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RECENT COURT RULINGS UNDERMINE SUITS AGAINST ALCOHOL ADVERTISING

by

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Attempts to undermine the First Amendment protections for commercial speech continue in all their glory, or lack thereof, this time in the form of challenges to alcoholic beverage advertising. In four cases filed against the producers of alcoholic beverages, plaintiffs' class action lawyers use state consumer protection statutes to attack alcoholic beverage advertising allegedly targeted at youth as misleading or concerning unlawful activity, and therefore undeserving of First Amendment protections under the Supreme Court's "*Central Hudson* test." While the tactic may be creative, two recent trial court decisions rejecting challenges to tobacco advertising allegedly targeted to youth instruct that the lawsuits should not survive First Amendment scrutiny.

The Alcoholic Beverage Lawsuits. The allegations in three of the four lawsuits are virtually indistinguishable, which is not surprising given that they all involve the same class action law firm. The cases, *Hakki v. Zima Company, et al.* (Washington, D.C.), *Wilson v. Zima Company, et al.* (North Carolina) and *Kreft v. Zima Beverage Company, et al.* (Colorado), were brought against alcoholic beverage producer Zima and a host of other alcoholic beverage producers, asserting that the defendants target underage consumers in a manner that is "deliberate, reckless, and illegal." Such actions, allege the plaintiffs, constitute "unfair, deceptive, and unconscionable" practices in violation of state consumer protection statutes.

A fourth class action lawsuit challenging alcohol advertising was recently dismissed. In *Goodwin v. Anheuser-Busch Cos., Inc.; Miller Brewing Co.* (California), the plaintiffs alleged that the defendants' acts "constitute unlawful, unfair and/or fraudulent business acts or practices and unfair, deceptive, untrue and/or misleading advertising" in violation of Section 17200 of the California Business and Professions Code. A Superior Court judge dismissed the lawsuit, holding that the court lacked jurisdiction because the California Department of Alcoholic Beverage Control is vested with the authority to regulate alcohol advertising. The judge noted that the plaintiffs failed to identify any advertising that is misleading or false. "Instead the plaintiffs focus on puffery, popularity, social acceptance, athleticism, etc. that drinking can bring. This is not actionable under the Consumer Legal Remedies Act."¹

The underlying factual allegations are similar in all four cases. In short, they claim the alcoholic beverage producers promote their products by advertising in magazines with a substantial minor age readership; using television and radio commercials placed during shows that have high percentages of minor age viewers; sponsoring sporting and social events attended by minors; marketing on web sites with games; and other youth-oriented activities, and giving promotional products to minors. More generally, the lawsuits

¹*Goodwin v. Anheuser-Busch Cos. Inc.*, No. BC310105, Slip Op. at 11 (Cal. Super. Ct. Jan. 28, 2005).

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claim that the producers design their advertising to appeal to underage consumers by using youthful models with themes of sexual prowess and physical attractiveness. The tobacco advertising cases and the recent dismissal of the California alcohol case suggest that plaintiffs will have to prove much more than youthful appeal to survive constitutional scrutiny.

The Tobacco Advertising Cases. The predecessors to the alcoholic beverage cases were challenges brought by class action attorneys against tobacco companies for allegedly intentionally marketing their products to minors. In *Levine v. Philip Morris Inc.*,² a trial court in New York granted summary judgment for Philip Morris in part because it found that the mere fact that the challenged cigarette advertising appealed to the minor plaintiff was not sufficient to render the advertising deceptive under state consumer protection laws. The court underscored that the plaintiff failed to prove that the minor began smoking or continued smoking because of the challenged advertising.

In the second case, a California appellate court affirmed a summary judgment decision and held that the challenged cigarette advertising did not directly incite minors to purchase cigarettes in violation of state prohibitions, and thus was not speech concerning unlawful activities. Accordingly, under the commercial free speech doctrine first articulated by the Supreme Court in *Central Hudson Gas & Electric Co. v. Public Service Commission*,³ the advertising was protected by the First Amendment.

