permitting any physical occupation by the government nor
permitting the loss of all economic value to be justified on any basis.
The other will permit any personal property that is somehow related
to commerce, regardless of its value and importance, to be diminished
to nothing by state regulations that invoke the police power. This
dichotomy goes against thirty years of Supreme Court doctrine that
characterizes property as a bundle of rights and not as a physical res. It
also creates a sacrosanct position for land which does not recognize
the realities of a modern world where intangible property is the basis
of great wealth and much of the national economy.

Law should reflect society, not chain it to the past. For that
reason, courts should expand their definitions of takings to look
beyond simple classifications and look to the relationships between
owner and property, owner and society, and owner and state. Where
one of the parties has violated the reasonable expectations of the
other, compensation should be due. If one neighbor abuses another’s
expectations, he should be held to pay civil damages. If the owner uses
property against the reasonable expectations of the law, then his
property can be controlled through law, and its value is properly
forfeited. However, when the state determines to go against the
established, reasonable expectations of its citizenry to be secure in
their property, it owes them compensation as well.
IV
Conclusion

There is nothing particularly wrong with the FDA’s new regulations. Indeed, they are designed to address a major problem in the United States. However, in violating the expectations of R.J. Reynolds that the government created by allowing them to sponsor NASCAR, the FDA has utilized its power in an extreme fashion. Their destruction of this valuable property can only be justified if R.J. Reynolds receives fair and just compensation. This can happen either through a claim against the government or as part of a mutually agreed upon compromise. If it does not, then we as a legal society have stepped back to a time when land was the only property of value. The implications of recognizing superior rights for the landed class should not go unheeded.