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The Do's and Don'ts of Regulating Commercial Door-to-Door Speech Under the First Amendment

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In general, municipalities enjoy the power to regulate business activity in their communities, so long as the regulation bears a reasonable connection to the health, safety and welfare of the community, and otherwise comports with statutory and constitutional principles. Commercial door-to-door solicitation raises particular concerns for municipalities seeking to protect their residents. As a result, a "solicitor ordinance" is a common municipal enactment that prohibits solicitors from going door-to-door in residential neighborhoods without first obtaining a permit or license, or registering with the local police department. This article specifically addresses the limits of a municipality's authority to regulate commercial door-to-door activities.

The Nature of Commercial Speech

Commercial door-to-door solicitation possesses three characteristics that justify greater regulation by local government. Initially, although the right to distribute information door-to-door has historically been afforded First Amendment protection,[1] it provides the opportunity for both residential crime and the invasion of privacy, justifying some regulation by a local government.[2] Second, by definition, commercial door-to-door solicitation seeks to obtain funds from the resident listener. As a result, a municipality may regulate the act of solicitation by imposing a time, place, and manner restriction, as long as the restriction: (1) is content-neutral, (2) is narrowly tailored to serve a significant governmental objective, and (3) leaves ample alternative channels of communication available to the speaker.[3] Even when the funds are sought for religious, charitable, or political purposes, the municipality's interest in protecting its citizens from fraud justifies some level of regulation.[4] The third characteristic of commercial door-to-door solicitation is that the purpose of the speech is the speaker's own financial benefit.[5] Although charitable, religious, and political speech may also be in furtherance of a non-economic interest, if it primarily proposes a commercial transaction, it will be deemed to be commercial speech.[6]

The Regulation of Commercial Speech

Commercial speech provides an opportunity for greater deception and confusion that is not present in other forms of speech, and municipalities may, therefore, regulate it to a greater degree.[7] Nevertheless, commercial speech is protected activity under the First Amendment,[8] and a regulation targeting such speech must directly advance a substantial governmental interest and be narrowly tailored to restrict no more speech than necessary.[9] Only a "reasonable fit" between the municipal interest and the means employed to prevent harm is required.[10] However, despite this relaxed standard, the municipal burden is not satisfied by mere speculation or conjecture. Rather, the government must demonstrate that the harms it recites are real, and that its restrictions will, in fact, alleviate them to a material degree.[11] Moreover, the "reasonable fit"

determination includes a consideration of whether numerous, less burdensome, alternatives are obvious and available.[12] Accordingly, although caselaw does not prohibit a complete ban on commercial speech, a municipality will have difficulty establishing that a total ban is a reasonable fit or is narrowly tailored.[13]

Targeting Only Commercial Speech In *Cincinnati v. Discovery Network, Inc.*, the U.S. Supreme Court held that the City of Cincinnati's restriction of commercial newsracks on city sidewalks had no relation to its asserted interest in safety and aesthetics.[14] Since the distinction drawn by the ordinance between commercial and non-commercial speech was practically meaningless, the ordinance failed to provide the requisite reasonable fit between ends and means.[15] Accordingly, a content-based commercial regulation must seek to prevent harms that are caused only by commercial speech.[16] An ordinance may also be found to violate equal protection rights.[17] Thus, despite the Supreme Court's apparent endorsement of greater restrictions for commercial speech,[18] the focus on the reasonable fit requirement constitutes a difficult hurdle for municipalities that target commercial speech to control evils not particular to it.[19]

Permits and Licensing Requirements Municipal action often takes the form of a permit or license requirement, imposing a prior restraint on speech. Although not *per se* unconstitutional, prior restraints are disfavored and presumed invalid.[20] Any prior restraint on door-to-door solicitation must, therefore, comply with the limitations generally applicable to prior restraints. First, the ordinance must provide narrow, objective, and definite standards to guide the licensing authority so as not to bestow overly broad discretion.[21] Second, the written regulation must contain a period of time during which the decision to grant or deny the license will be made.[22] Third, a means of review or appeal must be provided.[23] Finally, an ordinance may not favor residential solicitors over non-residential solicitors,[24] but a higher fee may be imposed on particular categories of the former.[25]

The Regulation of Door-to-Door Commercial Solicitation

Since residential commercial solicitation occurs in the listener's private realm, it raises additional interests that are not present in the public forum. Recently, in *Watchtower Bible and Tract Soc. of New York, Inc. v. Village of Stratton*, the Supreme Court held that an anti-solicitation ordinance reached too far by preventing both non-commercial and commercial "canvassers" from going on private property without a permit: "Had [the ordinance] been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud."[26] However, the Court did not provide any guidance as to how far a commercial solicitation ordinance could go, or how well the asserted governmental interests would fare in the face of a constitutional challenge. In other words, the Court did not directly address the scope and intent of a municipality's powers to regulate door-to-door commercial speech.

