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Opinion No. 05-040

The Constitutionality of Alcoholic Beverage Commission, Rules 0100-1-.01(3)(a), 0100-3-.04(2) and 0100-3-.04(3)(b)

QUESTION

Are Tennessee Alcoholic Beverage Commission Rules 0100-1-.01(3)(a), 0100-3-.04(2), and 0100-3-.04(3)(b) (ABC Rules) vulnerable to challenge on grounds that they unlawfully infringe on the right to free speech in violation of the First Amendment of the United States Constitution?

OPINION

With the exception of Rule 0100-1-.01(3)(a)(1), the ABC Rules are vulnerable to serious constitutional challenge as infringements on free speech in violation of the First Amendment of the United States Constitution.

ANALYSIS

In Op. Tenn. Att'y Gen. No. 82-11 (January 19, 1982), this office opined that Alcoholic Beverage Commission Rule 0100-1-.01(3)(a) was a lawful and reasonable restriction on commercial speech and therefore did not violate either the First Amendment of the United States Constitution or Art. I, § 19 of the Tennessee Constitution.[1] Since that opinion was issued, the Supreme Court has rendered decisions related to state-imposed restrictions on the advertising of alcoholic beverages and gambling which call into question the continuing validity of Op. Tenn. Att'y Gen. No. 82-11. The Court's reasoning in those cases suggests that under the present state of the law, the ABC Rules would be subject to serious constitutional challenge on First Amendment grounds.

The Rules prohibit certain types of alcoholic beverage advertising and restrict others.

Rule 0100-1-.01(3)(a) states:

> Advertising on Radio or Television Stations Prohibited. - The availability of alcoholic beverages may not be advertised on radio or television stations in Tennessee except under the following circumstances:

[1]That opinion was based in large part on *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2434 (1980).

1. Television advertising of liquor-by-the-drink licensees may show normal scenes of activity within the restaurant portion of any such licensee. Consumption of alcoholic beverages may not be shown nor may alcoholic beverages be the central focus of any such advertising. Any scene which is inconsistent with the inconspicuous presence of alcoholic beverages as a normal accompaniment to restaurant food service is specifically prohibited. Audio portions of television broadcasts shall contain no reference to alcoholic beverages.

2. Audio portions of television broadcasts and radio broadcasts shall contain no reference to the availability of alcoholic beverages. However, use of the word "beverages" in broadcast advertising which principally relates to food service is not considered to violate this section. Use of the following in broadcast audio advertising is specifically declared to be in violation of this rule: drinks, happy hour, attitude adjustment hour, cocktails, highballs, or any other language generally understood to refer to alcoholic beverages or a period in which their prices for alcoholic beverages are reduced.

Rule 0100-3-.04(2) states:

Distilled spirits may not be advertised in any manner on radio or television stations operating in Tennessee.

Rule 0100-3-.04(3)(b), dealing with the permitted advertising of wine, states:

Such advertisements must not give the name, address or telephone number of a Tennessee licensed wholesaler or retailer.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Court developed a four-part analysis to determine whether restrictions on commercial speech violate the First Amendment. The factors are: (1) whether the speech concerns lawful activity and whether it is misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is more extensive than necessary to serve that interest. *Id.* In the time since the issuance of Op. Tenn. Att'y Gen. No. 82-11, the Court has applied the *Central Hudson* test to invalidate various restrictions on commercial speech on First Amendment grounds.

In *Edenfield v. Fane*, 507 U. S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the Court

applied the *Central Hudson* test to a state law ban against in-person solicitations by CPAs.[2] In that case, the Court found that the ban failed to meet the third requirement of the *Central Hudson* test because there was no evidence to support the state's assertion that a blanket prohibition against such solicitations actually protected the public from harm.

In *Greater New Orleans v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999), the Court invalidated a federal statute prohibiting privately-owned gambling casinos from advertising on radio or television because the ban did not advance any legitimate governmental interest in a direct and material way. The government argued that the ban on advertising promoted its interest in preventing gambling addiction. The Court rejected the argument based on its finding that federal law allowed casinos owned by Indian tribes to run television and radio advertisements. Since the government failed to show that gamblers were less likely to get addicted from gambling in Indian-owned casinos, the Court held that the prohibition violated the First Amendment.

