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TEXAS SIGN ASSOCIATION SIGN POST:

RTM MEDIA, INC. VS. CITY OF HOUSTON

Introduction

On September 26, 2007, the Honorable Melinda Harmon, Judge of the United States District Court for the Southern District of Texas, issued a preliminary injunction holding the Houston Sign Code unconstitutional and unenforceable in *RTM Media Inc. vs. City of Houston*.

Almost exactly one year later, on September 29, 2008, Judge Harmon entered her final judgment in the case. This time, however, the Judge ruled completely opposite from her preliminary injunction order, against RTM and for Houston. More importantly, even though the facts, law, attorneys, parties, and arguments remained the same over the year since she ruled the Houston Sign Code was unconstitutional, Judge Harmon also found the Code complied with the First Amendment in her final opinion.

Factual and Procedural Background

RTM Media Inc. ("RTM"), an independent Houston based outdoor advertising company, started constructing billboards in the extraterritorial jurisdiction ("ETJ") of the City of Houston adjacent to federal interstate and primary highways with permits issued only by the Texas Department of Transportation ("TxDOT") in 2003. RTM argued that it need not comply with Houston's permit and other sign regulations, because TxDOT maintains exclusive jurisdiction over off-premise signs located in Houston's ETJ adjacent to federal highways.

Houston disagreed, and issued almost 2000 municipal court citations to RTM's principle, Curtis Brooks. In addition to prosecuting these tickets in criminal court, the City of Houston also filed a lawsuit against RTM in July 2007 in State court, seeking a mandatory injunction for the removal of RTM's alleged illegal and un-permitted signs. Simultaneously, the City began contacting RTM's advertisers, and warning them that they would be in violation of the Houston Sign Code and subject to ticketing for "using" RTM's illegal signs.

On September 12, 2007, RTM filed suit in Federal Court, under Cause No. 07-02944, seeking an injunction against the City's contact with its customers. RTM also alleged more broadly that the Houston Sign Code violated the free speech protections of the First Amendment of the United States Constitution, by impermissibly distinguishing regulations on the commercial vs. non-commercial messages communicated on signage.

Preliminary Injunction Order

The Court addressed RTM's request for a preliminary injunction on First Amendment grounds by examining the United State Supreme Court's decisions in *Central Hudson Gas & Electric Corp. vs. Public Service Commission of New York*, 447 US 557 (1980) and *City of Cincinnati vs. Discovery Network Inc.*, 407 US 410 (1993). Specifically, the Court noted that the Houston Sign Code distinguished its regulation of commercial and noncommercial billboards based upon the content of the messages displayed on such billboards.

Commercial billboards are extensively regulated by the Houston Sign Code, and even prohibited under Section 4612(b). By contrast, Section 4619(c) of the Code completely excludes from regulation all structures sign structures containing noncommercial messages.

During the one-half day evidentiary hearing on RTM's application for preliminary injunction, RTM created a favorable record on the difficulty in distinguishing between commercial and non-commercial billboards. Specifically, the Houston Sign Administrator was extensively cross-examined about her opinion on several billboard displays, including whether they were considered commercial and subject to her department's regulation, or non-commercial and excluded from regulation. The Sign Administrator exhibited confusion and indecision in analyzing the content of the messages on the billboards, and subjectively and arbitrarily deciding whether they were included or excluded from regulation.

The Court concluded that the Houston Sign Code's different treatment and regulation of commercial and non-commercial billboards was an impermissible content based regulation and violation of the First Amendment to the United States Constitution:

This Court sympathizes with the City's substantial interest in reducing and preventing "billboard blight" for reasons of aesthetics, traffic safety, and property values, but the City cannot achieve those goals by regulating billboards based on the content of their message. Noncommercial billboards are visual blights, traffic dangers, and undesirable for property values for the same reason as commercial billboards. The City can impose content neutral restrictions on time, place, and manner without reference to the content of the regulated speech and that are directly related to their goals, e.g., restricting the overall number of billboards it permits, their location, size, etc., but not by regulating and prohibiting only off-premises commercial billboards while allowing noncommercial billboards to proliferate freely.