Although the Supreme Court has not squarely addressed this issue, lower courts have done so. Regulation of commercial door-to-door solicitation is typically supported by the strong legitimate interests in preventing crime, fraud, and the invasion of residential privacy.[27] A municipality may require solicitors to provide identification or fingerprints, to register, and

obtain identification cards.[28] Additionally, a local government may restrict the hours during which a solicitor can call upon residents.[29] However, the asserted interest must *actually* be infringed by the activity sought to be regulated, or the ordinance will fail to constitute a reasonable fit between end and means.[30] This examination is a detailed one. For example, a waiting period before the issuance of a permit or license does not thwart the annoyance of door-to-door solicitors,[31] evidence of increased crime rates after dark does not support preventing house calls before nightfall,[32] and fingerprinting solicitors does not prevent crime if the municipality does not, in fact, use the prints to deter or investigate criminal conduct.[33]

The resident's right to prohibit commercial speech is another factor used in considering the validity of a municipal solicitation regulation. Whether a reasonable fit exists will be heavily influenced by whether the ordinance constitutes a complete ban, or merely seeks to enforce the express intent of the resident to not receive the communication. While the latter is fully within the domain of a municipality's regulatory authority,[34] the former is deemed an unnecessary substitution of the municipality's judgment for that of its individual residents.[35]

The First Amendment permits government to prohibit speech only when the captive audience cannot avoid it.[36] The guard against paternalism, which results in a preference for enforcement rather than prohibition, stems from the listener's right to receive a communication, and the general rule that "the speaker and the audience, not the government, assess the value of the information presented."[37] To this end, allowing the homeowner or resident to determine which communications he will entertain is a less intrusive and more effective means of protecting privacy.[38] Citizens remain able to throw away offensive or objectionable written material that arrives by mail,[39] and the ability to post "no solicitation" signs properly leaves "the decision as to whether distributers of literature may lawfully call at home ... with the homeowner himself."[40] For example, the U.S. Court of Appeals for the Seventh Circuit has shown its willingness to invalidate an ordinance because it did not allow the individual homeowner to decide for himself whether or not to receive the communication.[41] Further, so long as residents remain able to post "no solicitation" signs, a municipal ban on solicitation from 5:00 to 9:00 pm is not necessary.[42] However, a municipality may lawfully maintain a list of those residents who have expressed a desire to not receive solicitors, require solicitors to obtain the list, and prosecute those who fail to abide by it.[43]

To Regulate or Not to Regulate: Door to Door Commercial Advertisements That Do Not Summon the Occupant

An ordinance should also distinguish between commercial solicitations that are presented face-to-face and those delivered in writing.[44] For example, there is a nationwide industry that delivers business advertisements door-to-door, typically by the use of door hangers. This activity does not desire, or require, direct contact with residents. While in-person solicitation is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,"[45] the silent delivery of an invitation to make an offer to buy a product or service[46] does not inherently invoke the dangers of face-to-face solicitation. Rather, the resident remains free to read the material on his own time and discard it if he chooses to do so.[47] Accordingly, there is a negligible amount of intrusion and annoyance, and no intimidation, confrontation, or fraud, associated with the mere hanging of a commercial advertisement on a

person's door. Thus, the traditional governmental interests are typically not triggered by such activity.

Although the privacy of a resident is ferociously guarded by the courts, in the absence of the resident's expressed desire to be left alone, residential privacy is the least convincing rationale for prohibiting the mere delivery of commercial information if the resident is not summoned to the door.[48] Indeed, courts have recognized that picketing is more of an intrusion[49] and municipalities remain able to punish a speaker's failure to stop delivering inserts to the homes of objecting customers.[50]

