Counsel's Advisory

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 14 No. 7 May 5, 2006

D.C. COURT DISMISSES "ATTRACTIVE ADVERTISING" CLASS ACTION LAWSUIT

by
J. Russell Jackson

Another court has joined the growing chorus of decisions[1] holding that lawsuits challenging so-called "attractive advertising" of alcohol beverages fail to state a legal claim. In *Hakki v. Zima Company, et al.*, 2006 WL 852126 (D.C. Super. 2006), Judge Frederick H. Weisberg dismissed a case brought against various brewers, distillers, and importers which claimed that their advertising appealed to minors. Mr. Hakki sought to have these alcohol advertisers pay a class of parents the money that underage adults and adolescents spent buying alcohol illegally from retailers or complicit adults.

Judge Weisberg held that Mr. Hakki had not pled an injury to himself. The money that underage people spent illegally belonged to them, not their parents. And the complaint failed to link any person's illegal expenditure to any defendant's advertising.

The court also rejected plaintiff's Consumer Protection Procedures Act claim because the advertising was not "materially misleading under an objective standard." *Hakki* at *3. Rather, the ads were alleged to "employ attractive models, video games and animation, social situations with which minors might identify, [and] certain types of humor." *Id.* The court held that:

> Neither the CPPA nor any other District of Columbia law makes it an unlawful trade practice to place advertisements that are intended to appeal to persons over 21 because the same advertisements may also appeal to persons under 21, who are prohibited from purchasing the product.

Id. The court also held that the complaint failed to state claims for unjust enrichment and rescission because there was no transaction at all between plaintiff and any defendant. *Id.* at *4.

In rejecting the negligence claim, the court held that plaintiff could establish neither a legal duty nor proximate cause. The court reasoned that even if it were true that attractive advertising led to underage drinking:

---

[1] *See Eisenberg v. Anheuser-Busch, Inc.*, No. 1:04 CV 1081, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006); *Jacquelyn L. Tomberlin v. Adolph Coors Co., et al.*, No. 05 CV 545, slip op. (Wisc. Cir. Ct. – Dane Cty. February 16, 2006); *Kreft v. Zima Beverage Co.*, No. 04CV1827, slip op. (Colo. Dist. Ct. Jefferson County Sept. 16, 2005); *Goodwin v. Anheuser-Busch Cos.*, 2005 WL 280330 (Cal. Super. Ct. – Los Angeles Jan. 28, 2005).

> For this to occur . . . the underage drinker would have committed a crime, as would the retailer who sold the beverage to him or her or the adult who purchased it from the retailer and made it available to the underage drinker (unless the underage drinker stole it, which would constitute a separate crime). While these criminal acts may be "foreseeable," Defendants are virtually powerless to prevent them and legally owe no duty to the parents of the underage drinker to protect against harm to the parent or the child caused by the criminal acts of both the child and at least one other adult.

Id. The court also noted that imposing such a duty in tort is a public policy question that "belongs to the other branches of government." *Id.* at *5.

The court did not rule on the constitutional arguments, but observed that:

> Any attempt to regulate commercial speech associated with the marketing of a lawful product to those who are legally entitled to use it based on the premise that such speech may also make the product attractive to those who are not legally entitled to use it, might well run afoul of the First Amendment.

Id. at n.6.

J. Russell Jackson is a partner in the Complex Mass Torts Group of New York's Skadden, Arps, Slate, Meagher & Flom LLP and an adjunct associate professor of law at Brooklyn Law School. He represents a defendant in illegal underage drinking class actions and was the principal brief writer for the defendants in *Eisenberg* and *Goodwin*.