



Vol. 19 No. 36

October 15, 2004

LAWSUITS TARGETING ALCOHOL ADS TREAD ON FREE SPEECH RIGHTS

by

John J. Walsh

A flurry of class action lawsuits filed over the past year seek injunctive relief and massive damages from spirits, malt beverage and beer producers based on “youthful” appearing models and themes in alcohol beverage advertisements. The gravamen of *Hakki v. Zima Beverage Company et al.*, and three other complaints,¹ is largely that these marketers target minors by depicting individuals who *appear* to be underage — or at least youthful — engaging in activities within an atmosphere of alcohol beverage consumption very attractive to underage persons. The plaintiffs allege that this constitutes “targeting” of underage drinkers or potential drinkers with the purpose of conditioning them to be the next generation of legal drinkers with definite brand preferences.

This LEGAL BACKGROUNDER argues that these complaints, because they directly impact “commercial speech,” are unlikely to survive constitutional scrutiny under the Supreme Court’s *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557 (1980). It also argues that these cases provide an ideal opportunity for courts to at last provide the same “strict scrutiny” protection to commercial expression that other forms of expression under the First Amendment receive. One precedent that should be considered in that regard is *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002). In that case, the Supreme Court held that the First Amendment bars a federal statute enacted for the protection of children by prohibiting sexually explicit images that *appear* to depict minors, but which were produced without using real children.

It is clear that the *Hakki* plaintiffs and others are attempting to circumvent the barriers erected by the Supreme Court’s First Amendment–based decisions. Each of these lawsuits are based on alleged violations of broad unfair business or trade practice laws and false advertising laws, including California’s infamous “17200” law implicated in *Nike v. Kasky*, 27 Cal.4th 939, 45 P.3d 243 (2002), *cert granted, dismissed as improvidently granted*, 539 U.S. 654 (2002). The allegations that the cited advertisements are both “illegal” and “misleading” were designed to sidestep the first part of the four-part *Central Hudson* test for commercial speech (that the speech must be about legal activity and not misleading). The plaintiffs’ goal, just like that of plaintiffs in class action lawsuits against the tobacco industry, is to survive a motion to dismiss and enter into a discovery fishing expedition through defendants’ documents and records and those of their ad agencies, market surveyors, demographics analysts, etc.

¹Three of the complaints are identical in substantive pleading: *Hakki v. Zima Beverage Company et al.*, District of Columbia Superior Court; *Wilson v. Zima Company, et al.*, Mecklenburg County Superior Court, North Carolina; *Kreft v. Zima Beverage Co.*, District Court, City and County of Denver Colorado. Their congruence is no accident; the same D.C. and Virginia based law firms are active in each, with local counsel. The fourth action is *Goodwin v. Anheuser Busch and Miller Brewing Co.*, filed in the Superior Court, Los Angeles County, California.

John J. Walsh is Senior Counsel to the New York City law firm Carter Ledyard & Milburn LLP.

The “facts” alleged in these complaints about the misleading nature and purpose of the advertisements and the intent of the defendants in placing them are not well-pleaded. They are full of hearsay and are extremely conclusory as to both the ultimate facts and the law involved. They ignore the legitimacy of creating advertising that appeals to the youngest tier of legal, adult drinkers: the 21 to 30 year-old group. They would impose draconian censorship on alcohol beverage advertisements to this group of young adults and the media they select to convey their legal messages to these legal drinkers. Artful draftsmanship, using words like “misleading” and “seductive” should not put the alcohol beverage companies behind a pleading “eight-ball” where hearsay and opinions masquerading as factual allegations are accepted as truth and the commercial speakers have the burden to justify their constitutionally protected messages addressed to a legal audience. From the moment a judge considers such pleadings, the burden should be on the plaintiffs to prove them not with speculative conclusions about the effects of presumptively constitutional advertising content, but with clear and convincing evidence of actual falsity or intent to both target and mislead underage drinkers. Biased surmises by alleged social scientists that the messages have been intentionally and purposefully prepared for and addressed to those under 21 are not sufficient. There should be a clear and convincing showing by the plaintiffs that they have and will present admissible evidence of actual intent to target and mislead minors.

It is certainly questionable whether the plaintiffs can meet the burden of proof required by the state consumer protection laws at issue in these cases. It is very likely, however, that the plaintiffs’ claims will not withstand analysis under the Supreme Court’s *Central Hudson*-based jurisprudence

While “very likely” does not have the same predictive quality as “a certainty,” it seems appropriate given what two authoritative commentators on the commercial speech decisions of the U.S. Supreme Court over the past decade have called “the potentially capricious nature of the *Central Hudson* intermediate scrutiny four-part test. . . .” Steven G. Brody and Bruce E.H. Johnson, *ADVERTISING AND COMMERCIAL SPEECH* (2nd Ed. 2004), Practising Law Institute. While capriciousness should not play a role in the judicial treatment of these complaints, these pleadings clearly were drafted with a view to avoid the fate of the legislatively or agency created restrictions on commercial speech struck down in recent years under the third and fourth parts of the *Central Hudson* test. The Supreme Court’s decisions in cases ranging from *Rubin v. Coors Brewing*, 514 U.S. 476 (1995) and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (both alcohol beverage advertising cases) through *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999) (gambling casino advertising) and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco advertising), provide an analytical filter through which those complaints should not pass. For example, an injunction against a national TV ad designed to appeal to legal 25-year old consumers, issued because 18-year olds may see it, is not “carefully calculated” as the fourth part of *Central Hudson* requires. Such an injunction would stop the legal message cold just as surely as Massachusetts’ “1000 foot” rule, struck down in *Lorillard*, would have removed tobacco ads on billboards from vast areas of that state.