Crime prevention is also not served by regulating the delivery of written commercial solicitations to residences. The threat of burglars posing as solicitors to determine if anyone is at home is not as convincing when the resident is not summoned to the door. Moreover, any interest in preventing crime by limiting the accumulation of unsolicited advertising material (signaling a potentially unoccupied residence) applies equally to non-commercial material. The U.S. Supreme Court has at least suggested that where a regulation is concerned with distribution practices – as opposed to content – the lower standard applied to the regulation of commercial speech may not apply.[51] Finally, while the accumulation of materials may be visually unappealing, the resident remains able to throw unwanted materials away,[52] and his failure to do so is generally not imputed to the speaker.[53]

The difficulties a municipality may face in prohibiting the mere delivery of commercial advertisements door-to-door can be understood by examining the standards for the regulation of other modes of solicitation that do not require face-to-face contact. Enactments that regulate e-mail advertising ("spam") do not ban e-mail ads; rather, they require the sender to provide a means for recipients to request not to receive any more ads.[54] Likewise, a "no call registry," which regulates the telemarketing industry by providing citizens with the opportunity to "opt-out" of receiving telephone calls from commercial advertisers, was recently upheld in *Mainstream Marketing Services, Inc. v. Federal Trade Comm'n* because it did not block speech directed at a willing customer and was, therefore, narrowly tailored.[55] Accordingly, the traditional rationales for regulating commercial door-to-door solicitation are not easily transferred to the mere delivery of written commercial advertisements at a residence. Indeed, cases that have considered such activity have held that a regulation prohibiting it cannot be squared with the First Amendment.[56]

Conclusion

First Amendment commercial jurisprudence is clear that a municipality can do no more than is necessary to prevent a real harm. While most drafters of ordinances may be aware of the need to consider both the category of speech they seek to regulate and the speaker's chosen forum, a municipality regulating solicitors must also be cognizant of the method chosen by the speaker to deliver his message. Indeed, the power of a municipality to regulate door-to-door commercial speech will be diminished where the method of delivery does not endanger the municipality's interest in the prevention of crime, litter, and invasions of privacy, particularly where the resident may act on his own to request that such delivery cease. Thus, the failure to consider the method of delivery may place otherwise valid ordinances in jeopardy.

Notes

1. *See* Watchtower Bible and Tract Soc. of New York, Inc. v. Village of Stratton, 536 U.S. 150, 160 (2002).

2. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988).

3. Weinberg v. Chicago, 310 F.3d 1029, 1037 (7th Cir. 2002).

4. *Watchtower Bible and Tract Soc. of New York, Inc.*, 536 U.S. at 162.

5. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980) (the court noted commercial speech was expression "related solely to the economic interests of the speaker and its audience").

6. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421 (1993).

7. *Id*. at 426, n.21.

8. Thompson v. Western States Medical Center, 535 U.S. 357, 366-67 (2002).

9. *Central Hudson*, 447 U.S. at 566.

10. Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989).

11. Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

12. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, n.13 (1993).

13. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988).

14. *Discovery Network, Inc*., 507 U.S. at 424.

15. *Id*. at 436, n.21 (a ban on newsracks containing "commercial handbills" did not apply to newsracks containing "newspapers" – unclear how the removal of 62 newsracks while leaving untouched 1,500 to 2,000 similar newsracks used for distribution of newspapers served the stated interest in safety and esthetics). *See also*, Chicago Tribune Co. v. Village of Downer's Grove, 125 Ill. 2d 468, 475 (Ill. 1988).

16. *Discovery Network, Inc*., 507 U.S. at 424, 429; *see also*, Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983); Ad World, Inc. v. Doylestown Tp., 672 F.2d 1136, 1140-41 (3d Cir. 1982).

17. *Chicago Tribune Co*., 125 Ill. 2d at 476-77.

18. Watchtower Bible and Tract Soc. of New York, Inc. v. Village of Stratton, 536 U.S. 150, 165 (2002).

19. *Discovery Network, Inc*., 507 U.S. at 424, 429; *Chicago Tribune Co.*, 125 Ill.2d at 475.

20. Weinberg v. Chicago, 310 F.3d 1029, 1045 (7th Cir. 2002).

21. *Id*. at 1045-46; FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-26 (1990).

22. *FW/PBS, Inc*., 493 U.S. at 226-27; *Weinberg*, 310 F.3d at 1045.

23. *FW/PBS, Inc*., 493 U.S. at 228.

24. City of Carrollton v. Bazette, 42 N.E. 837 (Ill. 1896).

25. Edwards v. City of Reno, 742 P.2d 486 (Nev. 1987) (peddlers).

26. Watchtower Bible and Tract Soc. of New York, Inc. v. Village of Stratton, 536 U.S. 150, 165 (2002).

27. City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1550-51 (7th Cir. 1986); Edenfield v. Fane, 507 U.S. 761, 768-69 (1993).

