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Litigation Update: Courts Dismiss Class Actions Challenging Alcohol Beverage Industry's Advertising

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Segments of the public health advocacy community and plaintiffs trial bar are increasingly and vigorously sponsoring litigation as a tool to cure public health problems affecting young people. In the name of public health, advertising for breakfast cereal, cookies, fast food, alcohol beverages and soft drinks have all been the subject of lawsuits or threatened suits in recent months.

The Firm has recently secured the dismissal of the complaints in four purported class action lawsuits brought on behalf of parents of underage alcohol purchasers against client Heineken USA and other major alcohol beverage companies seeking to blame "attractive" mass media and Internet advertising for underage drinking and to recover, among other things, all profits allegedly attributable to underage alcohol use. *See Hakki v. Zima Company*, No. 03-9183, 2006 WL 852126 (D.C. Super. March 28, 2006); *Tomberlin v. Adolph Coors Company*, No. 05 CV 545, slip op. (Wis. Cir. Ct. Dane County Feb. 20, 2006); *Eisenberg v. Anheuser-Busch*, No. 1:04 CV 1081, 2006 WL 290308 (N.D. Ohio Feb. 2, 2006); *Kreft v. Zima Beverage Co.*, No. 04CV1827, slip op. (Colo. Dist. Ct. Jefferson County Sept. 16, 2005).[1] In dismissing the four lawsuits, the courts have reinforced the viability of important liability-limiting principles, including:

- Plaintiffs should not be permitted to maintain a class action without pleading direct injury to themselves shown to be attributable to each defendant sued, and in the case of a litigation challenging advertising, to identifiable advertisements;

- Alcohol beverage manufacturers do not have sufficient control over the actions of underage end users to justify holding them liable for injuries caused by the illegal use of advertised products; and

- The courts are not the appropriate branch of government to create restrictions on non-misleading advertising of lawful products.

These dismissal decisions should provide a framework for courts examining similar lawsuits in the future against advertisers of beverage, food and other products.

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[1] Two other cases against alcohol beverage companies related to advertising and based on slightly different sets of facts were also recently dismissed. *See Guglielmi v. Anheuser-Busch Cos.*, No. CV-04-594-ST, 2005 WL 300064 (D. Or. Feb. 8, 2005), adopted by, No. CV-04-594ST, 2005 WL 524721 (D. Or. Mar. 4, 2005); *Goodwin v. Anheuser Busch Cos.*, No. BC310105, 2005 WL 280330 (Cal. Super. Ct. Jan. 28, 2005).

THE COMPLAINTS

Plaintiffs in the *Hakki, Tomberlin, Eisenberg* and *Kreft* cases alleged that members of the alcohol beverage industry "intentionally create and disseminate their product advertisements in such a way as to appeal to underage consumers of alcohol . . . for the purpose of reaping millions of dollars of revenue and profit flowing from the illegal consumption of alcohol by underage drinkers." *Hakki*, 2006 WL 852126, at *1. The complaints faulted defendants "for using advertisements and marketing campaigns that are likely to appeal to minors, because they employ attractive models, video games and animation, social situations with which minors might identify, certain types of humor, and the like." *Id.* at *3. At bottom, the *gravamen* of the plaintiffs' allegations in each of the cases was that advertising that is attractive to legal adult consumers of alcohol beverage products is also seen by and appealing to underage people who may not legally purchase these products and that the advertising is placed in media in which "too many" underage people are part of the audience. *See id.; Eisenberg*, 2006 WL 290308, at *2; *Kreft* at 2; *Tomberlin* at 1. However, plaintiffs did "not identify any particular beverage, any particular ad or marketing technique, or any particular manufacturer that caused any identifiable underage consumer to purchase or consume alcohol." *Eisenberg*, 2006 WL 290308, at *4.

Plaintiffs asserted claims based on theories of unjust enrichment, negligence, and violations of state consumer protection statutes seeking "recoupment of monies given by parents to their underage children, or taken by the children without parental consent, which, in turn, have been spent on the illegal purchase of alcoholic beverages." *Eisenberg*, 2006 WL 290308, at *2. Plaintiffs also sought injunctions limiting the use of certain types of advertising and marketing and the media in which advertising and marketing for alcohol beverages can be placed.[2]

The significant bases for the courts' rulings dismissing these complaints are discussed below.[3]

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[2] Members of the alcohol beverage industry generally adhere to self-regulatory codes by which they pledge to avoid certain advertising and marketing practices and to place their advertisements and promotions in places where the audience is reasonably expected to be at least 70% adults of legal drinking age. *See, e.g.*, http://www.beerinstitute.org/BeerInstitute/files/ccLibraryFiles/Filename/000000000384/2006ADCODE.pdf and http://www.discus.org/industry/code/code.htm.

[3] The plaintiffs in *Kreft* and *Eisenberg* have filed notices of their intent to appeal. Further, at least three other complaints that include similar allegations related to advertising are pending against members of the alcohol industry.

