

Ninth Circuit Opinion Calls into Question Constitutionality of California Tied-House Laws

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On January 7, 2016, the U.S. Court of Appeals for the **Ninth Circuit** issued an [opinion](#) in **Retail Digital Network, LLC v. Appelsmith**, overruling longstanding Ninth Circuit precedent concerning the legality of certain restrictions on alcohol beverage advertising under the *First Amendment* and opening the door to part of California's tied-house scheme potentially being declared unconstitutional. The case concerns the legality of sections of California's tied-house laws, California Business and Professions Code Section 25503(f)-(h), which prohibit manufacturers and wholesalers (and their agents) from giving anything of value to retailers in exchange for advertising their products. Retail Digital Network, LLC (RDN), which installs advertising displays in retail stores and contracts with parties to advertise their products on the displays, sought a declaratory judgment that Section 25503(f)-(h) violated the First Amendment after RDN's attempts to contract with alcohol manufacturers failed due to the manufacturers' concerns that such advertising would violate these tied-house provisions.

The district court found Section 25503(f)-(h) constitutional under a Ninth Circuit case from 1986, *Actmedia, Inc. v. Stroh*, in which the court upheld Section 25503(h). The *Actmedia* court applied the intermediate scrutiny test on commercial speech regulation articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York* (1980). The *Central Hudson* test looks at whether: (1) the speech is not misleading and concerns lawful activity; (2) the governmental interest justifying the regulation is substantial; (3) the regulation directly advances the governmental interest; and (4) the regulation is not broader than necessary to serve the governmental interest. RDN argued that subsequent Supreme Court decisions – *Rubin v. Coors Brewing Co.* (1995), *44 Liquormart, Inc. v. Rhode Island* (1996), and *Sorrell v. IMS Health, Inc.* (2011) – overrule *Actmedia*.

The Ninth Circuit determined that *Actmedia* is “clearly irreconcilable” with *Sorrell* – a difficult standard to meet. (The court did not find *Coors* or *44 Liquormart* to have undermined the reasoning of *Actmedia* as these cases involved complete bans on certain commercial speech, which Section 25503 is not.) *Sorrell* required “heightened judicial scrutiny” (rather than the intermediate scrutiny applied by the *Actmedia* court) of restrictions on non-misleading, content- or speaker-based commercial speech about lawful products.

Such heightened scrutiny may be applied using the *Central Hudson* test, the Ninth Circuit found, but the court must further focus on the consistency between the government's asserted interest under the second *Central Hudson* prong and the legislative purposes that "actually animated" the challenged law. In articulating its decision, the court noted that other federal circuit courts of appeal have agreed that *Sorrell* requires heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech.

The court reversed the lower court's grant of summary judgment to the California Department of Alcoholic Beverage Control (ABC) and remanded the case to the district court to apply heightened judicial scrutiny to the statute. Specifically, the court advised the lower court to consider whether the ABC has shown a real danger of paid advertising of alcohol beverages leading to vertical or horizontal integration under circumstances existing in the current market (and suggested that the legislative concerns at the time of Section 25503(f)-(h)'s enactment are no longer "an actual problem in need of solving"). The court also instructed the lower court to consider whether the ABC's concern is real in the circumstances of the case (where a third party, not a manufacturer or wholesaler, makes payments to retailers). The district court must consider whether the ABC has shown that Section 25503(f)-(h) "materially advances" its "goals of preventing vertical and horizontal integration and promoting temperance" (and suggested that the ABC has not). Finally, the district court must find, under the fourth *Central Hudson* prong, a fit between the legislature's goals and the means used to accomplish those goals (and suggested that a narrower approach may be possible to achieve the ABC's goals).

By remanding the case, the Ninth Circuit gives the district court the opportunity to independently determine the constitutionality of the relevant tied-house provisions after applying heightened judicial scrutiny consistent with this opinion. Nevertheless, based on the Ninth Circuit's reasoning, we believe it is highly likely that Sections 25503(f)-(h) will be found unconstitutional under the First Amendment.

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National Law Review, Volume VI, Number 8

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