U.S. Department of Justice

Office of the Associate Attorney General

EC2082

The Associate Attorney General

Washington, D.C. 20530

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Honorable John C. Stennis
President Pro Tempore
United States Senate
Room SR-205
Russell Senate Office Building
Washinton, D.C. 20510

Dear Senator Stennis:

I wish to advise you of the decision of the Department of Justice not to defend the constitutionality of the provisions of 2 U.S.C. § 205(e) and (f), which preclude the labeling and advertising of the alcoholic content of beer. In Adolph Coors Co. v. James Baker, et al., C.A. No. 87-Z-977 (D.Col.), plaintiff has alleged that these restrictions violate the Free Speech clause of the First Amendment. We have reviewed this matter and determined that the labeling and advertising restrictions are unconstitutional and, therefore, submit this letter pursuant to the continuing authority of § 21 of Public Law 96-132, 93 Stat. 1049-50.[1]

The restrictions of § 205 were enacted shortly after the repeal of Prohibition to curb false and abusive claims of alcoholic content by brewers. See, e. g., H. Rep. 1542, 74th Cong., 1st Sess. at 12-13 (1935). While these proscriptions may have passed constitutional muster under the First Amendment as then interpreted by the Supreme Court, we believe that the restrictions do not survive the test for regulation of commercial speech now applied by the Supreme Court. See, e. g., Central Hudson Gas & Elec. Co. v. Public Service Com'n, 447 U.S. 557, 563-4 (1980); Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, ___ U.S. ___, 106 S.Ct. 2968 (1986).

A four-part test is applied to the regulation of commercial speech. The courts will first determine whether the speech is protected by the First Amendment, i. e., whether it is related to lawful activity and not misleading. Truthful advertising of the

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[1] Section 21 requires the Attorney General to notify Congress of decisions of this type. Both the Attorney General and the Deputy Attorney General have recused themselves from this matter.

alcoholic content of beer meets this standard. Next, the courts will consider whether the government interest is substantial and whether that interest is furthered by the regulation. Assuming that the advertising is truthful, as it must be to gain First Amendment protection, it is difficult to see how the interest of preventing deceptive and abusive advertising practices is furthered. Even assuming that the advertising and labeling restrictions could survive examination under these factors, they do not pass muster under the final criterion, whether the regulation is more extensive than necessary to serve the asserted interest. Less restrictive alternatives, such as regulating the labels and advertisements for accuracy, would achieve the ends sought in a less restrictive manner.[2]

We are aware of the position taken by some that these restrictions serve to prevent escalating alcoholic content of beers by competitive brewers. Regulatory alternatives less restrictive of First Amendment rights remain available, such as restricting the type of statements regarding alcoholic content that could be made. Moreover, arguments justifying § 205 as maintaining beer as the alcoholic beverage of moderation run the serious risk of stimulating its consumption and are contrary to the purpose of lowering alcoholic content.

Further, in light of other provisions of § 205, it is difficult to consider other justifications for the advertising and labeling restrictions placed on beer alone. Cf. Bolger v. Youngs Drug Products, 463 U.S. 60, 71 (1983). Other provisions of § 205 expressly require the disclosure of the alcoholic content of distilled spirits and many wines. Thus, we cannot articulate a rationale based on the health and social costs of alcohol abuse because the same section requires the disclosure for more potent spirits.

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[2] It should be noted that the Supreme Court's decision in Posadas displays a greater willingness to defer to legislative judgments regarding the effectiveness of a particular restriction in achieving legislative goals and the relative ineffectiveness of less restrictive alternatives. Assuming that this analysis is not a unique one applied only to that case, the extra regulatory burden imposed on beer makers cannot be justified inasmuch as Congress elected to prevent abusive practices for other beverages through compelled disclosure of alcoholic content. Instead, § 205's restrictions on beer can only be seen as a product of their time and as legislative objectives obtainable in less intrusive ways.

In short, it is our view that the restrictions on the labeling and advertising of the alcoholic content of beer are not constitutional and we will so advise the district court.

Sincerely,

STEPHEN S. TROTT
Associate Attorney General

Enclosure