**CSA Legal and Legislative Update (March 31, 2016)**

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**Recent Court Rulings: Commercial Speech and the City of Los Angeles**

Several recent court rulings reiterate that commercial speech regulations, including signage restrictions based on content, are subject to "heightened scrutiny" evaluation and that government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way. "That burden is not satisfied by mere speculation or conjecture." Rather, to survive scrutiny "a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Since 2009, CSA and ISA have worked diligently with the city of Los Angeles to develop a reasonable and responsible updated sign ordinance that protects the onsite sign industry and serves all stakeholders fairly. Initially, among other concerns the draft ordinance proposed the elimination of the distinction between onsite and offsite signs. After much work establishing a coalition with affected groups, including the hotel association, car dealers and others. CSA persuaded the city to differentiate between the two sign types. However, the city delayed adoption of the new ordinance, made numerous tweaks, and now, nearly seven years later, still has not adopted a new ordinance. The bulk of the delay dealt with how to address objections to digital signs (onsite and offsite) and the city's requirement that they be restricted to special sign districts. Also, while the ordinance revision has been pending, numerous lawsuits brought by billboard companies challenging the ban and other aspects of the sign code, were filed against the city.

Those cases have now been mostly resolved, but the city ordinance effort and new revisions are still underway. CSA and ISA continue to work diligently with the city to bring finality to this matter. Along the way, CSA, working with the billboard industry, had to fend off legislation proposing a statewide moratorium on digital signs (legislation penned by the current LA city attorney), as well as re-educate several times new council members and staffers, including a new Planning Director. CSA and ISA retained the services of local lobbyists to assist with the endeavor.

**What is the *Lamar* case about – and why is it important?**

In the one of the lawsuits, Lamar v. City of Los Angeles (initially decided in 2015), a state lower court judge ruled, among other points, that under the California Constitution there was no material difference between an onsite sign and an offsite sign, and the billboard ban was thus unconstitutional (a result contradictory to prior federal court rulings based on the US Constitution).

The City appealed, and in an unusual twist, CSA and ISA filed "amicus" friend of the court briefs supporting *the city* (as did several Planning groups). CSA/ISA's position was that if the appellate decision were upheld on appeal in favor of Lamar, it would seriously undermine

California's on-premise sign laws (sponsored by CSA 30 years ago), as well as result in an unrestricted proliferation of billboards, i.e., potentially every sign could be used for offsite advertising, jeopardizing the entire on-premise industry, and subjecting on-premise signs along the highway to Caltrans regulation.

Fortunately, earlier this year (2016) the appellate court overturned the decision and provided a clear statement of the legal underpinnings in this area. Here's an excerpt from the appellate court decision:

"This is another round in the continuing litigation between outdoor advertising companies and the City of Los Angeles over "offsite signs" – billboards with commercial messages in locations other than at a property owner's business. In 2002, the city established a permanent ban, with some exceptions, on new offsite signs, including a ban on alterations of legally existing offsite signs (the sign ban). In 2009, the city explicitly banned offsite signs with digital displays."

1. The Sign Ban

The sign ban in the Los Angeles Municipal Code (LAMC or municipal code) prohibits signs if they "[a]re off-site signs, including off-site digital displays, except when off-site signs are specifically permitted pursuant to a relocation agreement . . . . This prohibition shall also apply to alterations, enlargements or conversions to digital displays of legally existing off-site signs, except for alterations that conform to . . . this Code." (LAMC, § 14.4.4.B.11.)

The municipal code defines an offsite sign as a sign "that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where the sign is located." (LAMC, § 14.4.2.) An onsite sign is "[a] sign that is other than an off-site sign." (Ibid.) The city does not prohibit "an ideological, political or other noncommercial message on a sign otherwise permitted by" its sign regulations. (LAMC, §14.4.4.A.)

The sign ban contains exceptions. It does not apply "to off-site signs, including off-site digital displays, that are specifically permitted pursuant to a legally adopted specific plan, supplemental use district or an approved development agreement." (LAMC, § 14.4.4.B.11.) In addition, under the city's building code, the sign ban does not apply to "work located primarily in a public way" (LAMC, § 91.101.4), such as public transit shelters and other facilities.

The objectives of the city's sign regulations include that "the design, construction, installation, repair and maintenance of signs will not interfere with traffic safety or otherwise endanger public safety," and that the regulations "will provide reasonable protection to the visual environment by controlling the size, height, spacing and location of signs." (LAMC, § 14.4.1.A. & B.)

2. The Legal Background

Among the many lawsuits generated by the city's sign ban and related ordinances were three challenges in federal court, in differing contexts, to the constitutionality of the sign ban. In each case, the Ninth Circuit found no constitutional violation. (See Metro Lights, L.L.C. v. City of Los Angeles (9th Cir. 2009) 551 F.3d 898, 900, 902, 914 (Metro Lights) [the city did not violate the First Amendment "by prohibiting most offsite

commercial advertising while simultaneously contracting with a private party to permit sale of such advertising at city-owned transit stops" (of which there were approximately 18,500)]; World Wide Rush, LLC v. City of Los Angeles (9th Cir. 2010) 606 F.3d 676, 679, 686-687, 690 [the city's ban on freeway facing billboards was not an unconstitutionally underinclusive restriction on commercial speech; the exceptions to the ban for billboards at Staples Center and in a special use district did not undermine the city's traffic safety and aesthetics objectives; bans on supergraphic and offsite signs were not unconstitutional prior restraints on speech]; Vanguard Outdoor, LLC v. City of Los Angeles (9th Cir. 2011) 648 F.3d 737, 745, 746-748 (Vanguard) [concluding the city's distinction between offsite and onsite signs "has been repeatedly upheld as content-neutral and valid," and rejecting the plaintiff's contention that the protections for commercial speech under the California Constitution are different from the protections under the First Amendment].)

