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The Municipal Lawyer Magazine

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THE JOURNAL OF LOCAL GOVERNMENT LAW

Reducing Public Sector Retiree Health Benefits

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Avoiding RLUIPA's "Substantial Burdens"

Public Employment Litigation and "Trial by Media"

Brownfields or Minefields? Redevelopment and CERCLA





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Reach Higher!

by Chuck Thompson,
IMLA Executive Director and General Counsel



From our youngest days, we know that if we are to grow in knowledge and skill, we must stretch. Some of us are born with talent and innate skills and need little work to succeed in our professions. Others, folks like Tiger Woods, LeBron James, Lance Armstrong, and Michael Phelps, work hard to succeed. When I managed local government law offices, nothing irritated me more than complacency.

At IMLA, I admit that I feel the same. Without doubt, there are few records that cannot be broken, and there are few systems that cannot be improved with effort. Over the years, as a participant in change, I can remember having residents of communities I served telling me, "If it ain't broke, don't fix it." My response was that a mule and a plow worked, and it was not because they were broken that folks sought to improve this method of productivity. Obviously, the analogy could work with the Model T, the propeller plane, the slide-rule, the pen, and the typewriter. When my father passed away, I remember thinking about the changes he saw in his life, and, with my mother turning 93, I amaze myself with reflecting on the changes she has seen: barely into the age of the automobile when she was born, she watches the space shuttle blast into orbit from a launch site just a few miles from her home. She can use the Internet to talk with her great-grandchildren; yet, as a child, the telephone was not common. Doctors can enable her to hear and to see well beyond what was thought possible not that many years ago. Scientists now can even grow human skin on animals, and recreate animals from single cells.

As attorneys, we, too, are seeing changes in our practices. Aside from the incessant television ads for personal injury lawyers and daily notices of class-action opportunities, changes in technology require that we adapt to more demanding client expectations. Clients more often expect a lawyer to respond immediately to emails and phone calls. Technologically-proficient clients often know more about recent decisions and regulatory changes than many of their attorneys, and want (and sometimes need) immediate help in understanding their effect. In short, the days of a staid practice of law are mostly in the rear-view mirror.

Changes are also coming in the way local government attorneys interact with their clients while rendering legal advice. In June, Mark Hayes invited me to come to Arkansas to speak at the meeting of the Arkansas Municipal Attorneys Association. We picked a program I do on ethics and privilege while practicing under Rule 1.13. As I prepared my presentation, I discovered that a local government practitioner in Arkansas could pretty much expect that attorney-client privilege does not exist in the government context. Shortly, afterwards, I gave a similar presentation in Florida, where privilege survives but may be on life-support. Is this the direction in which we are heading? Can we stem the tide?

At IMLA, we are looking at the changes in the practice of law and changes in technology to see how we can serve our members better. During her presidency, Susan Rocha formed a Committee called Vision 2020, designed to protect the organization from becoming complacent. Already, we are working on some good ideas that we hope will enable local government law offices to better serve their clients. We expect to use Twitter and social-networking tools to deliver timely and important information to members. We have been increasingly engaging members through conference calls to provide information in substantive or practice areas, and adding value to membership. We have also been implementing CLE through interactive teleconferences and webinars to provide low-cost educational programming. Each time we implement a new idea or concept, we get valuable feedback from our members and try to make improvements based on the suggestions – so keep the ideas coming!

As we move forward, you will see changes. We hope you will value all of these, but recognize that some change may be difficult to accept. To make sure we are headed in the right direction, you must let us know how you think we are doing. Please take a few minutes to email me, call me, or write me and let me know what you think we've gotten right, wrong, or need to do.

Speaking of suggestions, one of our members gave me a call recently and offered a couple of excellent suggestions and comments. One point that was well made involved our too-frequent emails or entreaties to members. We will try to limit them. In addition, he said their frequency and tone seemed to make us appear that we were "desperate." Well, I am desperate, but not because of any problems at IMLA – I think it is fair to say that we continue to be reasonably well-positioned despite the terrible economic conditions most local governments face, and in keeping with the prospect that conditions will improve. Rather, I am

desperate because at age 61, I know that I don't have a decade or more to move IMLA forward. I see what we can be and where we can be and how we can get there, but feel pressed for time. My goal is to increase membership so effectively that IMLA can reduce its dues, reduce its fees for programming, and develop ways to deliver better and more valued services to our members.

When I represented a sanitary district in conjunction with being a county attorney, I could see how the methodology worked. With fixed costs that do not change regardless of the number of customers served or gallons processed, if you can increase customers, you can decrease the unit cost for each customer. As IMLA has moved away from providing individual research requests through a large legal staff, its fixed costs have diminished substantially. Depending on the services our members need, if we can increase membership without incremental increases in services, we can reduce our unit costs. In short, when you recruit members for us, we will be able to make our programs less expensive and we can lower the cost of membership. As an example, if we were able to increase membership revenue by $100,000 in FY10, we could: reduce the price of each interactive teleconference we provide by roughly $25 per line, cut the Conference registration fee by roughly $125, cut the Seminar registration fee by half, or we could reduce dues by about five percent. To reach a goal of $100,000 in new membership revenue, we'd need to retain the members we had in FY09 and get between four and ten new regular members from each state.

Let's go viral. Send a letter or an email, or give a call to ten prospective regular members in your state. Let them know that IMLA wants them to join and participate in finding ways to make the practice of local government law more effective. Let them know that IMLA offers some of the best and most cost-effective national CLE for local governments and that, if they have any questions or suggestions, I will try to respond directly and individually. Let them know that IMLA advocates for them and that their membership will enable IMLA to do so more effectively.

This past year, IMLA advocated for local governments in a number of cases and in a number of ways. We intend to do better and more this year. The Supreme Court will be hearing a number of cases important to local government. Congress and federal agencies continue to intrude on the founding principles of federalism in programs affecting local government. More and more frequently, local governments are asking IMLA to participate in cases in their state appellate courts or in the federal circuits. All of these requests have one thing in common: an important issue affecting local government. What follows are just a few of these issues:

- May generally applicable land-use regulations be applied to regulate a megachurch under RLUIPA?
- Does the ADA allow private citizens to challenge a local government's self-evaluation and transition plan?
- Does the False Claims Act allow a person to use a local government's own audit of its implementation of a federal program as the primary basis of a *qui tam* action against the local government?
- Whether a governmental entity can transfer property to a private entity/ third party for valid consideration in an effort to eliminate an Establishment Clause violation?
- Whether private practice city or county attorneys are employees of the local government, or independent contractors?
- Whether Congress can federalize collective bargaining for public safety employees of a local government?
- Whether Congress should reconsider its decision to require local governments to withhold 3% of their payments to contractors and pay that money over to the IRS?
- Whether prosecutors should have prosecutorial immunity for pre-indictment advice to police?

This is just a partial list of issues IMLA will be working on in the coming year, but it represents the broad diversity of important issues that local governments face, either in the courts or in the federal legislative setting. Join us as we band together to advance and protect the interests of local government. **ML**

Correction

In the last issue of the Municipal Lawyer, we listed the name and e-mail address of Stephen J. Smith, the Law Director for the City of Dublin, Ohio incorrectly. The correct e-mail address is ssmith@szd.com. Our apologies for any confusion this may have caused.

Coming in Our Next Issue!

The November/December 2009 *Municipal Lawyer* looks at Supreme Court rulings over the last Term, including employment law cases, the Voting Rights Act ruling, the ruling in *Pearson v. Callahan,* and other decisions of interest.

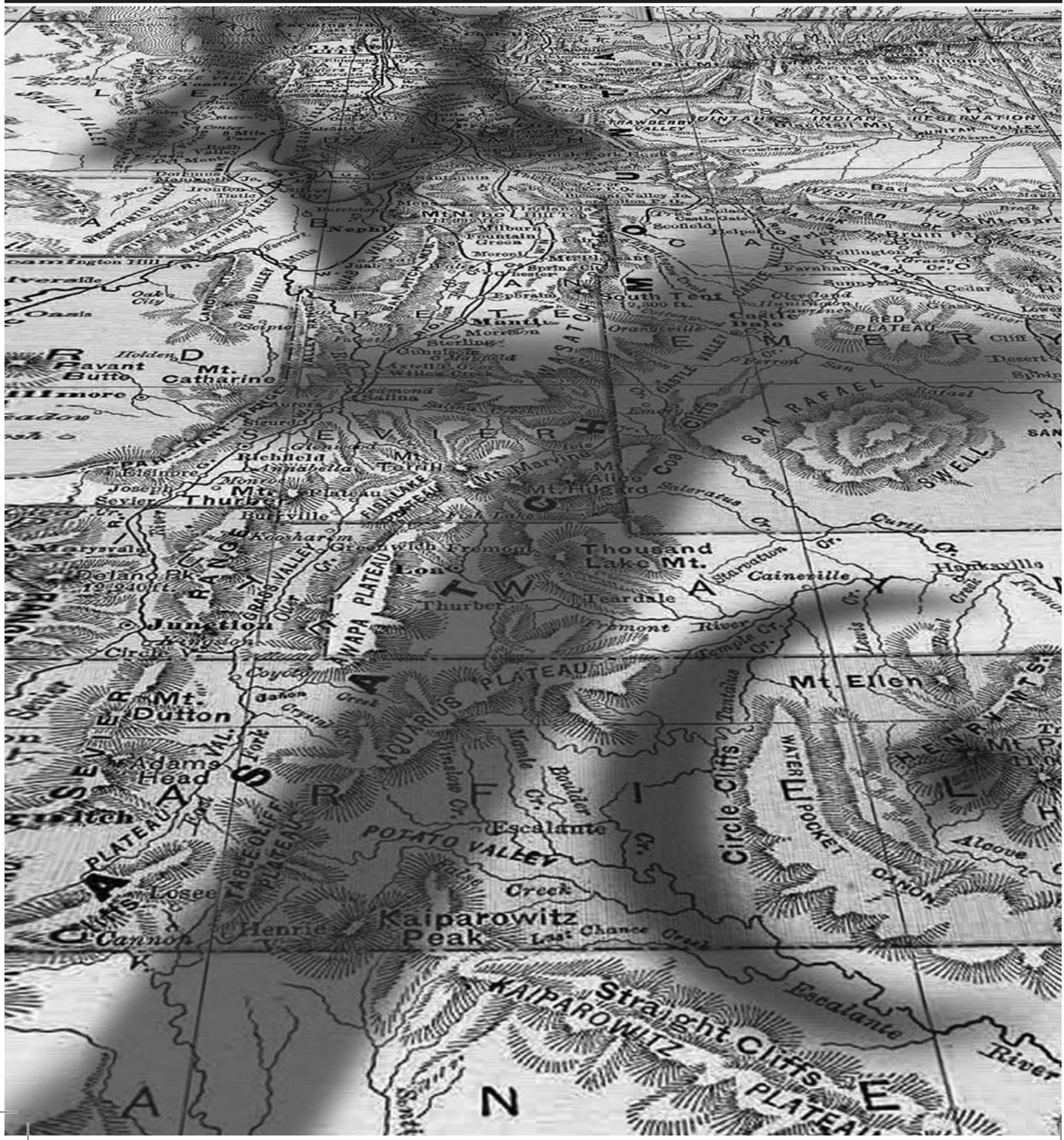
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Avoiding "Substantial Burdens" on Religious Land Use Applicants

by Lora A. Lucero



Local governments are admonished not to "substantially burden" a religious land use applicant's right to free exercise, but the Religious Land Use and Institutionalized Persons Act of 2000[1] (RLUIPA) does not define the term, leaving everyone, including the courts, in a quandary. Nearly a decade after RLUIPA was signed into law by President Clinton, a review of the decisions that have grappled with "substantial burden" indicates there have been relatively few instances where the courts have found that the local government substantially burdened the religious land use applicant.

This commentary is divided into two parts. In this first article, some of the perplexing definitions of "substantial burden" are provided, along with cases where no "substantial burden" was found. In the next article, the decisions holding that a "substantial burden" existed will be examined in greater detail to glean some lessons for planners and local government attorneys.

Reviewing 76 reported decisions between 2001 and July 2009 which addressed the "substantial burden" issue in the RLUIPA land use context, I found only 17 in which the court ruled in the applicant's favor on the "substantial burden" issue. Decisions where a substantial burden on the religious land use applicant was found and which will be discussed in greater detail in the next article include: *DiLaura v. Tp. of Ann Arbor*,[2] *Cottonwood Christian Ctr. v. Cypress Redev. Agency*,[3] *Murphy v. Zoning Comm'n of Town of New Milford*,[4] *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*,[5] *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*,[6] *Congregation Kol Ami v. Abington Tp.*,[7] *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*,[8] *Westchester Day School v. Village of Mamaroneck*,[9] and several others.[10]

The odds are definitely in favor of the local government. However, what these ratios fail to reveal is the added factor of how many times a local government capitulated prior to trial when confronted with threatened RLUIPA litigation. Since RLUIPA allows a successful religious land use applicant to obtain attorneys' fees – with no such opportunity for a local government that succeeds in defending itself against a RLUIPA claim – there is probably a stronger motivation for a local government to settle a claim and avoid RLUIPA litigation.

The joint statement issued by Senators Orrin Hatch and Edward Kennedy on the purpose of RLUIPA provides that "it [was] not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise. Instead that term as used in [RLUIPA] should be interpreted by reference to Supreme Court jurisprudence."[11] The sponsors also noted that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."[12]

If RLUIPA accomplished nothing more than to reset the clock back to the pre-*Smith* jurisprudence,[13] city planners and local government attorneys might not feel such consternation. However, RLUIPA broadened the definition of "religious exercise" to include "[t]he use, building, or conversion of real property for the purpose of religious exercise" with respect to "the person or entity that uses or intends to use the property for that purpose."[14] "Religious exercise" also includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[15] This tension was summed up well by the Connecticut Supreme Court in one RLUIPA case:

> [I]nterpreting the substantial burden provision of RLUIPA as creating a significantly broader right than that guaranteed by the free exercise clause would render the statute constitutionally suspect under [*Boerne v. Flores*]. On the other hand, interpreting the provision as creating a right with precisely the same scope and contours as that guaranteed by the free exercise clause would ignore the statute's express terms and effectively render it superfluous.[16]

What's a court suppose to do?

"Substantial Burden" Defined

The federal circuit courts of appeals have not settled on a single definition or test for "substantial burden." In the U.S. Court of Appeals for the Ninth Circuit, a land use regulation "must be 'oppressive' to a 'significantly great extent' … imposing a significantly great restriction or onus upon religious exercise."[17] The Eleventh Circuit defines a "substantial burden" as one that causes "more than an inconvenience on religious exercise; it must place significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. A 'substantial burden' may result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[18] However, legitimate and "run of the mill" zoning requirements rarely, if ever, will rise to the level of a substantial burden.[19] The Fourth Circuit, in a RLUIPA case in the context of institutionalized persons, held that "a substantial burden on religious exercise occurs when a … government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[20] The U.S. District Court for the District of Maryland appears to have accepted this definition in the land use context.[21]

The Eighth Circuit holds that the government action must bear on "some central tenet" of an applicant's religious belief system, or prevent the applicant from engaging in an exercise that is "fundamental" to that belief system.[22] The Seventh Circuit has fashioned the "effectively impractical" standard in a 2003 case: "A land use regulation that imposes

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Lora A. Lucero is a city planner and land use attorney in Albuquerque, New Mexico. She is the Editor of *Planning & Environmental Law*, published by the American Planning Association. Ms. Lucero, along with Michael S. Giaimo (Robinson and Cole, LLC), edited *RLUIPA Reader: Religious Land Uses, Zoning, and the Courts*, published by the American Bar Association and American Planning Association in April 2009.

a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable."[23] While the court appeared to retreat from that standard in 2005, when it decided that a city's denial of a rezoning permit constituted a substantial burden because it required the applicant church to search for other parcels of land or file more applications, resulting in "delay, uncertainty, and expense,"[24] the Seventh Circuit returned to the 2003 definition in 2006, when it held that a village's "conditions on the approval of the permit limiting the size of the buildings, the number of services, the use of the surrounding outdoor areas, and the number of major activities to be conducted in the course of the week, did not impose a substantial burden."[25]

The Third Circuit says a "substantial burden" is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise… effectively impracticable."[26] On the other hand, in the Tenth Circuit, no substantial burden can be found where "the incidental effects of otherwise lawful government programs 'make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.'"[27]

No "Substantial Burden"

Although local government attorneys might best divine what constitutes a "substantial burden" by focusing on the few cases in which the courts have actually found such a burden occurred, a brief review of instances where there was no "substantial burden" is heartening. A word of caution, however – every decision is very fact-specific, and it is important to read the *entire* opinion in order to appreciate the nuances in the ruling. On the plus side, RLUIPA facts can be juicy, and many decisions could compete with John Grisham's story-telling abilities.

Communication Antennas. A 150-foot monopole, with antennas and associated equipment, built on property located next to a synagogue, is not a substantial burden and does not affect the synagogue at all, except, perhaps, aesthetically.[28]

Although local government attorneys might best divine what constitutes a "substantial burden" by focusing on the few cases in which the courts have actually found such a burden occurred, a brief review of instances where there was no "substantial burden" is heartening.

Walking. Excluding churches and synagogues from a business district, which requires some people to walk further to attend services, is not a substantial burden. "While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA."[29]

Spending Money and Logistical Burdens. A congregation that owned property within a city but was barred by the city's zoning ordinance from using the property for worship or prayer, argued that it was "forced to spend a considerable amount of money to rent space" for a place to hold worship services, and complained "about the inconvenience of having to set up the worship space in the high school auditorium every week and defer to the high school's needs if there [was] a conflict."[30] However, such monetary and logistical burdens do not rise to the level of a substantial burden on a congregation's constitutional free exercise rights, and the congregation's RLUIPA claim failed for the same reason that its free exercise claim failed.[31]

Administrative Building in an Agricultural District. The denial of a permit to build a 40,000 square-foot church administrative office building in a county's agricultural district – where churches were allowed but office buildings were not – was not a substantial burden. The church failed to show that the county's decision "interfere[d] with a central belief of the Church's religious doctrine."[32]

Requiring a Special Use Permit. Chicago's zoning ordinance allows churches "by right" in all residential zones, but requires a special use permit to operate in commercial and business areas, and limits churches in manufacturing areas. This was found not to impose a substantial burden. Various churches argued that the scarcity of affordable land available for development in residential zones, along with the costs, procedural requirements, and the inherent political aspects of the special use, map amendment, and planned development approval processes, imposed a substantial burden. The court disagreed, noting:

> these conditions – which are incidental to any high-density urban land use – do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. … Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.[33]

Denial of Rezoning. A religiously-affiliated college maintained that a denial of its rezoning application (to allow it to build an educational facility with outdoor sports fields, a gymnasium, a theater/chapel, and student residence halls for 1,200 students) was a substantial burden. The Ninth Circuit concluded the college was "simply adverse to complying with the PUD ordinance's requirements," and the college was required to submit a complete application just like all other applicants.[34] In another case, a church sought to construct an apartment complex on property it owned across the street from its church. The property was zoned for single-family residential use, with single-family homes on either side, and the property required rezoning to multiple-family residential use. After the city denied the church's rezoning request, the Supreme Court of Michigan agreed, finding that building

an apartment complex did not constitute a "religious exercise."[35] Even assuming this could be a religious exercise, the court explained that if the church wanted "to build an apartment complex, it [could] do so; it just ha[d] to build it on property … zoned for apartment complexes. … In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else."[36] Accordingly, the refusal to rezone was not a substantial burden.

