SIMPSON
THACHER

"Attractive Advertising" Suits Held Judicially Unappealing

(This memorandum updates an article originally published as Washington Legal Foundation's *Counsel Advisory*, September 7, 2007)

October 31, 2007

Four appellate courts have now joined the seven trial judges[1] who have accepted the Firm's arguments on behalf of client Heineken and other alcohol beverage companies and held that parents of minor children may not maintain suits seeking to hold alcohol beverage advertising responsible for illegal underage drinking. The theory of these suits is that a putative class of parents of underage drinkers have been injured by a "long-running, sophisticated, and deceptive scheme" to "capture the minds, hearts, and wallets" of young drinkers by placing ads in youth-oriented media utilizing themes that resonate particularly with teenagers.

In *Hakki v. Zima Co., et al.*, No. 06-CV-467 (D.C. Ct. App. June 26, 2007), the D.C. Court of Appeals affirmed the dismissal of the first of these lawsuits for lack of standing and failure to state a claim. The court affirmed the trial court's holding that the plaintiff/parent in *Hakki* had no standing to sue under the D.C. Consumer Protection and Procedures Act (CPPA) because any money that illegal underage drinkers spend on alcohol belongs to them, not to their parents and because defendant's alcohol advertising was not linked to an underage alcohol purchase by a underage child of the plaintiff. This is the first decision from D.C.'s highest court to confirm that the 2000 amendment to the CPPA, which allows suits by a "person, whether acting for the interests of itself, its members, or the general public," does not do away with the requirement that a plaintiff must show cognizable injury to himself caused by the defendant's challenged conduct to bring a claim under the CPPA.

The *Hakki* court also affirmed the dismissal of (i) the parent's negligent marketing claim, because alcohol advertisers have no "special relationship" with parents or the illegal underage drinker; (ii) the parent's claim for unjust enrichment claim because no "benefit" had been conferred by the parent on any defendant; and (iii) the parent's rescission claim because there was no contract between the parent and any defendant to rescind.

In *Alston v. Advanced Brands and Importing Co.*, Nos. 06-1836/3367 (6th Cir. July 17, 2007), the Sixth Circuit held that the parents had no standing to maintain similar claims filed in Michigan and Ohio.

---

1 *Bertovich v. Advanced Brands & Imp. Co.*, 2006 WL 2382273 (N.D.W. Va. Aug. 17, 2006); *Alston v. Advanced Brands & Importing Co.*, 2006 WL 1374514 (E.D. Mich. May 19, 2006); *Hakki v. Zima Co.*, 2006 WL 852126 (D.C. Super. March 28, 2006); *Tomberlin v. Adolph Coors Co.*, Case No.05CV545, slip op. (Wis. Cir. Feb. 16, 2006); *Eisenberg v. Anheuser-Busch, Inc.*, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006); *Kreft v. Zima Beverage Co.*, Case No. 04cv1827, slip op. (Colo. Dist. Sept. 16, 2005); and *Goodwin v. Anheuser-Busch Cos.*, 2005 WL 280330 (Cal. Super. Ct. Jan. 28, 2005), *appeal dismissed*, (Cal. Ct. App. Aug. 17, 2006).

Circuit Judge Batchelder characterized plaintiffs' claim as "specious" that alcohol advertising injured their "parental rights," because there is no legal authority "that would support restriction of a private party's freedom of speech and expression under the theory that the expressed ideas interfere with a parent's right to make decisions regarding their children's upbringing." *Id.* at 2. Judge Batchelder also found that plaintiffs' claim of "economic injury" was similarly suspect, holding that "the causal connection between the defendants' advertising and the plaintiffs' alleged injuries is broken by the intervening criminal acts of the third-party sellers and the third-party, underage purchasers." *Id.* at 3. The Circuit's opinion also rejected the notion that lawsuits against advertisers are the appropriate vehicle for parents concerned about illegal underage drinking, stating: "If these plaintiffs are convinced that alcohol advertising (i.e., First Amendment commercial speech) should be outlawed, then the means must be by legislation, not by judicial fiat." *Id.* Finding no cognizable injury, the Sixth Circuit remanded to the district courts with instructions to dismiss for lack of standing and federal subject matter jurisdiction. In *Kreft v. Adolph Coors Co., et al.*, No. 05CA2315 (Colo. Ct. App. Oct. 4, 2007), the Colorado Court of Appeals reached the same conclusion in affirming the dismissal of causes of action for violations of the Colorado Consumer Protection Act, unjust enrichment, and negligence for lack of standing. The Court of Appeals held that a parent does not suffer direct economic injury when underage children wrongfully spend money on alcohol. The Court awarded defendants their attorneys' fees pursuant to C.R.S. § 13-17-201.

Most recently, in *Tomberlin v. Adolph Coors Co.*, No. 2006AP1302, slip op. (Wis. Ct. App. October 25, 2007), the Wisconsin Court of Appeals affirmed the dismissal of a complaint alleging violations of the Wisconsin Deceptive Trade Practices Act, unjust enrichment, negligence and public nuisance. The Court of Appeals held that a parent suffers no legally cognizable injury when his or her child spends the "child's own money for a product or purpose the parent disfavors." *Id.* at 4. The Court of Appeals also held that the marketing of alcohol beverages in the manner alleged in the complaint does not actionably interfere with the parent-child relationship.

Each of these decisions refused to allow putative classes of "concerned citizens" to maintain an advertising and marketing-related suit under statutes forbidding unfair trade practices or under the common law. By requiring actual injury attributable to the challenged practice of the defendants, the courts clarified and reinforced the significance of the twin actual injury and causation requirements in standing analysis.

For more information, contact:

David W. Ichel (212-455-2563, dichel@stblaw.com)

Bryce L. Friedman (212-455-2235, bfriedman@stblaw.com)

David W. Ichel and **Bryce L. Friedman** are partners in the Litigation Department at Simpson Thacher & Bartlett LLP. They represent Heineken in the underage drinking class actions and were the principal brief writers for the defendants in *Hakki*.