PLAINTIFFS MUST ASSERT A LEGALLY COGNIZABLE INJURY CAUSED BY EACH DEFENDANT

A common theme running through the *Hakki, Tomberlin, Eisenberg* and *Kreft* dismissal decisions is that the plaintiffs' failure to allege a legal injury-in-fact to themselves caused by any defendant's advertising was fatal to each cause of action in the complaints. As the *Hakki* court explained:

> Although the complaint alleges that Defendants' advertising causes underage drinking to the detriment of Plaintiff and the classes he purports to represent, it does not allege (1) that Plaintiff has, or has had, a child, (2) that any such child, when underage, purchased or consumed the product of any Defendant, or (3) that any such child ever saw one of Defendants' advertisements, much less that he or she was influenced by Defendants' marketing techniques to purchase or consume the product of any Defendant.

Hakki, 2006 WL 852126, at *2.

Plaintiffs sought to overcome the failure to link defendants' advertising to an injury they suffered by claiming that the alleged "misuse of family funds" by underage drinkers who illegally purchase alcohol causes an economic injury to their parents for which defendants are responsible. But, as the *Eisenberg* court observed, if parents or others give money to their children, the money then belongs to the children, not to the parents, and "the parents suffer no financial harm from the child's decision to spend that money in any way they see fit." 2006 WL 290308, at *3.

The courts also rejected plaintiffs' claims that defendants' advertising caused injury by interfering with their "general right to make decisions concerning the care, custody, and control of their children." In addressing this claim, the *Eisenberg* court observed:

> There is no allegation that the [alcohol beverage companies] have somehow prevented the Plaintiff parents from monitoring what media their children are exposed to; from communicating with their children to counter the images and influences present in mass advertising and marketing of [alcohol beverage companies'] products; or from exercising control over their children's finances to prevent them from purchasing the Defendants' products.

Eisenberg, 2006 WL 290308, at *4; *see also Hakki*, 2006 WL 852126, at *2 ("Cases . . . which have allowed parents to sue . . . to vindicate their own parental rights [] are simply inapposite to a claim against private companies for doing nothing more than creating a temptation to which children may have illegally succumbed, making it more difficult for parents to prevent them from doing what they should not do."); *Tomberlin* at 4 ("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."); *Kreft* at 4 ("The Court is unaware of any law, and none has been cited to the Court, that recognizes parental rights as being a

cognizable and legally protected interest when the case involves conduct by a private entity as opposed to the government").

UNJUST ENRICHMENT REQUIRES A BENEFIT CONFERRED ON PLAINTIFF BY THE DEFENDANT

In an effort to avoid the unclean hands defense that would naturally apply if illegal underage purchasers themselves were to sue alcohol beverage advertisers to get their money back, plaintiffs in these cases sought recovery on behalf of a class of parents for amounts that their underage children allegedly spent on alcohol. These parental claims did not state a claim for unjust enrichment because a plaintiff must plead that a benefit was conferred by the plaintiff on the defendant and that the benefit was unjustly retained by the defendant. *See* 26 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 68:5, at 62 (4th ed. 2003). Here, the parents, by definition, did not engage in the illegal underage purchase transactions and therefore could not have provided any benefit to any defendant. Moreover, the alcohol beverage manufacturer defendants also did not engage in the illegal underage transactions because alcohol beverages are obtained from retail stores or bars or from complicit adults, not from manufacturers. Thus, the unjust enrichment claims were dismissed because plaintiffs "[could not] establish that the Defendants retained a benefit, conferred by the Plaintiffs . . . ." *Eisenberg*, 2006 WL 290308, at *12; *see Hakki*, 2006 WL 852126, at *3.

NEGLIGENCE: MANUFACTURERS DO NOT HAVE A LEGAL DUTY TO PREVENT THE ILLEGAL MISUSE OF THEIR PRODUCTS

To state a claim for negligence a plaintiff must generally allege an injury proximately caused by the defendant in breach of a legal duty owed by the defendant to the plaintiff. As discussed above, all four recent decisions held that the complaints failed to adequately allege injury to the plaintiffs caused by each defendant.

More fundamentally, the *Eisenberg* and *Hakki* courts went on to find that no negligence claim could be sustained because there is no legal duty running from alcohol beverage manufacturers and importers to parents of illegal underage drinkers. The courts applied the principle that a defendant has no legal duty to prevent illegal conduct that allegedly injures the plaintiff unless the defendant has a "special relationship" with either the plaintiff or the illegal actor such that it was in a position of "control" so as to have been able "to prevent" the illegal act and resulting injury. The defendant alcohol beverage manufacturers, who do not sell at retail, were not alleged to have had any relationship at all with any underage purchasers or their parents and were in no position to control or prevent the unlawful drinking of any individual underage person. As the *Eisenberg* court explained:

> [It] is foreseeable to all that many underage people will attempt to obtain and consume alcohol before they are of legal age to do so. This does not, however, create an actionable duty in every person who encounters a person under

> twenty-one to prevent or discourage underage drinking, or to make drinking seem unappealing.

