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“ATTRACTIVE ADVERTISING” SUITS HELD JUDICIALLY UNAPPEALING

by

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Two appellate courts have now joined the seven trial judges¹ who have 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. 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

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).

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.

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