9th Circ. Could Allow Retailers To Advertise Alcohol

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In a decision released on Jan. 7, 2016, Retail Digital Network LLC v. Jacob Appelsmith,[1] the U. S. Court of Appeals for the Ninth Circuit overturned 29-year-old precedent set in Actmedia Inc. v. Stroh,[2] which held that those portions of California Business and Professions Code Section 25503 that prohibit alcoholic beverage suppliers and wholesalers from paying for the privilege of advertising at a retail establishment did not violate the First Amendment.

In a decision with a potentially far-reaching impact, the court in Retail Digital Network applied recent U.S. Supreme Court jurisprudence to overturn 29-year-old precedent and require heightened scrutiny to a California trade practice statute prohibiting alcohol beverage suppliers and wholesalers from, directly or indirectly, giving anything of value to retailers for advertising their products.

Retail Digital Network involves an advertiser, Retail Digital Network LLC (RDN), which seeks to operate as a nonlicensed alcohol beverage industry advertising middleman. RDN installs liquid crystal displays in retail stores. It generates revenue by contracting with advertisers to display their products and services and pays each retail store a percentage of its advertising revenue. Litigation arose after RDN offered its services to alcohol beverage manufacturers who refused to do business out of fear that RDN's business model would violate California Bus. & Prof. Code section 25503 (f)-(h), which, among other things, forbids alcohol beverage manufacturers and wholesalers from, directly or indirectly, paying for the privilege of advertising at retail establishments.

Of the three subsections of section 25503 under scrutiny, section 25503 (h) is what the California Department of Alcoholic Beverage Control has most frequently invoked against suppliers (brewers, winegrowers, distillers and importers) who have paid a retailer (or a third party hosting an event at a permanent or temporary retail location), or furnished anything of value to advertise at a retailer's premises. The statute specifically prohibits a direct or indirect payment to place an ad on or in a retail premises. The department has won cases in the Courts of Appeal against a group of suppliers who paid the

postage and printing costs for a retailer's brochure featuring the suppliers' products (i.e., who indirectly furnished a thing of value)[3] and against a supplier who co-sponsored a race with a retailer and provided advertising material at the retailer's premises where the race was run.[4] On the other hand, the department lost its claim, at a hearing conducted by a department administrative law judge, against a supplier who had legally furnished a logoed T-shirt to an event promoter who in turn lent the shirt to an employee of a retailer who supplied services at the event.[5]

Perhaps the biggest problem suppliers have encountered with 25503 (h), however, is in the area of sponsorships. If a supplier provides a retailer nearly anything (except signs permitted by statute or regulation) the department has sometimes (but not always) claimed a violation of section 25503 (h). Several tied-house exemptions have been enacted over the years to protect specific venues at which suppliers sponsor and advertise events (think of those beer signs in center field at baseball stadiums, hockey rinks, aquatic parks and bar tops in high-end restaurants promoting expensive spirits as examples). But not all venues have protected themselves with tied-house exemptions and those which have not continue to be at risk for violating section 25503 (h).

In 2011, RDN filed suit in the U.S. District Court for the Central District of California seeking declaratory relief that section 22503 (f)-(h) is unconstitutional under the First Amendment. It also sought an injunction against the State's enforcement of the law. The state moved for summary judgment which the District Court granted pursuant to Actmedia Inc. v. Stroh. Actmedia previously upheld section 25503 as consistent with the First Amendment after applying intermediate scrutiny to laws burdening commercial speech pursuant to Central Hudson Gas & Electric Corp. v. Public Service Commission N.Y., 447 U.S. 557 (1980).[6]

RDN appealed, and on Jan. 7, 2016, the Ninth Circuit reversed and remanded. In Retail Digital Network, the Ninth Circuit held that Actmedia is irreconcilable with a trio of subsequent Supreme Court decisions including Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484 (1996) (plurality opinion) and, most importantly, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011). Sorrell modified the Central Hudson test by including a threshold inquiry into whether a challenged law that burdens nonmisleading commercial speech about legal goods or services is content- or speaker-based. If it is, the challenged law is subject to heightened, rather than intermediate, scrutiny. Under heightened scrutiny, pursuant to Sorrell, Central Hudson remains the appropriate analytical

framework but the government bears the burden of showing "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"[7] and that the challenged law "is drawn to achieve [the government's substantial] interest."[8] Because section 25503(f)-(h) is a content-based restriction on nonmisleading commercial speech regarding a lawful good or service, the Ninth Circuit held that law must be subject to heightened scrutiny. Accordingly, the Ninth Circuit remanded on an open record for the district court to apply heightened judicial scrutiny and determine, among other things, whether the government "has shown that there is a real danger that paid advertising of alcoholic beverages would lead to vertical or horizontal integration under circumstances existing in the alcoholic beverage market today"[9] and "whether the state has shown that section 25503(f)-(h) materially advances the state's goals of preventing vertical and horizontal integration and promoting temperance."[10]

Importantly, the Ninth Circuit expressed grave "skepticism regarding whether section 25503(f)-(h)'s burden on expression directly advances and is fit to achieve a permissible goal" of promoting temperance.[11]

Assuming the Ninth Circuit does not grant rehearing en banc, or that in the interim the state does not file a petition for certiorari with the U.S. Supreme Court, we must wait to see how the district court will ultimately decide the constitutionality of section 25503(f)-(h) on remand. But the trial court must heed the Ninth Circuit's admonitions, and the decision on remand very well may open the door to aligning modern methods of alcohol beverage advertising with 21st century commerce - including those big beer signs in center field - at least within the Ninth Circuit.