28. *See generally*, Nat'l People's Action v. Village of Wilmette, 914 F. 2d 1008, 1011 (7th Cir. 1990).

29. *See Watseka*, 796 F.2d at 1558.

30. A recent example is Pacific Frontier v. Pleasant Grove City, 414 F.3d 1221 (10th Cir. 2005) (city enjoined from enforcing solicitation ordinance's bond provision and fingerprinting provision, as it failed to show that these requirements materially advanced its interests – the city had never compensated a citizen through a bond posted by solicitors and had no mechanism for doing so, and the city provided no evidence that fingerprinting solicitors operated as a cost-saving mechanism).

31. Chicago Tribune Co. v. Village of Downer's Grove, 125 Ill. 2d 468, 475 (Ill. 1988).

32. *Watseka*, 796 F.2d at 1556.

33. *Nat'l People's Action*, 914 F.2d at 1012; *see also*, Weinberg v. Chicago, 310 F.3d 1029, 1038 and 1040 (7th Cir. 2002) and *Pacific Frontier,* 2005 WL 1625238 at *7.

34. Rowan v. U.S. Postal Office Dept., 397 U.S. 728 (1970).

35. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73-74 (1983); Martin v. City of Struthers, Ohio, 319 U.S. 141, 144 (1943); South/Southwest Ass'n of Realtors, Inc. v. Village of Evergreen Park, 109 F.Supp.2d 926 (N.D. Ill. 2000).

36. *See Bolger*, 463 U.S. at 72.

37. Edenfield v. Fane, 507 U.S. 761, 767 (1993).

38. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 639 (1980); *see also*, Anderson v. Treadwell, 294 F.3d 453, 464 (2d Cir. 2002).

39. *Bolger*, 463 U.S. at 72.

40. *Martin*, 319 U.S. at 147-49.

41. Pearson v. Edgar, 153 F.3d 397, 404 (7th Cir. 1998).

42. City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1556-57 (7th Cir. 1986). *See also*, Krantz v. City of Fort Smith, 160 F.3d 1214, 1220 (8th Cir. 1998) (examining whether a time, place, and manner restriction considered the desires of the resident listener).

43. *See* Rowan v. U.S. Postal Office Dept., 397 U.S. 728, 738 (1970); South/Southwest Ass'n of Realtors, Inc. v. Village of Evergreen Park, 109 F.Supp.2d 926, 929 (N.D. Ill. 2000).

44. *See* U.S. v. Kokinda, 497 U.S. 720, 733-34 (1990) (solicitation is more intrusive and intimidating than the mere distribution of information).

45. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 641 (1985). *See also*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 474 (1988); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978).

46. *See* O'Keefe v. Lee Calan Imports, Inc., 128 Ill.App.2d 410, 413 (Ill. App. 1970).

47. *See* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983).

48. Martin v. City of Struthers, Ohio, 319 U.S. 141, 146-47 (1943).

49. Distribution Systems of America, Inc. v. Village of Old Westbury, 862 F. Supp. 950, 959 (E.D.N.Y. 1994); *Martin*, 319 U.S. at 146-47.

50. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 639 (1980).

51. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 n.13 and 426 n.21 (1993) ("the principal reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution practices." *Id*. at 426 n.21).

52. *See Bolger*, 463 U.S. at 72.

53. *See* Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 162 (1939) (littering is considered to be the fault of the litterbug, not the leafletter). *See also,* Krantz v. Fort Smith, 160 F.3d 1214, 1218 (8th Cir. 1998).

54. Controlling The Assault of Non-solicited Pornography and Marketing Act of 2003, 15 U.S.C.A. § 7704 (a)(3)(A)(I) (2003); 815 ILL. COMP. STAT. 511/10(a-5) (2000).

55. Mainstream Marketing Services, Inc. v. F.T.C., 358 F.3d 1228, 1238,1242 (10th Cir. 2004).

See also, Adam Zitter, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 FORDHAM L. REV. 2767 (May 2004).

56. Ad World, Inc. v. Doylestown Tp., 672 F.2d 113 (3d Cir. 1982); Distribution Systems of America, Inc. v. Village of Old Westbury, 862 F. Supp. 950 (E.D.N.Y. 1994).