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guishable from the present case. She observed that the guidelines in *Morales* were not in themselves “law,” but invoked generally applicable consumer fraud statutes to enforce the NAAG guidelines relating to rates, routes, or services. Justice O’Connor reasoned that consumer fraud statutes not facially related to airlines were preempted in *Morales* because the subject matter of the action related to airline rates. Similarly, the Illinois Consumer Fraud Act at issue in this case also

should be preempted because the subject matter of the contract the plaintiffs sought to enforce related to airline rates and services. According to Justice O’Connor, *Morales* is indistinguishable from the present case, and therefore both the plaintiffs’ breach of contract and Consumer Fraud Act claims should be preempted by the ADA. However, Justice O’Connor acknowledged that personal injury claims against airlines are not always preempted under her view of *Morales*. She

distinguished many personal injury claims as not relating to airline services, but rather relating to safety.

In summary, although the dissenters took opposite positions on ADA preemption, the majority of the Court followed the middle ground, barring the plaintiffs’ claims against American Airlines based on state consumer fraud statutes, but allowing them to seek enforcement of contract terms agreed to by the airline.

Coors wins battle over beer labels

by Russell Collins

Beer drinkers may now know exactly how much alcohol is in their drink of choice. The United States Supreme Court recently struck a federal ban on labeling beer with its alcohol content in *Rubin v. Coors Brewing Company*, 115 S.Ct. 1585 (1995).

Since 1935, the Federal Alcohol Administration Act (“FAAA”) has banned the disclosure of beer alcohol content on labels. The post-prohibition statute established federal rules governing the distribution, production and importation of alcohol; and created the Federal Alcohol Administration. The FAAA empowered the Secretary of the Treasury to regulate alcohol packaging through § 205(e)(2), which then delegated the power to the Bureau of Alcohol, Tobacco and Firearms (“ATF”). The ATF then enacted 27 C.F.R. § 7.26(a), which prohibited the disclosure of alcohol content on labels and in advertisements in states that did not have legislation mandating its inclusion on beer labels.

ATF rejects proposed Coors label

In 1987, the ATF rejected Coors’ proposed beer label design and advertising campaign pursuant to its regulations. Both the label and ad campaign disclosed the alcohol content of Coors beer. Coors responded by filing suit in Colorado District Court against the Secretary of the Treasury. The court granted injunctive relief barring enforcement of the alcohol content disclosure ban, but the Tenth Circuit reversed and remanded, emphasizing the government’s substantial interest in suppressing alcohol “strength wars.”

On remand, the district court again invalidated the label ban; however, it upheld the prohibition against using the alcohol content of beer in advertising. Although the government requested review of the label ban nullification, Coors did not challenge the legitimacy of the advertising restriction. The Tenth Circuit affirmed the later district court decision nullifying the label

restriction, reasoning that it violated the First Amendment by failing to advance a governmental interest in a direct and material way. The Supreme Court granted certiorari.

Commercial speech guidelines govern

Initially, the Supreme Court classified beer labels as commercial speech and structured its analysis to fit that classification. The Court applied the two part test for constitutional validity articulated in *Central Hudson Gas & Electric Corp v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1978). For a commercial speech regulation to survive a First Amendment challenge, it must meet two requirements: 1) the regulation must be related to lawful activity; and 2) must assert a substantial governmental interest. Additionally, the regulation must directly advance the government's asserted interest and may not be broader than necessary.

The government alleged the ban advanced its substantial interest in limiting "strength wars" by preventing brewers from distinguishing their beer on the basis of alcohol content and by inhibiting consumers from choosing beers based on percentage of alcohol. Alternatively, the government maintained the labeling ban simplified state efforts to regulate alcohol, since the ban only applied to states without their own beer label legislation. The government argued this limited application prevented states from having to pass their own legislation.

Coors responded that the FAAA was not originally passed to suppress strength wars, but to prevent inaccurate claims of alcohol content. Coors stressed it merely wished to disclose truthful and verifiable information on its labels. Further, Coors argued that the label regulation did not aim to suppress strength wars because the same statute actually mandated producers of wine and distilled spirits to print alcohol content on their labels.