Denial of Conditional Use Permit. A church wanted to build a meetinghouse, 16,558 square feet in area and 28 feet tall, on a 5.64-acre tract zoned single-family residential, which required a conditional use permit (CUP). The city rejected the application because "the parcel was too small to accommodate the buffers of vegetation and distance" required for a meetinghouse of that size in that location, but noted that "it could approve a site plan that included a building of the same size on a larger lot with adequate buffering."[37] The court held that it was not a substantial burden to require the church to submit a new application,[38] referring to *Westchester Day School v. Village of Mamaroneck*. There, the Second Circuit noted that the denial of a specific proposal may constitute a substantial burden when a "board's stated willingness is disingenuous, or cure of the problems noted by the board would impose so great an economic burden as to make amendment unworkable, or where the change demanded would itself constitute a burden on religious exercise."[39] A mere denial, without more, however, was not a substantial burden.

Denial of a Soup Kitchen. Where a redevelopment ordinance did not allow a church to operate a soup kitchen within a redevelopment zone, a court held there was no substantial burden in requiring the church to relocate outside of the narrowly-drawn redevelopment zone.[40]

Denial of Demolition Permit. A religious organization serving university students wanted to demolish its current building so it could construct a larger building on the site, but the historic district commission denied its request for a demolition permit. Noting that the religious organization could, instead, use the second floor (half of its current building space, which was leased to commercial tenants), the district court was "not convinced that the lack of a designated meditation space or student lounge imposes a substantial burden" on the organization.[41]

Distractions. An Orthodox Jewish congregation had grown and the rabbi wanted to relocate because of the distractions in the current location (e.g., female congregants who arrived late for prayer services had to pass through the section reserved for men to get to the side reserved for women; and the Kiddush, a ceremonial blessing of the wine and meal, was prepared in the prayer area while services were ending). The city denied the CUP because the proposed location did not have adequate parking and a walkway would not provide safe pedestrian access. The district court found the denial did not substantially burden the congregation's ability to worship according to their beliefs, and the distractions did not rise to the level of a substantial burden.[42]

Applying for Special Exception. A county's zoning code required a special exception for religious organizations and day-care centers located in certain residential districts. A rabbi was issued with a code violation notice for operating a synagogue in his residence and was told the corrective action would be for him to apply for a special exception. He refused to apply and eventually, a lien was placed against his property. The Eleventh Circuit held that requiring an application for a special exception did not pose a substantial burden because it did "not coerce conformity of a religious adherent's behavior."[43]

Denial of Permit for Large Building. Many RLUIPA cases involve growing congregations that need more space. In one case, a church was denied a special use permit (SUP) to construct a school and church building. It had previously received an SUP for a 10,925 square-foot building to use as a sanctuary and a day-care for 40 children, and another SUP to increase the day-care to 72 children and build a 28,500 square-foot elementary school for 280 students. After the SUP expired in 2001, the church submitted a new application, to build a 34,989 square-foot school. The board denied this SUP application because the proposed facility, in relation to the size of the site, was out of proportion to similarly-situated schools and combined church and school facilities, and was inconsistent with the review criteria and standards for the granting of a SUP. The church framed the RLUIPA argument as a "size issue" and argued that "anything less than the addition of a 34,989 square-foot building on its property prevent[ed] it from fulfilling its ministries and missions."[44] The Sixth Circuit declined to "set a bright line test by which to 'measure' a substantial burden," reversing the lower court.[45] Even though the denial of the SUP might make the applicant's religious exercise more expensive or difficult, it did not "place substantial pressure" on the church "to violate its religious beliefs or effectively bar the church from using its property in the exercise of its religion."[46]

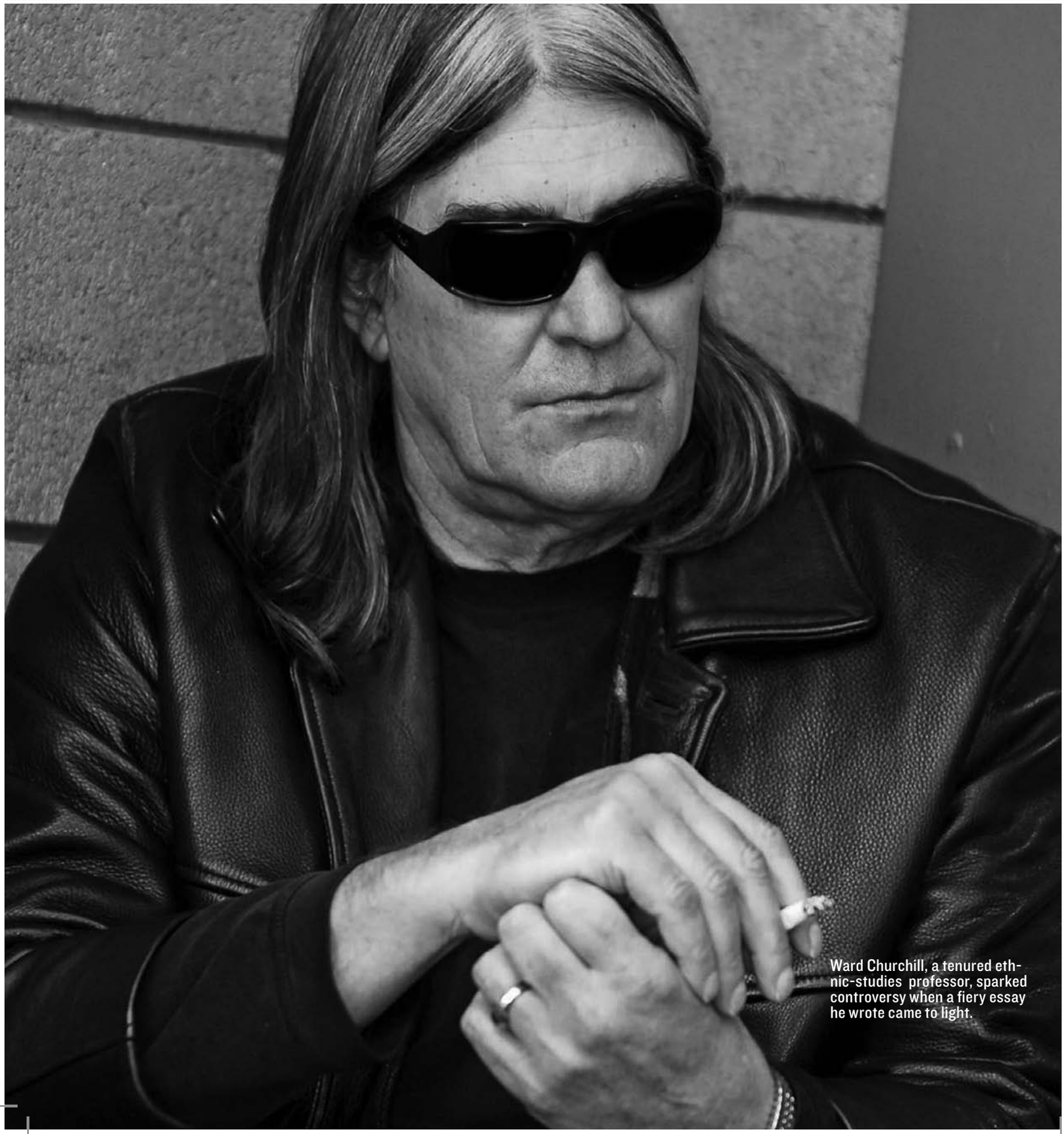
No Churches in Industrial Zones. After a church purchased a warehouse in an industrial zone and began using it as a church, a village sought an injunction against it based on violations of the building code. The church countered with a RLUIPA suit, claiming that the zoning code substantially burdened its free exercise rights because no churches were allowed within the industrial zone. The court, however, decided that a "ban on churches in the industrial zone [could not] in itself constitute a substantial burden on religion, because then every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA."[47]

Denial of Campground, Hiking Trails. A church wanted to develop its 24-acre parcel for a non-denominational ministry campus, to include a campground and hiking trails. The city denied the campground and hiking trails because these were not accessory uses for a church or worship center. A court ruled the denial did not impose a substantial burden on the church's exercise of religion in violation of RLUIPA.[48] The ordinance defined "accessory use" as "[a] use or structure customarily incidental and subordinate to the principal use or structure."[49] A campground was not an accessory use to a church/worship center and the hiking trails would relate primarily to the campground and campers.[50]

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High-Profile Litigation in Public Employment Lawsuits

by Lawrence L. Lee and Raj Chohan



Ward Churchill, a tenured ethnic-studies professor, sparked controversy when a fiery essay he wrote came to light.

Employment lawsuits filed by public employees for wrongful termination can develop into headline news and take on a life of their own. When an adverse employment action becomes a topic for the media (something usually initiated by counsel for the terminated employee), governmental entities find themselves facing a potential three-headed monster of bad facts, bad issues, and bad press. Here's a review of cases that made recent headlines, and the lessons learned.

Churchill v. University of Colorado

In April of 2009, Professor Ward Churchill obtained a favorable jury trial verdict against the University of Colorado (CU) for discharging him in violation of his First Amendment rights.[1] This case contained all the elements of a perfect storm.

Churchill, a tenured ethnic-studies professor, sparked controversy in 2005 when a fiery essay he wrote several years earlier came to light.[2] The piece compared some of the victims of the 9/11 attacks on the World Trade Center to the notorious Nazi, Adolph Eichmann.[3] Public outrage led to a chorus of criticism from elected government officials across the state. The then Colorado Governor, Bill Owens, openly called for Churchill's resignation.[4] CU's Board of Regents issued a public apology, which reached the national media, condemning the professor's caustic composition.[5] Some CU donors threatened to curtail their fundraising efforts until something was done about Churchill.[6] Fox News personalities Bill O'Reilly and Sean Hannity provided a flurry of critical commentary.[7] Denver television stations and newspapers explored every conceivable angle, and local talk-radio hosts hammered away about the professor for months on their daily drive-time shows.[8] The media scrutiny was intense.

After lengthy review, CU decided that Churchill's essay was constitutionally protected political speech.[9] However, the University announced it would be looking into allegations of research misconduct involving some of Churchill's other published works.[10] Several committees reviewed his scholarly writings and concluded that he had plagiarized material and fabricated research.[11] Ultimately, the University revoked Churchill's tenure and dismissed him for academic misconduct, but it insisted he had not been terminated for his controversial 2001 essay.[12]

Professor Churchill filed suit, claiming that the University violated his First Amendment rights by terminating him in retaliation for the unpopular, but constitutionally protected, remarks he made.[13] The case went to trial, and the professor's attorney repeatedly referred to a "howling mob" which included Bill Owens, the State's former governor, and CU and elected officials.[14] In cross-examination, Owens was forced to explain statements he had made on *The O'Reilly Factor* television show, in which Owens appeared to be making veiled threats that CU's budget would be cut if the school didn't fire Churchill.[15] Moreover, plaintiff's counsel played a videotaped deposition from former CU President Betsy Hoffman, who testified that the governor called her after the Churchill controversy had become national news, demanding that she terminate the professor immediately.[16] On the stand, Owens denied pressuring CU to fire Churchill.[17] When interviewed by various media outlets after the verdict, one juror explained that the governor's testimony stuck out in particular.[18]

Both sides called a parade of public officials to testify. Some fortified the University's defense, others weakened it.[19] Numerous scholars opined on the intricacies of plagiarism and whether Churchill's writings constituted academic fraud. Despite weeks of trial and credible evidence that Churchill lost his job because of shoddy scholarship, the jury concluded otherwise. All six jurors agreed Churchill had been fired in retaliation for his incendiary essay, in violation of his constitutional rights.[20] However, the jury awarded Churchill only nominal damages – the sum of one dollar.[21] The trial judge subsequently vacated the jury's verdict based on quasi-judicial immunity and denied Churchill's request to be reinstated.[22]

Powers v. City of Seattle

In 2008, the City of Seattle settled a defamation lawsuit brought by a former police officer who claimed that the City leaked confidential information about a pending misconduct case to a newspaper, *The Seattle Times*. The City settled the suit for the bargain sum of $12,000,[23] but not before unwittingly picking an embarrassing fight with the press.

Officer John Powers was an eight-year veteran of the Seattle Police Department when he was fired in 2005 for misconduct. According to *The Seattle Times* (citing anonymous sources), he was being investigated in connection with a drug-related offense.[24] He was suspected, among other things, of giving cocaine to his girlfriend. Powers filed a defamation lawsuit against the City for allegedly leaking the details of the investigation to the media.[25]

According to Seattle City Attorney Tom Carr, a good legal strategy led to a bad tactical decision.[26] Powers could not prove that the City gave confidential information to reporters because *The Seattle Times* cited only anonymous sources.[27] Journalists in the State of Washington are protected from reveal-

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ing their sources by a particularly strong reporter-shield law.[28] The City could have Powers' claims dismissed if the reporters who wrote the stories exercised their privilege to protect their sources. The City's lawyer exchanged e-mails with the *Seattle Times*' attorney, attempting to get some agreement on how the reporters would assert the privilege. Thinking that there was an agreement, the City's lawyer sent the subpoenas to the *Times*' lawyer. The City's lawyer expected the journalists to exercise their privilege and refuse, which was what the City wanted them to do.[29] What he wasn't expecting was the barrage of new stories, editorials, and condemnations that followed.[30] Suddenly, a heated public debate took place in the media on how the First Amendment applied in this matter. Local television stations covered the controversy, while pundits commented on the wisdom of going after journalists. Politicians started to weigh in – Governor Christine Gregoire said the subpoenas targeting the reporters "troubled" her.[31]

Mr. Carr subsequently got on the phone himself; he quickly resolved the issue with *The Seattle Times* attorney and withdrew the subpoenas.

Johnson v. Village of Rockton

In 2007, a jury returned a verdict in favor of Jeremiah Johnson, a police officer who was terminated by the Village of Rockton, Illinois shortly after being called into action in Iraq.[32] The damages award was approximately $27,000.00.[33] While the relatively low amount suggests the outcome was a good one for the Village, there was a tremendous amount of bad press associated with the case: high-ranking state officials publicly criticized the Village government, news reports appeared in local and regional newspapers, and major market publications like the *Los Angeles Times* covered the story.[34]

By way of background, the Village hired Johnson in 2002 as a part-time police officer.[35] At the time, Johnson was a member of the Illinois National Guard. He alleged that the Village delayed in giving him a full-time position because in his military status, even though other police officers who were sworn in at the same time as he was received full-time duties within a shorter time.[36] Johnson also alleged that the police chief complained about "scheduling conflicts" involving Johnson's military obligations.[37] When Johnson was ordered to active duty in Iraq, the Village terminated his employment eleven days later.[38] When Johnson returned from duty, he re-applied for his previous position. The then Illinois Lieutenant Governor, Pat Quinn, and Attorney General, Lisa Madigan, attempted to intervene on behalf of the returning soldier. During a press conference, Lt. Gov. Quinn stated, "[w]e do not want our soldiers fighting terrorism abroad to have to fight for their jobs when they come back home."[39] Local newspapers ran sympathetic articles explaining that, "[i]n the heat of combat in Iraq, Jeremiah Johnson would picture his wife and young daughter – and wonder how he'd support them when he returned from the war zone."[40]

The Village refused to re-hire Johnson and he sued, claiming wrongful termination in violation of state and federal laws that protect reservists summoned to action.[41] At trial, the Village insisted it terminated Johnson because of concerns over his poor performance. There was evidence that Johnson had made a traffic stop and "challenged a combative suspect to a fight,"[42] and the police department had received complaints that Johnson had a habit of tailgating other drivers. Moreover, the Village argued that Johnson had exhausted his personal leave and had gone beyond his allotted sick time.[43] At trial, the jury concluded that Johnson's military service was a motivating factor in his firing, and it found the Village liable for the wrongful termination.[44]

Eng v. Cooley

In 2009, the U.S. Court of Appeals for the Ninth Circuit decided that the Los Angeles County District Attorney and other defendants were not entitled to qualified immunity in their individual capacities with respect to a First Amendment retaliation lawsuit filed by David Eng, a senior attorney in the District Attorney's office.[45]

Eng was assigned to investigate allegations of crime and fraud in connection with a development project, the Belmont Learning Complex.[46] The newly-elected District Attorney, Steve Cooley, vowed to clean up apparent improprieties that were associated with the $200 million project.[47] His office placed Eng on a task force designed to produce criminal indictments against prominent people involved with the project.[48] However, after months of investigation, the task force concluded that there were no violations that warranted prosecution.[49] Eng reported his findings to Special Assistant District Attorney Anthony Patchett, who headed the task force. Eng alleged he was threatened with "severe personal consequences" if he didn't change his report to reflect what Patchett believed the District Attorney "wanted to hear."[50] Eng refused.