These complaints request damages and injunctions to alleviate the potential harms to youth, but *Lorillard* and its predecessors cited above make clear that alternatives that do not suppress speech at all, or restrain it less, must be considered and tried in the first instance. The onus of clear alternatives, such as educational programs, or tighter regulation of sales including criminal sanctions, falls on government, not advertisers. Simply stated, the plaintiffs have gone to the wrong branch of government.

Finally, as noted *infra*, one can hope that no court will accept at face value the conclusory allegations characteristic of these complaints that the advertising attacked is intentionally misleading, deceptive or an illegitimate targeting of underage drinkers, and thus, under the first part of *Central Hudson*, not entitled to review under that test. Hopefully, there will be no examples of judicial “caprice” here. But if there is temptation to do so, the Supreme Court’s treatment in 2002 of alleged harm to youth in *Ashcroft v. Free Speech Coalition* should demolish the theoretical construct of these complaints.

If Congressional action to “protect children” by enacting the Child Pornography Prevention Act of 1996 (“CPPA”) could not withstand the scrutiny required by the First Amendment in *Ashcroft*, surely requests to suppress alcohol beverage advertising directed to *adults* — *legal* drinkers — because of its alleged effect on minors should meet the same fate under the First Amendment principles explained by Justice Kennedy in his *Ashcroft* opinion.

CPPA expanded the scope of child pornography laws to include images produced without actually using children, such as computer imaging techniques, by prohibiting “any visual depiction . . . that is, *or appears to be*, of a minor engaging in sexually explicit conduct.” Opponents of CPPA argued that images produced *without* the participation of minors do not in fact cause the harm invoked by minors’ actual participation in that activity — the basis on which child pornography laws have been upheld. As Justice Kennedy pointed out in the 7-2 majority opinion in *Ashcroft*, “Congress decided that the materials produced without the involvement of real children still threatened to harm children in other ways,” — ways he characterized as “harm flow[ing] from the *content* of the images” (emphasis added). Another section of CPPA defined child pornography to include “any sexually explicit image . . . advertised . . . in such a manner that *conveys the impression*,” of a minor engaging in sexually explicit conduct (emphasis added). The legal contest in *Ashcroft* revolved around the “appears to be” and “conveys the impression” formulations, *i.e.*, the content suppression aspects of CPPA, which were successfully challenged as vague, overbroad and in violation of the First Amendment.

An objective reading of the *Hakki* and other complaints reveals that they are aimed directly at the *content* of the alcohol advertising, particularly content which “*appears*” to show minors engaging in alcohol induced activities, “*or conveys that impression*.” The pleadings are explicit on this: “. . . [D]efendants have engaged in a highly sophisticated, unfair, and deceptive scheme designed to conceal and disguise their efforts to capture the minds, hearts and wallets of underage consumers.” *Hakki, Wilson and Kreft Complaints*, ¶8. Also: “The fundamental objectives of these marketing efforts include: . . . (c) establishing in the minds of teenagers the *impression* that the use of their products is associated with sexual prowess, physical attractiveness, heightened confidence, and immunity from the consequences of rule breaking and risky behavior.” *Id.*, ¶9

Also of interest are entire sections of the California complaint in which plaintiffs allege that the two largest beer marketers in the U.S. have created new malt beverages (referred to as “alcopops”) to target “Underage Drinkers” by using “Alcopop Bottles and Labels . . . Specially Designed to Appeal to Youth.” The defendants’ magazine ads are also said to be disproportionately directed at minors with “Messages that are Specially Geared Toward Youth.” *Goodwin Complaint*, at 59 et seq.

The claims, particularly those directed at so-called “alcopop” ads, share the common theme that alcohol marketers are luring minors into illegal, harmful activity. The *Ashcroft* Court answered similar allegations by invoking not only long-standing and recent First Amendment precedents barring the suppression of expression intended for adults as part of government efforts to protect children, but also key commercial speech decisions striking down restrictions targeted at protecting children from alcohol, gambling or tobacco advertising. Thus in *Ashcroft* itself, the Supreme Court drew together precedents from the constitutional world of “commercial speech,” with that of “non-commercial speech.” It would not, arguably, be such a great doctrinal leap, then, for a court to apply the principles enunciated in *Ashcroft* to a substantially similar situation where advertising was at issue.

