

ORDINANCES

Sign Wars

by Devala A. Janardan, Associate Counsel

It's no secret that billboards make big money for their owners. Clear Channel Outdoor is a "global leader in the outdoor advertising industry, providing clients with advertising opportunities through billboards, street furniture displays, transit displays, and other out-of-home advertising displays."[1] In 2008, Clear Channel Outdoor reported revenues of $3.29 billion.[2] Even California Governor Arnold Schwarzenegger has considered collecting revenue for his state by selling space on the public "Amber Alert" signs that line California's freeway system.[3] All this potential revenue has resulted in an enormous headache and litigation for city attorneys across the country. Here's a review of two Ninth Circuit cases that have made recent headlines.

In one of its first rulings of 2009, the U.S. Court of Appeals for the Ninth Circuit decided *Metro Lights, LLC v. City of Los Angeles*.[4] Los Angeles had a longstanding practice of entering into contracts with private entities, which would build public structures (transit shelters) at their own expense in exchange for the exclusive right to advertise on the structures. One such arrangement concerned CBS, a company that agreed to install and maintain public facilities at city-owned transit stops in exchange for exclusive advertising rights on those facilities. The following year, the Los Angeles City Council adopted an ordinance that prohibited off-site signs, except when such signs were "specifically permitted pursuant to a variance, legally adopted specific plan, supplemental use district or an approved development agreement."[5] Metro Lights, LLC, was a company that owned and operated outdoor signs. In 2003, after it installed new off-site signs, it was cited for violating the ordinance. Metro filed suit against the City, arguing that the private contract with CBS undermined the City's purported grounds for enacting the ordinance. The district court agreed with Metro, stating "[t]he City cannot, on one hand, preclude [Metro] from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout [the City]."[6]

On appeal, the arguments centered around the test in *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980), a four-part inquiry to analyze the constitutionality of a restriction on commercial speech that included whether the restriction directly advanced the state interest involved, and whether it was more extensive than was necessary to serve that interest. Metro had argued that, by permitting the street furniture signs, but not other, similar signs, the City was underinclusive in protecting its interest in traffic safety and aesthetics. Metro also introduced a photograph showing two adjacent, identical signs – the only difference was that one was on a building, and one was on a bus shelter – and argued that, under the ordinance, one sign would be impermissible while the other was exempted. The Ninth Circuit disagreed with both arguments. The Supreme Court had upheld similar exceptions to a sign ordinance in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1980), and the claim that similar signs were treated differently under the law did not undermine the City's objectives; in fact, the ordinance would "halve the clutter on the street shown in the photograph."[7] In addition, the Ninth Circuit relied on *Metromedia*'s rationale "with its emphasis on deference to legislative judgment,"[8] and ruled that the law was not more restrictive than necessary to further the government's interest: the City could "silence speakers in general but permit them to bid for the right to speak on City-owned land, assuming that the speakers on the City-owned land [did] not undermine the goal of the City's prohibition."[9]

Since then, the Ninth Circuit has ruled in another sign case, *Maldonado v. Morales*.[10] Maldonado owned property along U.S. Highway 101, and applied to the California Department of Transportation (Caltrans) for a permit for a billboard with off-site advertising. The permit was refused on the ground that the California Outdoor Advertising Act (COAA) banned off-site advertising billboards along "landscaped freeways," which included Maldonado's land. When Maldonado used his land for a billboard with off-site commercial advertising, Caltrans sued him in state court for nuisance and obtained an injunction prohibiting such further use. Maldonado brought an action claiming that the COAA was overbroad, vague, and violated his equal protection rights, because a grandfathering clause allowed some off-site commercial billboards (those that existed in 1967, when the COAA was enacted).

The Ninth Circuit dismissed Maldonado's argument that the distinction between commercial and non-commercial speech was vague: the "settled law of this circuit [was] that the commercial/non-commercial and onsite/offsite distinctions [were] not unconstitutionally vague."[11] The law was also not overbroad, since "[t]he COAA [did] not ban all signs, or even nearly all signs, but only off premises, commercial billboards."[12] Maldonado's equal protection claims fared no better. The court applied intermediate scrutiny and found that the State's