During the next several months, Cooley initiated several internal investigations to "[force] David Eng out of the District Attorney's Office,"[51] including one into Eng's alleged sexual harassment of a law clerk. The inquiry proceeded despite the law clerk's insistence that the two had engaged in a private consensual relationship with no sexual harassment.[52] The District Attorney ordered Eng to work from home until that investigation was concluded. Upon Eng's return to the office, he was demoted.[53] Cooley later suspended Eng and filed misdemeanor charges against him for using an office computer to access personal information. The charges were dismissed when the prosecution's star witness invoked his right to remain silent, apparently because he had also misused office computers.[54]

In 2003, the *Los Angeles Times* published a detailed story on Eng's case, including an interview with his attorney.[55] The article explained Eng's belief that he had experienced retaliation because he refused to recommend criminal charges against people involved with the Belmont project.[56] Several weeks later, officials in the District Attorney's Office offered to "resolve matters" with Eng if he agreed to publicly apologize to the District Attorney and tell the *Los Angeles Times* that his attorney's interview was "unauthorized and inaccurate."[57] Eng

returned to work without agreeing, and the Civil Service Commission subsequently "resolved all outstanding allegations in favor of Eng."[58]

Eng filed a Section 1983 lawsuit claiming that Cooley violated his First and Fourteenth Amendment rights.[59] Eng alleged that Cooley retaliated against him for commenting on the Belmont project and speaking to reporters through his attorney.[60] The district court granted partial summary judgment, but left intact the constitutional claims pertaining to Eng's criticism of the District Attorney's Office, and the statements his attorney made to the *Los Angeles Times*.[61] The court concluded that the defendants were not immune from liability.[62] On appeal, the Ninth Circuit affirmed that Eng had "properly alleged a violation of his First Amendment rights."[63] Moreover, it held that Eng had "clearly established" a First Amendment interest in his public comments to the press, even if they were delivered through his attorney.[64]

Lessons Learned

Employees Have an Incentive to Air Grievances in Public

In 2006, the U.S. Supreme Court made it more difficult for public employees to win employment retaliation cases involving First Amendment claims.[65] The Court's ruling in *Garcetti v. Ceballos* added another hurdle to the *Connick-Pickering* test.[66] Now, in order to receive First Amendment protection, employees must show, as a threshold matter, that they were speaking as private citizens on matters of public concern.[67] Importantly, the First Amendment does not protect a government employee whose speech occurs pursuant to his official duties.[68] While the Supreme Court has not defined "speech pursuant to official duties," most courts agree that speech that is commissioned or required by the job itself almost always constitutes speech that falls within an employee's official duties.[69]

For employees that encounter situations similar to that of David Eng, there is an implicit incentive to air grievances outside of the employment context. Eng's decision to go to the media strengthened his ultimate argument in his lawsuit – that he spoke as a private citizen on matters of public concern. Had Eng kept his grievances about the Belmont project within the confines of his work environment, his speech would likely have been construed as being made pursuant to his official duties, and it would have been much more difficult for his First Amendment claims to survive summary judgment. An employer should bear in mind that disciplining an employee for providing information which supports a contrary position to that of an elected or appointed official will invite a future claim of retaliation, even in politically-charged public offices. It is also critical that employers immediately involve human resource personnel to encourage employees to resolve their internal grievances at the first and lowest possible level in the employment hierarchy. Without such available internal safeguards, employees may have a legal incentive to air their personnel issues in public, which may ultimately work to support a claim of retaliation.

Have a Responsive Message and Use a Single "Pipeline"

In situations where the employer is suddenly faced with media attention before internal resolution measures can be fully utilized, the entity is immediately expected to provide a response as to its position. Patrick O'Rourke from the University of Colorado not only lived through several years of the Ward Churchill controversy, he was also lead counsel in the civil trial, defending CU in the district court. He believes it is critical to have an action plan in place to "circle the wagons" and focus the message.[70] When Professor Churchill's essay first appeared on the national scene and the initial firestorm of controversy hit, elected officials frequently gave public comments to reporters without fully appreciating the implications. To the extent possible, it makes sense to deliver a focused message to the media through a single source, as this cuts down on the "freelancing" some public officials may be inclined to engage in when there is no pipeline in place. Strong admonitions by employers' counsel, advising the employers that statements in the press may be used against them in a deposition and at trial, usually (as evidenced in the Churchill lawsuit) provides the necessary medicine to avoid strengthening a plaintiff's lawsuit.

Caution elected officials to learn both sides of the story. Often reporters catch public officials before they have been fully apprised of an issue or controversy. A journalist working on a deadline will simply provide whatever information he has and seek a response from the public official. Often this information is incomplete. When officials are able to take a step back and check with the government entities involved in the controversy, there is a good chance that they will be better informed when they talk to the media.

Don't Subpoena Reporters

There's an old saying about picking fights with people who buy ink by the barrel. Issuing subpoenas to compel reporters to reveal their sources is almost always a bad idea. In most cases, their attorneys will put up a mighty effort to quash the subpoenas. Even if the subpoenas survive, there's a good chance the reporters will refuse to divulge their sources, particularly if the sources are confidential informants. Then, every media organization around will stand in unity with the beleaguered journalists. The public entity seeking the sources will face a barrage of bad press from one end of the country to the other. Unless it is absolutely necessary, avoid this tactic.

"No Comment" = An Undesirable Vacuum

While lawyers are usually loath to talk to the media during a period of pending litigation, the rules can change in the context of high-profile litigation involving public employees. If the public entity under fire doesn't define the message that it ultimately wants to convey in the litigation, someone else will do it. Plaintiffs' employment attorneys may have an interest in putting their "spin" in the public consciousness during the pretrial period. This gives them a head start in controlling the message, as the employer is usually caught off-guard when a reporter calls for comment, often being unable to provide more than the default cliché of not being able to respond due to pending litigation. Employers faced with this should ask the reporter for a copy of the lawsuit and arrange a time for another conference, ideally within a couple of hours of the initial conversation. This gives the employer's representative time to develop an appropriate response and

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The Legal Implications of Reducing Public Sector Retiree Health Benefits

by William T. Payne and Stephen M. Pincus



Most states and many local governments have promised health care benefits to their retired workers.[1] These promises may be contained in statutes or ordinances, or may have been collectively bargained. The level and duration of the retirement medical benefits to be paid vary greatly. Some governmental entities simply provide retirees access to the health plans provided to current employees without a subsidy; some require retirees to pay some or most of the cost of continuing coverage; and others provide lifetime benefits for retirees and their spouses, or benefits that last until they become eligible for Medicare.

The cost of providing retiree health care has soared with the increasing number of governmental workers reaching retirement age, retirees living longer, and medical costs outpacing general inflation. In addition, for the first time, the Governmental Accounting Standards Board (GASB) now requires – pursuant to GASB Statement No. 45 (GASB 45) – that states and localities "accrue" the costs of "other post-employment benefits" (OPEB) over an employee's career, and disclose the present value of any unfunded liability.[2] Even before the recent downturn in the stock market, it was estimated that state and local governments had OPEB liabilities totaling $1.5 trillion.[3] Among states, New Jersey has reported the highest unfunded OPEB liability at $68.8 billion ($7,946 per state resident) while, on the low end, North Dakota has reported $31 million ($48 per state resident) in unfunded liability.[4] Many municipalities have OPEB liabilities of several thousand dollars per resident, including San Francisco ($6,251) and Newton, Massachusetts ($7,758).[5]

While these obligations have been known for years, most governmental entities have not set aside funds to satisfy them, as they generally have done for pension benefits. Instead, they have treated the funding of retiree health-care as an annual "pay-as-you-go" expenditure. Now that accrual liability of state and local governmental OPEB costs is fully disclosed, credit and bond-rating agencies may decide to lower their ratings for governmental entities that are not proactive in addressing these unfunded obligations.

With GASB 45's potential impact on credit ratings and with tax revenues down due to the recession, public employers across the country have renewed their attempts to contain the cost of providing retiree health benefits. These efforts include instituting or raising monthly premiums, imposing higher deductibles, capping benefits, or eliminating retiree health-care coverage altogether. While it is clearly legal to make such changes for future hires, whether they can be made for current retirees, or current workers who have not yet retired, is often the subject of litigation by workers and retirees, who claim that their right to health-care benefits is "vested" and cannot be unilaterally changed.

The outcomes of the cases are likely to turn on careful analyses of the governing constitutional and statutory law, as interpreted by courts. This article highlights the legal landscape and the practical considerations that governmental officials and their attorneys need to evaluate when seeking to reduce retiree health benefits, and that employee and retiree groups should weigh when deciding to bring suit after such reductions.

Collectively-Bargained Benefits

For many retirees, the right to retiree health benefits is rooted in contract – specifically, the collective bargaining agreements, entered into by their unions, when they were employees. The language pertaining to retiree health benefits varies widely, as do the interpretations of this language by state courts. Many of these courts have looked to federal law for guidance, even though pertinent federal statutes do not apply to state and local government plans.[6]

The key question in cases involving retiree health benefits is whether the language of a collective bargaining agreement (CBA) provides for vested benefits. It is a well-settled principle in labor law that, in general, the terms of a CBA do not survive beyond the expiration of the contract.[7] However, a benefit can "vest" and survive the expiration of the CBA if the parties have agreed to such vesting. An example of such an agreement is one that includes language stating that retiree health benefits will be provided "until death," or "throughout retirement."

In general, courts have taken three different approaches when analyzing the language of a CBA to determine whether the parties intended to vest retiree health benefits.

Inference to Vest. Some courts find that retirement benefits constitute a form of "deferred compensation," observing that it is unlikely that the union would forgo higher wages for its members in exchange for a retirement benefit that was unilaterally terminable. These courts will infer that the parties intended that the benefits survive the expiration of the CBA, absent language to the contrary (such as a "Reservations of Rights" clause, granting the employer the right to unilaterally modify or terminate retiree health benefits).[8]

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Inference to Not Vest. Other courts find that an entitlement to retiree health benefits does not survive the expiration of the CBA in the absence of a written, unambiguous expression of an intent to make the benefits "vested." These courts find that it is "not sound policy to bind an employer to a lifetime obligation absent specific language to the contrary."[9]

No Presumption. Lastly, some courts simply utilize traditional contract principles and avoid applying a presumption for or against vesting.[10]

If the contract language is unambiguous, a court generally determines whether the benefits are vested by limiting its analysis to the governing document alone. If the language is ambiguous, courts will consider extrinsic evidence to determine the parties' intent. This evidence can take many forms, including the government's practice of continuing to provide retiree health benefits,[11] oral or written statements by the employer to retirees or prospective retirees explaining their future pension and insurance benefits, and the settlement proposals made during bargaining.[12]

In order to reduce benefits, government employers cannot simply enter into an agreement with a union to modify the health benefits provided to current retirees. In a leading case, *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, the United States Supreme Court ruled that a union had no authority to reduce or eliminate vested retiree health benefits for member-employees who had already retired, and that retirees whose vested benefits were cut could sue their employers directly.[13] In reaching this conclusion, the Court noted that a union's primary loyalty was to the active employees, and expressed concern that, if a union simultaneously negotiated for retirees and active employees, it could "see fit to bargain for improved wages and other conditions favoring active employees at the expense of retirees' benefits."[14] Some state courts have adopted the doctrine that unions may not bind retirees who were formerly union members if the retirees' benefits have vested.[15]

Benefits Created by Legislative Act

States and local governments also provide health benefits to retirees pursuant to statute, ordinance, or written policy. In many states, these create contractual rights between the governmental entity and their employees. The Contract Clause of United States Constitution[16] protects against impairment of these contractual rights. Some state constitutions have similar protections – for example, the Illinois Constitution provides that membership in a government retirement system "shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."[17]

An analysis regarding a possible Contract Clause violation has three elements: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.[18] Whether there is a contractual relationship depends on the language of the governing legislation. For example, an employee working for the Commonwealth of Pennsylvania retired at a time when the employee handbook promised a retiree health-care plan with no retiree premium. A year after the employee's retirement, the employer eliminated the no-premium plan, resulting in a lawsuit. The court found that the language of the handbook and the employees' retirement code established that retired employees could participate in the State's health-care plan, but it did not require the State to provide retirees with the option of retaining the medical coverage they had upon retirement, and that the applicable retirement statute provided the State with flexibility in determining the extent of medical coverage provided to retirees.[19]

On the other hand, in a case from California, retired school board members brought suit against a school district, seeking a writ of mandamus directing payment of their retiree health benefits after the district reversed an earlier authorization providing for such payments. The court found that the long-time board members had a vested right to paid post-retirement health benefits because state law allowed legislative bodies, such as the school district, to provide such benefits, and the district had adopted a written policy to provide such benefits at no cost to retired school board members.[20]

If a court finds the existence of a substantial impairment, the state's action can withstand scrutiny only if it is "reasonable and necessary to serve an important public purpose."[21] Governmental entities seeking to justify the impairment of vested rights due to fiscal woes have a heavy burden. The U.S. Supreme Court has noted that a "governmental entity can always find a use for extra money, especially when taxes do not have to be raised,"[22] and the U.S. Court of Appeals for the Eighth Circuit recently found that "such concerns must be related to 'unprecedented emergencies,' such as mass foreclosures caused by the Great Depression."[23] As such, courts have almost uniformly found that governmental entities had failed to meet the burden of showing that a modification of the retirement benefit was "the only fiscal viable alternative for correcting its alleged fiscal woes."[24]

Promissory Estoppel

Generally, to prevail under estoppel principles, plaintiffs need to show that the defendant made a material misrepresentation upon which the plaintiffs reasonably relied to their detriment. Following these principles, courts deny relief under the estoppel theory in benefits cases where the plaintiffs failed to show reasonable reliance, particularly when they knew or should have known of the actual plan provision which contradicted the misrepresentation.[25] However, in a few cases, courts have held that public entities were estopped from refusing to provide lifetime benefits. For example, in *Law Enforcement Labor Serv., Inc. v. County of Mower*, the court found that the benefits were vested because the county made representations, in writing, to deputy sheriffs that they had met the eligibility criteria for retirement benefits (including payment by the county of health-care premiums), even though the CBAs did not expressly provide for such payments.[26]

When Do Benefits Vest?

State courts take different views of when retiree health benefits vest. Some courts focus on the employment relations and recognize that retirement benefits are a form of deferred compensation. More specifically, when an employee obtains

a retirement benefit through collective bargaining, the employee forgoes present wages in exchange for the future benefit. The promise of such a benefit "induces the employee to complete his or her required services before he or she receives the benefit."[27] These courts hold that the public employer cannot decrease retirement benefits once the employee begins his service [28] and, thus, governmental units may only reduce levels of retirement benefits for future hires. Other courts take the view that retirement health-care benefits vest when employees become retirement-eligible,[29] while other courts hold that such rights only vest at the time of retirement.[30]

Can Vested Benefits be Modified?

If retirees have a vested right to retiree health benefits, does the governmental body have the flexibility to modify retiree health-care plans?

The Supreme Court of Connecticut addressed this question when the City of Waterbury attempted to change retiree medical coverage from a traditional indemnity plan to a managed care plan. The court found that, although the retiree health benefits were vested, past CBAs had given the City the right to make limited modifications to the form, but not the substance, of the medical benefits plan.[31] The burden then shifted to the retirees to demonstrate that the benefits "[were] not substantially commensurate with the benefits provided under the agreements in effect at the time of the retirees' retirement, when viewing the group as a whole."[32] The court determined that, although a managed health-care plan was less flexible, a beneficiary could easily incur greater out-of-pocket costs under the old indemnity plan than under the new plan. As such, the new plan did not substantially reduce the provision of services or increase the costs to the group as a whole, and, therefore, did not materially affect the substance of the vested benefit.[33]

Bankruptcy

Municipal bankruptcies are very rare and have usually involved authorities or other limited-purpose governmental entities. In 2008, the Town of Vallejo, California filed for bankruptcy under Chapter 9 of the federal Bankruptcy Code,[34] the provision that permits municipalities to reorganize debts.[35] As part of its reorganization plan, Vallejo sought to reject current contracts with its unions that provided a variety of employee benefits, including retiree health care. The federal bankruptcy court found that, under the Supremacy Clause of the United States Constitution,[36] the federal Bankruptcy Code "trumped" any state labor laws offering protection to public sector workers. Further, in an issue of first impression, the court held that the protections added by Congress in the 1990's – imposing procedural and substantive requirements on Chapter 11 debtors before rejection of CBAs – did not apply in Chapter 9 cases. Instead, a municipality needed only to show that: the contracts burdened the state, the equities favored the rejection, the debtor had made reasonable efforts to negotiate a voluntary modification, and – despite such efforts – there was little likelihood of a prompt, satisfactory solution.[37]

If a governmental entity is permitted to reject current labor contracts in bankruptcy proceedings, it seems likely that it would also be permitted to reject expired CBAs providing for retiree health benefits. The *Vallejo* decision may, therefore, have a profound impact on financially-distressed governmental entities and their retirees. In states where the right to retiree health benefits is strongly protected, localities may find that bankruptcy offers the only mechanism for removing such obligations from their balance sheets.

Conclusion

In the wake of the implementation of GASB 45, promises of retiree health benefits made long ago are now coming home to roost. It has become apparent that many state and local governments will not be able to sustain "pay-as-you-go" funding mechanisms for retiree health benefits in the long run. Governmental employers are responding by considering pre-funding their OPEB obligations by setting up investment-earning trusts or by issuing bonds. At the same time, governmental entities are continuing their attempts to reduce plan expenses. Before any actions are taken, governmental attorneys will serve their clients well by providing a full legal analysis of any prospective actions. At the same time, attorneys for employee and retiree groups should do a similar analysis when deciding to bring suit to challenge any reductions or terminations of benefits.

Notes

1. According to one source, 92% of states and 61% of localities report providing health benefits to retirees. *At a Crossroads: The Financing and Future of Health Benefits for State and Local Government Retirees*, Center for Local Government Excellence (July 2009).
2. GASB Statement No. 45, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions* (Issued 6/04) (hereinafter "GASB 45"). A summary is available online at http://www.gasb.org/st/summary/gstsm45.html.
3. *You Dropped a Bomb on Me, GASB*, Credit Suisse, Mar. 22, 2007.
4. *At a Crossroads, supra* n. 1, at 37-52.
5. E. Keating and E. Berman, *Unfunded Public Employee Health Care Benefits and GASB No. 45*, Accounting Horizons, 251 (Sept. 2007).
6. The pertinent federal statutes are the Employee Retirement Income Security Act of 1974 (ERISA), which requires compliance with "the terms of [any] employee benefit plan," 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3) (West 2009), and Section 301 of the Labor Management Relations Act of 1947 (LMRA), which confers jurisdiction in suits alleging violations of labor contracts in the private sector, 29 U.S.C. § 185(a) (West 2009). *See* W. Payne and P. Ewing, *Union-Negotiated Lifetime Retiree Health Benefits: Promise or Illusion*, 9 Marquette Elder's Advisor 319 (2008). These statutes do not apply to the public sector, 29 U.S.C. § 1003(b)(1) (2002). *See* DiGuillio v. R.I. Bhd. of Corr. Officers, 819 A.2d 1271 (R.I. 2003).
7. *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 207 (1991); Poole v. City of Waterbury, 831 A.2d 211, 220 (Conn. 2003).
8. *See, e.g.*, Navlet v. Port of Seattle, 194 P.3d 221, 233 (Wash. 2008); Roth v. City of Glendale, 614 N.W.2d 467, 472 (Wis. 2000).
9. Anderson v. Town of Smithfield, No. C.A. PC05-3823, 2005 WL 3481627, at *7 (R.I. Super. Dec. 20, 2005).

