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## First Amendment: Ordinance Requiring Large Warnings in Billboards Promoting Sugary Drinks is Compelled Speech and Unduly Burdensome

## *American Beverage Association v. City and County of San Francisco*, no. 16072/16073 (9th Cir. Jan 31, 2019).

**An ordinance requiring that 20% of an outdoor advertisement for sugary beverages must be devoted to a prescribed warning about dangers of sugar has been enjoined; with the Circuit finding that San Francisco failed to demonstrate the need for compelling that such a large percentage of the ad be so utilized.**

In June 2015, the City and County of San Francisco ("San Francisco") enacted an ordinance ("Ordinance") requiring that that advertisements for certain sugar sweetened beverages ("SSB") include the following statement:

> WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco. City & Cty. of

S.F., Cal., Health Code art. 42, div. I, § 4203(a) (2015).

The Ordinance defines SSB as "any Nonalcoholic Beverage sold for human consumption, including, without limitation, beverages produced from Concentrate, that has one or more added Caloric Sweeteners and contains more than 25 calories per 12 ounces of beverage;" excluded are milk, plant-based milk alternatives, natural fruit and vegetable juices, infant formulas, and supplements.

An "SSB Ad" covers "any advertisement, including, without limitation, any logo, that identifies, promotes, or markets a Sugar-Sweetened Beverage for sale or use that is any of the following: (a) on paper, poster, or a billboard; (b) in or on a stadium, arena, transit shelter, or any other structure; (c) in or on a bus, car, train, pedicab, or any other vehicle; or (d) on a wall, or any other surface or material." However, the Ordinance does not include advertising in or on: periodicals; television; electronic media; SSB containers or packaging; menus; shelf tags; vehicles used by those in the business of manufacturing, selling, or distributing SSBs; or logos that occupy an area of less than 36 square inches.

The Ordinance also governs the form, content, and placement of the warning on SSB Ads, and requires that the warning occupy at least 20% of the advertisement and be set off with a rectangular border. I§ 4203(b).

San Francisco's stated purpose in requiring the warning is, among other reasons, to "inform the public of the presence of added sugars and thus promote informed consumer choice that may result in reduced caloric intake and improved diet and health, thereby reducing illnesses to which SSBs contribute and associated economic burdens." Id. § 4201. Failure to comply with the warning requirement can result in administrative penalties imposed by San Francisco's Director of Health. Id. § 4204(a).

Various outdoor advertising entities sued to enjoin implementation of the Ordinance. The district court denied their motion, finding no likelihood of success because the warning was not misleading, did not place an undue burden on Plaintiffs' commercial speech, and was rationally related to a substantial governmental interest--but the court stayed implementation of the Ordinance pending interlocutory appeal. A three-judge panel of the Ninth Circuit reversed the district court; the Circuit then ordered that the case be reheard en banc.

The Circuit's first task was to determine what level of scrutiny applies-two precedents provided differing standards:

> Under *Central Hudson*, the government may restrict or prohibit commercial speech that is neither misleading nor connected to unlawful activity, as long as the governmental interest in regulating the speech is substantial. 447 U.S. at 564. The restriction or prohibition must "directly advance the governmental interest asserted," and must not be "more extensive than is necessary to serve that interest." Id. at 566. Under *Zauderer* . . . , the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is "reasonably related" to a substantial governmental interest. 471 U.S. at 651.

The Circuit opted for the less restrictive *Zauderer* standard, and rejected the argument that *Zauderer* applies only to situations in which the government requires disclosures to prevent consumer deception, pointing out that the DC, Sixth and Second Circuits have all adopted a similar interpretation of Zauderer: "In short, we reaffirm our reasoning and conclusion in CTIA that Zauderer provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech-even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers."

Zauderer asks three questions about a compelled warning: whether it is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome. There is no required sequence to this inquiry, and the Ninth Circuit chose to analyze the last question first. Here, San Francisco had

not carried its burden in establishing why the border and 20% warning size requirements were necessary. In fact, the record showed that a smaller warning-half the 20% size-would accomplish San Francisco's stated goals: its own expert cited and discussed a study that examined a warning similar to that required by the Ordinance, which used warnings covering only 10% of the image. The expert concluded that the cited study "provides empirical support that the message content and design of the San Francisco warning is associated [with] an improved understanding of health harms associated with overconsumption of SSBs and may reduce the purchase of SSBs."

