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RECENT CASES

Brewery's Bad Frog Was Set Free After Giving New York "The Finger"

by Irene Kowalczyk

In *Bad Frog Brewery, Inc., v. N.Y. State Liquor Authority*, 134 F.3d 87 (2d Cir. 1998), the Court of Appeals for the Second Circuit reversed the district court's grant of summary judgment, which held in favor of the New York State Liquor Authority's ("NYSLA" or "Authority") prohibition of Bad Frog Brewery, Inc.'s ("Bad Frog") offensive beer labels. The Second Circuit held that NYSLA unlawfully rejected Bad Frog's application for approval of its beer labels, and held that the labels were protected as commercial speech under the First Amendment of the United States Constitution.

Bad Frog Gets Disciplined

Bad Frog, a Michigan corporation, manufactures and markets alcoholic beverages throughout the United States. In the marketing of several beer products, the company developed labels for its bottles depicting a frog holding up its four-fingered hand, with the second finger raised and the other fingers curled. The gesture is easily recognized as "giving the finger." The labels also display slogans such as "He just don't care," "An amphibian with an attitude," and "The beer so good . . . it's bad."

The Federal Bureau of Alcohol, Tobacco, and Firearms and at least fifteen states have approved the

labels for use. However, three states have rejected the labels. In May 1996, Bad Frog's distributor attempted to secure permission from NYSLA to use the labels on its beer products. Two months later, NYSLA rejected Bad Frog's application for brand label approval and registration pursuant to § 107-a(4)(a) of New York's Alcoholic Beverage Control Law. NYSLA stated that the slogan, "He's mean, green, and obscene," rendered the entire label obscene. In August of 1996, Bad Frog resubmitted its application to NYSLA, replacing the offensive slogan with the phrase, "Turning bad into good." In both applications, Bad Frog claimed that the frog's gesture implied "I want a Bad Frog beer" and was intended to promote peace, solidarity, and good will.

One month later, NYSLA rejected Bad Frog's second application, stating that the company's explanation of the frog's gesture was "ludicrous and disingenuous." The Authority also found that the slogan "He just don't care" and the gesture, which appeared near the label's health warning, jointly act to "foster a defiance" to the warning and found that the label itself "encourages combative behavior." NYSLA also expressed concerns about minors' exposure to the label in grocery stores and its potential to entice

minors to consume alcohol. Furthermore, NYSLA stated that "giving the finger" was an obscene gesture meaning "Fuck You" or "Up Yours," and was known to provoke violence. NYSLA stated that approving the label "would not be conducive to proper regulation and control and would tend to adversely affect the health, safety and welfare of the People of the State of New York."

District Court Told Bad Frog to Lose the Attitude

In October 1996, Bad Frog filed the present action in the district court, seeking to prevent NYSLA from barring the sale of Bad Frog beer under the disputed labels. The district court denied the motion for a preliminary injunction in December, finding that Bad Frog had not demonstrated a likelihood of success on the merits. In July 1997, the court granted summary judgment for NYSLA, holding that NYSLA's decision to reject the labels "appeared to be a permissible restriction on commercial speech" under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980). In addition, the court found that the Eleventh Amendment of the United States Constitution seemed to bar Bad Frog's state law claims.

It therefore declined to exercise supplemental jurisdiction over pendent state law claims.

Bad Frog Fights Back on Appeal

On appeal, Bad Frog raised a First Amendment challenge to NYSLA's decision to reject its label application, and several state law claims against NYSLA commissioners in their individual capacities. The brewery argued that the labels did not constitute commercial speech, but merely communicated a joke, and therefore should enjoy full First Amendment protection. NYSLA, on the other hand, contended that although the labels were entitled to some protection under the First Amendment, they should have been evaluated by the reduced standards afforded to commercial speech.

The Second Circuit reviewed a line of United States Supreme Court decisions to determine whether Bad Frog's labels constituted commercial speech, entitling them to only reduced First Amendment protection. The court then applied the Supreme Court's *Central Hudson* test to determine the governmental restrictions on commercial speech. Although the court recognized the two substantial state interests that NYSLA raised to support its rejection of Bad Frog's labels, it found that NYSLA's prohibition of the beer labels did not directly advance the asserted state interests. Furthermore, the court determined that the ban on the labels was more extensive than necessary to further the state interests. The court concluded that the brewery's First Amendment challenge to the State's prohibition of its beer labels entitled the

brewery to injunctive relief.