The Court acknowledged the government's interest in suppressing strength wars as "substantial"

under the test from *Central Hudson* and recognized a further concern in promoting the health, safety, and welfare of citizens through alcohol regulation. However, the Court accepted Coors' interpretation that the purpose of the statute was unrelated to the suppression of strength wars. The Court also rejected the government's argument that the ban facilitated state alcohol regulation.

Ban fails to advance government's interest

Under the *Central Hudson* test, a valid restriction on commercial speech must also directly advance the governmental interest and not be broader than necessary. The Court relied on a previous articulation of this standard that held the government must demonstrate how the regulation advances its interest in a "direct and material way."

The government argued that it met this burden by alleging that beer producers are already waging a "strength war" in the "malt liquor" market (malt liquor has a higher alcohol content than regular beer). The government maintained "common sense" indicates that a ban on disclosure will prevent consumers from choosing beer on the basis of alcohol content. To support its contention, the government pointed to the suppression of a strength war in the 1930s caused by the label ban. Further, the government claimed that Coors challenged the label regulation in order to change the consumer perception that its beer contains less alcohol than other brands.

In response, Coors argued the regulation is broader than necessary and internally inconsistent. While this regulation prevents disclosure for beer, other regulations mandate disclosure for distilled spirits and wine with an alcohol content greater than 14 percent. Coors argued that this distinction and the ability to distinguish high alcohol beer through the use of "malt liquor" destroys any benefit of the disclosure ban.

The Court rejected the government's position and accepted Coors' argument that the regulation does not further the government's interest in suppressing

strength wars. The Court acknowledged the “overall irrationality” of the current label regulation in light of the more effective, and unchallenged, advertising regulation. The Court found Coors’ argument persuasive, which focused on the different treatment of alcohol disclosure in malt liquor.

As the Court recognized, even though the regulation advanced the state’s interest in a “direct and material way,” it failed the First Amendment test that required a “fit” between the regulation and its articulated goals. Alternatives exist which accomplish the government’s goals more effectively. For example, Coors suggested directly limiting the alcohol content of beer or limiting the ban to “malt liquor.” The Court recognized that the label ban was too broad and concluded that it violated the First Amendment’s protections of commercial speech. Therefore, the Court invalidated the label ban and affirmed the Tenth Circuit’s opinion.

Justice Stevens disagrees with analysis

Justice Stevens, concurring, disagreed that beer labels qualify as commercial speech because the label

regulation does not prevent misleading speech or protect consumers from incomplete information — the essential reasons for regulating commercial speech.

Justice Stevens based his position on Coors’ desire to disclose truthful, accurate information about the alcohol content of its beer. Justice Stevens argued that the majority failed to articulate why the lower protection standards afforded commercial speech should apply to beer labels. In any other context, truthful statements about alcohol content would receive full First Amendment protection. Justice Stevens reasoned that commercial speech guidelines should be limited to speech that may mislead consumers. Here, Coors merely wished to present “truthful, unadorned, informative speech.” Therefore, Justice Stevens argued the higher protections given to speech under general First Amendment guidelines should have applied to nullify the label ban.

Nevertheless, the majority’s position that commercial speech guidelines govern led to the invalidation of the federal label ban on alcohol content disclosure on beer labels in those states that do not mandate it themselves.

Texas Supreme Court denies homeowners’ implied warranty and unconscionability claims under state’s Deceptive Trade Practices-Consumer Protection Act

by Raquel Villanueva

In *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1994), the Supreme Court of Texas held that homeowners suing their developer under the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”) had no cause of action based upon either an implied warranty or unconscionability theory. The court further held that the lower court’s judgment allowing the

homeowners to recover both the cost of repairs and the diminution in value of the home improperly granted them double recovery and ruled that the homeowners failed to evidence compensable mental anguish. Therefore, the court modified the judgment by denying double recovery and damages for DTPA claims and attorneys’ fees.