Such an approach could move us away from the erroneous and mischievous characterization of speech as merely “commercial,” which has had the effect of allowing undue government regulation of business related speech — a misconceived vestige of government’s long standing authority to regulate business *conduct*. Under the *Central Hudson* line of cases, speech labeled as “commercial” is not protected by “strict scrutiny,” but by the extremely flexible standard of “intermediated scrutiny.” Critics of that test, including members of the Supreme Court, have not yet been heeded. See *Kozinski & Banner, Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); *Greater New Orleans Broadcasting Ass’n, Inc. et al v. United States, et al*, 527 U.S. 173, 184 (1999). While it must be acknowledged that the *Central Hudson* test has produced some favorable results in the last decade,² *Hakki* and other cases attacking advertising for adults may provide the right opportunity for more robust doctrinal defenses.

²A recent example in the realm of alcohol advertising is *Pitt News v. Pappert, Attorney General*, 2004 U.S. App. LEXIS 15615 (3rd Cir. 2004). While the decision did strike down a Pennsylvania statute forbidding paid alcohol beverage advertising in media associated with an educational institution, the court’s reasoning revealed the decision could have turned on minor changes in the factual situation, exposing the inherently unpredictable nature of the test *Central Hudson* dictates.

There is no doubt that the end purpose of these actions is to eliminate or restrain a form of expression about legal activity, i.e. the sale of alcoholic beverages to adults entitled to receive information about, purchase, possess and consume them. These suspect allegations are thus deserving of probing and careful scrutiny by a court from the outset to insure that free speech values will not be prejudiced or chilled, not only by the relief sought, but also by the litigation itself. In *Kasky v Nike*, the California Supreme Court, unlike two lower courts which dismissed the complaints, made the mistake of not seeing that Kasky's pleading was a transparent attack (under the same California Unfair Competition and False Advertising Laws which the *Goodwin* complaint invokes) on fully protected speech in a worldwide public debate about labor conditions and Nike's role in Third World countries. Viewing Nike's statements as "economically motivated" commercial speech, the California Supreme Court allowed the case to go forward. Regrettably, after granting certiorari and allowing a full briefing, the U.S. Supreme Court decided not to exercise its jurisdiction.

The kind of front-end judicial scrutiny needed with these cases was once available to defendants under California's "anti-SLAPP" law.³ California adopted this law to protect, among other expressive activities, speakers' "conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." A recent legislative action in California has placed this important protection for commercial speakers in jeopardy. Possibly with the *Hakki*-type of lawsuits in mind, plaintiffs' lawyers successfully lobbied the California Legislature to enact a new statute, CCP § 425.17, which turns the purpose of the anti-SLAPP law on its head. It effectively removes sued "commercial" speakers' right to an early motion to strike under the anti-SLAPP law if *the plaintiff's* claim is said to be "in the public interest." Yet, under the anti-SLAPP law, the critical factor is that the speech to be protected in the public interest is *the defendant's*. Whether CCP § 425.17 denies equal protection to advertisers in California is another new issue in an already complex legal situation. For sure, though, its existence makes it all the more critical that courts take very seriously their responsibility to apply constitutional First Amendment jurisprudence once these profit-seeking class action lawsuits against alcohol beverage advertisers are put to such a test.

These class actions ask courts to look at the content of particular alcohol beverage ads and rule (or ask juries to rule) that even if it is permissible to speak in that manner to a youth on the day after he turns 21, the speech is still illegal, harmful, damaging and enjoined if it reaches another youth 20 years and 363 days old. *Ashcroft* and similar cases applying strict scrutiny to expression dictates that this is not a sustainable argument. Nor can the class actions withstand the weaker, intermediate scrutiny applied to commercial expression under *Central Hudson* and its progeny.

Society must find alternative ways to accommodate speech rights while protecting its youth from harms that can follow their emulation of adult drinking behavior. There is nothing new here: where drinking is concerned, the first alternative is support and encouragement of *parental guidance and supervision*. The second is more and better *education* for both parents and their youthful charges about the risks of underage alcohol consumption. The third is *enactment and enforcement of laws regulating conduct* of both the underage and adults where the sale or provision to, or possession or consumption of alcohol beverages by underagers is involved. For instance, has any State considered a law requiring that an underage drinker convicted of DWI be ineligible for a driver's license until a specified adult age is reached with no repetition? Legislators — public policy makers — not judges, should be addressing these issues.

The Neo-Prohibitionists behind these complaints say they are not against alcohol beverages for adults. But they ignore the fact that every adult's right to free speech is diminished when governments — in this case the state courts using state laws — are used to suppress commercial expression directed at young adults. In the end, the First Amendment will — and always should — keep averting the prior restraints sought by such claims. The lower courts handling these cases should not have to wait for new First Amendment guidance from the Supreme Court. There is ample guidance on the books right now.

³Calif. Code of Civil Procedure § 425.16; SLAPP stands for Strategic Lawsuits Against Public Participation.