Given that a 10% warning size would be effective, the court found that "therefore, the 20% requirement is not justified and is unduly burdensome when balanced against its likely burden on protected speech." The court did not opine whether a 10% rule-or greater-would necessarily be valid, only that San Francisco had not met its burden to demonstrate that the Ordinance was justified.

The remaining factors also favored an injunction. Having amply demonstrated a First Amendment compelled speech controversy requiring strict scrutiny analysis, the Plaintiffs established the likelihood of sustaining irreparable harm, the balance of hardships tipped in their favor, and there was a significant public interest in upholding First Amendment principles.

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## State-Created Danger: Routinely Placing Bus into Service with Mirror that Obscured Driver's View is Not Affirmative Act

### *K.W. v. Southeastern Pennsylvania Transportation Authority*, No. 18-1980 (3d Cir. Jan. 17, 2019).

**Finding that a municipal transit authority's failure to prevent a bus with a mirror that obscured the driver's view from being placed in service-which resulted in a pedestrian's death-was not an "affirmative act," the Third Circuit had upheld a lower court denial of liability on state-created danger grounds.**

Sheena White ("White") and K.W., her son ("K.W."), were crossing a street when they were struck by a Southeastern Pennsylvania Transportation Authority ("SEPTA") bus making a left turn. White died at the scene and K.W. suffered serious injuries. K.W.'s guardian filed suit against SEPTA, the bus maker, New Flyer of America, and the maker of the mirror-system of the bus, Rosco, Inc. ("Rosco"). As for SEPTA, the allegation was that "the size, shape, configuration, and placement of the Rosco driver-side mirror on the New Flyer buses created an unreasonable obstruction of the driver's view resulting in a high incidence of near or actual collisions with pedestrians during left-hand turns," and that, ultimately, by placing the bus in service on the day of the accident created a "substantial and unjustifiable risk that pedestrian-bus collisions would occur during left hand turning maneuvers at intersections." The claim was that this amounted to a substantive due process violation redressable via § 1983. The district court disagreed.

On appeal, the Third Circuit homed in on the fact that, generally, states do not bear the obligation to protect citizens from general hazards, but that the state-created danger theory provides an exception. The exception requires proving four elements: "(1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that

created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all."

The problem for the plaintiff was the fourth element of the test-plaintiff was essentially contending that SEPTA was at fault for *failing to act* to affirmatively improve pedestrian safety. The Court noted that a "failure to remediate an allegedly known risk does not constitute an affirmative act" under the fourth element of the test. The plaintiff, perhaps recognizing this, tried a slightly different tack and argued alternatively that placing the bus in service was a *change in the status quo* that was an "affirmative act." The Circuit, while acknowledging this alternative theory is a valid one, in this case said there was not a change in the status quo on the day in question. In fact, the mirror design at issue had been a source of grievance from drivers, the union, and a known accident factor since 2003--that history had led SEPTA to change driver directives and provide driver training specifically on the mirror issue. In effect, the "status quo" *was to put this bus in service with this particular mirror design, driven by a driver who had been educated as to concerns about the mirror* and doing so on the day of the accident was not an alteration. There was no state-created danger, which eliminated plaintiff's constitutional due process claim-thereby eliminating plaintiff's *Monell* claim as well.

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## Statutes: Interpretation Which Produces Result Inconsistent with "Manifest Intention" of Legislature Cannot Stand

### *White v. City of Watertown*, Case No. 2016AP2259 (Wis. Jan. 31, 2019).

**Where a statute provided that "towns" were required to determine fencing disputes among residents, a "city" could not avoid its responsibility to assume a similar adjudicative role; such a stance was contradicted by other definitional portions of the statute and was at odds with the legislative intent.**

Wis. Stat. § 90.03 requires "the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, [to] keep and maintain partition fences between their own and the adjoining premises . . . ." Foreseeing cost for the mandatory fences might cause disagreement, the Wisconsin legislature also included a detailed procedure for quantifying costs and allocating them amongst the adjoining landowners. The enforcement procedures set out that the "town" wherein the property lies has the responsibility to determine and allocate the cost of constructing and maintaining the fencing.

Dr. Stuart White and Janet White ("Whites") had just such a need for fencing and disagreed with their neighbor over cost, but when they repeatedly asked the City of Watertown ("City") to engage in the enforcement procedures to determine costs via statute, it responded that the enforcement procedures set out in the state law only applied to *towns and not cities.* Eventually the Whites filed suit seeking declaratory judgment on the issue and an injunction. The City answered with a motion to dismiss arguing the Whites failed to state a cause of action because Wis. Stat. §§ 90.10-90.12 does not authorize cities to administer the enforcement procedures for fencing between neighbors. The circuit court and the appeals court agreed with the Whites.