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Both Hands on the Wheel

by Devala A. Janardan, Associate Counsel

A new research report released in July 2009 by the Virginia Tech Transportation Institute (VTTI) shows that drivers who are text-messaging had the highest risk, compared to other cell phone tasks, of being involved in a crash or near crash.[1] The study shows a 23-fold increase in the risk of a crash or near crash when texting compared to an individual who did not use a phone while driving.[2] Consider the VTTI study in light of the following figure, provided by a wireless communications industry trade group: 110 billion text messages were sent in the United States in the month of December 2008, an eleven-fold increase from the same period in 2005.[3] Statistics such as these have now grabbed the attention of all levels of government, and in July 2009, members of Congress introduced a bill that, if passed, will essentially ban drivers throughout the United States from texting while driving.

The bill is S.1536, the Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009 (ALERT).[4] The bill, introduced by U.S. Senators Charles Schumer (D-N.Y.), Robert Menendez (D-N.J.), Mary Landrieu (D-L.A.), and Kay Hagan (D-N.C.), requires the Secretary of Transportation to reduce Federal highway funding by 25% to any state that does not enact a law that prohibits, except in an emergency, "an individual from writing, sending, or reading text messages while operating a motor vehicle." A "motor vehicle" is defined as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways" and also includes any "railcar or other component of a fixed guideway system that is not subject to regulation by the Federal Railroad Administration." The inclusion of railcar-type vehicles in the definition of "motor vehicle" can be attributed to recent mass transit accidents, including a commuter train accident[5] in Los Angeles that killed 25, where the conductor was texting. A state would have roughly two years to enact such a law. While introducing the bill, Senator Schumer stated that "studies have shown over and over that texting while driving is dangerous and it's time to take action to prevent the tragic accidents that result from this activity. …We have seen too many lives ruined due to drivers recklessly using their cell phones. With this new legislation, drivers will finally be held responsible for dangerous behavior that puts the public at risk."[6]

Of course Congress is not the first out of the gate on this issue. According to the Insurance Institute for Highway Safety, text messaging is already banned for all drivers in 17 states and the District of Columbia. An additional nine states ban texting for drivers considered "novice" drivers, which can be defined as those with a learner's permit;[7] and/or individuals under 18,[8] 19,[9] or 21;[10] and/or those that have had a driver's license for less than one year.[11] Cities, including Chicago, Cleveland, Detroit, Santa Fe, and more have also passed similar laws.

The penalty for violating a texting law varies. S.1536 does not set a penalty but states that the Department of Transportation (DOT) Secretary will promulgate regulations that "specify a minimum penalty for a first offense" and "stipulate that penalties be graduated for repeated offenses."[12] It will be interesting to see how DOT sets the penalty for this offense. As a quick survey, Virginia has a $20 fine for the first offense; $50 for the second offense.[13] Illinois is $75 for the first offense.[14] The City of Cleveland is $100 for the first offense, $250 for the second offense, and a whopping $500 for a third offense.[15]

In addition to legislators at the federal, state, and local levels, federal agencies are also getting involved in the discussion. Department of Transportation Secretary Ray LaHood has announced a summit to address the dangers of text messaging that will take place around the release of this issue of *Municipal Lawyer*. Sec. LaHood states, "If it were up to me, I would ban drivers from texting, but unfortunately, laws aren't always enough…. We've learned from past safety awareness campaigns that it takes a coordinated strategy combining education and enforcement to get results. That's why this meeting with experienced officials, experts and law enforcement will be such a crucial first step in our efforts to put an end to distracted driving."[16] Looks like everyone wants to be in the driver's seat on this one.

IMLA will keep you updated via our upcoming Twitter feed, but please don't look it up while you make your morning commute.

Notes

1. Press Release, VTTI, *New Data From VTTI Provides Insight into Cell Phone Use and Driving Distraction* (July 27, 2009) (on file with author).
2. *Id.*
3. CTIA – The Wireless Association, *Wireless Quick Facts*, http://www.ctia.org/advocacy/research/index.cfm/AID/10323 (last visited Aug. 12, 2009).
4. Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009, S.1536, 111th Cong. (2009).
5. Joel Rubin et al., *Total Destruction: At Least 17 die in head-on Metrolink Crash*, L.A. Times, Sept 13, 2008, at http://www.latimes.com/news/local/la-me-traincrash13-2008sep13,0,2874450.story.
6. Press Release, Office of Senator Charles E. *Schumer, Schumer, Menendez, Landrieu and Hagan Unveil First-Ever Legislation to Ban All Drivers From Texting While Operating a Vehicle* (July 29, 2009) (on file with author).
7. Delaware, Kansas, Maine, Mississippi, Nebraska, West Virginia.

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ANNUAL REPORT



2009

A Message From IMLA's President

It has been good to be IMLA's Queen. This has been a year of change and opportunities for a new direction for this organization. One of the things I am most proud of, and thankful for, was the opportunity to provide our members with a new approach to Board membership, encouraging and fostering future leaders for IMLA. These bylaw amendments will be presented to the membership for a vote at the Miami Conference's business meeting.

I want to acknowledge the hard work of the committee members who served on IMLA committees this year, with a special recognition of the **Board Restructure Committee** and the **Legal Advocacy Committee**. Because of the hard work of the Board Restructure Committee, under the able leadership of **Steve Smith** of Dublin, Ohio, and **Art Pertile** of Stafford, Texas, the membership will be presented with a major shift in how our Board members are elected, aimed at inspiring greater participation in the IMLA leadership. All of the members of the Board Restructure Committee agreed to serve when I asked, and for that I will be eternally grateful. Whether the membership decides to amend the bylaws or not, we have at least brought the issue to the forefront for debate.

The Legal Advocacy Committee's mission and membership remain close to my heart – I served as its Chair for ten years and I know how much work and attention this takes. Because of their diligence, IMLA actively participated in key cases at the Supreme Court, starting with the landmark case of *Pleasant Grove City v. Summum*, and including *Pearson v. Callahan*, *Van de Kamp v. Goldstein, Ricci v. DeStefano*, and others. Thanks to **Sheryl King Benford** for serving as the Committee Chair, and to all the Committee members for your hard work and daily dedication – you will get a higher place in heaven. IMLA Vision 2020 is a Committee that should continue to discuss, debate, and inquire into how we can provide our members with the best services possible. I intend to volunteer for this group and help as much as I can.

While serving as IMLA's President-Queen may appear to be easy, it is only because of the efficient and dedicated IMLA staff – all seven of them: **Veronica Kleffner, Sophia Stadnyk, Rhonda Jackson, Trina Shropshire-Paschal, Devala Janardan,** and **Mary Vlach**. Never before have I encountered a staff of so few who do so much with so little. We may not say it often enough, but we are so thankful for all the work that you all do for IMLA. **Chuck Thompson** proved to be a wise counsel to me this year and, while we may not have agreed on everything, we always ended up in the same place: doing, together, what we thought was best for this organization. **Veronica Kleffner** – the heart and soul of IMLA – saved me more times than I can count. As long as she remains an integral part of this organization, I will sleep better knowing that all is right with the world.

Every step I took was also made easier in knowing that IMLA's First Vice President, **DeWitt ("Mac") McCarley**, had my back. The changes proposed this year began in the presidency of **Bob White**. Bob, Mac, and I had discussed what needed to be brought forward that we knew would take more than one year to complete, and agreed on the process. Without their constant support and encouragement, we would not have come as far as we have this year.

The Top 50 City Summit, the new "stand-alone" programs on Construction Law and Code Enforcement, the teleconferences, and the specialized list-serves, all owe their beginning to the ideas of Chuck Thompson and his never-ending goal of making our services more relevant to our members.

I particularly want to give a shout-out to my comadres in Miami – **Julie Bru**, the City Attorney, and **Maria Chiaro**, the Deputy City Attorney, for all of their hard work in making **IMLA's 74th Annual Conference** everything this President could hope for.



I am humbled and honored to have served as your President this year. I promise you I will continue to work to promote and support this premier local government lawyers association.

Mil gracias,

Susan C. Rocha
IMLA President
(City Attorney, Cibolo, Texas)

MEMBERSHIP

A major concern over the last several years has been the critical need to increase our membership. This year, despite the unfavorable economic climate, we continued membership recruitment and retention efforts:

"IMLA Lite" continued as one of our major initiatives to address membership. This program, approved by the IMLA Board in 2007, allows us to reach out to and serve a vast number of communities that have been previously under-served. Participating states in the "IMLA Lite" program to date include 12 states: Alabama, Arkansas, Georgia, Iowa, Kansas, Missouri, New Jersey, New Mexico, North Dakota, Tennessee, Texas, and Wisconsin.We are extremely pleased at the very favorable responses we are receiving from these participating states and are looking forward to adding more in the coming fiscal year. Our membership now is over 3,407 municipalities across the U.S. and Canada.



Another program that contributed to our growth has been the "**Top 50 Summit.**" This annual meeting, which is geared towards the large counties and cities in the U.S. and Canada, was held for the third consecutive year, and took place in Toronto, Ontario.

Working Groups are another program that we've promoted extensively this year. The list serve groups, divided by subject area, are currently open to non-members to join and participate fully in. However, it is planned that in the future, non-members will need to become IMLA members to continue participating.

Overall, our membership retention rate for the past year was 94%. IMLA must maintain a strong membership base, and our programs all require sufficient resources to keep them effective. For that reason, I am asking you to help us attract and retain members.

There are also a couple of proposals that attempt to conform the bylaws to current practice. We are hopeful that these changes can strengthen the IMLA and carry us into the future.

FINANCIAL

Throughout 2008 and into 2009, local governments continued to struggle with the impact of a depressed economy. These financial constraints affect our members (local government budgets cuts, drastically reduced training or CLE allocations, and travel restrictions) and, in turn, affect IMLA.

To ameliorate the negative effects of the economy, IMLA has reacted like most of our members: we have reduced payroll, cut costs, and increased productivity. In doing so, we were able to end this year with another annual, positive net asset balance as we continue to reduce the lingering negative net asset balance that IMLA has carried for several years. Recognizing the toll the economy has taken on our members, we sought to find ways to deliver services in a more cost-effective method. Like many of our members, we faced a daily barrage of emails touting audio-conferences on virtually every subject under the sun. We reacted by finding a way to offer similar programming, but targeted at our members' interests and at a much lower cost. We will continue to offer these alternative forms of programming beyond the economic crisis, but once travel restrictions are lifted and budgets are restored, we will also resume offering meetings in addition to our annual Conferences where our members can network and gain substantive knowledge on important topical issues.

While our financial situation is relatively healthy, we could reduce our members' costs for all that we do, and further expand services, if we could increase our membership base. For that reason, if each of our members could bring us a new member, we could reduce the costs for membership and programming.

BYLAW AMENDMENTS

A proposal to amend the IMLA bylaws was made by the Board Restructure Committee. These proposals are intended to increase the opportunities for members to become board members, increase the transparency of the process and to allow the Executive Director and opportunity to address issues of regional or demographic diversity by suggesting appointments to the Board or to do so with recruitment in mind. There are also a couple of proposals that attempt to conform the bylaws to current practice. We are hopeful that these changes can strengthen IMLA and carry us into the future. The recommendations are, in brief:

Number of Board Members: IMLA Board membership will increase to up to 25 members. Currently six members of the 21-member Board are Officers (President, First Vice President, Second Vice President, Third Vice President, Treasurer, and Executive Director).

Term Limits: The term of office for Board members will be three years. The member is eligible to serve for an additional three-year term, for a total of six years, and afterwards, must sit out at least

one year before beinΩg eligible for a Board position again.

Staggered Terms: Board positions shall be staggered with approximately four positions open each year. The President, Vice President, Past President, Treasurer, and Executive Director are not included in the staggered terms rotation. Therefore, each year, a minimum of four Board positions will be open. Officers will be selected from the pool of individuals who have previously served at least two years on the IMLA Board. We will no longer have the automatic "moving up" of Board members to officer positions.

Officers: There will be a President, Vice President, Treasurer, and Executive Director. We are eliminating the remaining two Vice President positions.

The Nomination Committee: This is increased from three to five people, to be selected by the President, Vice President, Immediate Past President, State League Counsel, and the Past, Past President.

State League Board Position: We will continue to have a Board position for our State League Counsels, who will continue to serve for two years, but now, they will be eligible to serve as President.

Notice of Board Positions: Notice will be sent to the membership and will be posted on the IMLA site well in advance of the Annual Conference. The notice will include the members of the Nominating Committee, along with a short application form that we are encouraging members to fill out.



IMLA has continued its efforts into this fiscal year to find ways to enhance membership value, to raise revenues, to make our Conference and Seminar more useful, and to offer additional IMLA programming in various formats.

OTHER NEW INITIATIVES

IMLA has continued its efforts into this fiscal year to find ways to enhance membership value, to raise revenues, to make our Conference and Seminar more useful, and to offer additional IMLA programming in various formats. Many of these ideas were suggested by members, and we continue to ask for your feedback on our activities and services.

IMLA Vision 2020. This Committee was created by the IMLA President to begin the dialogue of what IMLA can do better for our members – to review the services that IMLA offers and discuss ways that these can improve. Committee Co-Chairs are **William J. Kearns** (General Counsel, N.J. State League of Municipalities) and **Susan Moore** (General Counsel, Georgia Municipal League). If IMLA is to stay a viable and necessary association, we need to shape a plan for the future of IMLA and the delivery of services that adapts to the changing times.

Working Groups. These 14 groups, based in specific subject areas, include dedicated listservs and regular conference calls. There is no cost to join. The groups include Employment Law, Code Enforcement, Counties, Construction Law, Young Lawyers, Coastal Communities, Capital Cities, Brownfields, and many others (you can access the specific groups online from the IMLA homepage, www. imla.org). These groups provide great opportunities for our members to network with attorneys in other communities with common interests and common practice areas.

Teleconferences and "Kitchen Sink" Discount. As mentioned, IMLA introduced a new lineup of teleconferences and webinars in 2009, aimed allowing members with restricted or no travel budgets to still obtain affordable, high-quality programming, along with CLE credits for those jurisdictions that permit credits for teleconferences. Based on the suggestion of a member, IMLA offered a significant discount (the "Kitchen Sink") for anyone who purchased the entire lineup of events.

Facebook/Twitter/Blog. IMLA introduced its web blog this year. Other innovations included an IMLA page on the Facebook site and a Twitter feed.

Stand-Alone Programs. We've continued the "stand-alone"or single-subject CLE programs that we introduced in 2008. These are designed as one- or two-day intensive workshops, aimed at providing members with topic-specific educational and networking opportunities.The most successful stand-alone program this year was our second annual one-day seminar focusing exclusively on Canadian municipal law. The event, held in Toronto, Canada, in June was an outstanding program coordinated with a Municipal Law Departments Association of Ontario (MLDAO) event. Our last stand-alone program for 2009 is a program on Voting Rights to be held at the Radisson Hotel in Columbia, S.C. on December 10, 2009.

We strive to cut costs and save time by e-mailing our members with information rather than rely on the post office. E-mailing addresses change – it is essential that you keep us advised about any changes to your contact information so that we can continue to e-mail you with the Newsletters and bi-weekly updates. It's easy to check your own member information: simply log on to *MyIMLA* (top right-hand side of the IMLA website at www. imla.org.

LEGAL ADVOCACY

One of our services that merits more comprehensive discussion is legal advocacy on behalf of local governments and local government entities. IMLA's Legal Advocacy Committee (LAC), chaired by **Sheryl King Benford**, continued IMLA's strong presence in advocating the interests of local governments before various courts. From August 2008 through August 2009, IMLA participated in no less than 20 cases as an *amicus*. The most significant case was the decision in *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009), in which the Supreme Court held that the placement of a permanent monument in a public park was a form of government speech and was, therefore, not subject to scrutiny under the Free Speech Clause. The Court's opinion specifically cited the *amicus* brief submitted by IMLA (authored by **Mary Jean Dolan**). Another case at the Supreme Court level where the LAC approved participation was *Arizona v. Johnson*, 129 S.Ct. 781 (2009), a Fourth Amendment case where the Court ruled that it is reasonable for a police officer to pat-down a passenger during a traffic stop for a minor driving infraction, if the officer had an articulable basis to believe that the passenger might be armed and dangerous. Unfortunately, IMLA did not side with the winning argument in all cases. In the reverse discrimination case, *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), the Court found that the City of New Haven, Connecticut, violated Title VII of the Civil Rights Act of 1964 when it discarded the results of a firefighter promotional exam when all but one of the top candidates were white.

IMLA will also be participating in the first takings case before the Court in over four years (and the first with Chief Justice John Roberts). The case, *Walton County v. Stop The Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2009), *cert. granted*, 77 U.S.L.W. 3673 (U.S. June 15, 2009) (No. 08-1151), concerns a challenge to a state vesting statute contrary to the common law of accretion, which basically gives the state ownership of the land it creates when it fills seaward of the "erosion control line" which becomes the new property boundary.Still other cases where IMLA participated as an *amicus* in the federal circuits and in state courts included issues such as billboards, RICO, open meetings, attorney's fees, affirmative litigation against bank lenders concerning the foreclosure crisis, bankruptcy, *qui tam* actions under the False Claims Act, and more. Space does not allow a thorough treatment of the details of these cases, so check out our Legal Advocacy Report, available at www.imla.org.

IMLA will consider being an *amicus* in the Supreme Court, the federal circuits, and in the highest courts of each state; in addition, we will participate in litigation below those levels where the issues are of paramount importance to local governments. To maintain our *amicus* program, IMLA needs the support of its members. We need help in identifying important cases early enough that we can consider whether to join. We need help in identifying brief writers – we would like to keep a roster of brief writers and their areas of interest, so when an appropriate case presents itself, we can call on them. If you are interested in helping, contact me at cthompson@imla.org.



IMLA will consider being an *amicus* in the Supreme Court, the federal circuits, and in the highest courts of each state; in addition, we will participate in litigation below those levels where the issues are of paramount importance to local governments.

CONCLUSION

Obviously, with the downturn in the economy and the challenges we faced this past year, we are delighted to see that changes we implemented have helped move us in the right direction. Nevertheless, small changes in membership and attendance can help or hurt the organization. For that reason, let me ask each of you to try to get one of your non-member colleagues to join. By increasing regular membership by about four new members in each state, we could reduce the fees for attending our Conference and other programs, or we could reduce membership fees. These are challenging times for all of us, but I can assure you that we are striving to add value to your membership and to make IMLA a stronger organization.

Charles W. Thompson, Jr.
Executive Director,
General Counsel



Highlights of the Coming Term

by Sophia M. Stadnyk, Senior Associate Counsel

The United States Supreme Court has a number of interesting cases scheduled for oral argument in the coming weeks.

