



## CASE REPORT

### **MUNICIPAL SIGN REGULATIONS – COMMERCIAL SPEECH – PROHIBITIONS ON PORTABLE ADVERTISING SIGNS. Local restrictions on portable signage may not be enforceable against clothing that displays an advertising message. Kitsap County v. Mattress Outlet, Inc., 2005 WL 171359, \_\_ P.3d \_\_ (Slip Op., January 27, 2005.)**

**I. Facts.** Mattress Outlet employed independent contractors to advertise its retail business by waving to passersby from public sidewalks while wearing oversize raincoats that prominently displayed the company's name, address, and store location. Kitsap County cited Mattress Outlet for displaying off-premises signs in violation of the Kitsap County Code (KCC), which defined "sign" as "a collection of letters, numbers or symbols which calls attention to a business, product, activity, person or service." The Kitsap County Superior Court affirmed the validity of the challenged sign code provisions, and Mattress Outlet appealed to the Washington Supreme Court.

**II. Applicable Law and Analysis.** In a splintered plurality ruling, the Washington Supreme Court reversed the superior court's decision and dismissed the county's citations against Mattress Outlet. Notwithstanding this specific result, however, distilling a clear rule of law from the Supreme Court's multiple opinions is extremely difficult.

Characterizing the Mattress Outlet raincoats as "signs" under the KCC, four of the Court's nine justices determined that — as applied to Mattress Outlet's hired contractors — Kitsap County's prohibition on human advertisers unconstitutionally infringed upon the company's commercial speech rights. Under the reasoning of these justices, the county failed to demonstrate that human-worn advertising signs cause visual blight or negatively impact traffic safety. The four justices also reasoned that the effectiveness of the challenged ordinance was undercut by exemptions for various categories of commercial and noncommercial signage. These justices thus concluded that — under the constitutional standard for commercial speech restrictions — the ordinance did not directly advance the county's purported aesthetic and traffic safety interests and was not "narrowly tailored" to advance those regulatory objectives.

The four dissenting justices reached the opposite conclusion under the applicable constitutional standard, and argued that the ordinance represented a facially valid restriction on commercial speech. The analysis adopted by this contingent would defer heavily to local legislative determinations regarding the perceived aesthetic and traffic safety harm posed by portable signage.

The ninth justice issued a separate opinion concurring in the dismissal of the county's citations against Mattress Outlet, but declining to reach the core constitutional issues in the case. In this

justice's view, the Mattress Outlet raincoats did not satisfy the definition of "signs" under the Kitsap County Code and were thus exempt from local regulation.

**III. Conclusion.** Because a majority of justices in *Mattress Outlet* construed raincoat advertisement displays as portable signs under the applicable code definition, cities should carefully heed the Court's specific result regarding human-worn advertising signage. Any decision to enforce a local sign regulation in this context should occur only after a thorough review of the relevant code language and consultation with legal counsel.

The Washington Supreme Court is, however, apparently deadlocked over the key constitutional issues implicated by signage restrictions — i.e, the extent to which cities may (1) prohibit portable signs outright, (2) grant preferential treatment to noncommercial signs, and (3) exempt select categories of signage from a general regulation. Without a clear majority opinion from the Supreme Court on these points, the *Mattress Outlet* case provides little guidance to municipalities in crafting and enforcing local sign ordinances. These significant questions will hopefully be resolved by the *Ballen v. City of Redmond* case currently pending before the Ninth Circuit Court of Appeals. But until the Ninth Circuit issues its opinion, cities should approach the entire arena of sign regulation with caution.