The City's argument in the Wisconsin Supreme Court was that Wis. Stat. §§ 90.10-90.12 only authorizes towns, not cities, to determine and allocate the cost of constructing and maintaining the fencing and it would be "unfaithful to the statutory text" to conclude that cities too had authority and would require adding new text to Chapter 90. After reciting standard rules of statutory construction, the Court went about considering the statutory subparts of Chapter 90 in total and "encounter[ed] municipality-specific statutory references almost immediately." The Court,

however, focused its attention on one statute neither party had highlighted: the definition of the person in the government unit tasked with managing the enforcement procedures - the "fence viewer" - and the Court found it remarkable that the statutes *defined this role for towns, villages, and cities.* While the Court found the City's argument "plausible" it ultimately found it "unsustainable" because the definition did more than just "identify who" may serve as a fence viewer, but instead identified *where* the fence viewers "perform their official functions." Town supervisors cannot be "fence viewers wherever they may roam, they are fence viewers only "in their respective towns.'" The same was true for villages and *cities.*

The Court did not hang the entire case on the definition, however, it got to its ultimate result with two rules of statutory interpretation dictated straight from the legislature. Wis. Stat. § 990.01 directs that "[i]n the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated *unless such construction would produce a result inconsistent with the manifest intent of the legislature*." It thus determined it must include cities with towns in the legislature's fence cost-sharing statutes to achieve the legislative intent. And, second, the Court pointed out that both parties and all courts had somehow overlooked Wis. Stat. § 990.01(42), which says that "'Town' may be construed to include cities, villages, wards or districts." The lower courts were affirmed, albeit on very different grounds.

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## Statutes of Limitation: Each Concert in a Series Constitutes a Separate Event for Purposes of Triggering a 120-Day Notice Requirement

### *The Yacht Club of Sister Bay Condominium Association, Inc. v. Village of Sister Bay*, Case No. 2017AP140 (Wis. Jan. 18, 2019).

**Reversing two lower tribunals, the Wisconsin Supreme Court has held that, in a nuisance noise action brought by a condominium against a municipality which operated an outside music venue, each individual concert was a separate event, meaning that the plaintiff's failure to object within 120 days after the first concert did not foreclose a claim.**

The Village of Sister Bay, Wisconsin ("Village") received an anonymous donation to build a performing arts pavilion and did so. The pavilion faced a condominium and, during performances, residents complained of noise so loud windows and personal items shook and that the shows went on past the public park hours in which it was located, to as late as midnight. The Yacht Club of Sister Bay Condominium Association, Inc. ("Yacht Club") served the Village with a written notice of injury pursuant to Wis. Stat. § 893.80(1d) in 2015, but the Village did not respond. The Yacht Club followed up by filing a case with causes of action for both private and public nuisance against the Village, seeking damages for loss of property value, substantial annoyance and invasion of its property rights, and seeking injunctive relief abating future nuisance-causing activities. The Village answered with a motion to dismiss, arguing that that the Yacht Club failed to serve the Village with a notice of injury *within 120 days* after the happening of the event giving rise to its claim. The state circuit court granted the Village's motion and denied the Yacht Club's argument that the Village was on notice of the claims from the initial notice before the lawsuit was filed was not prejudiced. The state court of appeal agreed with the circuit court on the untimely notice, making it the sole issue on appeal to the Wisconsin Supreme Court.

Wis. Stat. § 893.80(1d)(a), the notice of injury statute requires that "written notice of the circumstances of the claim" be served on the governmental subdivision "[w]ithin 120 days after the happening of the event giving rise to the claim . . ." and prohibits any actions against municipalities without such notice. The first issue was the Yacht Club's claim that each individual

performance was a different "event" giving rise to a separate claim and, therefore, its failure to provide notice within the 120 days after the *first event in 2014* was not fatal to its case. The Village argued the lower courts both had it right when they rejected this theory. The Supreme Court agreed with the Yacht Club, citing age-old precedence "that every continuance of a nuisance is, in law, a new nuisance."