On October 06, the Court hears oral argument in a First Amendment case, *U.S v. Stevens*, 533 F.3d 218, *cert. granted*, 129 S. Ct. 1984 (U.S. Apr. 20, 2009) (No. 08-769), where the Court is being asked to recognize a new category of unprotected speech – speech dealing with depictions of cruelty to animals. Stevens, who had compiled and advertised dog-fighting and hunting videos and merchandise for sale, was charged and convicted of violating a statute, 18 U.S.C. § 48. This prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. Stevens' case was the first prosecution under § 48 to proceed to trial, and he unsuccessfully applied to dismiss the indictment based on his assertion that the provision abridged his First Amendment right to freedom of speech. The purpose of the legislation was to target so-called "crush" videos (depictions of women inflicting torture on small animals by stepping on them – a "very specific sexual fetish"). Although the government conceded that § 48 constituted a content-based restriction on speech, it argued that the type of speech regulated fell outside of First Amendment protection, comparing the depiction of animal cruelty to the depiction of child pornography. The U.S. Court of Appeals for the Third Circuit disagreed, stating "[t]hat attempt simply cannot carry the day. … No matter how appealing the cause of animal protection is to our sensibilities, we hesitate – in the First Amendment context – to elevate it to the status of a compelling interest."

On October 07, the case of *Salazar v.Buono*, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, 129 S.Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472) comes before the Court. The case involves a cross erected on federal land – on what used to be part of the Mojave National Preserve – by private citizens as a memorial to the "Dead of All Wars." Subsequently, in light of an Establishment Clause challenge, Congress enacted legislation ordering the Secretary of the Interior to convey a one-acre parcel of land that included the monument to a veterans' group, in exchange for a parcel of privately-owned land of equal value, with the federal government retaining a reversionary interest in the event the memorial use lapsed. However, the statute did not mandate that a cross remain as part of the memorial. The respondent had no objection to the public display of a cross, but was offended that the public land on which the cross was located was not an open forum on which other persons could display symbols. The Ninth Circuit determined that the presence of a cross on federal land violated the Establishment Clause. Following the transfer, it held that the government continued to impermissibly endorse religion despite the divestiture, by allegedly retaining control and oversight over the land, and by continuing to endorse religion by permitting a cross at the site. Assuming the respondent has standing to bring the action, the question before the Supreme Court is whether the Ninth Circuit erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

Oral arguments in *Alvarez v. Smith*, 524 F.3d 834 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 1401 (U.S. Feb. 23, 2009) (No. 08-351) are scheduled for October 14. The case raises questions about the forfeiture of personal property and whether the Due Process Clause requires a local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding; if so, when such a hearing must take place. The plaintiffs were all persons whose property had been seized by Chicago police officers pursuant to the Illinois Drug Asset Forfeiture Procedure Act (DAFPA). Forfeiture proceedings had to be instituted once the appropriate notice was given, but for property worth more than $20,000, 97 days could elapse between the seizure and the filing of judicial forfeiture proceedings; for property worth less than $20,000, it could be a maximum of 187 days. The plaintiffs claimed that due process required that they be given a prompt, post-seizure, probable cause hearing, even though the DAFPA did not require such hearings. The Seventh Circuit agreed, noting that, "given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required." The Supreme Court is being asked to decide the question of entitlement to a post-seizure probable cause hearing, and the applicable standard that courts should apply (the "speedy trial" test or the three-part due process analysis in *Mathews v. Eldridge*).

On November 04, *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065) comes before the Court on the question of a prosecutor's liability for arranging false testimony. In 1978, McGhee and another man, H., were convicted

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Brownfields Redevelopment and the Threat of CERCLA Liability

by Elaine C. Lippmann

Local governments nationwide face the harmful effects of brownfields in their jurisdictions, while at the same time recognizing the opportunities that such sites present for redevelopment and revitalization of neighborhoods. A brownfield is defined as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[1] These underdeveloped or abandoned properties often lie idle for years because of the fear of environmental contamination and uncertain cleanup costs. Meanwhile, they cause blight in their neighborhoods, drive down property values, and hinder economic development. The potential acquisition of these properties presents local governments with the opportunity to turn abandoned, contaminated properties into green space, transportation corridors, or facilities that enhance neighborhoods, promote economic development, and generate tax revenue. Development can occur through public construction, private investment, or public-private partnerships.

Local governments can acquire brownfields through voluntary sales, eminent domain, or involuntary means, including tax liens and foreclosures. These acquisitions clear the way for the municipality to conduct site assessments, remediate environmental hazards, and otherwise prepare the property for development. However, local governments are often dissuaded from such acquisition because of a well-founded fear of environmental liability, particularly under the Comprehensive Environmental Response, Compensation, and Liability Act,[2] or CERCLA.

Under CERCLA, suits by the federal Environmental Protection Agency (EPA), states, or private parties can impose cleanup liability upon any "potentially responsible party."[3] Section 107(a) lists four categories of parties that may be held liable for the costs: the current owner and operator of the facility; a person who owned or operated the facility at the time of the disposal of hazardous substances; any individual, corporation, or government who arranged for the disposal or treatment of hazardous substances; or the transporter of the hazardous substances, if that individual selected the disposal or treatment site.

Liability under CERCLA is strict,[4] joint and several,[5] and retroactive.[6] This means that any current owner of contaminated property may be liable for the entire cleanup cost associated with that property, unless the land owner qualifies for some form of liability protection. More significantly, potential liability exists regardless of whether the current owner contributed to the contamination or owned the property at the time the contamination occurred. Under this liability scheme, local governments are treated the same as private parties.[7] Thus, local governments are understandably wary of acquiring title to brownfields, fearing staggering cleanup costs and liability claims once they take ownership.

Recognizing these disincentives, Congress has enacted several provisions of CERCLA with the intent of protecting local governments when they acquire property. In the right circumstances, these provisions reduce or eliminate the liability to which a local government is exposed when it acquires or cleans up a brownfield. However, each such defense has stringent eligibility requirements. In many cases, eligibility for such defenses turns on how the property was acquired or the details of the acquisition. As a result, it is critically important for local governments to understand the scope and limits of these defenses before they settle on a course of action with respect to a particular property. Whenever possible, local governments should structure their brownfield acquisition transactions to ensure that they will be protected by at least one of the available defenses or exclusions from liability.

The following overview examines the three primary exclusions and defenses to CERCLA liability that may shield local governments from liability for brownfield cleanup costs. Local governments should keep the scope and limitations of each exclusion and defense in mind when acquiring brownfields for redevelopment.[8]

Exemption for Involuntary Acquisitions

CERCLA's definition of "owner or operator" exempts from liability State or local governments that acquire ownership or control of brownfields "involuntarily." Section 101(20)(D) of CERCLA states:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.[9]

This is an exemption from liability rather than a defense, so it relieves the local government of the affirmative burden of proving a defense. It does not extend, however, to any State or local government that caused or contributed to a release of a hazardous substance at the site.[10]

This exemption's applicability to local governments acquiring brownfields has generated confusion, mostly surrounding



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the meaning of the word "involuntarily." A key ambiguity is whether the transaction must be involuntary from the local government's perspective or that of the prior owner. In other words, to qualify for this exemption, must a local government have a brownfield thrust upon it? Or does the intentional acquisition of a property from an unwilling owner qualify the acquiring local government for the exemption? CERCLA gives a non-exhaustive list of some of the transactions that will be considered involuntary – including bankruptcy, tax delinquency, and abandonment – and the EPA has provided additional examples of what it views as "involuntary":

- Acquisitions by government entities acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisition of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by government entities through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions by government entities pursuant to seizure or forfeiture authority.[11]

The EPA has attempted to clarify the term "involuntary" by providing the following test: An acquisition is involuntary if "[t]he government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property."[12] This appears to exclude situations where the acquisition of the property is initiated by the local government. On the other hand, the EPA has acknowledged that involuntary acquisitions, including the examples listed in CERCLA, generally still require some sort of discretionary, volitional action by the government in order to "control or take title to the property." Thus, the EPA has explained that "a government entity need not be completely 'passive' in order for the acquisition to be considered 'involuntary' for purposes of CERCLA."[13] In other words, a local government can take some action in order to complete the transaction and still qualify for the Section 101(20)(D) exemption.

An important question for local governments is whether Section 101(20)(D) exempts them from liability when they acquire brownfields by eminent domain. A further question is whether Section 101(20)(D) applies when they acquire properties in a consensual sale against the backdrop of pending or threatened eminent domain proceedings. These questions are important because eminent domain is a key tool that local governments use in acquiring and redeveloping brownfields.

The National Association of Local Government Environmental Professionals (NALGEP) reports that, in discussions and interviews with local officials, 63 percent of the respondents stated that they had used eminent domain on at least one occasion to acquire a brownfield property.[14] The respondents explained that the option of using eminent domain authority was particularly important in situations that are common to brownfield development – when owners are unwilling to transfer the property or to allow access for site inspections, or when the local government cannot locate the owners of abandoned properties to pursue sales negotiations. Yet NALGEP found that the actual use of eminent domain authority in a litigated condemnation of property is rare. Instead, it is far more common for local governments to assert their intention to use eminent domain but, ultimately, acquire the land through a negotiated sale. The local government's ability to assert its intention to acquire the property through eminent domain often provides landowners with an otherwise-absent incentive to enter into negotiations for a sale.[15]

In a 2003 guidance document, the EPA stated explicitly that it interprets CERCLA to not include an acquisition using eminent domain as an involuntary acquisition for purposes of the Section 101(20)(D) exemption[16] (although it does include it for purposes of the affirmative defense, discussed below). While not stated expressly, the EPA's position implicitly excludes consensual sales, negotiated against a backdrop of condemnation proceedings.

Courts have, so far, agreed with this interpretation and have been unwilling to apply the Section 101(20)(D) exemption in these circumstances. In *City of Wichita v. Aero Holdings, Inc.*, the City purchased a contaminated property for public use. The purchase agreement contained a provision stating that the sale was "in lieu of condemnation," included for the purpose of recording that, but for the negotiated purchase of the property, the City would have acquired the property using its eminent domain power.[17] The City argued that it was exempt from liability because it acquired the property "by virtue of its function as sovereign."[18] The court rejected this claim, holding that neither the actual nor threatened use of eminent domain qualified as an involuntary acquisition for purposes of Section 101(20)(D). The City's purchase of the property after evaluating it, and with knowledge that it was contaminated, was clearly a volitional act.[19] Further, the court expressed its concern that if a city could place itself beyond the reach of CERCLA merely by threatening the exercise of eminent domain, it would thwart Congress' intent to treat local governments the same as private parties.[20] The court concluded by adding that even the actual exercise of eminent domain power would not be considered involuntary because, in such circumstances, the property was "acquired because of some characteristic desirable to the governmental entity and affirmative steps [were] taken to acquire the property for some specific use."[21]

Similarly, in *United States v. Occidental Chemical Corp.*,[22] a court rejected the argument made by the City of Niagara Falls that, in purchasing contaminated property to build roads and a park, it was making an involuntary purchase because these were functions that a sovereign had to perform. The court explained that, "since all municipal purchases are made for the benefit of citizens, the city's construction of the word involuntary would cause the exception to swallow the rule."[23]

These cases demonstrate that a local government's use of its eminent domain authority to acquire a brownfield for redevelopment is unlikely to exclude the local government from liability under CERCLA. Accordingly, this exclusion appears to be limited to acquisitions that are not initiated by the local government. It may, therefore, be of little use to governments that are actively seeking to develop a particular brownfield property.

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Third-Party Affirmative Defense

Section 107(b)(3) of CERCLA states that there shall be no liability under CERCLA for "an act or omission of a third party other than an employee or agent of the defendant" or any person with a "contractual relationship" with the defendant.[24]

In defining "contractual relationship," Section 101(35)(A)(ii) of CERCLA excludes transfers of title where "… a government entity … acquired the facility by escheat, or through any involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation."[25] Read together with Section 107(b)(3), this language offers an affirmative defense to governments that acquire property through such means. In order to avail itself of this affirmative defense, however, the local government must demonstrate both that it exercised "due care," and that it took precautions against foreseeable acts or omissions by any third party responsible for contamination.

"Due care" is a legal term defined by courts, and is highly dependent on the specific facts of the case. Some examples of due care found in the case law include identifying and assessing the contamination found at the site,[26] notifying state and federal environmental agencies,[27] taking steps to control and limit exposure to the contamination,[28] warning tenants and the public about the potential hazards and informing them of actions that can be taken to prevent exposure.[29] Conversely, the courts have found a failure to exercise due care occurred where a local government took no action upon learning of the contamination, failed to prevent the spread of the contamination, or failed to warn people of the potential hazards.[30]

Once again, the term "involuntary" creates some ambiguity. As quoted above, the EPA has provided some guidance on what is considered involuntary and has indicated that some affirmative acts by the government to effectuate a transaction will not invalidate this defense. However, this has not been fully tested by the courts.

Although Section 101(35)(A)(ii) specifically mentions eminent domain, that provision – and the third-party defense established by it and Section 107(b)(3)– still leaves some ambiguity that local governments must keep in mind in seeking to acquire brownfield properties. For example, it is not clear from the statute itself whether use of eminent domain to qualify for the third-party defense requires an actual judicial proceeding, litigated to completion. If so, that would seriously affect the usefulness of this defense in the most common acquisition scenario: a voluntary purchase under the threat of eminent domain. The EPA has indicated that a voluntary purchase may qualify under this defense, stating that, in an acquisition by eminent domain, "the property is taken *either by purchase* or condemnation."[31]

The courts, however, have not necessarily taken this view. In at least one case, a court rejected a city's defense under this provision. The city had threatened to use eminent domain but, ultimately, reached an agreement with the owner and purchased the property.[32] The court explained that, "[o]nly if the parties had been unable to agree would the City have been empowered to exercise its power of eminent domain… Since it was unnecessary for the City to exercise this authority and take this step, it is evident that the City did not obtain the Right-of-Way by resorting to its statutory power of eminent domain."[33]

A federal court in California, on the other hand, reached a different, more flexible conclusion in *City of Emeryville v. Elementis Pigments, Inc.*[34] In this case, the City commenced eminent domain procedures to acquire a contaminated property, but reached an agreement with the owner and successfully purchased the property. The court accepted the City's defense, stating that "the statute's plain language does not require any type of eminent domain proceeding. Rather, it uses the broader phrase 'exercise of eminent domain authority.' Additionally, the words 'by purchase or condemnation' encompass purchases and do not limit the defense to the result of a judicial proceeding."[35]

Thus, whether a purchase made under the threat of eminent domain will qualify a local government for the third-party defense will likely vary among jurisdictions and will depend on the specific circumstances surrounding the acquisition. Unfortunately, the dearth of case law interpreting this provision means that local governments in most jurisdictions have little guidance in assessing the success of this defense in various situations. However, the third-party defense is potentially very helpful to local governments seeking to redevelop brownfields. It has a significant advantage over the liability exclusion in Section 101(20)(D) in that it explicitly includes the exercise of eminent domain authority as an acceptable means of acquisition; but, if a transaction falls short of a full judicial proceeding, there is a risk that a court could find the acquisition is ineligible for this defense.

Bona Fide Prospective Purchaser Defense

A third potential defense for a local government seeking to acquire a brownfield for redevelopment is the bona fide prospective purchaser (BFPP) defense, found in Section 107(r) of CERCLA.[36] Added by the Small Business Liability Relief and Brownfields Revitalization Act of 2002[37] (the brownfields amendments), this provision provides a defense that extends to certain purchasers of property known to contain hazardous materials. The BFPP language is significant because a BFPP may acquire property with knowledge of contamination, and, nonetheless, still qualify for a defense to liability.[38]

The defense generally extends to entities, including local governments, if:

- All disposal of hazardous substances occurred prior to the acquisition of the property;
- The owner made all appropriate inquiries into the potential presence of hazardous substances on the property prior to acquiring it (including interviews with past and present owners, reviews of historical sources of information, reviews of federal, state, tribal and local government records, and visual inspections[39]);
- The owner exercised appropriate care with respect to any hazardous substances on the property;
- The owner is not potentially liable

for response costs and is not affiliated with a potentially responsible party through a family or financial relationship; and
- The Other statutory requirements are met.

In many ways, the BFPP defense may be the safest way to avoid liability for a local government seeking to acquire a brownfield for redevelopment. However, the requirements for achieving BFPP status are onerous. The local government seeking BFPP status must show, by a preponderance of evidence, that it complied with all of the statutory requirements. In addition, in order to maintain its status as a BFPP, the local government must perform various continuing obligations, including complying with any land use restrictions and institutional controls established or relied on in connection with the response action.[40] The EPA believes that the statute requires BFPPs to comply with these land use restrictions and institutional controls even if they were not in place at the time the BFPP purchased the property.[41]

In short, BFPP status requires a careful monitoring of ongoing compliance with the statutory requirements, and requires careful oversight by the EPA regional offices as part of their exercise of enforcement discretion. Since the BFPP provision is still relatively new, the courts have not yet provided any additional guidance with which to assess the limits and risks of this defense.

Conclusion

Before entering into a transaction to acquire a brownfield for redevelopment, it is important to have a plan for defending against potential liability. The local government needs to consider the specific facts surrounding the potential acquisition of a property and the likely applicability of each possible defense to those facts.

The possible defenses available to a local government with respect to a prospective property may dictate whether and how the local government should pursue acquisition. For example, a local government acquiring a property through tax delinquency may feel confident in relying on the liability exclusion for involuntary acquisitions, but a local government acquiring a property through a demolition lien foreclosure, which is not mentioned in the statute, will have to examine the situation more closely to make sure that its acquisition would meet the EPA's test of involuntariness. Similarly, a local government wishing to acquire a property through a negotiated purchase under the threat of eminent domain must determine whether its jurisdiction would treat such a negotiated purchase as sufficient to invoke the third-party defense. In many cases, a local government will conclude that achieving the status of a BFPP is the safest (or, perhaps, only) way to shield itself from liability. In such cases, the local government will want to work closely with its regional EPA office and ensure that it can and will take all actions necessary to obtain and maintain that status.

A group of stakeholders led by IMLA and the Northeast Midwest Institute is leading efforts to explore CERCLA revisions that would remove the barriers to local government redevelopment of brownfields. The group has drafted language that would remove much of the statutory ambiguity that now exists, and would bolster liability protections for public agencies when they acquire contaminated land. Until such revisions are adopted, however, local governments wishing to acquire and redevelop brownfields must proceed with caution and explore their options carefully.

