

Communicating Vendors' First Amendment Rights at Town-Sponsored Events

BACKGROUND

Municipalities dedicate countless hours and dollars every year planning and hosting family-friendly activities for their communities. Among the many pre-event considerations CIRMA members face, running a fair and efficient vendor application process is among the most important. Recent events have identified a need to reexamine how towns develop and implement the vendor application process in order to mitigate liability.

SCENARIO

A municipality was hosting its annual Town Fair, which has taken place during Labor Day Weekend every year for nearly 100 years. The event consists of a number of family-friendly activities, including carnival rides and games, agricultural and craft exhibits, food vendors, merchandise vendors, and more. The town has conditions and considerations that the vendors must follow in order to be allowed to display their products; these conditions and considerations are posted on the fair's website and are communicated during the vendor application process.

On the first day of the three-day event, the president of the Fair Commission, who is an agent of the town, was notified by a patron of "an inappropriate exhibit" located in the merchandise vendor section. The patron alleged that the products being sold were offensive and not consistent with the family-friendly culture of the fair. Immediately, the president of the Fair Commission went to the booth in question to better understand the situation.

At the booth, the president identified products, such as shirts and towels, being sold with images of marijuana leaves and other smoking paraphernalia. The president agreed with the patron, indicating that the images were inappropriate and the products should not be sold at the event; however, the vendor, an alternative pain treatment manufacturer, argued that the products being sold displayed legal substances and that it is within their first amendment right of freedom of speech to display these images. The president countered and said that the products were not approved by the Fair Commission and that they must be removed, or that the vendor would be removed from the event. Ultimately, the vendor was removed from the event due to their refusal to stop selling the products.

A few months later, the vendor filed a notice of intent to sue against the town and its officers, alleging violation of their first amendment right of freedom of speech. The town defended its decision, stating that it is within their right to control what images can be displayed and that the vendor violated the fair's policy of getting the merchandise pre-approved during the application process. Ultimately, the judge ruled in favor of the vendor. The Town was responsible for paying \$85,000 to the vendor, which included payment for the vendor's attorney fees and lost wages as a result of being asked to leave the three-day event. But how can this be?

INVESTIGATION - MUNICIPALITIES' RIGHTS

The Federal Supreme Court has established and continues to enforce that governmental entities are protected by the Government Speech Doctrine. The Government Speech Doctrine recognizes that a government entity "is entitled to say what it wishes" and to select the views that it wants to express. In essence, the government is not barred by the Free Speech Clause of the First Amendment from determining the content of what it says and can engage in viewpoint discrimination.

With the Government Speech Doctrine in mind, the town has created policy consisting of conditions and considerations that vendors must follow during the event. Language contained in this policy stated, "All vendors must have professional looking concessions," and, "Pictures of your set-up and lists of products you wish to sell should be included with your application." The town contended that, by asking the vendor to remove the products deemed to violate the fair's policy, they were acting within their rights.

The judge ruled that the fair acted within its right to exercise its discretion in determining which vendors comply with the event's family friendly culture; however, the fair inconsistently applied its own policies, as they do not always require vendors to submit photographs of the merchandise being sold, and was unreasonable in its treatment of the vendor.

RECOMMENDATIONS

The Case Example confirms a municipality's rights to control free speech at its events; however, it also highlights the need to consistently enforce policy. Below are some useful tips that CIRMA members can follow to better protect themselves from Violation of Rights claims.

Policy: Develop and adopt a policy consistent with the municipality's right under the Government Speech Doctrine. Consider submitting the policy to CIRMA Risk Management for review and recommendations. In addition to CIRMA's review, the municipality's legal counsel should review language to ensure it is consistent with applicable state and federal laws.

- Within the policy, consider omitting language that states the municipality/commission/or event organizer will review all products and materials.

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- Consider including language such as, *“The [event organizer] reserves the right to refuse any exhibit, item, action, activity it considers to be inappropriate to its reputation or image, and this includes the right to ask the exhibitor to remove any exhibit or item or cease such actions or activities.”*

Communication: Communicate the policy to all vendors and merchants prior to the event, typically during the application process or thereabouts.

Response: Educate appropriate event staff and volunteers of this policy. It is recommended that the decision to remove items or cease activities is controlled to one person or a few people to ensure that the policy is enforced equally and fairly. However, event staff and volunteers should be informed on who to notify when inappropriate exhibits, items, actions, or activities are suspected or observed.

Questions? Ask your Supervisor or contact your CIRMA Risk Management Consultant at (203) 946-3700.

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