The Court next tackled the Village's argument that if every performance was a new "event" that Wis. Stat. § 893.80(1d)(a) for notice applied to, as the Court held, then the its *E-Z Roll Off* precedent required ruling in its favor. *E-Z Roll Off* holds that allowing cases to proceed against municipalities when the plaintiff has not complied with the 120-day notice frustrates the purpose of the statute, which is to give municipalities time to compromise and budget for potential settlement or litigation. Allowing such suits, so the theory goes, would create limitless exposure for municipalities, in contravention of the legislature's intent.

The Supreme Court ruled against the Village for two reasons. First, the *E-Z Roll Off* case was specifically limited to the anti-trust context and was thus inapplicable to the nuisance case before it. Second, the Court said accepting the Yacht Club's argument in this case did not have the same effect of subjecting the Village to "limitless liability" as it did for the city at issue in *E-Z Roll Off.* The successful argument in *E-Z Roll Off* was that each payment made under a contract was an individual "event" and, since the same payment made every month lacks any unique characteristics, making each payment an "event" for purposes of the notice requirement subjected the municipality to never-ending liability - i.e. the 120-day period started over and over automatically every time a payment was made. In distinct contrast to the consistency and uniformity of payments made every month, concert performances have wide variability and lack uniformity, and that fact means that some performances may be a nuisance while others may not. Ergo, each performance may or may not give rise to a nuisance claim and therefore, the Court held, after each concert the Village faced liability for 120 days and no more. The Court thus found the Village was given enough information to budget for settlement or litigation resulting from any concert that is alleged to be a nuisance (the purpose and intent of the notice period was met) and found *E-Z Roll Off* did not apply, ruling against it.

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## Taxation: County is not "Vendor" Merely Because It Provides Low-Cost Camping Spots; "Business of Selling" and Profit Motive Required

## ***State of Wyoming Department of Revenue v. Board of County Commissioners of Johnson County*, S-18-0098 (Wyo. Jan. 15, 2019).**

**Affirming the Wyoming Board of Equalization, the state's Supreme Court has found that a county renting camping spots at a fairground for $25.00 per week was not "engaged in the business of selling" and lacked "a continuing effort to make a profit," meaning that it was not liable to collect sales and lodging taxes.**

Johnson County, Wyoming ("County"), through its Fair Board, provides sixty-nine (69) camp spots at the Johnson County Fairgrounds during the annual Johnson County Fair and Rodeo. The County charges $25.00 per site for the week and supplies the sites to exhibitors and their families. In 2016 the Johnson County Tourism Association inquired of the Department of Revenue ("Department") whether lodging taxes must be collected for the use and rental of the camp spots. The Department determined the Fair Board was a "non-exempt lodging vendor" statutorily obligated to collect and remit sales and lodging taxes. The Department assessed the County a $113.75 tax bill. On appeal the State Board of Equalization ("Board") reversed, holding the Fair Board was not a "vendor" under the law. The Wyoming Supreme Court affirmed.

Wyo. Stat. Ann. § 39-15-103 states that "every vendor shall collect the tax imposed by this article and is liable for the entire amount of taxes imposed." As for "vendor," it is defined as "any person engaged in the business of selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under this article." Wyo. Stat. Ann. § 39-15-101(a)(xv). The Board found the phrase "engaged in the business of selling" was the key language and that it required "a continuing effort to make a profit" or to be "engaged in a trade or business ... involved in the activity with continuity and regularity and ... [the] primary purpose for [which] must be for income or profit." The Court ultimately agreed that the income derived by the County was not for profit but used instead only to offset the operating costs. It noted the total per season was $1,725.00, indicating the $25.00 fee was not "for profit." Moreover, it agreed that the Department had the burden to show otherwise and that that it failed to meet that burden in the administrative hearing, meaning the administrative opinion from the Board was not unreasonable, contrary to law, or arbitrary or capricious. It reversed and held the County was not required to collect lodging tax on the camp spot fees it collected.

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## Taxation: Ninth Circuit Precedent is not "Clearly Irreconcilable" with Subsequent SCOTUS Ruling and Supports Finding that County May Tax non-Indian Lessees of Indian Trust Lands

### *Agua Caliente Band of Cahuilla Indians v. Riverside County*, No, 17-56003 (9th Cir. Jan. 28, 2019).

**In upholding the district court's decision that Riverside County may assess a possessory interest tax from non-Indian lessees of Indian trust lands, the Ninth Circuit has determined that its own precedents on the issue were phrased broadly enough to avoid an irreconcilable conflict with a later Supreme Court opinion.**

Riverside County, California ("County") sought to assess and collect a possessory interest tax ("PIT") from non-Indian lessees of Indian trust lands on the Agua Caliente Reservation. The Agua Caliente Band of Cahuilla Indians ("Agua Caliente") argued the tax could not be applied, but the district court granted summary judgment to the County holding it has the right to assess and collect the PIT. The issue on appeal was whether the Ninth Circuit's precedent upon which the district court based its decision was "clearly irreconcilable" the Supreme Court's *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) case decided nine years after the Ninth Circuit precedent.

