

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

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Opinion No. 15-04

Content Restrictions on Outdoor Advertisements at Retail Beer Establishments

QUESTIONS

1. Does the Tenn. Code Ann. § 57-5-304(a) prohibition of outdoor signs and displays at beer retail establishments advertising brand names, pictures, numbers, prices, or diagrams relating to beer violate the First Amendment to the United States Constitution?
2. May an establishment that has a beer permit have one outdoor sign that displays a beer brand and logo?

OPINIONS

1. Tenn. Code Ann. § 57-5-304(a) is susceptible to a First Amendment challenge because it prohibits truthful and nonmisleading commercial messages about lawful products, its regulations do not directly advance the government's interest in preventing alcohol abuse, and because the government's interest in preventing alcohol abuse could be advanced by means that do not restrict protected commercial speech.
2. No. Pursuant to Tenn. Code Ann. § 57-5-304(a), an outdoor sign that displays a beer brand and logo is specifically prohibited unless the establishment qualifies as one of the exceptions under subsection (b).

ANALYSIS

1. Tenn. Code Ann. § 57-5-304(a) provides as follows:

No outdoor sign, advertisement or display that advertises beer may be erected or maintained on the property on which a retail beer establishment is located other than one (1) sign, advertisement or display which makes reference to the fact that the establishment sells beer but does not use brand names, pictures, numbers, prices, or diagrams relating to beer.

Tennessee Code Ann. § 57-5-304(a) restricts commercial speech, and its requirements are unambiguous, but it is not a total ban on commercial speech since

retail establishments are only prohibited from advertising beer on more than one outdoor sign on their own property. And, although retail establishments are also restricted in the information they can advertise, they may still advertise the beer they sell by brand and picture in other media or in other locations.

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const., amend. 1. The First Amendment “protects the dissemination of truthful and nonmisleading commercial messages about lawful products and services in order to ensure that consumers receive accurate information.” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 485 (1996).

The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See 44 Liquormart*, 517 U.S. at 489, n.1. A state may nevertheless “regulate commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices . . . if the regulation’s purpose is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.” *Id.* at 485. However, regulations that “entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be viewed with ‘special care.’” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566, n.9 (1980).

In *Central Hudson*, the Supreme Court established a four-part analytical framework for determining whether restrictions on commercial speech violate the First Amendment. The four-part analysis considers: (1) whether the expression is protected by the First Amendment; (2) whether the asserted governmental interest is substantial; (3) if both inquiries yield positive answers, whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest. *Id.* at 566.

Even though the § 57-5-304(a) ban is not a total ban, its restrictions on commercial speech are still subject to the *Central Hudson* analysis. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 588-89 (2001) (finding that regulations that prohibited outdoor advertising of smokeless tobacco or cigars within 1,000 feet of a school or playground violated the First Amendment). The United States Supreme Court has used the *Central Hudson* four-part test to strike down restrictions on alcoholic beverage labeling and advertising. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court struck down a federal law that prohibited brewers from disclosing the alcohol content of their beers on package labeling. The Court held that the law did not significantly advance the governmental interest in suppressing “strength wars” because it was inconsistent with other federal laws that allowed the identification of certain beers with high alcohol content as “malt liquors” and required disclosure of alcohol content on product labels. *Id.* at 488-89. Again applying the *Central Hudson* analysis, the Supreme Court also struck down a Rhode Island law banning advertising of prices of alcoholic beverages, finding that the law violated the

First Amendment and did not advance the state's interest in promoting temperance. *44 Liquormart*, 517 U.S. at 505-06.

It is the opinion of this Office that Tenn. Code Ann. § 57-5-304(a) is susceptible to a First Amendment challenge under controlling Supreme Court precedent because the statute prohibits the dissemination of “truthful and nonmisleading commercial messages about lawful products,” *44 Liquormart*, 517 U.S. at 485, the restrictions it imposes do not directly advance the government's substantial interest in preventing alcohol abuse and promoting public health and safety, and because the government's interest in preventing alcohol abuse could be advanced by means that do not restrict protected commercial speech. *Central Hudson*, 447 U.S. at 566.