Ramifications of Preliminary Order

Judge Harmon's preliminary injunction order was not limited just to RTM, its advertisers, billboards, federally funded highways, or the ETJ. Instead, the order states that "the City shall be enjoined from enforcing its Sign Code." Even though RTM originally disputed with the City only the permitting requirements over its off-premise signs located adjacent to federally funded highways in the ETJ, a literal reading of the preliminary order goes well beyond such a narrow issue. The order seems to cover all parties, all types of signs,

all thoroughfares, and all areas. Indeed, any effort by the Houston Sign Administration to enforce any of its regulations would appear to be enjoined under the preliminary order.

Subsequent Action

Judge Harmon and the Houston City Council undertook noteworthy activities after the September 26, 2007 preliminary order. First, Judge Harmon significantly narrowed her original Order on October 16, 2007. The Order Clarifying Preliminary Injunction entered September 26, 2007 effectively enjoins the City from enforcing its Sign Code only against RTM and its advertisers and billboards. RTM advised Judge Harmon at the hearing on the City's Motion for Reconsideration that it did not oppose this "clarification" to the original Order.

Second, the Houston City Council attempted to cure the constitutional defects in the Sign Code by effectively repealing the exemption from regulation for non-commercial signage contained in Section 4619(c). The October 30, 2007 City of Houston Ordinance changes the definitions for both on-premise and off-premise signs to "include any new sign that would otherwise meet this definition, but that would be excluded from regulation by Section 4619(c) of the Sign Code." The new Ordinance goes on to state that "the construction, erection, placement, attachment, painting, installation or other implementation of new off-premise signs is prohibited," and that "any new on-premise sign must comply with all applicable requirements of the Building Code, the Sign Code and this Ordinance." Finally, the Ordinance states it "shall not be construed to limit or restrict the City of Houston in its defense of the Sign Code in [the RTM litigation]," and that it "shall remain in full force and effect until 90 days following a final resolution of that cause of action."

Final Judgment

As mentioned, Judge Harmon ruled in her preliminary injunction order in favor of RTM after a full evidentiary hearing, by relying on the Supreme Court's decisions in *Central Hudson vs. Public Service Commission*, 447 US 557 (1980) and *City of Cincinnati vs. Discovery Network*, 407 US 410 (1993). In general, these are among the leading Supreme Court holdings that it violates the First Amendment to base sign regulations on the content of the message as opposed to the time, place, and manner of the signage.

Almost exactly a year later, Judge Harmon ruled against RTM based on the parties' written summary judgment motions in her final decision. While neither the facts nor the law changed during the passing year, the Judge reached an opposite result by factually distinguishing *Discovery Network*, where the Supreme Court had stricken a Cincinnati ordinance banning newsracks containing commercial publications while allowing those with noncommercial publications. The Supreme Court felt the Cincinnati ordinance did not establish a "reasonable fit" between the city's goal of aesthetics and the ban of commercial newsracks as the means for achieving it, because only 62 commercial newsracks would be removed while 1,500 to 2,000 noncommercial newsracks would remain.

By contrast, Judge Harmon noted that the number of off-premise commercial signs in Houston had decreased by about 50% since the passage of the Sign Code, so that Houston's fit was reasonable and not "minute" or "paltry" like Cincinnati's efforts. The Judge also placed more emphasis on *Metromedia vs. City of San Diego*, 453 US 490 (1981), where the Supreme court addressed a San Diego ordinance that permitted onsite commercial advertising, while prohibiting other commercial and noncommercial advertising on signs. Judge Harmon cited the plurality opinion in *Metromedia* as holding "that, insofar as the ordinance regulated commercial speech, it satisfied the *Central Hudson* test."

RTM has already filed a notice to appeal the final decision to the Fifth Circuit Court of Appeals. Such appellate procedures typically last almost a year, during which the Houston Sign Code will continue to be considered constitutional and enforceable.

Conclusion

The preliminary and final decisions in *RTM Media, Inc. vs. City of Houston* are broad and far reaching. The preliminary order represents a significant expansion of the Supreme Court's First Amendment jurisprudence, such as *Central Hudson Gas & Electric Corp. vs. Public Service Commission of New York* and *City of Cincinnati vs. Discovery Network, Inc.* The final decision cites the same cases, but arrives at an opposite result. Regardless of the result of the appeal to the Fifth Circuit, sign codes in Houston and across the country will be more closely scrutinized to confirm they do not base regulations on the content of the messages displayed on the signage because of this case.