

## **Supreme Court tackles free-speech issue**

Case involves Nike's comments made in public relations effort

**By WILLIAM HOFFMAN**

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January 24, 2003 - DOWNTOWN DALLAS – A commercial free-speech case pending before the U.S. Supreme Court could extend First Amendment protections to statements made by corporate executives for public relations purposes or open the door to a raft of lawsuits.

"I believe these public relation statements will be held to the lower standard of commercial free speech," said Rob Scott, partner at Scott & Scott L.L.P., a constitutional and appellate law firm in Dallas.

At issue in the case of Nike Inc. v. Kasky is whether the Beaverton, Ore.-based apparel maker and its executives can be sued for allegedly issuing false statements about its labor practices overseas in advertising, press releases and other documents distributed for public relations purposes. Marc Kasky, an activist on corporate behavior, sued under a California law holding that truth is no defense to charges of business fraud if the statements challenged are misleading in context. A California trial court initially dismissed the suit, but the California Supreme Court reinstated it.

According to that court's written opinion, Nike launched a public relations offensive in response to media reports in the mid- and late-1990s that it workers overseas were paid less than the locally applicable minimum wage, required to work overtime, subjected to physical, verbal and sexual abuse and exposed to toxic chemicals and dangerous working conditions. Nike executives denied the charges in press releases, Web postings, letters to newspapers and full-page advertisements, the court's opinion said. The company further claimed overseas workers received free meals and health care, and were paid on average double the applicable local minimum wage.

The California Supreme Court reinstated Kasky's suit by a 4-3 decision. However, dissenting justices argued that, because the debate over labor conditions was a matter of public interest, Nike's comments should be protected.

Chip Babcock, partner in the litigation section, media law practice group, at Jackson Walker L.L.P. in Dallas, agreed with the dissenters.

"If the speech is a matter of public concern, the motivation of the speaker is irrelevant," Babcock said. "If it's on a matter of public concern, the speaker should be entitled to full First Amendment protection." Scott disagreed. "Speech made in connection with public relations should be governed by the same standards as speech made in advertising," he said. "If the statements are not false, no liability will attach. Nike is asking for blanket protection for its statements even if they are false."

Babcock said each relevant case certified by the court has raised hopes that the deeply divided justices would reconcile their strong opinions and draw a "bright line" on where commercial speech ends and protected speech begins. Each time constitutional and commercial lawyers have been disappointed, he said. Babcock said if the court draws the line in the wrong place—which he said in this case means denying Nike First Amendment protection—it would mean "a huge expanse of potential liability to corporate speakers," he said.

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