Notes

1. *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(a)(A), 115 Stat. 2356, 2361 (2002).
2. Comprehensive Environmental Response, Compensation, and Liability Act , 42 U.S.C. §§ 9601-9675 (2000).
3. 42 U.S.C. § 9607(a) (2002).
4. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 167-68 (4th Cir. 1988); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988); United States v. Northeastern. Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); New York. v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).
5. *Monstanto Co.*, 858 F.2d at 171-73.
6. *Id.* at 173-75.
7. B.F. Goodrich v. Murtha, 958 F.2d 1192, 1198-99 (2d Cir. 1992) ("CERCLA expressly includes municipalities…within its definition of persons who can incur…liability under [§107]").
8. Note that in addition to CERCLA, other federal and state environmental laws may apply to a brownfield acquisition. These laws are not discussed in this article, but should be considered as well.
9. 42 U.S.C. § 9601(20)(D) (2002).
10. 42 U.S.C. § 9601(20)(D) (2002).
11. EPA, *The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities* 2 (Dec. 1995), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fs-involacquprty-rpt.pdf.
12. *Id.* at 1.
13. *Id.* at 3.
14. NALGEP, Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment 9 (2006), available at http://www.nalgep.org/publications.
15. *Id.* at 9-10.
16. EPA, Questions and Answers Regarding Federal Brownfields Property Liability 4 (Nov. 2003), available at http://www.epa.gov/NE/brownfields/pdfs/qa6FINAL.pdf.
17. City of Wichita v. Aero Holdings, Inc., 177 F. Supp. 2d 1153, 1162 (D. Kan. 2000).
18. *Id.* at 1167. Specifically, the City relied on Section § 101(20)(D) to argue that, had the sale not occurred, the City would have condemned the property pursuant to its eminent domain power; for this reason, it acquired the property "by virtue of its function as sovereign."
19. *Id.* at 1167-68.
20. *Id.* at 1169.
21. *Id.* at 1168.
22. 965 F. Supp. 408 (W.D.N.Y. 1997). This case involved the infamous Love Canal; *see, e.g.*, http://www.epa.gov/r02earth/superfund/npl/0201290c.pdf.
23. *Id.* at 413.
24. 42 U.S.C. § 9607(b)(3) (2002).
25. 42 U.S.C. § 9601(35)(A)(ii) (2002).
26. New York v. Lashins Arcade Co., 91 F.3d 353 (2d Cir. 1996).
27. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796 (D.N.J. 2003).
28. *Lashins Arcade Co.*, 91 F. 3d at 353.

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Stones and Salamanders

by Sophia M. Stadnyk, Senior Associate Counsel

The Ontario Supreme Court of Justice addressed two unusual cases recently – the first involved the rare occasion in which a court grants a non-suit application; the second centred around a "threatened species."

"A Stone on a Public Highway Does Not Disrepair Make"

In 2000, 51-year-old Maria Copeland signed up to take part in a fundraiser sponsored by The Canadian Cancer Society. She paid a $10 fee and filled out a waiver of liability that stated: "I waive and release any and all claims for myself, heirs, executors, and administrators against all sponsors, officials, and organizers of the [event] for injury, illness, or death which may directly or indirectly result from my participation…. I have read and fully understand and agree with the contents of this waiver/release prior to participating…."

The event took place on a 22-kilometre course—a municipal parkway that was temporarily closed to vehicular traffic. About 1,000 joggers, walkers, cyclists and rollerbladers participated. Near the end of the course, Ms. Copeland's rollerblade hit something on the road and she tripped, hurting herself. A police officer found the probable stone she tripped on, about the size of his thumb. It was the only stone on the ground in the vicinity, and neither Ms. Copeland nor another woman rollerblading slightly ahead of her had seen the stone before the fall. Ms. Copeland sued the Society and the City of Hamilton, taking the position that the road ought to have been cleared for the event, and that the stone created an unreasonable risk under the *Occupiers' Liability Act*.

The court disagreed and, at the close of her case, granted the defendants' motion for a non-suit and dismissed the case. The test for a non-suit was whether the evidence was such that no jury acting judicially could find in favour of the plaintiff. "[T]here is no evidence before the court… whereby a legitimate inference could be drawn that the persons entering onto the premises were not reasonably safe or that the highway was in a state of non-repair. The plaintiff was not exposed to an unreasonable risk. The road was not required to be in a perfect state of repair."

The court referred to the following factors: first, the course retained its character as a public highway at all material times. *The Occupiers' Liability Act* did not apply, and the standard of maintenance was established by *The Municipal Act*, being a state of repair that was reasonable in light of all of the circumstances. The road was "very clear" with "no evidence of any debris or hazards." Alternatively, the Society was the "occupier," and did take positive action to take reasonable care under s. 3(1) of the Act to address any safety concerns by way of patrols before and during the event. There was no duty to warn because there were no risks to the knowledge of the defendants for which there should have been a warning. Further, the court was satisfied that Ms. Copeland had read and understood the enforceable waiver of liability, a waiver that was worded broadly enough to cover the conduct of the defendants. The case is *Copeland v. Hamilton (City)*, 2009 CanLII 42450 (Ont. S.C.J. Aug. 13, 2009).

Safeguarding Salamanders

The second case, *Guelph (City) v. Soltys*, 2009 CanLII 42449 (Ont. S.C.J. Aug. 13, 2009), arose out of a proposed development of a corporate-industrial business park by the City and a private entity, and a resulting injunction application. The land contained a creek, and areas of forest and wetlands, and the proposal included a culvert over the creek. In April 2009, a dead hybrid "unisexual" salamander was found within the area and given to a university professor, an expert on the Jefferson Salamander. ("It is likely that most citizens will not have heard of the Jefferson Salamander. As it happens, the Jefferson Salamander is a 'threatened species' within the meaning of the *Endangered Species Act, 2007*.") The City retained a consultant to provide an opinion on the existence of the salamander on the property. The report concluded that it was likely that the habitat of the Jefferson Salamander did not exist within the vicinity where it was proposed the culvert be installed. However, in contrast, the professor opined that additional survey work (which could take up to three years) was needed before this could be determined. The City notified the Province about the report, and the applicable Ministry, the Ministry of Natural Resources, took no formal action to halt construction.

Soltys belonged to a group called Land Is More Important Than Sprawl (LIMITS), which opposed the development. When construction of the culvert began, Soltys and the other defendants entered the property and shut down construction. Some wore bandanas and sunglasses that hid their facial features, and all ignored demands to leave. The City and the developer applied for an injunction to restrain the trespass and interference with the construction. The defendants filed their own application for an injunction, seeking to restrain construction based on the potential impact on the salamander's habitat and citing the "precautionary principle" (where there was a threat of a significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat).

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Paid Sick-Leave Ordinance Challenge

by Devala A. Janardan, Associate Counsel

In early July, New York Mayor Michael Bloomberg, in a forum with other mayoral candidates, stated for the first time that he would support a city law that would require large employers to provide paid sick leave to employees who worked within city limits.[1] Currently, only three cities have passed local measures that require employers to provide paid sick-leave – San Francisco, the District of Columbia, and Milwaukee – so Mr. Bloomberg's comments have boosted the hopes of individuals and interest groups that favor of mandating paid sick-leave. These entities have needed a boost since Milwaukee had its paid sick-leave ordinance challenged and invalidated in court. In June 2009, the Circuit Court of Milwaukee County ruled that the ordinance was invalidly enacted and unconstitutional.[2] As more and more cities consider local laws that require private employers to provide paid sick leave to employees, it is noteworthy to see why the local Wisconsin court decided the way it did.

Milwaukee's paid sick-leave law was enacted in late 2008.[3] The ordinance requires employers with ten or more employees to provide paid sick-leave, up to a maximum of 72 hours per employee per year. Employers with fewer than ten employers are still required to provide paid sick leave, but to a lower maximum, 40 hours per employee per year. Paid sick leave can be used for the following general reasons: the employee's own illness or preventative care; to care for a family member who is ill or who needs preventative medical care; or an absence necessary due to domestic abuse, sexual assault or stalking. With regards to an "absence necessary due to domestic abuse, sexual assault or stalking," the ordinance allows an employee to use paid sick leave to seek medical attention, obtain the services of a victim services organization or psychological or other counseling, seek relocation, or for legal action.[4]

A local pro-business group, the Metropolitan Milwaukee Association of Commerce, Inc., (MMAC) challenged the ordinance on a number of grounds, alleging among other things, that the ordinance was an invalid exercise of police power, impaired existing employment contracts, and extraterritoriality. Challenges to the validity of the use of a city's police powers are reviewed under the rational basis test and, in Wisconsin, a plaintiff suing a locality "must demonstrat[e] beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective."[5]

The court ruled that the ordinance failed to meet the rational basis standard. It first identified the objectives of the ordinance. The City had relied on numerous findings and objectives as listed in the "whereas" clauses in the ordinance. Some of these findings included: the fact that a large number of employers do not provide sick-leave; that the absence of paid sick leave poses serious problems for City employees and the community; serious problems, like employees coming into work sick, exposing others to sickness, or spreading sickness to certain goods that are entered into the stream of commerce; employees risking the loss of employment for staying home while sick; the difficulty of scheduling medical appointments; and the risk of family members being sent to a nursing home.[6] These supported the objectives of protecting the public welfare, health, safety and prosperity of the City in order to ensure a decent and healthy life for its citizens.

The court focused on the provision regarding using paid sick leave to deal with issues related to domestic abuse, sexual assault, and stalking, and specifically noted that "[a]t no point does the summary, findings, or objectives of the Ordinance include, discuss, or refer to provisions related to domestic abuse, sexual assault or stalking."[7] The court ruled that "[a]lthough the treatment of injuries related to domestic violence and sexual assault fall squarely within the objective" of protecting the welfare, health and safety of the public, "even the broadest interpretation of the [whereas clauses] would not rationally relate the objectives to the provisions permitting paid leave to *attend to relocation and pursue legal action*."[8] Based on this finding, the court granted summary judgment in favor of MMAC and issued a permanent injunction.

The court also addressed MMAC's challenge that the law impaired existing contracts. Under Wisconsin law, courts apply a three-part test in order to determine whether a new law unconstitutionally impairs existing contracts. First, is an obligation of a contract substantially impaired; second, does the legislation have a significant and legitimate public purpose; and lastly, is the impairment of the contract reasonable and necessary to serve that purpose.[9] The court noted that Wisconsin laws, such as the Living Wage Act, Family Medical Leave Act, and its Worker's Compensation Act, had all impacted collective bargaining in a much more intrusive way than the ordinance, which "only peripherally affects collective bargaining. … It operates prospectively, imposes gradual requirements upon employers, and allows employers to credit other types of paid time off as paid sick leave."[10] The court also held that the ordinance was not unconstitutional as extraterritorial. MMAC contended that because the ordinance regulated employers regardless of their location, it violated extraterritoriality limits on municipal legislation. The court disagreed, noting that the ordinance "explicitly only regulates those employees who

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Using the IMLA-MCC Listserve

by Lawton Langford

IMLA and Municipal Code Corporation (MCC) operate a List Service exclusively for municipal attorneys. There are currently 629 attorneys who participate on the IMLA-MCC Listserv, generating almost 30 messages each day covering topics as diverse as accident response fees, alcohol permit revocations, a Maryland patronage case, abandonment of a utility easement, and the myriad of issues that arise during the "normal" day of a local government attorney. This column will describe how to join, and get the maximum benefit from the tools that are available from the Listserv software.

Who qualifies? How to subscribe. To qualify as a member, a person must be an attorney with a significant portion of his or her practice comprised of representing local governments. Not all prospective subscribers are accepted: for instance, vendors are not qualified participants and there are no solicitous postings. To subscribe to the Listserv, go to MCC's website, www.municode.com, and click on the bullet titled "Listservs." Across the center of the next screen are a series of links. Click on the one titled "Attorney List Subscribe." You will be asked to type in your name and e-mail address, and to submit this information by clicking on the "Subscribe" button. You will then receive instructions from the Listserv to introduce yourself to the group. Once your introduction is circulated, your subscription will be activated.

Using the Listserv. To make maximum use of the Listserv, including researching archives, managing your profile to suspend messages while on vacation, or changing the mode in which messages are received (digest or index format), you must have a password. To create a password, either read the instructions found within the Listserv FAQs, or send an e-mail to password@municode.com.

Searching the archives. Past Listserv messages are stored at municode.com for your perusal. Messages dating back to 2006 are currently available, though the archives will be purged periodically to free up space. This archive has proven invaluable to many Listserv members. Although it enables you to search using keywords (similar to Westlaw or Lexis), the real value is finding discussions on topics, written by peers who may be wrestling with the same issue. By searching the archives, an "expert" who would be willing to discuss his or her solution to your immediate problem may be found. To search the archives, go to www.municode.com and click on the eighth bullet, titled "Listservs." Click on the "Attorney List Archives" link in the middle of the screen and log-in, using the e-mail address you used to subscribe and your password. Click "Search Archives" at the bottom of the choices, under the title "options." Enter your search word in a dialogue box and click "search" at the bottom right.

Searches can be by author, date range, or key word. A "hit list" of messages meeting your search criteria will be returned, along with the subject line from the original message. Clicking on the "Item #" to the left of the hit list will open the original message.

Sharing files. Another useful tool for Listserv members is the FTP site. FTP stands for "File Transfer Protocol" and is a way to share documents. For security reasons, the Listserv does not allow attachments to messages, which means an alternative method for sharing documents is needed. FTP'ing documents is easy, though to view any file on the FTP server, the software in which the document was created must be available to the viewer: a Word document on the FTP server would require the person downloading the document to have Word on their computer. To access the FTP server, go to: ftp://ftp.municode.com/attorneylistserv. To open a document posted on the FTP site, double-click it—this will automatically launch the software necessary to display the document (assuming your computer has that software loaded).

There is a username and password requirement, and all members of the Listserv are entitled to them. However, because this magazine has wider circulation than just Listserv members, the username and password are not published here. If you are a Listserv member and want the username and password, send an e-mail to ListFTP@municode.com.

Managing messages. Because the Listserv generates approximately 30 messages each day, it is easy to become overwhelmed. Members address this in a couple of ways. One way is to create a separate folder for Listserv messages in your e-mail software, and then establish a "rule" that automatically sends Listserv messages to that folder. This keeps the Listserv messages out of your Inbox and allows them to accumulate until it's convenient to review them. An alternative is to use the "digest" or "index" mode of delivery. These are settings on a participant's profile that bundle or index messages. In the digest mode, one e-mail is sent containing 25 messages. To review the messages, open the digest message. The index mode sends a summary of the subject lines of messages. To review the original messages, click on one of the indexed subject lines.

Water Cooler List. The MuniAtty Listserv is intended to provide a forum for the substantive discussion of issues relevant to practicing local government attorneys. An alternative forum called the Water Cooler List exists for the more whimsical or collegial banter that attorneys enjoy. This is moderated by IMLA's past President, William J. Kearns. To join, send an e-mail to Mu-

nicAttyWaterCooler@yahoogroups.com that identifies you and the local government that you represent. You will get a response from YahooGroups that you are not a member, asking if you want to join. Respond to the message as directed and YahooGroups will notify Bill Kearns so that your membership can be approved. The approval process is simply to keep the discussions among our municipal attorney colleagues.

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Inside Canada

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The court held both sides were entitled to their respective injunctions. The plaintiffs were entitled to an injunction to restrain trespassing and interference with construction: "the defendants have no right to take the law into their own hands." As property owners, the plaintiffs were entitled to assert the ordinary rights of property owners, including the right to prevent people from impeding or obstructing lawful activities on the property. The defendants' right to seek an injunction rested on their obtaining standing as public interest litigants. The court granted them this status, and, after a review of the *Endangered Species Act*, held there was a serious question to be tried as to whether a stop work order should be issued. "If the injunction is not granted, the work is commenced, and habitat is destroyed, the harm will be irreparable." An injunction for a 30-day period was granted, sufficient to give the Minister of Natural Resources time to decide whether to act and issue a stop work order under the legislation. ML

Ordinances

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are working within the geographical boundaries of the City" and had no bearing on what benefits employers offered when their employees operated outside the City limits.[11]

The City plans to appeal, and it remains to be seen whether or not efforts to require employers to provide paid sick leave will remain at the local level or transition to Congress. In May, Representative Rosa DeLauro (D-CT) introduced the Healthy Families Act, H.R. 2460, which would require employers of 15 or more employees to provide at least one hour of paid sick time for every 30 hours worked. As of August 2009, the bill sits with the Committee on Education and Labor.

Notes

1. David Chen, *At Working Families Party Forum Bloomberg Declines to Toe Liberal Line*, N.Y. Times, July 3, 2009, at A25.
2. Metro. Milwaukee Ass'n of Commerce v. City of Milwaukee, No. 08CV018220 (Milwaukee Cty. Cir. Ct. June 12, 2009).
3. Milwaukee, WI., Code of Ordinances § 112 (2008).
4. *Id.* at § 112-5.
5. State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, 313 N.W.2d 805 (Wis. 1982).
6. *Metro. Milwaukee Ass'n* at 26-27.
7. *Id.* at 28.
8. *Id.* (emphasis added).
9. Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (2006).
10. *Metro. Milwaukee Ass'n* at 32.
11. *Id.* at 33. ML



Cases



Civil Rights

Qualified Immunity – Deadly Force

On March 9, 2005, John Garczynski handed his estranged wife Leigh a large packet and told her not to open it unless something happened to him. Leigh opened it almost immediately and saw the packet contained her husband's last will and testament, an obituary listing his date of death as March 9, 2005, a journal containing references that he intended to kill himself, and other documents. Leigh called 911. While the police were trying to locate him, Garczynski called Leigh and had a lengthy conversation with her. The police monitored the call, hoping to determine his whereabouts. After locating Garczynski, the police approached his car and found him holding a gun to his head. One of the officers yelled at him to drop the gun. Garczynski appeared to aim the gun at the officers, at which point one of the officers shot and killed him. Garczynski's estate brought a civil suit pursuant to 42 U.S.C. § 1983, seeking damages in excess of ten million dollars and claiming the use of excessive and deadly force. The district court granted summary judgment on the Section 1983 claims, holding that the officers were entitled to qualified immunity because the officers' use of deadly force was "objectively reasonable under the circumstances."

The U.S. Court of Appeals for the Eleventh Circuit affirmed the ruling. Based on the facts, the burden was on the decedent's estate to show that qualified immunity should not apply because the officers violated a constitutional right, and the right violated was clearly established at the time of the incident. The court analyzed the excessive force claim under the Fourth Amendment's "reasonableness" standard, as determined by the "totality of circumstances." Only arguable probable cause was needed to qualify for immunity. Here, the threat to the officers and Graczynski's refusal to drop his gun contributed to a situation in which the officers' use of force was "objectively reasonable given all the circumstances from a reasonable officer's viewpoint." *Garczynski v. Bradshaw*, 573 F. 3d 1158 (11th Cir. 2009).

