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OVERTURNING OF ALCOHOL AD BAN CONFIRMS COMMERCIAL SPEECH RIGHTS

by
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Consumption of alcohol by people under 21 years of age is often viewed as an important societal problem and the cause of many social ills. State and local governments have sometimes responded by reviving decades-old and long dormant restrictions on alcohol advertising in a purported effort to reduce underage consumption. However, the First Amendment is a significant hurdle confronting such government efforts. A recent decision from a Virginia federal court, *Educational Media Company at Virginia Tech, Inc. v. Susan R. Swecker*¹, confirms that the First Amendment protects alcohol advertising in college newspapers, even where the newspapers' audience is forty percent under the legal drinking age. It also emphasizes the government's significant evidentiary burden in defending the regulation of truthful alcohol advertising and the need to narrowly tailor such regulations to their stated purpose.

The *Swecker* case arose from two Virginia Alcoholic Beverage Control Board provisions, 3 VAC 5-20-40(A) ("Provision 40(A)") and 3 VAC 5-20-40 (B)(3) ("Provision 40(B)"). Provision 40(A) was enacted shortly after the end of Prohibition. It allowed media advertisements to reference beer or wine, but "reference to mixed beverages only if the following words are used: 'Mixed Drinks,' 'Exotic Drinks,' 'Polynesian Drinks,' 'Cocktails,' 'Cocktail Lounges,' 'Liquor' or 'Spirits'. Provision 40(A) further forbid the use of the term "Happy Hour". Provision 40(B) was enacted after Virginia's drinking age was raised to 21 and applied only to "college student publications". It prohibited advertisements about "beer, wine and mixed beverages unless in reference to a dining establishment."

Representing two non-profit organizations – publishers of free student newspapers at Virginia Tech and the University of Virginia – the American Civil Liberties Union of Virginia sought an injunction against the enforcement of these two provisions. Both publications estimated that they lost tens of thousands of dollars in advertising revenues due to the challenged regulations.

¹No. 3:06-CV-396 (E.D. Va. Mar. 31, 2008), available at <http://www.acluva.org/docket/pleadings/techopinion.pdf>.

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In a thirty-four page opinion, United States Magistrate Judge Lauck issued a preliminary injunction against enforcement of Provisions 40(A) and (B).² The court recognized that sellers “have an interest in conveying truthful information, and adults have a corresponding interest in receiving truthful information” about adult products, including alcoholic beverages.³ It applied the test articulated by the Supreme Court in *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 565 (1980), to restrictions on commercial speech: a restriction on commercial non-misleading speech about lawful activity must be based on a substantial governmental interest, the regulation must directly and materially advance the governmental interest asserted, and the regulation must be a “reasonable fit between the means and the ends of the regulatory scheme.” *Id.* at 569. Here, the challenged regulations were deemed protected by the First Amendment and the government regulations did not pass the *Central Hudson* test.

With respect to Provision 40(A), the court found that even if the government had a substantial interest in “temperance” the record was insufficient to show that the “litany of permitted words” in the challenged regulation directly advanced that goal. With respect to Provision 40(B), the absence of a rationale and “the silence on the record as to any effect of the existing regulation” doomed the regulation under the First Amendment. The court noted that purporting to link alcohol use on college campuses with alcohol advertising in college newspapers simply “ignore[d] the vast world of electronic media and the internet. . . .” Accordingly, the Provisions were found to be not tailored closely enough to withstand constitutional scrutiny.

Swecker follows the decision in *The Pitt News v. Pappert*, 279 F.3d 96 (3d Cir. 2004), in which then-Circuit Judge Alito struck down a state statute prohibiting all paid alcohol advertising in educational institution publications. These decisions confirm that government bears a significant burden in regulating alcohol advertising, particularly if the purpose of that regulation is purportedly to curb underage drinking. Indeed, in its June 2008 report on Self-Regulation in the Alcohol Industry, the Federal Trade Commission, citing *The Pitt News* and *Swecker* decisions concluded that “self-regulation [by the alcohol industry] is an appropriate response to concerns about the impact of alcohol advertising on youth, in light of protections provided by the First Amendment to the United States Constitution.” *Self-Regulation in the Alcohol Industry, Report of the Federal Trade Commission*, June 2008 (available at <http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf> (last visited June 27, 2008)).

²On June 19, 2008, the court issued a permanent injunction against enforcement of the Provisions.

³*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (discussing tobacco). See *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 514 (1996) (striking down a state ban on alcohol price advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497-98 (1995) (striking down a federal law that prevented alcohol content claims on beer labels).