The Court has also applied the *Central Hudson* test to strike down restrictions on various forms of alcoholic-beverage labeling and advertising. In *Rubin v. Coors*, 515 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), the Court struck down a provision in the Federal Alcohol Administration Act that prohibited brewers from disclosing the alcohol content on package labeling. The Court found that the restrictions failed to satisfy the last two requirements of the *Central Hudson* test. The government argued that the prohibition advanced the government's interest in preventing alcoholism by preventing brewers from marketing their product based on alcohol content. The government contended that, if they permitted brewers to disclose the alcohol content of their beer, brewers would engage in strength wars to the detriment of the public. The Court rejected this argument, noting that federal law required distillers to display the alcohol content of distilled spirits on the bottle. Additionally, the Court was unswayed by the argument that the ban was narrowly tailored to further the governmental interest without unnecessarily infringing on speech.[3] The Court noted that governmental interests could be adequately served by appropriately tailored restrictions on the content of beer advertising.

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the Court held that an outright ban on advertising the prices of alcoholic beverages violated the First Amendment. There, the state argued that the ban was a legitimate means of promoting temperance. The Court disagreed and found that the prohibition was unduly restrictive because less

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[2]The State argued that the ban was necessary to protect potential clients from fraud and overreaching. The court rejected that argument noting that the State had failed to produce any hard evidence that the public would actually suffer harm from in-person solicitations by CPAs. *Edenfield v. Fane*, 507 U. S. 761, 768, 113 S.Ct. 1792, 1799, 123 L.Ed.2d 543 (1993).

[3]In *Board of Trustees of State University of New York*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Court noted that while the government is not required to employ the least restrictive means conceivable, it must still demonstrate that it has narrowly tailored the challenged regulation to address the claimed harm. The restriction does not have to represent the best solution. *Id.* at 480, 109 S.Ct. at 3035. It will be upheld if its scope is in reasonable proportion to the interest it is intended to protect. *Id.*

restrictive ways to promote temperance were readily available.[4] The Court stated, for example, that states could use taxes, education and other regulations on the marketing and sale of alcoholic beverages to promote temperance. *Id.* at 507, 166 S.Ct. at 1510.

More recently, in *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), the Supreme Court invalidated a ban on advertising lawfully compounded drugs. In doing so, the Court held that "if the Government could achieve its interest in a way that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371, 112 S. Ct. 1506.

The reasoning in the foregoing decisions indicates that outright bans against the advertising of alcoholic beverages are likely to be met with skepticism. The state would be required to prove that the ban or restriction serves an actual state interest and that the restriction or ban protects or furthers that interest in a definite way.

Applying the reasoning in the foregoing cases to the ABC Rules, it is likely that Rules 0100-3-.04(2) and .04(3)(b) would not withstand a First Amendment challenge. Both Rules are outright bans on certain types of liquor advertising. As the foregoing cases show, especially *44 Liquormart*, outright bans on the public dissemination of truthful and non-misleading information, related to the availability and prices of alcoholic beverages, are unlikely to withstand a First Amendment challenge. Furthermore, based on the Court's statements in *44 Liquormart*, it is unlikely that an argument that such a ban is an appropriate means of promoting temperance would persuade any court. Unless another real state interest can be identified, and unless there is a strong showing that the ban actually promotes such an interest, it is unlikely that any outright ban on liquor advertising will be upheld.[5]

Rule 0100-1-.01(3)(a), on the other hand, restricts, but does not ban outright the advertising of alcoholic beverages. As long as the restrictions contained in that Rule actually protect or further a real state interest, and as long as the restrictions are appropriately tailored to protect or serve those asserted interests, Rule 0100-1-.01(3)(a) might withstand a First Amendment challenge.

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[4]The Court was especially offended by the state's argument in this case. It noted that banning the dissemination of truthful information to consumers on grounds that it might be misused was both paternalistic and insulting. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, at 509, 116 S.Ct. 1495, at 1511, 134 L.Ed.2d 711 (1996).

[5]Any such argument would be undercut by the fact that Rule 0100-3-.04(3) allows wine sellers to advertise.

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