Probable Cause – Entry into Former Marital Home

Geneva Finigan was in the middle of divorce proceedings with her estranged husband. Although they both shared the title to their former marital residence, she had moved out and resided elsewhere. Her estranged husband still lived at the marital home and had changed the locks. After learning that her husband would be out of town, Finigan went to the house and decided to remove some items without his knowledge. Marshall, a police officer, responded to a report of a burglary in progress, and recognized the address because Finigan's husband was his friend. Marshall knew that Finigan had moved out and that divorce proceedings were pending. A neighbor, who was looking after the house, advised Marshall that the husband had changed the locks and expressed uncertainty as to how Finigan had obtained access to the premises. Finigan admitted to Marshall that she had removed property without her husband's knowledge, but stated that she had legal title to the residence, had removed only her own property, and that her divorce attorney told her she could do so. Marshall made no attempt to verify these claims and arrested Finigan. When she was later released without being charged, Finigan brought a 42 U.S.C. § 1983 suit alleging false arrest and abuse of process. The district court concluded that Marshall failed to investigate whether Finigan was legally entitled to enter the residence by virtue of her title and, therefore, lacked probable cause to make the arrest. As a result, the court denied Marshall's motion to dismiss based on qualified immunity.

The U.S. Court of Appeals for the Second Circuit vacated the ruling and remanded, finding that Marshall had probable cause to arrest Finigan. Under New York law, a person was guilty of criminal trespass when he or she "knowingly enter[ed] and remain[ed] unlawfully in a dwelling." Probable cause to arrest Finigan existed based on the following facts: a report of a burglary had been made; Marshall knew that divorce proceedings were pending and Finigan no longer resided at the premises, that the locks had been changed, and that Finigan's husband had not consented to her entry; and based on Finigan's admission that she entered and removed property from the premises. Finigan's main argument relied heavily on her telling Marshall that she shared title to the home and Marshall's failure to follow up on this assertion. The court, however, stated that the right of entry did not turn solely on the existence of an ownership interest – an owner could be convicted of burglarizing premises he owned but which were occupied by another. As stated by the court, Finigan's entry may have occurred "without great danger," but the law was in place to prevent "angry title-holding spouses" from entering property, and to prevent "looting of the premises by non-residence spouses." *Finigan v. Marshall*, 574 F. 3d 57 (2d Cir. 2009).

Section 1983 – Required "State Action"

Philips, a physician who practiced at Pitt County Memorial Hospital, contended that his practice privileges had been suspended by the hospital's governing board in violation of 42 U.S.C. § 1983, based on putative infringements of his Fourteenth Amendment due process rights. However, because a plaintiff alleging a violation of Section 1983 is required to prove that a "state actor" deprived the plaintiff of his rights, the status of the hospital became a critical issue. Private conduct, no matter how discriminatory or wrongful, failed to qualify as "state action." Until 1998, Pitt County owned all of the property repre-

senting the hospital, which it leased to PCMHI, an entity formed to operate the hospital. In 1998, the County and PCMHI entered into an agreement to change the status of the hospital from a public facility to a private, not-for-profit hospital, and the County sold the hospital to PCMHI. The County had the right to appoint eleven members of the 20-member board governing the facility, and retained additional rights arising out of the indebtedness over the purchase price. The hospital received some state and federal funds but the County was not involved in its day-to-day operations. In arguing that the board was a state actor, Philips argued that a sufficiently close nexus existed between the government and the defendants' decision to suspend him, pointing to the County's control and the fact that the board was appointed exclusively by state actors. The hospital, arguing that it was a private, non-profit organization, moved dismiss the action. The district court granted the motion and, on appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed.

Any control by the County was "largely embodied in the reverter provision which help[ed] assure that PCMHI [met] Pitt County's objectives of care for the indigent and payment to the County of specified monetary obligations." The state's involvement with the board ended as soon as the members were approved; thus, the plaintiff needed to present additional evidence that the state actor used its authority to influence hospital practice or physician privilege decisions. The County representatives were entitled to attend the board meetings but they did not have voting rights, and were not, in fact, actually present for the consideration of the plaintiff's suspension. Therefore, the suspension of the plaintiff's privileges was not state action. *Philips v. Pitt County Memorial Hospital*, 572 F.3d 176 (4th Cir. 2009).

First Amendment
Animal Slaughter Ordinances

To follow up on an article that appeared in the last issue of the *Municipal Lawyer (Regulating Noah's Ark – Religious Freedom and Animal Control Issues*, by Bradford Bullock, in the July/August 2009 issue), the U.S. Court of Appeals for the Fifth Circuit has since released its ruling in the case involving the City of Euless's animal control ordinance. The ordinance permitted the keeping and slaughter of up to four "tablefare" birds in residential areas, regardless of the purpose for which the poultry were kept, but prohibited the keeping and slaughter of four-legged animals within its borders. The exceptions include the killing of vermin (which was permitted) and the killing of animals by animal control officers. The purpose for the keeping and slaughter ban was public health and safety, primarily based on the runoff of animal waste, flies, smells, noise, possible disease transmission. The ban allegedly prevented practitioners of the Santeria faith from performing ceremonies essential to their religion (Santeria rituals often involve the sacrifice of live animals). The plaintiff, José Merced, was a Santeria priest who performed the sacrifices at his residential property. After the City learned of this, Merced was told to stop, as this violated the ordinance. He sued the city, seeking a permanent injunction that prohibited Euless from enforcing an ordinance that burdened his religious practice, and alleging violations of state law (the Texas Religious Freedom and Restoration Act, or TRFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, and the First, Fifth, and Fourteenth Amendments. The district court dismissed the RLUIPA claim because no zoning laws were at issue, and concluded that the ordinance did not burden Merced's religious practice, and that it furthered compelling governmental interests and was the least restrictive means of advancing them.

The U.S. Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded. Under TRFRA, the ordinance substantially burdened the plaintiff's free exercise of religion without advancing a compelling governmental interest using the least restrictive means. The court held this finding obviated the need to address the remaining constitutional questions. It was undisputed that Merced's sincere religious beliefs motivated his conduct, and that his killings were sacrifices and not mere slaughter. A government's ban of conduct sincerely motivated by religious belief substantially burdened an adherent's free exercise of that religion, and Merced's ability to perform some ceremonies did not mean the ordinance did not burden other Santeria practices. The court found that, in essence, Merced had to choose between living in Euless and practicing his religion. The City had "absolutely no evidence" that Merced's religious slaughter undermined any of its interests, and the exception that allowed the keeping, slaughter, and disposal of a small number of fowl on a regular basis had "the same corrosive effect on the city's interests as infrequent sacrifices of a larger number of animals." Possibly less restrictive alternatives to the ban included a permit scheme for animal sacrifices, requiring Santeria adherents to comply with conditions designed to safeguard the City's interests. *Merced v. Kasson*, Nos. 08-10358, 08-10506, 2009 WL 2343172 (5th Cir. July 31, 2009).

Establishment Clause – Bible Distribution in School

Members of Gideons International had been allowed to hand out Bibles to students at the South Irons Elementary School for the past 30 years. In 2005, the School District Superintendent advised the school board that several attorneys (including the district's own attorney) had recommended discontinuing the practice on the basis that it was unconstitutional. The board declined to do so. A lawsuit followed in 2006, brought by the parents of several students, against the school district, members of the Board of Education, and school officials, alleging that the Bible distribution violated the Establishment Clause of the First Amendment. The district court granted a preliminary injunction enjoining the District from "allowing distribution of Bibles to elementary school children on school property at any time during the school day." In the meantime, the school district adopted a new policy. This provided that an organization wishing to distribute "any printed material" had to submit the material, in advance, to the superintendent for approval. All requests "shall be approved" unless

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the material was libelous, obscene, or unlawful; advertised products or services for sale; endorsed a candidate for public office; promoted alcohol, tobacco, drugs, or other illegal activity; or was likely to cause substantial disruption at the school. If approved, the material could be distributed either in front of the administrative offices or at a table in a corner of the cafeteria. The plaintiffs amended their complaint to include the new policy. The District argued that plaintiffs were not entitled to a permanent injunction because adoption of the new policy made the challenge to the past practice of Bible distribution moot. The district court applied the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and concluded that the new policy violated the Establishment Clause because its purpose was "the promotion of Christianity" and its primary effect was "advancing religion by conveying a message of endorsement to elementary school children."

The U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of the district court granting a permanent injunction, but reversed the district court's grant of a declaratory judgment. The declaratory judgment – that plaintiffs "shall have judgment against defendants ... on plaintiffs' complaint" was improper because the precise import of the declaratory judgment was "hopelessly obscure. Given its impact on the operations of a state governmental entity, this ambiguity alone require[d] reversal." Second, a declaratory judgment prohibiting implementation of the policy was both unnecessary and inappropriate, as the policy had never been implemented and was "constitutionally permissible in a host of other applications." Turning to the injunction, the court addressed the District's argument that the permanent injunction "impermissibly mandate[d] a content-based restriction on speech in the limited public forum created by the content-neutral [new] policy." The injunction was based on a judicial determination that the District had impermissibly endorsed a particular religion and its scope was facially reasonable. More specifically, it did not address the new policy or prescribe how the District could distribute other materials to students, and left open the possibility that the District might, in a neutral manner, facilitate Bible distribution by private parties, such as the distribution of flyers advertising off-campus or after-school distributions. *Roark v. South Iron R-1 School District*, 573 F. 3d 556 (8th Cir. 2009).

Litigation and Liability
Evidence of "Suicide by Cop"

Boyd was shot and killed by Officer Paine of the San Francisco Police Department after Boyd had attempted two separate kidnappings earlier that day. One of the victims called police and a high-speed chase of Boyd ensued. During the chase, Boyd fired at the pursuing officers. When Boyd pulled over, officers surrounded his car and ordered him to get out with his hands over his head and lie on the ground. Witnesses testified that Boyd put his hands up, walked towards the officers, then returned to his car. When Paine realized Boyd was reaching back into his vehicle with both hands, he fired three times, fatally wounding Boyd. Two weeks previously, police had stopped Boyd and found his rap lyrics, which advocated the murder of police officers; three days before the shooting, Boyd had been apprehended for reckless driving and struggled with the arresting officers, repeatedly screaming at them "kill me," and calling them "filthy white racists." The Boyd family sued San Francisco, alleging the police used excessive and deadly force. In its defense, the municipality relied on the expert testimony of Dr. Emily Keram, a forensic psychiatrist, who concluded that Boyd had been attempting "suicide by cop" – that he had purposefully drawn the police officers' fire to accomplish this result. The plaintiffs objected to the admission this testimony and to other evidence regarding Boyd's past (prior lawsuits filed by him or by his mother on his behalf against law enforcement agencies, evidence of his prior arrests, evidence of the rap music lyrics, and evidence that he was on drugs at the time of the shooting). After trial, a jury ruled in favor of the defendants and the plaintiffs appealed, arguing that the district court abused its discretion in allowing the admission of improper evidence at trial.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. As Officer Paine did not know the evidence of Boyd's past prior to shooting Boyd, the only issue in front of the jury was whether Paine's actions were reasonable based on his perspective at the time. "Under the relevancy analysis prescribed by the Federal Rules, all of [this] challenged evidence was properly admitted, since it had a tendency to make a fact of consequence more or less probable. … police assertions that [Boyd] was acting erratically, taunting police and goading them to shoot him instead of following police commands, is made more probable by [Boyd's] earlier statements to Oakland police, as well as evidence that he was on drugs at the time." His alleged resistance to the police was "also made more probable by evidence, in the form of expert testimony, that his actions were consistent with an attempt to commit suicide by cop." Addressing the expert testimony in light of Federal Rule of Evidence 702, the court below had ultimately concluded that Dr. Keram's testimony was based on a reliable foundation and was relevant to the issues before the court. The "suicide by cop" theory was supported by numerous studies and "Dr. Keram was careful to tie her conclusions in this case to the literature on suicide by cop, noting recognized factors or connections supporting her opinion." The plaintiffs did not dispute the existence of articles in support of the theory or present evidence, outside of their own assertions, that the theory was unreliable. With the exception of part of its ruling on the rap lyrics, the district court did not abuse its discretion in admitting the evidence or Dr. Keram's testimony. *Boyd v. City and County of San Francisco*, No. 07-16993, 2009 WL 2413794 (9th Cir. August 07, 2009).

Personnel and Employment
Employment Discrimination

Hobbs, an African-American woman, had worked for the City of Chicago since 1989 as a "Motor Truck Driver" in the City's Department of Transportation (DOT). In 2000, she was given new responsibilities as a lot supervisor, being

the only African-American woman holding that position. However, her title remained unchanged and she was never paid as a foreman despite performing a foreman's job duties. In 1997 and 2000, Hobbs applied and interviewed for the foreman position, but both times a white male received the job, and in 2004, another white male, Q., was promoted to an acting foreman position (this was not posted as a job opening as the City did not consider this to be a permanent vacancy). In 2005, Hobbs filed a charge of discrimination against the DOT with the Equal Employment Opportunity Commission (EEOC), alleging the City denied her a promotion to the foreman position because of her race and gender. She alleged that shortly thereafter, Q. and other City employees began a campaign of disciplinary enforcement against her for infractions that were ignored in the case of other employees; her car was vandalized; and she was assigned work duties to humiliate her. She sued, alleging race and gender discrimination and retaliation claims in violation of 42 U.S.C. § 1981 against the City and her coworkers; race and gender discrimination and retaliation in violation of Title VII against the City; a hostile work environment claim against the City; and equal protection claims against all defendants pursuant to 42 U.S.C. § 1983. The district court granted the City's motion to dismiss the Section 1981 race and retaliation claims, and the Section 1983 claim against the City. Hobbs appealed.

The U.S. Court of Appeals for the Seventh Circuit affirmed. The district court properly granted summary judgment on Hobbs's Title VII and Section 1981 claims, as on the indirect, burden-shifting method in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the position was not given to someone outside the protected class who was similarly or less qualified than Hobbs. The acting foreman, Q., had at least two more years experience than Hobbs as a motor truck driver; unlike Hobbs, he had experience with the City's snow program; and, although he did not have Hobbs's college education and computer skills, these were not part of the job qualifications for an acting foreman. Even if Hobbs could show a prima facie case of discrimination, the City offered nondiscriminatory reasons for promoting Q., which Hobbs failed to show were pretextual. Although the process used in promoting Q. may have been "questionable," there was no evidence it was motivated by a racial or sexist animus. Hobbs further argued that she proved, through the direct method, that the City took adverse actions against her in retaliation for her discrimination complaints with the EEOC. This the court rejected on the basis that Hobbs failed to show a materially adverse action taken by her employer, or that there was a causal connection between the complaint and any adverse actions. The commissioner who disciplined her did not know that Hobbs had filed an EEOC charge; the assignments she was given were clearly within her job duties; and "[Q's] elevation – not Hobbs's complaints – was the reason her responsibilities changed." The mere fact that the vandalism occurred after the EEOC charge and the same day that Hobbs received notification of a disciplinary action was not enough to survive summary judgment. The hostile work environment claim also failed, as the facts did not rise to the level of the "severe or pervasive" threshold – the alleged vandalism and the failure to investigate it was "disgraceful, but that one act alone [was] not egregious enough to create a hostile work environment." *Hobbs v. City of Chicago*, 573 F.3d 454 (7th Cir. 2009).

Employee Speech Rights – Police

"[W]hen working for the government, saying one's boss is a bully does not necessarily a constitutional case make." Desrochers and Lowes were police sergeants with the San Bernardino Police Department. In 2006, Desrochers was transferred from the Homicide Unit to the Robbery Unit, an action he viewed as a demotion. Lowes was the subject of an internal affairs investigation pertaining to an April 2006 arrest, following which he received a two-week suspension. They claimed that the reason for these employment actions was actually based in grievances that they had made in 2006 respecting their supervisor, Lieutenant K., arising out of ongoing problems that they felt had a negative effect on the department's efficiency and morale. In the initial grievance, they asked the department to, among other things, remove K. from command of their unit and formally investigate the charges in their grievance. K. asked for and received a transfer after learning of the grievance, but the officers felt this was inadequate to address their issues and brought a formal complaint, again indicating that K's management style was destroying morale and created a "hostile work environment," reflected badly on the department, and impeded operating efficiency. When this grievance was denied, Desrochers and Lowes filed a complaint with the City's human resources department, and claimed retaliation at the hands of K's replacement. They alleged that their transfer and suspension were retaliation for engaging in speech protected by the First Amendment. The police department, however, stated that the actions were due to Desrochers botching a murder investigation and Lowes disobeying orders and endangering a suspect in custody. Ultimately, both officers brought a 42 U.S.C. § 1983 lawsuit. The district court granted summary judgment for the defendants after concluding that the plaintiffs' complaints did not address matters of public concern.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, in a decision limited to whether the plaintiffs spoke on a matter of public, as opposed to personal, concern. To address a matter of public concern, the content of the officers' speech had to involve "issues about which information [was] needed or appropriate to enable the members of society to make informed decisions about the operation of their government." Citing *Johnson v. Multnomah*, 48 F.3d 420, 425 (9th Cir. 1995), the court noted that, in "a close case, when the subject matter of a statement is only marginally related to issues of public concern, the fact that it was made because of a grudge or other private interest or to co-workers rather than to the press may lead the court to conclude that the statement does not substantially involve a matter of public concern." In this case, the fact that the speech contained references

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"Substantial Burdens"

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Conclusion

Stay tuned for part two of this article in the January/February 2010 *Municipal Lawyer*, where more RLUIPA decisions deciphering the "substantial burden" conundrum will be digested.

