Legal Backgrounder

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FEDERAL AND STATE COURTS REJECT "ATTRACTIVE ADVERTISING" CLAIMS

By

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Product advertising increasingly is under attack by advocacy groups and a well-funded plaintiffs' bar. Countless news reports describe threatened class action claims against companies that advertise fast food, cereal, candy, soft drinks, and alcohol. Although these suits are brought under consumer fraud statutes, they often do not fundamentally challenge the truth of the advertising content or identify material misrepresentations of fact. Rather, they are premised on the notion that the ads are simply too appealing for the audience to resist. To avoid the obvious personal responsibility arguments that would impede recovery, plaintiffs' lawyers craft these claims as ones brought by, on behalf of, or to protect children.

U.S. District Court Judge Donald C. Nugent recently dismissed one such class action with prejudice, writing an opinion that brings some much-needed common sense to "attractive advertising" claims and provides important instruction about which branch of government should set public policy on advertising that does not contain material misrepresentations of fact. *See Eisenberg v. Anheuser-Busch, Inc.*, No. 1:04 CV 1081, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006). In addition, a Wisconsin state court recently dismissed a nearly identical lawsuit for failure to adequately plead a legal injury. *Jacquelyn L. Tomberlin v. Adolph Coors Co., et al.*, No. 05 CV 545, slip op. (Wisc. Cir. Ct. – Dane Cty. February 16, 2006).

Background

Brewers and distillers voluntarily follow self-regulatory advertising codes that limit both advertising content and placement. As the Federal Trade Commission told Congress in 2003, "meaningful industry self-regulation can address a broad range of advertising issues without raising the

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constitutional issues that government regulation would impose." FTC, ALCOHOL MARKETING AND ADVERTISING: A REPORT TO CONGRESS at 7 (Sept. 2003). In addition, the FTC observed that "it appears that on average the beverage alcohol industry spends more than $50 million annually to sponsor public service activities to combat alcohol abuse and to reduce underage drinking and attendant injury." *Id.* at 20.

Under the brewers' and distillers' voluntary advertising codes, ads are not placed in measured media where the proportion of of-age adults in the audience is less than 70 percent, and compliance with these placement standards is audited. Brewers and distillers also have independent boards that review advertising complaints.

These steps have not satisfied anti-alcohol activists or certain class action lawyers, however. The *Eisenberg* and *Tomberlin* cases are two of a small number of class actions claiming that alcohol advertising that is not false or misleading for of-age adults nevertheless is unlawful because it is seen by a "disproportionate" number of underage adults and adolescents who also find it appealing and thus drink illegally. Two other state courts previously dismissed the cases with prejudice.[1]

In *Eisenberg*, the plaintiffs were parents of people who purportedly drank underage, but these parents sued only on their own behalf. They wanted to be paid the "family funds" their unidentified sons and daughters spent illegally buying alcohol. Under the perverse logic of this frequent drinker rewards program, the more of his own money a son spent breaking the law, the more his parent would be paid. The plaintiffs also wanted "disgorgement" of the share of the defendants' profits allegedly attributable to illegal underage drinking going all the way back to 1982, as well as injunctions against future advertising placements and content that allegedly appealed to underage people. The complaint pled causes of action in negligence, unjust enrichment, and violations of Ohio's Consumer Sales Practices Act (the "CSPA").

Judge Nugent, who decided *Eisenberg*, is not new to advertising issues or the First Amendment. Previously he had applied the United States Supreme Court's decision in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) to invalidate Cleveland's ban on alcohol billboard advertising in *Eller Media Co. v. City of Cleveland*, 161 F. Supp. 2d 796, 805-08 (N.D. Ohio 2001), *aff'd per curiam*, 326 F.3d 720 (6th Cir. 2003). Although Judge Nugent did not rule on the defendants' First Amendment arguments in *Eisenberg* because the complaint failed to state a claim under state law, the First Amendment clearly was on his mind as he interpreted Ohio law.

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[1] *See Goodwin v. Anheuser-Busch Cos.*, 2005 WL 280330 (Cal. Super. Ct. – Los Angeles Jan. 28, 2005); *Kreft v. Zima Beverage Co.*, No. 04CV1827, slip op. (Colo. Dist. Ct. Jefferson County Sept. 16, 2005). One federal court also has rejected a similar individual claim. *See Guglielmi v. Anheuser-Busch Cos.*, No. CV-04-594-ST, 2005 WL 300064 (D. Or. Feb. 8, 2005) (recommendation of magistrate judge), *adopted by* No. CV-04-594ST, 2005 WL 524721 (D. Or. Mar. 4, 2005).