Eisenberg, 2006 WL 290308, at *13; *see Hakki*, 2006 WL 852126, at *4. The *Hakki* court noted that while parents and retailers may have the ability to prevent illegal underage purchases, alcohol beverage manufacturers "are virtually powerless" to prevent an underage person from unlawfully purchasing alcohol, and therefore "they owe no duty to the parents of the underage drinker to protect against harm to the parent or the child caused by the criminal" underage purchase and consumption of alcohol. *Hakki*, 2006 WL 852126, at *4; *see Eisenberg*, 2006 WL 290308, at * 15.

TRUTHFUL ADVERTISING DOES NOT VIOLATE CONSUMER PROTECTION ACTS

Plaintiffs also alleged that defendants' advertising practices violated the unfair trade and consumer protection statutes, the contours of which may vary from state-to-state.

None of the courts found defendants' advertising false or misleading merely because it was "attractive" to underage people as well as adults over 21. In rejecting the plaintiff's claim under the D.C. Consumer Protection and Procedures Act, D.C. Code § 28-3901, *et seq.*, the *Hakki* court held that plaintiff "cannot prove [ ] any advertisement that was materially misleading under an objective standard or any that claimed consumption of alcohol by minors was legal or acceptable conduct." *Hakki*, 2006 WL 852126, at *3. An advertisement, the *Hakki* court held, is not misleading under an objective standard because it uses "attractive models, video games and animation, social situations with which minors might identify, certain types of humor, and the like." *Id.*

Consistent with the United States Supreme Court's First Amendment jurisprudence, the *Hakki* court also rejected a D.C. consumer act cause of action based on the placement of defendants' advertising in places where both of age adults and underage people might see it.

> 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. The legislature may wish to consider such a law if it could be shown that a particular form of advertising appeals, disproportionately or exclusively, to underage drinkers, but the statute under which Plaintiff brings suit does not permit the court to make such a law (or to declare policy in the area) where none exists.

Id. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983) ("the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) ("the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults").

CLAIMS OF "ATTRACTIVE ADVERTISING" DO NOT BELONG IN COURT

The courts in these decisions also recognized that some social problems are not best remedied through regulation by litigation, and that other branches of government are better suited to legislate or regulate in the first instance. The *Hakki* court explained:

> The problems associated with teenage drinking are well known. The court can appreciate the wisdom of a governmental policy to regulate advertising and marketing by alcoholic beverage manufacturers in an effort to minimize, to the extent possible, the risk that such advertising and marketing might influence teenagers to drink. In our system, however, the choice of that policy, and between competing policies, belongs to other branches of government. The blunt instrument of a private civil action for damages or injunctive relief, where there is no direct injury alleged is not the device our constitution and democratic institutions have chosen to impose standards of conduct on purveyors of alcohol at the manufacturing level.

Id. at *5. The *Eisenberg* court made similar points. It said:

> Any attempt to control the marketing and advertising of alcoholic beverages raises a multitude of issues, both legal and practical. 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. As evidenced by the facts set forth in the Complaint, such oversight would require an analysis of the market shares of various alcoholic products; an analysis of the readership and viewing demographics for national magazines, television ads and internet site traffic; and an analysis of the profitability of advertising in various mediums. It would require this court to isolate the influence of advertising from all other factors that may lead a[n] underage consumer to purchase alcohol in order to determine causation.
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> Each of these factors would be subject to constant change as the markets, demographics and other influences continuously fluctuate. 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.
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> 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.

Eisenberg, 2006 WL 290308, at *17-18.

The approach taken in *Hakki* and *Eisenberg* follows the similar reasoning of the Sixth Circuit's decision in *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), a case in which our Firm successfully obtained the Rule 12(b)(6) dismissal of a tort complaint seeking to blame producers of allegedly violent films and video games for a student's highly publicized killing of his classmates in Paducah, Kentucky. The Sixth Circuit affirmed the district court's dismissal of the complaint on the grounds, among others, that courts should abstain from promulgating restrictions on speech through the blunt instrument of tort law:

> [T]he question before us is whether to permit tort liability for protected speech that was not sufficiently prevented from reaching minors. At trial, the plaintiff would undoubtedly argue about the efficient measures that the defendants should have taken to protect the children. But at the end of this process, it would be impossible for reviewing courts to evaluate whether the proposed protective measures would be narrowly tailored regulations. Who would know what omission the jury relied upon to find the defendants negligent? Moreover, under the concept of negligence, there is no room for evaluating the value of the speech itself . . . . We cannot adequately exercise our responsibilities to evaluate regulations of protected speech, even those designed for the protection of children, that are imposed pursuant to a trial for tort liability. Crucial to the safeguard of strict scrutiny is that we have a clear limitation, articulated in the legislative statute or an administrative regulation, to evaluate. "Whither our children,". . . is an important question, but their guidance through the regulation of protected speech should be directed in the first instance to the legislative and executive branches of state and federal governments, not the courts.

300 F. 3d at 697. The *Hakki* and *Eisenberg* courts ruled that the same principle holds true in the alcohol advertising cases.

If you would like further information about these developments or to obtain a copy of the decisions discussed above, please contact David W. Ichel (dichel@stblaw.com), Mark G. Cunha (mcunha@stblaw.com) or Bryce L. Friedman (bfriedman@stblaw.com) by e-mail or at (212) 455-2000.