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Local Powers to Address COVID-19 in the Wake of Wisconsin Legislature v. Palm and OAG-03-20

On May 12, 2020, in its decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, the Wisconsin Supreme Court struck down the Wisconsin Department of Health Services' (DHS) statewide Safer-at-Home order. In the aftermath of that decision, municipalities and counties throughout Wisconsin faced uncertainty over whether local health orders to address COVID-19 would be similarly affected by the Supreme Court's decision.

On May 15, 2020, Attorney General Josh Kaul issued an emergency Attorney General opinion, OAG-03-20, to clarify the effect of the *Palm* decision on local powers to address COVID-19.

The Attorney General's opinion concluded that the *Palm* decision is not directly controlling on the powers of local health authorities under Wis. Stat. § 252.03, as the Supreme Court's decision only addressed DHS's authority under a different statute – Wis. Stat. § 252.02. The opinion further concluded that the *Palm* decision does not limit other measures directed by local authorities under Wis. Stat. § 252.03, as local health officers are not subject to the requirements of Wis. Stat. § 227.24 to engage in emergency rulemaking.

Despite these conclusions, the Attorney General's opinion advised that local authorities should still take certain precautions to ensure that local health orders do not run afoul of the *Palm* decision. Local authorities wishing to establish a local health order to address COVID-19 should take the following precautions:

1. Limit enforcement of a health order under Wis. Stat. § 252.03 to ordinances or administrative enforcement as criminal penalties may be affected by the Supreme Court's decision.
2. Ensure that any measures that direct people to stay at home, forbid certain travel, or close certain businesses speak specifically to the

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local health officer's statutory power under Wis. Stat. § 252.03(1)-(2) to "prevent, suppress and control communicable diseases" and "forbid public gatherings when deemed necessary to control outbreaks or epidemics."

In a footnote, the Attorney General's opinion noted that local governments also have emergency powers under Wis. Stats. §§ 323.11 and 323.14. While the opinion does not specifically address measures taken pursuant to those powers, Wis. Stat. § 323.14(4)(a) is broadly written to grant local governments authority to enact measures to protect the public health and welfare pursuant to an emergency declaration under Wis. Stat. § 323.11.

Under Wis. Stat. § 323.14(4)(a), during a declared emergency, local governments have the general authority to order, by ordinance or resolution, "whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency," including "the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways."

Local governments wishing to establish restrictions to address COVID-19 under Wis. Stat. §§ 323.11 and 323.14 should take the following precautions:

1. Avoid imposing restrictions that appear arbitrarily defined; restrictions should be content neutral and narrowly tailored to address the particular circumstances of the municipality's emergency, with those circumstances detailed in the emergency resolution or ordinance.
2. Articulate the reasoning behind the restrictions to show that the restrictions are based on facts and evidence, with that reasoning detailed in the emergency resolution or ordinance.

In the wake of the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm*, striking down DHS's Safer-at-Home order, local governments and local health authorities should be confident in their authority to impose restrictions and/or local health orders to address COVID-19. That being said, those wishing to exercise these local powers should be aware that such actions still pose some litigation risk.

On May 20, 2020, a group of Wisconsin residents filed a lawsuit in the U.S. District Court for the Eastern District of Wisconsin against Dane County, city of Madison public health director Janel Heinrich and 20 other Wisconsin officials, seeking to invalidate local stay-at-home orders and cease their enforcement. The lawsuit alleges the state and local stay-at-home orders violate the plaintiffs' civil rights to freely assemble and to freely exercise their religion. It also claims constitutional protections against excessive government intervention through the Establishment Clause have been violated, as well as freedom of speech and right to equal protection under the law.

In light of the recent federal lawsuit attempting to invalidate local stay-at-home orders, it is important for local governments and local health authorities wishing to use their powers to address COVID-19, to follow the precautions discussed above to support the validity of their restrictions and/or orders. The authority granted to local health authorities in Wis. Stat. § 252.03 and to local governments in Wis. Stats. §§ 323.11 and 323.14 provides a useful tool to address the COVID-19 pandemic.

— Eric B. Hagen

Federal District Court Rejects First Amendment Challenge to City of Madison's Billboard Ordinance Based on Reed

A federal district court in Wisconsin recently granted summary judgment against Adams Outdoor Advertising and rejected its arguments challenging the City of Madison's sign ordinance as unconstitutional. In that ruling, the court held that the United States Supreme Court's decision in *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015) (*"Reed"*), does not upset longstanding commercial speech doctrine.

Billboard and outdoor advertising is a multi-billion dollar industry. Some municipalities limit or ban such signs in order to promote traffic safety and to preserve aesthetic values. These regulations sometimes raise First Amendment issues. In *Adams Outdoor Advertising Ltd. Partnership v. City of Madison*, No. 17-cv-576-jdp (W.D. Wis. Apr. 7, 2020) (*"Adams"*), Plaintiff Adams Outdoor Advertising sought to modernize its existing billboards and convert others to digital, but it could not do so under Madison's sign ordinance.

Adams Outdoor Advertising brought multiple claims challenging Madison's sign ordinance, but its core contention was that the city's billboard rules were subject to strict scrutiny under *Reed*, which held that a regulation is content-based and therefore subject to strict scrutiny if it draws distinctions based on the message conveyed. *Reed*, 135 S. Ct. at 227. The court in *Adams*, however, held that *Reed* does not apply to Madison's regulation of billboards, stating that "whether the Capitol Square should look like Times Square is a decision that Madison city government is entitled to make, even after *Reed*."

For decades, it has been settled law that governments may impose restrictions on commercial speech if those restrictions satisfy "intermediate scrutiny," that is, the regulation must directly advance a substantial government interest and must not be more extensive than necessary. See *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). It is equally settled that governments may distinguish between on-premises and off-premises signs, subject only to that intermediate-scrutiny standard. See *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507 (1981).

As the court in *Adams* observed, *Reed* "leaves intact the general framework for evaluating restrictions on commercial speech in *Central Hudson* . . . and for evaluating billboard regulations in *Metromedia* . . . ." (Slip Op. at 6.) The *Reed* decision did not discuss either *Central Hudson or Metromedia*, although Justice Alito in concurrence listed "[r]ules distinguishing between on-premises and off-premises signs" as one example of a rule that is not content-based under his understanding of the majority holding. *Reed*, 135 S.Ct. at 2233 (Alito, J., concurring).

According to the court in *Adams*, "[r]egardless of what Reed may portend for the Court's future decisions, this court has no authority to disregard a Supreme Court decision that the Court itself has not overruled." (Slip Op. at 25 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997).) The district court held that the City's billboard ordinances directly advanced interests of traffic safety and aesthetics in a manner that was reasonably fit to accomplish those objectives, and therefore it ruled that the regulations were constitutional under *Central Hudson* and *Metromedia*. (Slip Op. at 30-35.) The court rejected Adams Outdoor Advertising's claims on other grounds too.

The decision in *Adams* provides municipalities with important clarity about First Amendment standards that apply to sign regulations and the limits of the Supreme Court's decision in *Reed*. The ruling vindicates the rights of a municipality to promote its own unique aesthetic values and to protect traffic safety within its borders.

Boardman & Clark partners Sarah Zylstra and Barry J. Blonien represent the City of Madison in the *Adams* litigation.

— Kathryn A. Pfefferle and Barry J. Blonien

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