



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## EMPLOYERS DEFLATED BY “INFLATABLE RAT” CASE

By **Kenneth A. Rosenberg** and **Daniel N. Kuperstein**

Inflatable balloons in the shape of rats, skunks and other pests used by unions during labor disputes cannot be easily deflated according to the New Jersey Supreme Court’s recent decision in *State v. DeAngelo* (A-73-07). The Court held that a municipal “sign” ordinance that banned all inflatable balloon signs, other than grand opening signs, was unconstitutional because it violated the First Amendment right to free speech and was overbroad.

This case arose after a summons was issued to Wayne DeAngelo, a union official with the International Brotherhood of Electrical Workers, Local 269, (IBEW) for displaying a 10-foot rat balloon (the Rat) on a sidewalk in front of a Gold’s Gym in Lawrence Township, New Jersey. DeAngelo was displaying the Rat to draw attention to a labor dispute that IBEW was having with a contractor working at the gym. He used the Rat for this purpose because it is considered a symbol of unfair labor practices, and an image long associated with those who “cross the picket line” or otherwise desert the union cause. After Gold’s Gym complained to the police, the police required IBEW to take the Rat down. IBEW initially complied, however, after the police left, DeAngelo re-inflated the Rat. When the police returned and discovered the Rat had been re-inflated, the officer issued DeAngelo a summons charging him with violating a municipal ordinance that prohibited the use of “balloon signs or other inflated signs.” DeAngelo challenged the summons on the basis that the ordinance was unconstitutional.

Both the municipal court and Law Division disagreed and ruled that the ordinance was valid. He then appealed this decision to the Appellate Division, where he argued that the ordinance was: (i) ambiguous, (ii) preempted by the National Labor Relations Act (NLRA), (iii) in violation of his right to free speech under the First Amendment, (iv) “void for vagueness” because it did not define the term “sign” and (v) selectively enforced against labor unions. In addressing the free speech issues, the Appellate Division found that the ordinance was “content neutral,” with the purpose of enhancing aesthetics and protecting public health and safety, and that it did not entirely prevent IBEW’s message, since it could still be conveyed by handbilling or conversation with individual members of the public. Thus, the Appellate Division upheld the ordinance.

Upon review, New Jersey’s Supreme Court reversed the Appellate Division’s decision and set aside DeAngelo’s conviction. In doing so, the Court found that the municipal ordinance sought to impose a content-based restriction on the display of inflatable signs on a sidewalk, a traditional public forum. The Court determined that the sign was content-based because it favored commercial over noncommercial speech, and because it only authorized signs displayed by certain entities and for certain purposes.

Under the First Amendment, the government is prohibited from enforcing content-based restrictions in public forums, such as a sidewalk, unless it can show that the restriction served a compelling governmental

interest and was narrowly drawn to achieve that end. Upon applying this test, the Court concluded that the ordinance was invalid because there was no evidence to suggest that the Rat or other inflatable signs displayed for non-commercial reasons were significantly more harmful to aesthetics or safety than signs displayed for commercial reasons, such as grand openings. This reasoning followed the logic of the dissenting judge of the Appellate Division, which highlighted the absurdity of the ordinance. Specifically, he pointed out that the application of the ordinance resulted in permitting an inflatable balloon of a rat for a Disney store grand opening to promote its popular animated Disney character “Ratatouille,” while banning IBEW’s Rat. The Court found no evidence that the ordinance was necessary to serve a compelling government interest or that it was narrowly drawn to achieve that end.

In addition, the Court held that the ordinance was invalid because it was overbroad. Under the First Amendment, an ordinance will be deemed overbroad if it almost completely forecloses a unique and important means of communication without offering a readily available alternative. The Court concluded that this test was met in this case because the ordinance virtually eliminated all signs except for grand opening signs, and it did not offer any alternative (relying on the rationale in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)).

While this decision may be deflating at first blush, employers and others affected by this decision, such as landlords, tenants and contractors, should note that this decision does not mean that *all* displays of the Rat or similar pests are lawful. In fact, depending on the

placement or position of the balloon, or the timing and context of its positioning, the display may be illegal. Specifically, while unions may have a limited right to display an inflatable pest, or to picket or handbill under certain circumstances, if such displays physically stop people from entering a store or a work site, or if the accompanying labor dispute involves disparagement of the business’ product or violence, a business may be able to obtain an injunction to restrain such conduct through the National Labor Relations Board or state court.

Finally, this decision only strikes down a municipal ordinance prohibiting such signs on First Amendment grounds – it does not, for example, mean that the display of the Rat or other pests constitutes lawful picketing under the NLRA, or that the accompanying labor protest is lawful under state law. However, whenever such activity occurs, employers should exercise caution and contact labor counsel for guidance. This is particularly true when making decisions that could have an impact on union speech, the bargaining rights of unions or other union rights. By contacting labor counsel in advance employers can minimize the likelihood of having unfair labor practice charges or other legal action taken against them.

For more information regarding this *Alert*, please contact Kenneth A. Rosenberg at 973.994.7510 or [krosenberg@foxrothschild.com](mailto:krosenberg@foxrothschild.com), Daniel N. Kuperstein at 973.994.7579 or [dkuperstein@foxrothschild.com](mailto:dkuperstein@foxrothschild.com), or any member of the Labor & Employment Department. Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).



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