Under *Central Hudson*, the court first considers “whether the expression is protected by the First Amendment. For commercial speech to get such protection, it at least must concern lawful activity and not be misleading.” If the speech concerns lawful activity and is not misleading, the court then asks “whether the asserted governmental interest is substantial.” If so, the court must then “determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”⁴

In order to hurdle constitutional roadblocks, plaintiffs in the tobacco cases, and now the alcoholic beverage cases, attempt to circumvent the first two *Central Hudson* requirements by alleging that the challenged advertising is misleading, involves unlawful activity or both.

Phillip Morris’ “Marlboro Country” Advertising Was Not Deceptive Simply Because it May Have Appealed to the Minor-Aged Plaintiff. In *Levin v. Philip Morris, Inc.*, the plaintiff alleged, among other things, that Phillip Morris had violated the New York consumer protection statute, Section 349 of the General Business Laws of New York, which prohibits deceptive advertising. Section 349 requires the plaintiff to prove the defendant made a misrepresentation or omission that was likely to mislead a reasonable consumer, the consumer was actually misled or deceived, and the misrepresentation caused the consumer injury. To this end, plaintiff asserted that “defendant engaged in deceptive youth-targeted marketing and promotional practices which induced [plaintiff] and other minors to begin and to continue smoking.”⁵ The plaintiff argued that these practices were deceptive because the defendant “knew that the sale of tobacco products to minors was illegal, and that minors lacked the capacity and maturity to understand the true risks associated with cigarette smoking.”

As proof, the plaintiff asserted that the evidence established six facts. First, defendant knew that its “Marlboro Country” advertising campaign was appealing to minors and, second, because of the campaign, Marlboro dominated the market for underage smokers when the plaintiff Soloway began smoking. Third, the

²No. 102765/1998, 2004 WL 2334287 (N.Y. Sup. Ct., Comm. Div. Sep. 22, 2004).

³447 U.S. 557 (1980).

⁴*Id.* at 566.

⁵*Levine*, 2004 WL 2334287, at *7.

cigarettes Soloway smoked, Marlboro Lights, were marketed using the Marlboro Country campaign. Fourth, Soloway “was fascinated by photographs of film actors smoking unidentified brands of cigarettes,” and, fifth, Soloway “had a strong interest in advertising, even when she was a child,” with the Marlboro Country advertisements being her favorite. Sixth, Soloway began smoking Marlboro Lights when she was a minor “because she saw that brand promoted in advertisements that she liked.”

The court found that the advertising was not deceptive. The court stated, “The mere fact that Soloway may have seen and liked Marlboro cigarette advertisements, and found them to be visually appealing, even at a time when she was herself too young to smoke legally, or that those advertisements may have appealed to minors more generally, does not itself render those advertisements deceptive. Nor has plaintiff offered any evidence that Soloway was actually deceived, or that she ever claimed to have been deceived, by any of the defendant’s advertising or promotions.”⁶

Interestingly, the court went on to examine the evidence in the record as to why Soloway may have initiated smoking as a minor and continued smoking as an adult. Soloway “perceived that virtually everyone around her smoked, including her mother, her father, her step-mother, her older sister, and ‘all’ of her friends; because it made her feel good, or important, or glamorous; and because it helped her to relax, and relieved stress.” Thus, while the court acknowledged that the plaintiff may have found the Marlboro Country advertisements appealing, there was simply no evidence to demonstrate they *caused* the plaintiff to begin smoking as a minor, and in fact there was evidence indicating a variety of reasons why the plaintiff may have begun smoking as a minor, and advertising was not one of them.

The court’s rejection of the cigarette advertising as deceptive dictates that plaintiffs in the alcoholic beverage lawsuits must prove as a fundamental prerequisite for deception under the state consumer protection statutes that the challenged advertising *caused* the underage plaintiffs to begin drinking. Failure to establish this nexus renders unsuccessful the tactical efforts to circumvent the First Amendment protections for commercial speech.