Notes

1. 42 U.S.C.A. § 2000cc, *et seq.* (West 2009).
2. 112 Fed. Appx. 445 (6th Cir. 2004).
3. 218 F. Supp.2d 1203 (C.D. Cal. 2002).
4. 289 F. Supp.2d 87 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005).
5. 456 F.3d 978 (9th Cir. 2006).
6. 739 N.W.2d 664 (Mich. Ct. App. 2007), *vacated*, 746 N.W.2d 105 (Mich. 2008), *on remand*, 761 N.W.2d 230 (Mich. Ct. App. 2008).
7. No. Civ.A. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004).
8. 396 F.3d 895 (7th Cir. 2005).
9. 504 F.3d 338 (2d Cir. 2007).
10. Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp.2d 309 (D. Mass. 2006), Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 03, 2007), City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406 (Wash. 2009), Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder, 612 F. Supp.2d 1163 (D. Colo. 2009), Grace Church of North County v. City of San Diego, 555 F. Supp.2d 1126 (S.D. Cal. 2008), Church of Universal Love and Music v. Fayette County, No. 06-872, 2008 WL 4006690 (W.D. Pa. Aug. 26, 2008), Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp.2d 766 (D.Md. 2008), Guatay Christian Fellowship v. County of San Diego, No. 08cv1406 JM(CAB), 2008 WL 4949895 (S.D. Cal. Nov. 18, 2008), Barr v. City of Sinton, No. 06-0074, 2009 WL 1712798 (Tex. June 19, 2009), and Merced v. Kasson, Nos. 08-10358, 08-10506, 2009 WL 2343172 (5th Cir. July 31, 2009).
11. 146 Cong. Rec. 16,700 (2000).
12. *Id.*
13. Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (addressing the validity of laws that have the effect of burdening particular religious practices).
14. 42 U.S.C. § 2000cc-5 (7)(B) (2000).
15. 42 U.S.C. § 2000cc-5 (7)(A) (2000).
16. Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Comm'n of the Town of Newtown, 941 A.2d 868, 890 (Conn. 2008).
17. Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).
18. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).
19. *Id.*
20. Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).
21. Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp.2d 766, 785-86 (D. Md.2008) (approving jury instructions consistent with *Lovelace*).
22. Murphy v. Mo. Dept of Corr., 372 F.3d 979, 988 (8th Cir. 2004).
23. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
24. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).
25. Vision Church v. Village of Long Grove, 468 F.3d 975, 997-1000 (7th Cir. 2006).
26. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70 (3d Cir. 2004).
27. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006).
28. Omnipoint Communications, Inc. v. City of White Plains, 202 F.R.D. 402 (S.D.N.Y. 2001).
29. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004).
30. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp.2d 961, 986 (N.D. Ill. 2003).
31. *Id.*
32. N. Pac. Union Conf. Ass'n of Seventh Day Adventists v. Clark County, 74 P.3d 140, 147 (Wash. Ct. App. 2003).
33. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
34. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004).
35. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007).
36. *Id.* at 750.
37. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123, 1125 (Or. 2005).
38. *Id.* at 1130.
39. 386 F.3d 183, 188 n.3 (2d Cir. 2004).
40. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp.2d 507 (D.N. J. 2005).
41. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp.2d 691 (E.D. Mich. 2004).
42. Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp.2d 1207 (S.D. Fla. 2005).
43. Konikov v. Orange County, 410 F.3d 1317, 1323-24 (11th Cir. 2005).
44. Living Water Church of God v. Charter Tp. of Meridian, 258 Fed. Appx. 729, 737 (6th Cir. 2007).
45. *Id.*
46. *Id.*
47. Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846 (7th Cir. 2007).
48. City of Hope v. Sadsbury Tp. Zoning Hearing Bd., 890 A.2d 1137 (Pa. Commw. Ct. 2006).
49. *Id.* at 1140 n.1.
50. *Id.* at 1145. **ML**

High-Profile Litigation

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call the reporter back before his or her publication deadline. Refute the opposing party's spin, redefine the message, and, if necessary, consider holding a follow-up press conference.

During Trial, Monitor the Blogs

During trial, there may be second-guessing from many sources, including the public, the media, and even public officials. Litigation counsel for employers should avoid the temptation to get caught up in a media sideshow and, instead, should stick to focusing on a well-thought-out

game plan in anticipation of going to trial. If there are courtroom bloggers reporting on an entire trial, witness by witness, it makes sense to monitor those blog sites. Mr. O'Rourke believes they can provide a good indication of how the jury may be perceiving the testimony.[71] Paying less attention to the TV coverage is paramount, as these reports will typically focus on the most sensational testimony or information of the day, not necessarily the most important testimony. Ultimately, it is the jury's observations that matter most.

Conclusion

High-profile litigation is a peculiar animal in the arena of civil lawsuits in which an employer has been sued. Often, these cases come up under the worst of circumstances, with an array of uncontrollable variables in play. Having a well-thought-out plan in place for when a scenario explodes in the media can help government entities navigate these difficult cases, while minimizing bad press along the way.

Notes

1. Ward L. Churchill v. Univ. of Colorado, 2009 WL 1404898 (Colo. Dist. Ct. Apr. 02, 2009).
2. *Id.* ("The essay was largely ignored in publication online. However, in late January 2005, a New York college newspaper reported it in preparation for Churchill's forthcoming speaking engagement there.").
3. *Id.* (explaining that "little Eichmanns" was an allusion to the Nazi technocrat Adolph Eichmann, a key engineer of the Holocaust).
4. *Id.* ("Then-Gov. Bill Owens demanded Churchill's resignation, and the school's Board of Regents issued a condemnation of Churchill's essay and made a national apology.").
5. *Id.*
6. Allison Sherry, *Donors Applaud Churchill Decision*, Denver Post, July 26, 2007 ("One of the first things University of Colorado [P]resident Hank Brown did after its regents fired divisive professor Ward Churchill Tuesday was reach out to donors, some of whom had held back money until the process was resolved.").
7. David Montero, *Media horde followed case*, Rocky Mountain News, June 25, 2007 ("Churchill appeared on *The Hannity and Colmes Show* on Fox News for a heated debate, and Bill O'Reilly was one of the first to pound the Churchill topic regularly. Both hosts referenced Churchill repeatedly on their television and radio programs."); Valerie Richardson, *Ex-Professor blames firing on smears*, The Washington Times, Mar. 11, 2009 ("[Churchill's attorney cited the influence of] conservative radio talk-show host Rush Limbaugh and Fox News Channel political commentators Sean Hannity and Bill O'Reilly, who had criticized Mr. Churchill in the years before he was fired.").
8. David Montero, *Media horde followed case*, Rocky Mountain News, June 25, 2007 ("KHOW hosts Dan Caplis and Craig Silverman are fully invested in the story and broadcast today live from the University of Colorado. Caplis, in fact, cut short a vacation to be able to broadcast the firing of Churchill.").
9. Ward L. Churchill v. University of Colorado, 2009 WL 1404898 (Colo. Dist. Ct. Apr. 02, 2009) ("The investigation determined in March 2005 that [Churchill's essay] and other related statements did not exceed First Amendment protections.").
10. *Id.* ("[A]llegations began to surface that Churchill had committed research misconduct unrelated to this essay. The University initiated an investigation, and two faculty panels concluded that he had engaged in misconduct….").
11. *Id.*
12. *Id.* ("The University disputed Churchill's claim that it had terminated him in retaliation for his exercise of First Amendment rights. The school admitted that the allegations of research misconduct may have stemmed from publicity related to Churchill's controversial essay, but argued that the Board of Regents did not retaliate against him.").
13. *Id.*
14. John Aguilar, *Ward Churchill's Lawyer: 'It was an absolute mob mentality*,' Boulder Daily Camera, Mar. 10, 2009.
15. John Aguilar, *Ex-Gov. Owens denies pressuring CU to fire Ward Churchill*, Boulder Daily Camera, Mar. 11, 2009 ("[Churchill's attorney] showed the jury a transcript of a March 29, 2005, interview Owens gave Fox News talk-show host Bill O'Reilly, during which Owens said he didn't have the power to fire Churchill but did have oversight of the state budget.").
16. John Aguilar, *Betsy Hoffman testifies via video at Churchill trial*, Boulder Daily Camera, March 13, 2009 ("Hoffman testified that former Colorado Gov. Bill Owens … told her in a 'short, threatening' call to "fire Ward Churchill tomorrow.").
17. John Aguilar, *supra* note 15.
18. Michael Roberts, *Juror Bethany Newill Talks about the Ward Churchill trial*, Westward, Apr. 03, 2009 ("[H]e had gone on the Bill O'Reilly show and mentioned threatening the budget … [o]n the stand, he said that wasn't what he was doing, but that was clearly what I saw.").
19. Based on the authors' observations.
20. Felisa Cardona, *$1 win for Churchill*, Denver Post, Apr. 03, 2009.
21. Bruce Finley, *Churchill $1 award result of one juror: five on the six person jury wanted to give the fired professor more*, Denver Post, Apr. 04, 2009.
22. Ward Churchill v. Univ of Colorado, Order Granting Defendants' Motion for Judgment as a Matter of Law and Denying Plaintiff's Motion for Reinstatement of Employment *4, 26 (Denver Dist. Ct. July 7, 2009) (explaining that the claim of "First Amendment Retaliation in Terminating … Employment" never should have gone to the jury because CU's Board of Regents was protected by quasi-judicial immunity).
23. Interview with Seattle City Attorney Tom Carr (July 1, 2009).
24. Maureen O'Hagan, *Three* Times *reporters subpoenaed on sources*, The Seattle Times, Nov. 30, 2007.
25. Powers v. City of Seattle, No. C06-1727RSL, 2007 WL 1821020 (W.D. Wash. June 21, 2007).
26. Interview, *supra* note 23.
27. Maureen O' Hagan, *supra* note 24.
28. *Id.* ("Earlier this year, Washington joined the majority of states with a reporter-shield law. *Times* attorney Bruce Johnson said Washington's law is particularly strong and can be applied in federal court.").
29. Interview, *supra* note 23.
30. *Id.*
31. Maureen O'Hagan, *City attorney*

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drops subpoenas against 3 Seattle Times *reporters*, Seattle Tiimes, Dec. 05, 2007 ("Gov. Christine Gregoire was 'troubled' by the subpoenas and Republican gubernatorial candidate Dino Rossi called for Carr's removal from an open-government panel.").
32. Johnson v. Village of Rockton, No. 3:04-cv-50223, 2007 WL 5731932 (N.D. Ill. Dec.. 07, 2007).
33. *Id.*
34. Unspecified Author, *Soldier Sues After Police Fire Him*, Los Angeles Times, May 13, 2004 (quoting Lt. Gov. Patrick Quinn).
35. *Johnson*, 2007 WL 5731932 at 1.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Soldier Sues After Police Fire Him*, *supra* note 34 (quoting Lt. Gov. Patrick Quinn).
40. Sadie Gurman, *Jury awards former Rockton cop lost wages*, Rockford Register Star, Dec. 08, 2007.
41. Johnson v. Village of Rockton, No. 3:04-cv-50223, 2007 WL 5731932 (N.D. Ill. Dec. 07, 2007) (explaining Johnson's allegations that the Village violated the Uniform Services Employment and Reemployment Rights Act, the Local Government Employees Benefit Continuation Act, the Military Leave of Absence Act, the Service Men's Employment Tenure Act, and the Public Employee Armed Services Act).
42. *Id.*
43. *Id.*
44. *Id.* ("Jurors determined that Johnson's military status was a motivating factor in his termination.").
45. Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3001 (June 19, 2009) (No. 08-1571).
46. *Id.* at 1064.
47. Nicholas Riccardi, *D.A. Accused of Payback Prosecution*, Los Angeles Times, Feb. 28, 2003 (referring to the Belmont project as a "construction fiasco").
48. *Eng*, 552 F.3d at 1064 ("The task force was headed by Special Assistant Anthony Patchett, who emphasized from the beginning that the Task Force would deliver 'slam dunk' indictments against prominent individuals involved with the Belmont project.").
49. *Id.* ("Following an extensive seven-month investigation, the Task Force concluded that the building site was and had always been environmentally safe and that no indictments should issue.")
50. *Id.* at 1064.
51. *Id.* at 1065.
52. *Id.*
53. *Id.*
54. *Id.*
55. Nicholas Riccardi, *supra* note 47 ("Eng's attorney, Mark Geragos, says his client was set up for a sham prosecution because Eng urged Cooley to come clean with the public on Belmont more than a year ago.").
56. *Id.*
57. *Eng*, 552 F.3d at 1066.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1075-76.
64. *Id.*
65. Garcetti v. Ceballos, 126 S.Ct. 1951 (2006).
66. John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 A. J. Trail Advoc. 539, 561 (2007) ("[T]he *Garcetti* Court ruled that anything public employees say in the course of performing their assigned duties is not of public concern and is therefore not protected under the First Amendment").
67. Note, Raj Chohan, *Tenth Circuit Interpretations of Garcetti: Limits on First Amendment Protections for Whistle-Blowers*, 85 Denv. U. L. Rev. 573, 579 (2008) ("The *Garcetti* Razor: … If the speech of a government employee is found to be pursuant to official duties, then the rule in *Garcetti* acts as a razor, cutting off the possibility of constitutional protection and preventing the court from proceeding to the *Connick-Pickering* test.").
68. *Garcetti*, 126 S. Ct. at 1960.
69. Raj Chohan, *supra* note 67 at 588-90.
70. Interview with Patrick O'Rourke on July 1, 2009.
71. *Id.* ML

Retiree Benefits

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10. *Poole*, 831 A.2d at 223; City of Anchorage v. Gentile, 922 P.2d 248, 256 (Alaska 1996).
11. Myers v. City of Schenectady, 244 A.D.2d 845, 847 (N.Y. App. Div. 1997).
12. *City of Anchorage*, 922 P.2d at 257.
13. 404 U.S. 157, 173 (1971).
14. *Id.*
15. *See, e.g.*, Roth v. City of Glendale, 614 N.W.2d 467, 473 (Wis. 2000).
16. U.S. Const. art I, § 10.
17. Illinois Const., Art. XIII, § 5; *see* California Constitution, art. 1, § 9 ("A bill of attainder, *ex post facto* law, or law impairing the obligation of contracts may not be passed.").
18. Porter v. City of Highland Park, No. 263470, 2006 WL 1479909, *3 (Mich. Ct. App. May 30, 2006) (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).
19. Bernstein v. Pennsylvania, 617 A.2d 55, 61 (Pa. Commw. 1992); Davis v. Wilson County, 70 S.W.3d 724, 727-28 (Tenn. 2002) (no vesting pursuant to a county resolution).
20. Thorning v. Hollister Sch. Dist., 11 Cal. App. 4th 1598, 1609 (Cal. Ct. App. 1993).
21. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 25 (1977); McGrath v. R. I. Retirement Bd., 88 F.3d 12, 16 (1st Cir. 1996) (citing *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411-12 (1983)).
22. *U.S. Trust Co. of New York*, 431 U.S. at 26.
23. AFSCME v. City of Benton, Ark., 513 F. 3d 874, 882 (8th Cir. 2008).
24. Calabro v. City of Omaha, 531 N.W.2d 541, 552 (Neb. 1995); Ass'n of Surrogates and Supreme Court Reporters v. New York, 940 F.2d 766, 773 (2d Cir. 1991) (noting that a payroll lag was not justified because the State could have shifted money from another governmental program or raised taxes); *cf.* Baltimore Teachers Union, Am. Fed. of Teachers Local 340 v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1018-20 (4th Cir. 1993) (a one-percent pay reduction was justified due to a budgetary crisis requiring the City to balance its budget "midway through the fiscal year … [a]t the eleventh hour").

25. *See, e.g.*, In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 908 (3d Cir. 1995).
26. Law Enforcement Labor Serv., Inc. v. County of Mower, 483 N.W. 2d 696, 701 (Minn. 1992).
27. Navlet v. Port of Seattle, 194 P.3d 221, 231 (Wash. 2008).
28. Jeannot v. N. H. Personnel Comm'n, 392 A.2d 1193, 1195 (N.H. 1978); Thorning v. Hollister Sch. Dist., 11 Cal. App. 4th 1598 (Cal. Ct. App. 1992); Opinion of the Justices, 303 N.E.2d 320 (Mass. 1973).
29. *See, e.g.*, *Navlet*, 194 P.3d at 238; City of Anchorage v. Gentile, 922 P.2d 248, 260 (Alaska 1996).
30. *See, e.g.*, Hous. and Redev. Auth. of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005); Beggs v. City of Portales, 210 P.3d 798 (N.M. 2009).
31. Poole v. City of Waterbury, 831 A.2d 211, 234 (Conn. 2003).
32. *Id.* at 233-34.
33. *Id.* at 235.
34. 11 U.S.C. § 901, *et seq.* (West 2009).
35. 11 U.S.C. § 365 (West 2009). This, in general, provides that the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
36. U.S. CONST. art. 6, cl. 2.
37. In re City of Vallejo, 403 B.R. 72 (Bankr. E.D. Cal. 2009). ML

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8. Indiana, Nebraska, West Virginia.
9. Illinois.
10. Missouri.
11. Texas.
12. S.1536, §3.
13. Tara Morgan, *Since New Virginia Texting While Driving Law, Five People Ticketed*, NBC12News, July 31, 2009, at http://www.nbc12.com/Global/story.asp?S=10823369.
14. Theresa Gutierrez, *Quinn Signs Texting Ban Bill*, abc7chicago.com, Aug. 6, 2009, at http://abclocal.go.com/wls/story?section=news/local&id=6951218.
15. Kristyn Soltis, *Cleveland Bans Texting While Driving*, kentnewsnet.com, July 8, 2009, at http://media.www.kentnewsnet.com.
16. Press Release, Dept. of Transportation, *DOT Secretary Ray LaHood Announces Distracted Driving Summit* (Aug. 4, 2009) (on file with author). ML

SUPREME COURT

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of murder. The primary witness relied upon in bringing charges was a teenager who continuously changed his story and claimed he was pressured to implicate McGhee and H. (The witness later recanted and admitted he lied in hopes of getting a proffered reward and to avoid being personally charged with the murder.) In 2002, a court vacated or reversed the convictions, and both men brought civil rights actions against the County and the former prosecutors and officers involved in the initial investigation and prosecution, alleging they had used perjured and fabricated testimony and improperly withheld evidence. Richter, the County Attorney at the time, and Hrvol, an Assistant County Attorney, moved for and were denied qualified, absolute, and sovereign immunity. The Eighth Circuit held that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function.'" The question for the Supreme Court is whether a prosecutor can be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial. ML

BROWNFIELDS

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29. *Id.*
30. Foster v. United States, 922 F. Supp. 642 (D.D.C. 1996); Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290 (W.D.N.Y. 1996).
31. EPA, *Questions and Answers Regarding Federal Brownfields Property Liability* 4 (Nov. 2003) (emphasis added), *available at* http://www.epa.gov/NE/brownfields/pdfs/qa6FINAL.pdf.
32. City of Toledo v. Beazer Materials & Servs. Inc., 923 F. Supp. 1013 (N.D. Ohio 1996).
33. *Id.* at 1020-21.
34. City of Emeryville v. Elementis Pigments, Inc., No. 99-03719, 2001 WL 964230 (N.D. Cal. Mar. 06, 2001).
35. *Id.* at *8.
36. 42 U.S.C. § 9607(r) (2002).
37. Pub. L. No. 107-118, 115 stat. 2356 (2002).
38. A BFPP is not liable under CERCLA for cleanup costs at a site. However, if the EPA has unrecovered response costs incurred in cleaning up that property and the EPA response action increases the fair market value of the property, the EPA may have a windfall lien on the property. *See* EPA & U.S. Department of Justice, *Interim Enforcement Discretion Policy Concerning "Windfall Liens" under Section 107(r) of CERCLA (2003), available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.
39. Innocent Landowners, Standards for Conducting All Appropriate Inquiries, Final Rule: 40 C.F.R. Pt. 312.
40. 42 U.S.C. § 9607(r) (2002).
41. *See* EPA, *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (2003), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf. ML

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to department safety and efficiency was insufficient: "We have never held that a simple reference to government functioning automatically qualifies as speech on a matter of public concern." The plain language of the grievances catalogued a strained working relationship due to personality flaws, rather than incidents of incompetence or malfeasance. As a result, Desrochers and Lowes failed to meet their burden of demonstrating that their speech involved a matter of public concern. *Desrochers v. City of San Bernardino*, F. 3d (9th Cir. 2009). ML

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