Bad Frog's Federal Claims

The court first examined whether it should abstain from deciding the federal law claims until the state courts had ruled on the state law claims. These state claims concerned regulations on the marketing and labeling of alcoholic beverages, enacted by NYSLA under authority granted by New York's Alcoholic Beverage Control Law. According to the regulations, NYSLA could ban signage displaying "any statement, design, device, matter, or representation which is obscene or indecent or which is obnoxious or offensive to the commonly and generally standard of fitness and good taste" inside stores and taverns licensed to sell alcohol. N.Y. COMP. CODES R. & REGS. tit. ix § 83.3 (1996). The regulations also allowed NYSLA to prohibit alcoholic beverage labels that could deceive the consumer.

The court found that NYSLA's actions raised several undecided state law issues. It noted that the *Pullman* abstention doctrine could be appropriate because Bad Frog's federal constitutional claim turned on an uncertain area of state law. *See R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Under the *Pullman* abstention doctrine, a federal court may exercise its discretion to restrain from deciding the case until a state court interprets an unclear question of state law. The federal court retains jurisdiction over the case, pending a prompt state court determination. Abstention is warranted if there is substantial uncertainty as to the meaning of a state law, and there is reasonable probability that the state court's clarification of the law

would negate the need for a federal constitutional ruling.

Although a state court decision on the extent of NYSLA's authority to promulgate regulations might render a ruling on Bad Frog's First Amendment claim by the federal court unnecessary, the Second Circuit has held that abstention should only be applied in rare and unique cases. *Pullman* abstention is inappropriate for First Amendment claims if the allegedly overbroad state statute is challenged facially for inhibiting protected speech. In this case, the appellate court found that abstention was even less appropriate because Bad Frog challenged the state statute's ban on a specific example of speech. Therefore, the court declined to abstain from deciding the present case because of the substantial delay Bad Frog would experience if forced to resolve its state law issues in a state forum before bringing its federal claims in federal court.

Beer Labels Constituted Commercial Speech

After finding the case inappropriate for *Pullman* abstention, the court considered whether Bad Frog's beer labels constituted commercial or noncommercial speech. If the labels constituted noncommercial speech, they would receive full First Amendment protection. However, if the labels attempted to impart commercial information, they would be assessed under the reduced standards for commercial speech. Bad Frog argued that the beer labels attempted to convey a joke rather than commercial information, and therefore deserved full First Amendment protection. NYSLA, on the other hand, contended that the

labels should receive only limited protection under the First Amendment as commercial speech.

The court reviewed a line of United States Supreme Court cases, which discussed the forms of commercial speech that were protected under the First Amendment. The court noted that past decisions had not clearly resolved the issue, and a considerable degree of uncertainty remained regarding the degree of protection afforded to commercial speech that does not convey information. Prior Supreme Court cases held that the First Amendment did not protect commercial speech, including advertisements which merely proposed a commercial transaction. Subsequent cases created uncertainty as to the forms of commercial speech that were entitled to protection.

Finally, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court held that speech which merely suggested a commercial transaction did enjoy some First Amendment protection. Furthermore, the Court had occasion to address whether speech conveying minimal commercial information received any protection. In *Friedman v. Rogers*, 440 U.S. 1 (1979), the Court did not grant full First Amendment protection to a company trade name. Although the trade name suggested a commercial transaction and was a form of commercial speech, the trade name did not communicate information about the product until consumers attached meaning to it through brand association.

In analyzing the Supreme Court cases, the court in the present case determined that it was unclear

whether *Friedman* intended to remove trademarks from the types of commercial information protected by the First Amendment. Since *Friedman*, the Supreme Court has not expressly clarified whether logos and slogans, which convey no information but propose a commercial transaction, are protected.