The Court began by laying out *Bracker's* requirement that, in assessing the tax, the "court's inquiry should not be dependent on mechanical or absolute conceptions of state or tribal sovereignty" and that "courts engage in a particularized inquiry into the nature of the state, federal, and tribal interests at stake." The Circuit then went about assessing its PIT precedents in light of these directives. It started with its 1971 *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, which involved the same parties as the current case, and noted that even though it did not expressly engage in a particularized, interest-balancing inquiry, it did consider congressional intent behind legislation dealing with Indians and Indian lands, the PIT's legal incidence and its indirect economic effect on tribal and non-tribal members. Looking next to its 1976 *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 case, the Circuit characterized its analysis as a "more extensive analysis of the PIT's effect on federal and tribal interests, foreshadowing the later requirements of *Bracker*." With that, the Circuit held its PIT precedents were not "clearly irreconcilable" with *Bracker*. It did not note - though only after its

holding - that "clearly irreconcilable" is a high standard and that "some tension" is not enough. It thus affirmed the lower court's ruling, allowing the County PIT to be assessed and collected from non-Indian lessees of Indian trust lands.

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## Trials: Remand for Convicted Wife Murderer Who Was Prevented from Accessing Assets Outside Marital Estate for Defense Counsel

### *Rambo v. Administrator of the East Jersey State Prison*, No. 17-3156 (3d Cir. Jan. 30, 2019).

**The Third Circuit has vacated and ordered remand in a case where a New Jersey man who was convicted of murdering his wife had been deprived of access to assets outside the marital estate under the New Jersey Slayer Act.**

Roy L. Rambo ("Rambo") was charged for the murder of his wife in Warren County, New Jersey. After being charged - but before being convicted - the New Jersey Chancery Court froze all of Rambo's individual assets as well as his interest in the marital estate in response to a petition that was filed by Rambo's son in his capacity as administrator of his late mother's estate. Rambo chose to represent himself rather than take a public defender, since he could not access his (substantial) assets to pay for a private attorney. He was ultimately convicted and sentenced to 40 years in prison. Rambo filed a habeas petition in district court alleging that his murder conviction must be vacated because he was denied his Sixth Amendment right to his choice of counsel. The district court granted the habeas relief, reasoning that the New Jersey Chancery Court erred in freezing assets that Rambo owned *outside of the marital estate* (which were $300,000 and thus enough to provide funding for a private attorney). On appeal by the State of New Jersey (via the Warren County Prosecutor's Office) the Third Circuit vacated and remanded the case.

The district court used three cases in its ruling: *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 17 491 U.S. 600 (1989); *Luis v. United States*, 18 136 S. Ct. 1083 (2016). The Circuit pointed out that the last of those was inappropriately considered since it was not filed at the time of Rambo's habeas petition, leaving just two precedents to discuss. In *Caplin* the Supreme Court held that a federal statute authorizing *pretrial* forfeiture of property acquired as a result of drug trafficking without any exemption for property that could be used to pay defense counsel did not violate the Sixth Amendment, since the "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney . . . ." In *Monsanto* the Supreme Court held freezing certain assets that the Government alleged a defendant acquired as a result of a criminal enterprise was proper because it was not appropriate to let a defendant "use assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs."

The district court in this case rested its holding on its view that Rambo's interest in the disputed assets should not have been restrained before he was convicted because he still enjoyed the presumption of innocence. The problem with this, however, was that Rambo's case was *unlike Monsanto* and *Caplin:* it had absolutely nothing to do with New Jersey seizing property of a defendant based on a nexus to illegal activity. The sole basis for freezing Rambo's asset hinged on the New Jersey Slayer Act, which provides that "[a] surviving spouse . . . who criminally and intentionally kills the decedent is not entitled to any benefits under a testate or intestate estate . . ." The Circuit thus vacated the entire previous holding based on freezing assets related to illegal activity, and remanded to give the district court the opportunity to evaluate the habeas petition in light of the New Jersey Slayer Act, the law upon which the Warren County Prosecutor's Office had

actually acted.

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