Legal Opinion Letter

Vol. 25 No. 8 April 15, 2016

Washington Legal Foundation
Advocate for Freedom and Justice®
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Ruling on Utility Poles Mandatory Warning Protects Against Forced Speech

by Gregory S. Chernack

What started as an aesthetic dispute over the installation of new utility poles devolved into a legal battle involving the First Amendment, commercial speech, and environmental regulation. In *PSEG v. Town of North Hempstead*, 2016 WL 423635 (E.D.N.Y. Feb. 3, 2016), Judge Arthur D. Spatt held unconstitutional an ordinance requiring a public utility to place signs on its wood utility poles warning about chemical preservatives used to treat the poles. In so ruling, the *PSEG* court reinforced the line between commercial and non-commercial speech and the limitations on the power of government to force a corporation to express a message with which it disagrees.

The dispute began when the plaintiffs, Long Island Lighting Company (a public utility power company) and PSEG (Long Island Lighting's service provider), began replacing 23 utility poles in the Town of North Hempstead (the Town) on Long Island. *See id.* at *2. The new poles were 80-85 feet in height, approximately twice as tall as the poles that were being replaced. After a Town supervisor and some residents raised aesthetic concerns about the higher utility poles, the Town turned its focus to alleged environmental issues, specifically that the poles were treated with Pentachlorophenol ("Penta"), a wood-preserving chemical. *See id.* at **2-3. The federal Environmental Protection Agency, while deeming Penta "extremely toxic," has concluded its use as a wood preservative poses no unreasonable risks. *See id.* at *7. Nevertheless, the Town ultimately passed an ordinance requiring the plaintiffs—at their own expense—to place a sign on every fourth utility pole stating that:

> NOTICE—THIS POLE CONTAINS A HAZARDOUS CHEMICAL. AVOID PROLONGED DIRECT CONTACT WITH THIS POLE. WASH HANDS OR OTHER EXPOSED AREAS THOROUGHLY IF CONTACT IS MADE.

Id. at *6. The ordinance would apply not only to the 23 new poles but also to 25,000 pre-existing utility poles in the Town. *See id.* at *8.

The plaintiffs filed suit against the Town, claiming, among other things, that the ordinance compelled them to communicate a message with which they disagreed in violation of the First Amendment. The Town argued that the speech at issue was commercial speech and hence the ordinance was subject to a more relaxed standard of constitutional review. *See id.* at *11.

The court disagreed, concluding that the speech at issue was not commercial in nature and that the ordinance was therefore subject to strict scrutiny. The court explained that "in order to qualify as commercial speech, the message sought to be regulated must necessarily bear some discernible connection to the commercial interests of the speaker." *Id.* at *12. Because no connection existed between the warning signs and the plaintiffs' "products, services, or other commercial interests," *ibid*, the signs did not constitute commercial speech. In other words, the signs had no commercial connection to the selling of electrical power (even though the poles played

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a role in the transmission of that power) because the Penta-treated poles did not impact a consumer's decision regarding the purchase of electricity.

In reaching this conclusion, the court distinguished a U.S. Court of Appeals for the Second Circuit decision that upheld New York City's regulation mandating calorie-content disclosure on certain restaurants' menus. Such information, the court wrote, was disclosed "in connection with a commercial transaction, namely, the sale of a meal." *Id.* (discussing *New York Restaurant Association v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009)).

The court also rejected the Town's argument that the utility-pole warning constituted "government speech," and was thus exempt from constitutional scrutiny. Though the Town conceded that no precedent existed to extend the doctrine to the facts at hand, it asserted that because the public utilities were "highly regulated," their property was essentially quasi-governmental. The court responded, "To accept that premise would allow the Town to circumvent the First Amendment rights of non-governmental speakers simply by regulating their business activity." *Id*. at *14.

Once the court concluded that the speech was not commercial in nature, it easily found that the ordinance could not satisfy strict scrutiny. The court cast doubt on whether the Town was advancing a compelling government interest, but assuming it was, "there is little doubt that less restrictive means of addressing that concern are available." *Id.* at *15. The Town claimed that its choice to shift the burden and cost of a Penta warning to the utilities was "rational" and reflected a "common sense judgment." Neither explanation passed muster under strict scrutiny, the court explained.

Two aspects of the underlying dispute that were not directly material to the constitutional analysis clearly factored into the case's outcome. First, the warning ordinance arose from a campaign led by North Hempstead Supervisor Judi Bosworth, who found the new, taller utility poles "unsightly." Unable to prohibit the polls' installation, she sought to deter the disfavored business activity by forcing the utilities to communicate a negative message on their property. Second, Judge Spatt was troubled by the supervisors' reliance on questionable science related to the alleged environmental risks posed by polls treated with Penta. The Town's effort to spread public fear included Supervisor Bosworth's request that New York's Department of Environmental Conservation investigate health issues related to Penta-treated polls.

To fully appreciate the integrity of Judge Spatt's opinion, one must consider it in the context of the growing antipathy expressed in the media and academia toward commercial entities' speech rights. *See, e.g.*, Editorial, *Corporations Can't Hide Behind First Amendment*, Boston Globe, Mar. 21, 2016. That antipathy is fueling increased attempts by government bureaucrats to regulate business conduct, or to influence consumer choices by curtailing or compelling businesses' speech.

Judge Spatt could have been influenced by the environmental concerns that the Town's supervisors manufactured as a reason for the warning, or the prevailing academic winds that seek to categorize all speech by businesses as "commercial speech." He could have creatively concluded that because the utility poles were essential to what the plaintiffs were selling to consumers—electricity—the poles were part of the "product" and thus any speech related to the poles was commercial in nature.

Instead, Judge Spatt undertook a properly dispassionate analysis of the applicable precedents and maintained the correct demarcation point between commercial and non-commercial speech. His commendable approach should be emulated by other judges, and his reasoning should prove useful to future targets of unconstitutional speech regulation by municipalities.

 ISBN 1056 3059