# Ninth Circuit Opens the Door to Relaxing Decades-Old Law Restricting Supplier-Paid Advertising in Retail Establishments

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*In a decision released on January 7, 2016,* Retail Digital Network LLC v. Jacob Appelsmith,[1] *the U. S. Court of Appeals for the Ninth Circuit overturned 29-year-old precedent set in* Actmedia Inc. v. Stroh,[2] *which held that those portions of California Business and Professions Code Section 25503 that prohibit alcoholic beverage suppliers and wholesalers from paying for the privilege of advertising at a retail establishment did not violate the First Amendment.*

In a decision with a potentially far-reaching impact, the court in *Retail Digital Network* applied recent U.S. Supreme Court jurisprudence to overturn 29-year-old precedent and require heightened scrutiny to a California trade practice statute prohibiting alcohol beverage suppliers and wholesalers from, directly or indirectly, giving anything of value to retailers for advertising their products.

*Retail Digital Network* involves an advertiser, Retail Digital Network, LLC ("RDN"), which seeks to operate as a non-licensed alcohol beverage industry advertising middleman. RDN installs liquid crystal displays in retail stores. It generates revenue by contracting with advertisers to display their products and services and pays each retail store a percentage of its advertising revenue. Litigation arose after RDN offered its services to alcohol beverage manufacturers who refused to do business out of fear that RDN's business model would violate California Bus. & Prof. Code section 25503 (f)-(h), which, among other things, forbids alcohol beverage manufacturers and wholesalers from, directly or indirectly, paying for the privilege of advertising at retail establishments.

In 2011, RDN filed suit in the U.S. District Court for the Central District of California seeking declaratory relief that section 22503 (f)-(h) is unconstitutional under the First Amendment. It also sought an injunction

[1] Case No. 13-56069, D.C. No 2:11-cv-09065-CBM-PJW.

[2] 830 F.2d 957 (9th Cir. 1986).

against the State's enforcement of the law. The State moved for summary judgement which the District Court granted pursuant to *Actmedia, Inc. v. Stroh*. *Actmedia* previously upheld section 25503 as consistent with the First Amendment after applying intermediate scrutiny to laws burdening commercial speech pursuant to *Central Hudson Gas & Electric Corp. v. Public Service Commission N.Y.*, 447 U.S. 557 (1980).[3]

RDN appealed, and on January 7, 2016, the Ninth Circuit reversed and remanded. In *Retail Digital Network*, the Ninth Circuit held that *Actmedia* is irreconcilable with a trio of subsequent Supreme Court decisions including *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion), and, most importantly, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). *Sorrell* modified the *Central Hudson* test by including a threshold inquiry into whether a challenged law that burdens non-misleading commercial speech about legal goods or services is content- or speaker-based. If it is, the challenged law is subject to heightened, rather than intermediate, scrutiny. Under heightened scrutiny, pursuant to *Sorrell*, *Central Hudson* remains the appropriate analytical framework but the government bears the burden of showing "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"[4] and that the challenged law "is drawn to achieve [the government's substantial] interest."[5] Because section 25503(f)-(h) is a content-based restriction on non-misleading commercial speech regarding a lawful good or service, the Ninth Circuit held that law must be subject to heightened scrutiny. Accordingly, the Ninth Circuit remanded on an open record for the District Court to apply heightened judicial scrutiny and determine, among other things, whether the government "has shown that there is a real danger that paid advertising of alcoholic beverages would lead to vertical or horizontal integration under circumstances existing in the alcoholic beverage market today,"[6] and, "whether the State has shown that section 25503(f)–(h) materially advances the State's goals of preventing vertical and horizontal integration and promoting temperance."[7]

Importantly, the Ninth Circuit expressed grave "skepticism regarding whether section 25503(f)–(h)'s burden on expression directly advances and is fit to achieve a permissible goal" of promoting temperance.[8]

Assuming the Ninth Circuit does not grant rehearing *en banc*, or that in the interim the State does not file a petition for certiorari with the U.S. Supreme Court, we must wait to see how the District Court will ultimately decide the constitutionality of section 25503(f)–(h) on remand. But the trial court must heed the Ninth Circuit's admonitions, and the decision on remand very well may open the door to aligning modern methods of alcohol beverage advertising with 21st century commerce, at least within the Ninth Circuit.

[3] The *Central Hudson* test asks: (1) whether the speech at issue concerns lawful activity and is not misleading; (2) whether the asserted government interest is substantial; and, if so, (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

[4] *Retail Digital Network*, at *17 (*citing Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

[5] *Id*. (*citing Sorrell*, 131 S. Ct. at 2667-68).

[6] *Id*., at *25.

[7] *Id*.

[8] *Id*., at *24, 25-26, 26-27.

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