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Tenth Circuit Holds That Statute Regulating Alcohol Content Advertising Does Not Necessarily Violate the First Amendment

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Recent Cases

Tenth Circuit Holds That Statute Regulating Alcohol Content Advertising Does Not Necessarily Violate The First Amendment

In *Adolph Coors Company v. Brady*, 944 F.2d 1543 (10th Cir. 1991), the United States Court of Appeals for the Tenth Circuit held that alcohol advertising and labeling are commercial speech protected under the First Amendment and, when restrained, require a balancing between the interests of the public and the government.

Facts

In 1987, Adolph Coors Company ("Coors") requested approval from the Bureau of Alcohol, Tobacco, and Firearms ("Bureau") for labels and advertisements that would disclose the alcohol content of Coors and Coors Light beer. The Bureau denied Coors's request because the Federal Alcohol Administration Act ("the Act"), 27 U.S.C. 205(e)(2) and (f)(2), prohibits labels or advertisements that disclose the alcohol content of malt beverages unless otherwise authorized by state law.

District Court's Opinion

Coors sued the Bureau and the United States Treasury in the United States District Court for the District of Colorado. Coors claimed the Act violated its rights under the free speech clause of the First Amendment because the Act prohibited Coors from disclosing truthful information regarding the alcohol content of its products. Coors requested that the district court overturn the Bureau's disclosure denial and declare 205(e)(2) and (f)(2) of the Act unconstitutional.

The Treasury admitted that these sections were unconstitutional under the First Amendment. Consequently, the Speaker and Bipartisan Leadership Group of the

United States House of Representatives ("the House") intervened in the action to defend the constitutionality of the Act.

The district court concluded that the sections constituted an illegal restraint on commercial speech under the First Amendment. In addition, the district court found 205(e)(2) and (f)(2) of the Act unconstitutional and barred the Bureau from enforcing the sections. The Treasury and the House appealed the decision to the United States Court of Appeals for the Tenth Circuit.

Tenth Circuit's Opinion

The Tenth Circuit reversed the district court's ruling because it found a factual dispute existed as to the issues. In its determination of constitutionality, the appellate court used a four-part test outlined by the United States Supreme Court in *Central Hudson Gas v. Public Serv. Comm'n.*, 447 U.S. 557 (1980). This test applies to regulations that limit commercial speech and which allegedly violate the First Amendment. The *Central*

Hudson test states that a statute is constitutional if: (1) the expression being regulated is protected by the First Amendment; (2) the government interest in the regulation is substantial; (3) the regulation directly advances this interest; and (4) the regulation is not overly restrictive.

First, the appellate court noted that the Supreme Court has recognized advertising and product labeling as commercial speech. Under the first part of the *Central Hudson* test, this speech is protected under the First Amendment if it involves lawful activity and is not misleading. The appellate court stated that, because the proposed advertising and labeling involved a legal activity under federal law and was not misleading, it was protected under the First Amendment.

The second part of the test requires that the government's interest in regulating the disclosure of alcohol content in advertising and product labeling is substantial. The appellate court determined that the government had a substantial and legitimate interest in the regulation because it prevented unfair competition and protected the consumer.

In finding a substantial government interest, the court accepted the government's argument that a prohibition on the disclosure of the alcohol content would prevent "strength wars" in the brewing industry. In other words, the statute alleviated pressure on brewers to produce beer on the basis of an increased alcohol content. Additionally, the appellate court found Coors's admission that it wanted to display the alcohol content of its product to overcome the product's image of being a weak beer illustrative of this concern. Thus, the court maintained that a restriction on disclosure would result in the production of lower alcohol content beers, thereby protecting both the industry and the consumer.

Next, the appellate court determined that the district court had not addressed the question of

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Furthermore, of 200,000 alleged safety defects reported to the National Highway Traffic Safety Administration's safety hotline, only 370 complaints concerned air bags.