Central Hudson Provided First Amendment Protections For the Tobacco Advertising in In Re Tobacco Cases II. In *In re Tobacco Cases II*,⁷ the plaintiffs appealed the trial court’s ruling that 1) plaintiffs’ claims regarding defendants’ cigarette advertising were preempted under the Federal Cigarette Labeling and Advertising Act (FCLAA), by which Congress vested the authority to regulate cigarette advertising in the Federal Trade Commission; and 2) the defendants’ cigarette advertising was protected by the First Amendment. Applying *Central Hudson* and its progeny, the appellate court ruled that plaintiffs’ claims were preempted by the FCLAA.⁸

The FCLAA preempts state regulation of cigarette advertising that attempts to address society’s concern about smoking and health.⁹ However, the FCLAA does not preempt state laws prohibiting sales to minors and therefore the state may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt.¹⁰ In *In re Tobacco Cases II*, in an effort to resolve their federal preemption problem, plaintiffs alleged that the tobacco companies aided and abetted illegal cigarette sales to minors through their advertising campaigns and therefore plaintiffs’ claims fell within the inchoate-offense exception to FCLAA preemption.

⁶*Id.* at *8

⁷123 Cal. App. 4th 617 (Cal. Ct. App. 2004).

⁸Because the court decided the plaintiffs’ claims were precluded by federal law, it did not address the First Amendment issue beyond its preemption discussion.

⁹*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570-571 (2001).

¹⁰*Id.* at 552.

Given the First Amendment commercial speech issues, the court looked to *Central Hudson* and its progeny to ascertain whether the advertising was unlawful and therefore exempt from federal preemption under FCLAA.¹¹ Examining prior tobacco cases, the court made short work of its task determining whether the speech was entitled to First Amendment protection: “[H]owever socially objectionable and subject to regulation by the FTC it may be, cigarette advertising and speech-related promotion that does not *directly* incite minors to purchase cigarettes passes the ‘lawful and not misleading’ part of the *Central Hudson* test and thus is entitled to First Amendment protection.” The court underscored that “‘there is no contention here that the advertisements, whatever the marketing strategy behind them, say ‘Kids, get your Camels here.’”¹²

To reach its conclusion, the court relied upon four other cases, two of them involving tobacco, and the other two involving alcohol and contraception. First, the court looked to *Reilly* for the proposition that “‘so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult consumers have an interest in receiving that information.’”¹³ Second, the court relied on *Dunagin v. City of Oxford, Miss.*,¹⁴ a case involving a ban on alcohol advertising, to support the proposition that simply because some people are not allowed to purchase a product, the advertising to all people cannot be banned. The court then turned to *Rockwood v. City of Burlington*¹⁵ and *Carey v. Population Services International*¹⁶ to hold that advertising must directly incite illicit activity to lose First Amendment protection. *Rockwood* held that, “[r]egardless of whether tobacco advertising causes adolescents to smoke, or whether the tobacco companies have targeted the ‘youth market,’ advertising that does not directly incite illicit activity is protected.”¹⁷

Thus, *In re Tobacco Cases II* establishes that unless plaintiffs prove that the challenged advertising allegedly targeting minors directly incites unlawful activity, such as the purchase of cigarettes or alcohol by minors, the advertising is First Amendment-protected commercial speech under *Central Hudson*.

Conclusion. To circumvent commercial speech First Amendment protections, under *Central Hudson* a plaintiff must prove that the challenged speech is misleading or incites unlawful activity. The two recent decisions in the tobacco advertising cases demonstrate that it is highly unlikely that the plaintiffs in the alcoholic beverage cases can meet this burden. The *Levin* case counsels that cigarette advertising, even if directed at youth, is not deceptive, particularly absent proving a nexus between the advertising and the youth decision to smoke. *In re Tobacco Cases II* addresses the lawful requirement and instructs that youth-oriented advertising does not directly incite young people to purchase cigarettes, and therefore is lawful speech protected by the First Amendment. These cases are instructive to the courts considering the challenges to the alcoholic beverage advertising and the analyses and findings therein are compelling. Plaintiffs’ class action attorneys can always tinker with facts and creative theories and perhaps wrap their cases in “social values” but thankfully at the end of the day the First Amendment protections for commercial speech trump.

¹¹*In re Tobacco Cases II*, 123 Cal. App. 4th at 638.

¹²*Id.* (quoting *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 421 (D.Vt. 1998)).

¹³*In re Tobacco Cases II*, 123 Cal. App. 4th at 636 (quoting *Reilly*, 533 U.S. at 552).

¹⁴718 F.2d 738 (5th Cir. 1983).

¹⁵21 F. Supp. 2d 411, 421 (D.Vt. 1998).

¹⁶431 U.S. 678 (1977).

¹⁷*Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 421 (D. Vt. 1998).