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The Court's Analysis

The court began its opinion with workmanlike analyses of the elements of each of the plaintiffs' claims, which are important in their own respects. But in the end, the court fundamentally rejected the plaintiffs' invitation to become the "Alcohol Advertising Czar" for Ohio and the nation, deciding what is too funny, too sexy, or otherwise too appealing to appear in particular mass media. In analyzing the public policy component of the duty element of the plaintiffs' negligence claim, Judge Nugent demonstrated precisely why "attractive advertising" cases pose questions that are better answered by legislatures than by courts:

> It would be nearly impossible for this Court to define what is and is not an appropriate effort to avoid extensively exposing children and other underage consumers to alcohol advertising; what types of marketing unreasonably induce or encourage underage consumers to purchase alcohol; what efforts would ensure that underage consumers do not begin to drink alcoholic beverages as a result of their marketing efforts; and what measures manufacturers could take that would reasonably insure that alcohol is not sold to underage consumers. . .
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> . . . It would require the imposition of content-based restrictions on commercial speech, and, as it affects national advertising, could raise commerce clause issues. It would require deciding what humor, what images, and what themes appeal more to consumers under twenty-one than to those over twenty-one years of age. It would also subject the Defendants to potentially different standards in every case brought in Ohio and around the country.
>
> These are not the kind of decisions and policy considerations that are meant to be addressed by the Courts on a case by case basis. . .
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> * * *
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> The policy considerations raised by this case are more suited to legislative consideration than to judicial fiat. The Ohio Supreme Court has long recognized that the Ohio General Assembly, not the court, is the proper body to resolve public policy questions. . . .

Eisenberg, 2006 WL 290308 at *17-*18 (citations omitted).

In addition to this important exercise of judicial restraint, the court in *Eisenberg* made a number of other important holdings:

- The plaintiff parents failed to allege an injury to themselves because they did not allege a legally protected interest in the money that allegedly was spent. *Id.* at *3.

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- By lumping the defendants together and not connecting their advertising to any particular plaintiff or their son or daughter, the complaint failed to give sufficient Rule 8 notice to each defendant of what it did to harm plaintiffs. *Id.* at *4-*5.

- The CSPA did not apply because: (1) the plaintiff parents were not "consumers" engaging in a transaction, (2) the defendant manufacturers were not "suppliers" to the public because they sold only to state-licensed wholesalers, and (3) the defendants' mass media advertising was not a "solicitation" under the CSPA. *Id.* at *8-*9.

- The unjust enrichment claim failed because the plaintiffs had not engaged in any transaction with the defendants, and thus had not conferred a benefit upon them. *Id.* at *11-*12.

- The negligence claim failed because, *inter alia*, the defendants had no special relationship with the parents that would support imposing a duty on the defendants to prevent the parents' children from engaging in illegal purchases of alcohol from non-party retailers or complicit adults. *Id.* at *14.

In *Tomberlin*, Judge Richard G. Niess was faced with a nearly-identical complaint drafted by the same plaintiffs' lawyers. Judge Niess determined that the plaintiff parent lacked standing to sue because she failed to adequately plead injury, *i.e.*, the invasion of a legally-protected right. Plaintiff had cited cases recognizing a right to be free of governmental interference in parental decision-making.

Judge Niess recognized that those cases only applied to *governmental* interference, and further observed:

> [T]here is no allegation that defendants have somehow prevented plaintiff from monitoring what communications her minor child has been exposed to, from communicating with her minor child to counter the images and influences presented by mass advertising and marketing of defendants' products, or from exercising control over her minor child's finances to prevent the child from purchasing defendants' products. I find no legal authority, and plaintiff cites none, protecting a parent's rights to basic decision-making, in furtherance of her minor child's welfare, from the influences of mass advertising and marketing, legal or otherwise.

Slip op. at 4.

Conclusion

Judge Nugent's analysis of the public policy issues in *Eisenberg* should – along with the court's injury analysis in *Tomberlin* – provide useful ammunition to assist defendants in a variety of industries faced with "attractive advertising" claims.

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