It is unlikely that Tenn. Code Ann. § 57-5-304(a) would survive a First Amendment challenge when it is analyzed under the applicable four-part test established in *Central Hudson*. First, the speech prohibited by the statute is commercial speech that is protected under the First Amendment because it concerns lawful activity and is not misleading. *Id.*

Second, although the law does not explicitly state the government's rationale for the statutory restrictions on the protected speech, the interest generally advanced by such legislation is that of preventing alcohol abuse and promoting public health and safety pursuant to the state's police powers. *See, e.g., Lorillard*, 533 U.S. at 588-89 (outlining the health and safety dangers of alcohol). That interest is generally recognized as a substantial interest. *Id.*

The prohibition of speech protected by the First Amendment coupled with a substantial governmental interest triggers the third prong of the analysis: whether the regulation directly advances that governmental interest. It is doubtful that a court would find that the statute directly advances the government's interest in preventing alcohol abuse and promoting public health and safety because it is inconsistent with other laws and it is inconsistent with lack of regulation in analogous contexts. Retailers may still display the prohibited information in other ways, and there are statutory exceptions that allow the same information to be displayed in some other retail sales outlets. *See Central Hudson*, 447 U.S. at 566. For example, while beer retailers may not display the prohibited information on signs outside their establishments, they may display the very same information inside in the windows of their establishments where it may be seen from the outside, much as an outdoor sign would be seen. *See* Tenn. Alcoholic Beverage Commission Rules, ch. 0100-03-.06 (1978). In addition, the statute notably allows for the display of the restricted information upon request by a temporary beer permittee and allows exceptions for sports arenas, stadiums, and entertainment complexes. Tenn. Code Ann. § 57-5-304(b).

Tennessee Code Ann. § 57-5-304(a) targets only signs located on property outside retail establishments but leaves available many other means of conveying the

same information to potentially the same members of the public. These inconsistencies make it difficult to maintain the argument that the statute directly advances a government interest in preventing alcohol abuse and promoting public health and safety. *But see Midwest Media Prop., LLC v. City of Erlander, Ky*, 342 Fed. App'x. 133, 134 (6th Cir. 2009) (noting that a city may enact regulations on advertising signs related to a governmental interest in city aesthetics and traffic safety even absent a showing that those concerns in fact motivated the enactment of the regulations).

Fourth, the restrictions under Tenn. Code Ann. § 57-5-304(a) may be deemed more extensive than necessary to serve any state interest in public health and safety. *See Central Hudson*, 447 U.S. at 566. Indeed, in *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002), the Supreme Court invalidated a ban on advertising lawfully compounded drugs, holding that “if the Government could achieve its interest in a way that does not restrict speech, or that restricts speech less, the Government must do so.” Thus, if the state’s goal is to prevent alcohol abuse for public health and safety purposes, there are alternative forms of regulation that would accomplish this goal without restricting protected speech, such as deterring alcohol use by raising the price of alcoholic beverages via taxation or by developing educational campaigns that explain problems associated with alcohol consumption. *See, e.g., 44 Liquormart*, 517 U.S. at 507.

In sum, application of the *Central Hudson* analysis leads to the conclusion that Tenn. Code Ann. § 57-5-304(a) is vulnerable to challenge on First Amendment grounds.

2. According to the plain language of Tenn. Code Ann. § 57-5-304(a), the one permissible outdoor sign may only “make reference to the fact that the establishment sells beer.” Furthermore, the statute expressly prohibits any outdoor sign that displays a beer brand or a picture related to beer, which clearly includes a logo. *Id.* Thus, an establishment that has a beer permit may not have any outdoor sign that displays a beer brand and logo. However, the establishment may display the otherwise prohibited information if it qualifies as one of the listed exceptions under Tenn. Code Ann. § 57-5-304(b).

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