The Ninth Circuit cases relied on [US Supreme Court] jurisprudence, particularly Central Hudson Gas & Electric Corp. v. Public Services Commission (1980) 447 U.S. 557 (Central Hudson) and Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490 (Metromedia II).

In Central Hudson [1980], the high court reiterated its previously recognized "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.' " (Central Hudson, supra, 447 U.S. at p. 562; id. at pp. 562-563 ["The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."].) The court summarized a "four-step analysis for commercial speech" as follows: "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (Id. at p. 566; see also Board of Trustees v. Fox (1989) 492 U.S. 469, 471, 480 (Fox) [restrictions on commercial speech may "go beyond the least restrictive means to achieve the desired end"; high court's decisions require "a fit [between the legislature's ends and the means chosen to accomplish those ends] that is not necessarily perfect, but reasonable"].)

In Metromedia II [1981], the high court considered the constitutionality of a San Diego ordinance that banned offsite signs, with 12 exemptions (including "government signs" and "signs located at public bus stops"), but allowed onsite commercial signs. (Metromedia II, supra, 453 U.S. at p. 494.) (The ordinance had been upheld by our Supreme Court in Metromedia, Inc. v. City of San Diego (1980) 26 Cal.3d 848 (Metromedia I) against First Amendment and article I challenges.) In a four-justice plurality opinion, the court considered separately the effect of the ordinance on commercial and noncommercial speech, observing that its cases "consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech . . . ." (Metromedia II, at pp. 504-505.) The court concluded that, "insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of Central Hudson, supra[, 447 U.S. 557]." (Id. at p. 512; see id. at p. 511 [agreeing with "all of the cases sustaining the distinction between offsite and onsite commercial advertising"]; id. at p. 512 ["offsite commercial billboards may be prohibited while onsite commercial billboards are permitted"].)

**What does it mean?**

Essentially, the Lamar court affirmed that under both California and Federal law, an onsite/offsite distinction is lawful, provided it does not regulate the content of the message, i.e., that differentiating between onsite and offsite signs does not constitute a content-based distinction. In addition, the court succinctly explained and reiterated the longstanding guidance of Central Hudson on how to assess sign regulations. **In sum, significantly for the sign industry, the effect is that the status quo has been preserved.**

While the Lamar case was pending, the US Supreme Court issued a decision in the sign case of Reed v. Town of Gilbert [2015]. In Reed, the Town of Glibert, AZ, established various controls for area, height, placement and duration of temporary signs depending on the content and speaker, favoring some signs over others. As one justice put it, the ordinance did not even pass the "laugh test." However, Reed did not address commercial speech and subsequent rulings by

Federal courts have held that Reed does not apply to commercial speech.
And then, finally, in 2016,in Retail Digital Network v. Appelsmith, the Ninth Circuit took notice and held:

Consistent with [the US Supreme Court decision in Sorrell v. IMS Health, Inc.,131 S. Ct. 2653 (2011)] we rule that Sorrell modified the Central Hudson test for laws burdening commercial speech. Under Sorrell, courts must first determine whether a challenged law burdening nonmisleading commercial speech about legal goods or services is content-or speaker-based. If so, heightened judicial scrutiny is required. See Sorrell, 131 S. Ct. at 2664.

Heightened judicial scrutiny may be applied using the familiar framework of the four-factor Central Hudson test. With respect to the third Central Hudson factor, 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." Coors Brewing Co., 514 U.S. at 487. With respect to the fourth Central Hudson factor, the government bears a heavier burden of showing that the challenged law "is drawn to achieve [the government's substantial] interest." Sorrell, 131 S. Ct. at 2667-68. This inquiry first permits a district court to test the consistency between (a) the specific interests asserted by the government during litigation in addressing Central Hudson's second prong and (b) the legislative purposes that the court finds actually animated a challenged law, as made explicit in the statute's text or evidenced by its history or design. See Friendly House v. Whiting, 846 F. Supp. 2d 1053, 1060-61 (D. Ariz. 2012), aff'd sub nom. Valle Del Sol Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013). Post hoc rationalizations for a restriction on commercial speech may not be used to sustain its constitutionality.

Second, after identifying the governmental interests that animate the challenged restriction, intermediate scrutiny—and, a fortiori, heightened scrutiny—demands a "fit between the legislature's ends and the means chosen to accomplish those ends." Sorrell, 131 S. Ct. at 2668 (quoting Fox, 492 U.S. at 480). This requirement is demanding under heightened scrutiny, but it is "something short of a least-restrictive-means standard" that the government must meet under strict judicial scrutiny. See Fox, 492 U.S. at 477. What is required is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." Id. at 480.
"As in other contexts, these standards ensure . . . that the [government's] interests are proportional to the resulting burdens placed on speech," Sorrell, 131 S. Ct. at 2668, thus preventing "the government from too readily sacrific[ing] speech for efficiency." McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014) (alternation in original). These standards also check raw

paternalism, ensuring "that the law does not seek to suppress a disfavored message" or "keep people in the dark for what the government perceives to be their own good." Sorrell, 131 S. Ct. at 2668, 2671. Indeed, at least when the audience of commercial speech consists of adult consumers in possession of their faculties, the fact "[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers." Id. at 2671.

***Bottom Line:*** In light of these precedents, commercial speech regulations, including signage restrictions based on content, are subject to “heightened scrutiny” evaluation. "... Government carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." Coors Brewing Co., 514 U.S. at 487. "That burden is not satisfied by mere speculation or conjecture." Rather, to survive scrutiny "a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."