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Gordon & Breach Sci. Publrs. S.A. v. American Institute Of Physics, 1994 U.S. Dist. Lexis 11435 (S.D.N.Y. 1994)

may abrogate the states' Eleventh Amendment immunity as long as it makes its intent unmistakably clear in the statute that empowers Congress with abrogation rights. Since IGRA specifically empowers federal courts to entertain causes of action initiated by an Indian tribe arising out of a state's failure to enter into negotiations with the tribe, and because the statute places the burden on the states to prove good faith, the court found Congress unmistakably expressed its intent to subject states to suit in federal court. In determining whether Congress has the power to abrogate, the court looked to the Indian Commerce Clause of the Constitution, saying the key question is whether the Indian Commerce Clause gives Congress the plenary power to legislate in the area of Indian affairs. The court held that it does, giving Congress no less authority than it has under the Interstate Commerce Clause.

The court also held that IGRA does not violate the Tenth Amendment because the "good faith" provision does not directly compel states to enact a legislative program, but merely invites them to do so. If a state chooses not to enter into a tribal-state compact, the Secretary of the Interior will ultimately prescribe and enforce regulations to govern Class III gaming.

Additionally, since Class III gaming is only permissible on Indian lands in states where such activity is legal, states are free to outlaw such gaming and need not worry about negotiating with the Indian tribes. This also preserves state governmental accountability, a critical component of the states' Tenth Amendment Sovereignty.

Finally, the court held that since the act of negotiating involves discretion and is not ministerial in nature, the suits against the governors of Oklahoma and New Mexico are not barred by *Ex Parte Young*. Since IGRA names only the state as a party to a potential suit, the court found that an injunction to compel a governor to enter into a compact with an Indian tribe is improper. Affirmed in part, reversed in part.

C.L.

GORDON & BREACH SCI. PUBLRS. S.A. v. AMERICAN INSTITUTE OF PHYSICS, 1994 U.S. Dist. LEXIS 11435 (S.D.N.Y. 1994)

Plaintiffs Gordon & Breach (G&B) publish and distribute a wide range of technical, scientific, medical, commercial and business journals and books. Defendants, the American Institute of Physics (AIP) and the American Physical Society (APS), are nonprofit physics societies that publish physics journals. G&B brought

this action after AIP and APS published articles comparing scientific journals by price and value in 1986 and 1988 in two of their journals, *Physics Today* and the *Bulletin of the American Physical Society*. The articles' author, Henry Barschall, a physics professor and APS officer, ranked selected journals on the basis of "cost-effectiveness" and "impact." "Cost-effectiveness" was based on the price of the journal per thousand characters; "impact" was rated by the frequency with which each journal was cited in the academic literature. Journals published by AIP and APS were near the top of the rankings, while G&B's journals were ranked at or near the bottom.

G&B alleged that these articles constituted a "continuous promotional campaign" AIP and APS waged against them through: (1) the distribution of preprints of Barschall's survey at a 1988 librarian's conference; (2) publication of a press release by APS/AIP accompanying one by G&B in APS' January, 1993 newsletter; (3) a 1993 letter to the editor published in a non-APS/AIP publication, written by APS and AIP officers in response to an article attacking the surveys; and (4) continuous dissemination of the results of the survey by repeating quotes from the articles to the media, at meetings with librarians and others, and by electronic mailings to librarians across the country. The defendants filed a motion to dismiss, alleging that the statute of limitations had run, that the court should not apply the 1988 amendment to the Lanham Act, 15 U.S.C §1225, making use of "false or misleading" information in "commercial advertising or promotion" illegal, retroactively, that the articles were not "false and misleading" within the meaning of the Act, and that the articles did not constitue "commercial advertising or promotion" under the Act.

Held: Under section 43(a) of the Lanham Act, representations constitute "commercial advertising or promotion" if they are: (1) commercial speech; (2) made by a defendant who is in commercial competition with the plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) "disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." The court found Barschall's articles constituted protected speech beyond the reach of the Lanham Act for several reasons. Non-profit entities, such as AIP and APS, have purposes beyond the solely commercial which implicate significant First Amendment concerns. The court also said academic journals are a constitutionally protected product, and found that the alleged advertising message in Barschall's articles was not the central message or intent of the articles. "The ar-

ticles examine an issue of public significance, the dilemma facing scientific libraries that must cope with stagnant budgets and escalating subscription costs." Therefore, the court dismissed G&B's claims against the articles.

In reviewing the alleged "continuous promotional campaign," the court found that the letter to the editor and the press release fell too close to core First Amendment values to be considered "commercial advertising or promotion" under the Lanham Act. However, the distribution of reprints and the continued dissemination of the survey results to librarians were expressly promotional activities and therefore constituted "commercial advertising or promotion" as required under section 43(a) of the Act.

The Lanham Act is silent on the statute of limitations for claims and retroactivity of the amendments. In examining these issues, the court found that although section 43(a) claims contain elements of both fraud and injury to property, such claims fit better under the six-year statute of limitations for fraud then the three-year statute of limitations for injury to property. However, although the 1988 claim was not barred by the statute of limitations, the court held the articles were still not governed by the Act, finding the amendments could not be applied retroactively because they impose new liabilities by extending the reach of section 43(a) to trade libel and product disparagement. Specifically, the court noted there was no evidence that Congress intended these liabilities to apply retroactively.

Those claims directed at Barschall's articles, the subsequent releases and the letters to the editors were dismissed, as well as pendant state claims, which were dismissed without prejudice. The issues of the distribution of reprints and the continued dissemination of the survey results to librarians were left unresolved.

V.S.