To resolve the uncertainty in the case at hand, the Second Circuit reviewed *Posadas De Puerto Rico Association v. Tourism Co.*, 478 U.S. 328 (1986), in which casino advertising constituted commercial speech. In that case, instead of analyzing whether the advertisements conveyed commercial information, the Court examined whether the advertisements proposing a commercial transaction were allowed First Amendment protection. In its analysis, the Court applied the *Central Hudson* test for commercial speech protection.

The court in the present case found that the *Posadas* opinion supported the grant of limited First Amendment protection to trademarks. The court determined that the minimal information on Bad Frog's labels proposed a commercial transaction, and served to identify the beer as a product of the brewery, similar to a trademark. Therefore, the court found that the labels constituted commercial speech and should receive reduced First Amendment protection.

Bad Frog's final argument in favor of full protection was that its labels combined inseparable elements of commercial and noncommercial speech. According to the brewery, the labels proposed not only a commercial transaction, but also they imparted a political or social commentary. Bad Frog

argued that the court should have treated the entire label as fully-protected speech because the noncommercial message could not have been separated from the commercial speech.

The court rejected Bad Frog's argument, finding that the label's minimal amount of social commentary did not convert its commercial message into noncommercial speech. The court looked to *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), in which the Supreme Court used three factors in distinguishing between commercial and noncommercial speech: (1) whether the speech is an advertisement; (2) whether the speech refers to a particular product; and (3) whether there is an economic motive behind the speech. The Court held that although none of the factors were definitive, speech which incorporated all three factors was probably commercial. Finding all of the factors present in Bad Frog's labels, the court in the present case determined that the labels constituted commercial speech entitled to reduced First Amendment protection.

Frog Passed the Central Hudson Test

In analyzing NYSLA's rejection of the beer labels, the court applied the commercial speech standards set forth by the Supreme Court in *Central Hudson*. In that case, the Court developed a four-part test to determine whether commercial speech was protected by the First Amendment. First, the speech must concern "lawful activity and not be misleading." Next, the asserted state interest must be substantial. The court then must determine whether

the governmental restriction directly advances the substantial state interest. Finally, the regulation of speech should be narrowly tailored to meet the governmental interest, and may not be "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

The Second Circuit agreed with the district court that the labels satisfied the initial inquiry of *Central Hudson* because the consumption of alcohol was legal and the advertising labels were not deceptive. Furthermore, NYSLA satisfied the second prong by advancing two substantial state interests to support its decision to reject Bad Frog's labels. NYSLA claimed that the State had an interest in "protecting children from vulgar and profane advertising," and "in acting consistently to promote temperance." The court agreed with the district court that these two interests were substantial under the *Central Hudson* analysis.

Under the third prong of the *Central Hudson* inquiry, the court analyzed whether the prohibition of Bad Frog's labels directly advanced the two State interests. While the court acknowledged that a complete governmental ban on "vulgar and profane advertising" throughout New York was not necessary to survive the analysis, it stated that a single prohibition making a limited contribution to further the state's interest would not be material.

The court disagreed with the district court's analysis of the third prong. The lower court had adopted a narrow view, merely requiring NYSLA to prove that the ban on Bad Frog's labels would limit the exposure of children to the vulgar display on the label. The court of appeals, however, stated that in

order for NYSLA to demonstrate that it was materially advancing the asserted state interest in protecting children from obscenity, the state, as a whole, must attack the problem with substantial effort. Thus, the government must demonstrate that its ban on Bad Frog's labels was part of a substantial effort to shield children from vulgar displays.

The court noted that vulgar displays, such as comic books, were widespread throughout contemporary society, but there was minimal governmental regulation limiting children's exposure to vulgarity. Although NYSLA itself only possessed limited power to ban alcohol marketing schemes displaying vulgarity, the state, as a whole, did not attempt to shield children from vulgar displays in other realms. The court stated that:

[i]f New York decides to make a substantial effort to insulate children from vulgar displays in some significant sphere of activity, at least with respect to materials likely to be seen by children, NYSLA's label prohibition might well be found to make a justifiable contribution to the material advancement of such an effort, but its currently isolated response to the perceived problem, applicable only to labels on a product that children cannot purchase, does not suffice.