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2003), available at http://totalcommunicator.com/vol1_4/audience_article_print.html (last visited March 25, 2009).
10. Mark Twain, Roughing It 257 (New American Library, ed. 1980) (1871).
11. Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 Ind. L.J. 1101, 1112 (1993).
12. Federal Judicial Center 2001, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 42 (Federal Judicial Center and National Institute for Trial Advocacy, eds., 2001).
13. United States. v. Williams, 657 F.2d 199, 203 (8th Cir. 1981).
14. Hinkle v. City of Clarksburg, 81 F.3d 416, 424 (4th Cir. 1996); Fusco v. General Motors Corp., 11 F.3d 259, 264 (1st Cir. 1993); Gilbert v. Cosco, Inc., 989 F.2d 399, 402 (10th Cir. 1993).
15. *Hinkle*, 81 F.3d at 425; Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1088 (10th Cir. 1994).
16. *Hinkle*, 81 F.3d at 425.
17. Fed. R. Evid. 106.
18. Nicole J. DeSario, *Merging Technology with Justice: How Electronic Courtrooms Shape Evidentiary Concerns*, 50 Clev. St. L. Rev. 57, 66 (2003).
19. Federal Judicial Center 2001, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 191-96 (Federal Judicial Center and National Institute for Trial Advocacy, eds., 2001).
20. Fed. R. Evid. 611(c) and 602.
21. Fed. R. Evid 402 provides, in part, that "[a]ll relevant evidence is admissible, except as otherwise provided. ... Evidence which is not relevant is not admissible."
22. Fed. R. Evid. 802, 803, 804, 901, and 902.
23. Fed. R. Evid 703.
24. United States v. Barefoot, 952 F.2d 397 (Table) (4th Cir. 1991) (per curiam); United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), *cert.* denied, 423 U.S. 1052 (1976); United States v. Possick, 849 F.2d 332, 339 (8th Cir. 1988). ML

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instead of s. 90(1)(c) ("labour relations or other employee relations") to close the meeting, and whether the report was distributed "as soon as practicable and possible." However, because of the deference the court was required to give to the Board in relation to its own procedure, those defects alone were "not sufficient at this stage to warrant intervention." That was not the case with the remaining procedural issues – that the matter was raised without prior notice and an opportunity to investigate and respond. The fundamental problem with the CRD's approach to disciplining its member was that he was "never given any specifics of the complaints that might permit a reasoned and structured response," and never given "any opportunity to consult counsel or even any reasonable opportunity to study and respond to the vague allegations. ... In that light, it is difficult to see how the petitioner's right to be heard was respected in any sense." The fact that other Board members and Bell had spoken to Barnett about his conduct, and Bell had cautioned him that his conduct would be raised at the next Board meeting, did not constitute notice in law. "Notice" required that the recipient be capable of appreciating that some specific conduct would be discussed and sanctions sought, and be able to come to the meeting fully prepared to answer the charges. The report at issue "contained nothing specific" and "appear[ed] to merely bandy about words like 'harassment' and 'intimidation' without more." Further, the Chair's comments indicated "not only a clear bias against" Barnett, but "also a complete disregard for any fair process." Because Barnett was denied reasonable notice and denied procedural fairness, the resolution was set aside. As this mooted his claim for a copy of the report, the court advised that he apply, as suggested, under the *Freedom of Information and Protection of Privacy Act*. The case is *Barnett v. Cariboo Regional District*, 2009 BCSC 471 (B.C.S.C. Apr. 08, 2009). ML

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interest was substantial: banning new offsite billboards promoted traffic safety and reduced blight, even if all billboards were not eliminated; further, the State had a significant financial interest in allowing grandfathered billboards to stay, as otherwise it would have to pay just compensation to the billboard owners. In any event, Maldonado purchased the property in the 1990's, so he was not similarly situated to the grandfathered landowners.

The remainder of 2009 may provide equally active for billboard litigation in the Ninth Circuit. In March, a federal judge in California found that the City of Los Angeles had violated an injunction by refusing the opportunity for a billboard company to seek permits for new "supergraphic"[13] signs. As 2009 continues, there is no doubt that cities around the country will have to continue to do battle in sign wars.

Notes

1. Clear Channel Outdoor, Inc., Q4 2008 Earnings Report (2008), at http://www.clearchanneloutdoor.com/assets/downloads/pdfs_corp/CCO_Q4_2008_Release.pdf.
2. *Id.*
3. Patrick Mcgreevy, *Schwarzenegger Considers Selling Ads on Freeway Signs*, LATimes.com, Sept. 24, 2008 at http://articles.latimes.com/2008/sep/24/local/me-signs24.
4. 551 F.3d 898 (9th Cir. 2009).
5. Los Angeles, Calif. Municipal Code, § 91.6205.11 (2004).
6. Metro Lights, L.L.C. v. City of Los Angeles, 488 F. Supp.2d 927, 947 (C.D. Cal. 2006).
7. 551 F.3d at 910.
8. *Id.*
9. *Id.* at 914.
10. 556 F.3d 1037 (9th Cir. 2009).
11. *Id.* at 1045.
12. *Id.* at 1046.
13. Phil Willon, *Judge's ruling is a setback to L.A.'s efforts to combat supergraphics*. Los Angeles Times, Mar. 16, 2009 at http://www.latimes.com/news/local/la-me-supergraphics17-2009mar17,0,3230970.story. ML