Finally, since 1987, there have been recalls of only 10,543 air bags compared to 4.7 million seat belts. All of these statistics indicate a spectacular track record of reliability of air bags.

whether the regulation directly advanced the government's interest. The lower court did not have the benefit of a recent Supreme Court case that provides the framework for determining whether a regulation directly advances the government's interest. The Tenth Circuit stated that on remand, the district court must determine whether the government demonstrated a connection between its means, regulating alcohol content advertising, and its interest, preventing strength wars.

Finally, the appellate court stated that if the district court determined that the government's interest in preventing strength wars was directly advanced by the regulation, then it must determine whether the regulation was more extensive than necessary to serve this interest. Previously, the district court concluded that the government could have chosen a much less restrictive alternative, and therefore, the regulation did not satisfy the final element of the *Central Hudson* test. The appellate court maintained, however, that the district court misinterpreted the analysis of this final element by using an incorrect standard. The appellate court stated that the correct question was whether the regulation was proportionate to the interest being protected; the lower court should have measured the public's interest in disclosure against the government's interest in preventing strength wars to determine whether the regulation was overbroad. Therefore, the Tenth Circuit remanded the case to the district court for a redetermination of these last two factors.

Barbara L. Gallagher

Reference To American Arbitration Association Rules In Home Warranty Contract Makes Arbitration Decision Binding

In *Rainwater v. National Home Insurance Co.*, 944 F.2d 190 (4th

Cir. 1991), the United States Court of Appeals for the Fourth Circuit held that an arbitration section of a home warranty contract provided for final and binding arbitration since it was written pursuant to American Arbitration Association ("Association") rules.

Background

When purchasing his home, Charles Philip Rainwater ("Rainwater") bought a Home Buyers Warranty Contract with National Home Insurance Company ("National") as the underwriter. Included in the warranty's coverage were certain structural defects that must first occur after the warranty was purchased. Another section of the warranty provided for arbitration of disputes over National's coverage decisions. The warranty stated that the Association would conduct any arbitration proceedings according to the Association's rules. Also, the disputing parties' participation in arbitration was required before either party could sue.

Within one year of buying his house, Rainwater found a crack in the foundation and filed a claim under the warranty. National denied coverage, deciding that the foundation crack first occurred prior to Rainwater's purchase of the warranty. In response, Rainwater requested arbitration as provided for in the warranty contract.

After deciding that the foundation crack had first occurred during the warranty period and that it was a qualified structural defect under the warranty, the arbitrator ordered National to repair the foundation within sixty days. Following Association rules, National appealed the award. The arbitrator's decision was upheld.

National then sued in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that it was not bound by the arbitration decision. The district court dismissed National's suit, confirmed the arbitration award, and in addition, awarded Rainwater \$206,500 for reasonable costs of repair. National appealed to the United States Court of Appeals for the Fourth Circuit.

Fourth Circuit's Decision

The Fourth Circuit first recognized the longstanding federal policy of resolving any doubts concerning the scope of arbitrable issues in favor of arbitration. The court also noted a presumption that parties who agree to arbitration intend it to be binding. This policy of favoring arbitration exists, the court stated, because arbitration is an efficient and inexpensive dispute resolution process that does not take up valuable court time.

In light of this policy, the Fourth Circuit addressed whether Rainwater and National had agreed that the arbitration decision would be binding or whether it would merely serve as a condition precedent to bringing litigation. This issue was important because the court's jurisdiction to confirm the arbitration award stemmed from the parties' agreement that the award was final.

Rainwater argued that the award was final because the arbitration provision of the warranty contract stated that Association rules would apply to the arbitration process. Rule 26(c) of the Association regulations provides that unless otherwise provided by law or the applicable document, the parties involved shall be deemed to have agreed that any court having jurisdiction may enter judgment confirming the arbitration award. Rainwater contended that by adopting Association rules, National agreed that a court could confirm the arbitration award and thus impliedly agreed that the award was final.

The Fourth Circuit agreed, stating that other courts, including the Seventh and Tenth circuits, had found that if an arbitration agreement referred to Association rules and regulations the arbitration was binding. The Fourth Circuit found that the lack of explicit agreement to be bound by arbitration was inconsequential because reference to Association rules, which do provide for such a binding effect, implied such agreement.

National argued that the court first must determine if the warranty's arbitration provision stipulat-

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