Can a Local Ordinance Limit Alcohol Sponsorship and Advertising? An Introduction

Stacy Saetta and Jim Mosher, Pacific Institute for Research and Evaluation

Communities are concerned about alcohol companies sponsoring community events that are popular with families and young people. Youth alcohol problems are endemic in the United States, and associating youth-friendly community events with alcohol products may undermine efforts to reduce those problems.

In September of 2003, the National Research Council and the Institute of Medicine released a comprehensive report presenting a national cost-effective strategy for reducing underage drinking. The report recommended stronger advertising guidelines for the alcohol industry and "reasonable precautions" on placement of alcohol advertising and product promotion to reduce youthful exposure to alcohol advertising.

The alcohol industry has increasingly relied on sponsorship of community events as a tactic for marketing its products. Sponsorship is an integral part of modern marketing, which seeks to integrate commercial products into all aspects of social interactions, creating cultural icons and symbols. A sponsor typically places banners and other outdoor signs in key locations at the event; includes logos and advertising on tickets, publicity, programs, and other documents and messages regarding the event; ties in the sponsorship with other promotional activities and commercial messages; and may have exclusive rights to sell its products at the event. Sponsorship is therefore an ideal venue for accomplishing the goals of modern marketing since the commercial messaging at the event being sponsored is seamlessly combined with cultural, musical, and other forms of community celebrations.

Some communities are seeking avenues for restricting alcohol industry sponsorships of community events. However, they often encounter complex legal problems that may frustrate these efforts. Sponsorship is a form of commercial speech, and recent decisions by the United State Supreme Court and lower courts have made

clear that the U.S. Constitution requires careful drafting of any law restricting the rights of potential event sponsors.

Regulatory vs. Proprietary Restrictions on Alcohol Industry Sponsorships

The United States Supreme Court has recognized that while a municipality may not place complete statutory bans on truthful, non-misleading commercial speech, it may restrict commercial advertising, including alcohol advertising, on both public and private property.[i] The manner in which a municipality regulates the use of private property is different, however, from the way a municipality regulates the use of its own property, including the use of one of its public parks for a municipality-sponsored event. When a government restricts commercial speech on its own property, such as its public parks, it may be acting either in a "regulatory" capacity or in a "proprietary" capacity. This distinction in governmental capacities has implications for the manner and extent to which a municipality can restrict alcohol sponsorships at municipality-sponsored events held in public parks.

A constitutionally sound ordinance has as its foundation this key distinction in constitutional law related to commercial speech. Under the "proprietary capacity" theory, courts apply a low level of scrutiny, presuming the validity of municipality ordinances and upholding them as consistent with the First Amendment if they are reasonable and viewpoint neutral. In Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission, 797 F.2d 552 (8th Cir. 1986), for example, the Eighth Circuit Court of Appeals ruled that First Amendment rights of an advertiser were not violated when he was denied advertising space on the scoreboard in a municipally owned sports complex. The municipality had a policy of selling advertising space on the scoreboard under exclusive ten-year contracts, on a first come/first served basis, and of prohibiting competitors' advertising space elsewhere in the sports complex. The Eighth Circuit held the municipality's policy was a reasonable restriction on commercial speech where "the city, acting in a proprietary capacity, [had] allowed a small number of commercial

advertisers access to a limited amount of advertising space on government property in order to generate revenue."

If a municipality operates in its "regulatory capacity," which clearly applies to regulations of sponsorships on private property, courts scrutinize laws more closely. The municipality is not restricting its own speech, but rather the commercial speech of others. The U.S. Supreme Court has established a set of guidelines for such regulation, first set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343 (1980). The Court enunciated a four-prong test in that case for determining whether a regulation of commercial speech is valid under the First Amendment:

1. Whether the speech concerns lawful activity and is not misleading.
2. Whether the government's interest in regulating the speech is substantial.
3. Whether the regulation directly advances the asserted government interest.
4. Whether the regulation is narrowly tailored to serve the government's interest.

If the first prong is met – the speech concerns lawful activity and is not misleading – then the remaining three requirements must be established by the governmental entity restricting the speech.

Because the Central Hudson test is so restrictive, communities may seek to regulate sponsorships based on a municipality's proprietary capacity. It defines "municipality-sponsored" events as events that the municipality agrees to sponsor or endorse or events for which the municipality has agreed to act as a beneficiary of revenues either directly or indirectly generated from advertising and sponsorship. By using this definition and applying it to events on municipality property, a municipality can argue that its restrictions of alcohol sponsorship should be scrutinized based on the less restrictive rules associated with propriety actions rather than the test enunciated in

Central Hudson. When acting as a "proprietor," a community may exercise broad discretion, in the operation of its own commercial interests, to send a message of its own choosing, i.e., that it declines to accept, or chooses to limit, alcohol sponsorship or advertising in connection with municipally sponsored events

It is important to note, however, that it is difficult or impossible to draw clear distinctions between municipality actions that are proprietary and regulatory and between events that are municipality-sponsored and those that are not. Courts have provided little guidance in making these determinations. In general, the distinctions are based on the extent of involvement of the municipality in planning and implementing the event and on the direct revenue flows between the municipality and the event. These factors vary by event, and courts may reach differing conclusions based on specific circumstances. In the case of an event for which the municipality's only contribution is to provide the usual park and security services, and nothing more, courts are more likely to rule that the restrictions are regulatory in nature.

Because of this uncertainty, those seeking restrictions on alcohol sponsorships should anticipate that the alcohol industry sponsors will challenge them in court, arguing that the event is not municipality-sponsored and that therefore the municipality, rather than acting in its proprietary capacity as a municipality, is acting in its capacity as a municipality as a regulator of commercial speech. If a court agrees with this argument, it will scrutinize the municipality's ordinance under the more rigorous standards of Central Hudson. Because of this uncertainty, counsel should take care to draft any proposed ordinance to address the Central Hudson test and maximize the likelihood that its provisions will be found constitutional even under this more rigorous standard of review.

[i] *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001) (holding unconstitutional under free speech clause of First Amendment Massachusetts regulation of advertising to reduce underage tobacco use, but upholding restriction on manner of sale); *44 Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495 (1996) (holding unconstitutional, in violation of free speech clause of First Amendment, Rhode Island's complete statutory ban on price advertising for alcoholic beverages).