Thus, the court rejected the district court's finding that NYSLA's prohibition of Bad Frog's label materially advanced the substantial state interest in protecting children from profane advertising.

Next, the court examined

NYSLA's second asserted state interest, the promotion of temperance. The State argued that the insulting gesture and the slogan "He just don't care," placed in close proximity to the Surgeon General's health warning, encouraged consumers to ignore the health warning. In addition, the State contended that the labels would entice minors to defy authority and illegally consume alcohol. The court, however, found the arguments speculative. Under the *Central Hudson* framework, the State did not satisfy the third criterion because it failed to establish that the ban on Bad Frog's labels materially advanced the government's interest in temperance.

Finally, the court only examined whether NYSLA's ban on the labels was narrowly tailored to serve the state's interest in shielding children from displays of vulgarity. It found that complete prohibition of Bad Frog's labels was more extensive than necessary to advance the asserted governmental interest. In rejecting the district court's finding of narrow tailoring, the court emphasized the availability of numerous alternatives to a complete ban on the labels. The court was persuaded by Bad Frog's suggestions that it could refrain from over-the-air advertising and billboard displays and limit its marketing to point-of-sale locations. In addition, Bad Frog offered to segregate its beer products in grocery stores and convenience stores to limit children's exposure to the label. The court found that NYSLA failed to consider these less restrictive alternatives to a complete prohibition of Bad Frog's labels, and therefore, did not withstand the final criterion.

Due to the length of time that NYSLA's unconstitutional ban on Bad Frog's labels had been in effect, the court directed the district court to enjoin NYSLA from rejecting the company's label application. However, the court denied Bad Frog's claims for damages against the three NYSLA commissioners because it found that the commissioners' decision to reject Bad Frog's application was not unreasonable in light of the district court's findings. Therefore, the NYSLA commissioners were entitled to qualified immunity.

Bad Frog's State Law Claims

Bad Frog raised several state law claims against the NYSLA commissioners in their individual capacities under the New York State Constitution and the Alcoholic Beverage Control Law. In denying

Bad Frog's request for a preliminary injunction, the district court found that the Eleventh Amendment barred the claims. In its opinion granting summary judgment in favor of NYSLA and dismissing Bad Frog's federal claims, the district court declined to exercise supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(c)(3). The appellate court, disagreeing with the district court, found that the Eleventh Amendment did not bar all of Bad Frog's state law claims. However, due to the numerous novel and complex state law issues raised, the court of appeals declined to exercise supplemental jurisdiction.

Bad Frog Hits the Shelves With Finger Held High

In sum, Bad Frog's beer labels enjoy commercial speech protection

under the First Amendment. Under the *Central Hudson* framework, the State unconstitutionally banned the brewery's labels. Although the government's interests in insulating children from vulgarity and promoting tolerance were substantial, the prohibition on Bad Frog's labels did not materially advance these interests. Furthermore, the complete ban on the labels was more extensive than necessary to accomplish the state's interests. Therefore, the Second Circuit reversed the grant of summary judgment in favor of NYSLA, and directed the district court to enjoin NYSLA from prohibiting Bad Frog's labels.

CLR

Court Established Accrual Rule for Keyboard Users Afflicted with Repetitive Stress Injury

By Michael J. Calhoun

In *Blanco v. American Telephone and Telegraph Co.*, 689 N.E.2d 506 (N.Y. 1997), the Court of Appeals of New York ruled on a certified question that the cause of action for computer keyboard users who suffer from repetitive stress injury ("RSI") accrues at the onset of the user's symptoms or latest use of the keyboard, whichever occurred first.

Common Issues Raised By Various Repetitive Stress Injury Cases

RSI is a latent injury affecting musculo-skeletal tissue. Activities that involve repeated movements and exertions of musculo-skeletal tissue, such as playing video games or operating a jackhammer, cause

RSI. Recently, however, many computer keyboard users have been afflicted by this disorder. Carpel tunnel syndrome, the predominant type of RSI involves "compression of the median nerve as it passes through the wrist between the flexor tendons and the transverse carpal tunnel ligament." Recent widespread use of computer keyboards accounts for the