AMICUS

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A Unique Take on the Takings Clause

The City of Greenwood Village, Colorado enjoyed a recent victory in a case in which IMLA supported the City as an amicus involving a somewhat unusual claim that the City had violated the Takings Clause of the Fifth Amendment when its police officers had significantly damaged a home where a suspect who had fired on the police had barricaded himself inside. This case presents an important legal issue that plaintiffs' lawyers may try to replicate elsewhere, but it also offers a case study in how the media can tell one side of a story and thereby create a public relations issue for local governments. Both the public relations aspect of the case and its legal implications are explored below.

The Facts v. The Media Spin

The plaintiffs in this case are homeowners whose residence was destroyed by Greenwood Village police as a part of a 19-hour standoff with an armed suspect who had unlawfully entered their home, barricaded himself inside and shot at the police on multiple occasions. The police followed applicable procedures and the result was that nobody was injured or killed. Notwithstanding their painstaking efforts to prevent loss of life, they are now being sued by the homeowners for a claim that the police violated the Takings Clause of the Fifth Amendment.

The Tenth Circuit describes the situation facing police officers at the time as follows: "City's police department responded to a burglar alarm at the Lechs' home and learned that Robert Seacat, an armed criminal suspect who was attempting to evade capture by the Aurora Police Department, was inside. Although the nine-year-old son of John Lech's girlfriend was present at the time of the break-in, he was able to exit the home safely."[1] Seacat fired at police officers from inside the home.[2] According to facts in the record,, the police tried to negotiate with Seacat for five hours and then employed "increasingly aggressive tactics," including gas munitions, sending in a robot with a phone to negotiate, and using explosives to create sight lines to see Seacat, which would aid in apprehending him safely.[3] The police then sent a tactical team in to apprehend Secat, but he fired on them again and they were forced to retreat.[4] When all of these tactics failed, police ultimately used a BearCat (an armored vehicle) to open multiple large holes into the home so that they could see Seacat from outside.[5] At this point, they were able to locate him and sent in a tactical unit to successfully apprehend him without the loss of life or injury to any officers or Seacat.[6] Unfortunately, the use of the BearCat caused significant damage to the Lech's home, rendering it "uninhabitable."[7]

These are the facts in the court's decision based on the evidence in the record and construing the facts in the light most favorable to the Lechs. After the Tenth Circuit ruled in favor of the City (more on that below), the Washington Post ran a story with the following headline: "Police blew up an innocent man's house in search of an armed shoplifter. Too bad, court rules."[8] The Post article opens with the following description of facts:

> When they were finished, it looked as though the Greenwood Village, Colo., police had blasted rockets through the house…[Lech] thought it looked like al-Qaeda leader Osama bin Laden's compound after the raid that killed him. . . .
>
> But now it was just a neighborhood crime scene, the suburban home where an armed Walmart shoplifting suspect randomly barricaded himself after fleeing the store on a June afternoon in 2015. For 19 hours, the suspect holed up in a bathroom as a SWAT team fired gas munition and 40-millimeter rounds through the windows, drove an armored vehicle through the doors, tossed flash-bang grenades inside and used explosives to blow out the walls.[9]

Note that at this introductory point, the article has indicated this was a shoplifting suspect and fails to mention the single most important fact from the perspective of the police, that this armed suspect had fired his gun at police officers on more than one occasion from inside the home. The article makes the police sound eminently unreasonable in destroying this home; after all, why would you need to drive an armored vehicle into a home simply to apprehend a shoplifting suspect?[10] The article does eventually get to the fact that Seacat fired at the officers, but only after describing the Tenth Circuit ruling and including a number of quotes from Lech like "It just goes to show that they can blow up your house, throw you out on the streets and say, 'See you later. Deal with it."[11] And later in describing the second time Seacat fired at the officers, the article says that the officers retreated "after believing they heard Seacat fire several rounds."[12] But the Tenth Circuit was clear on this fact, saying "… Seacat fired at the officers while they were inside,requiring them to leave."[13]

To be fair, the Washington Post article does also provide some context from the City, for example, explaining that the reason the City only offered $5,000 by way of settlement to the Lechs was due to the fact that the family had insurance for their home which covered the vast majority of the damage, and the Lechs' decision to build a larger home than the one destroyed was the reason why insurance did not fully cover the replacement cost. But context like that is overshadowed by the skew offered by the article toward the homeowners.

The Tenth Circuit Decision and State of the Law

After the police rendered the Lechs' home uninhabitable, the plaintiffs brought suit under Section 1983, claiming the police officers violated the Fifth Amendment by taking their property without just compensation. The Lechs argued, in part, that the purpose of the Takings Clause was to "bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."[14] The Tenth Circuit rejected this argument, concluding that "as unfair as it may seem…when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking for the purpose of the Takings Clause."[15] The court went on to conclude that the police power / eminent domain distinction is dispositive in cases involving "direct physical appropriation or invasion of private property," like the Lechs' case.[16]

The Lechs next claimed that the police officers were not acting within their "police powers," which turns on the question of whether the government is using the property "for the public good" (police powers) versus "for the public use"(eminent domain).[17] Despite noting that the Lechs' position had "considerable appeal…as a matter of policy," the court agreed with a Federal Claims case and a Federal Circuit case and concluded that the damage to the Lechs' home was "not a taking for public use, but rather an exercise of the police power" as the home "had become instrumental to criminal activity…"[18]

The majority of the case law as cited by the Tenth Circuit appears to be on the side of the local governments and police in this area.[19] However, the Lechs pointed to two state supreme court cases, one from Minnesota and one from Texas, that they argued support their position. *Wegner v. Milwaukee Mut. Ins. Co.*, involved facts very similar to the Lechs' scenario, where police officers caused significant damage to an innocent third party's home when a suspect barricaded himself inside her residence.[20] The Minnesota supreme court held that the police officers had taken the property within the meaning of the Minnesota constitution.[21] However, the fact that the claim was brought under the Minnesota Constitution is a critical point as it provides in relevant part; "[p]rivate property shall not be taken, **destroyed or damaged** for public use without just compensation, first paid or secured."[22] The U.S. Constitution by contrast states "nor shall private property be taken for public use, without just compensation."[23] In concluding that the police had violated the Minnesota constitution, the court held that the property was "damaged" within the meaning of the state constitution, a term that is conspicuously absent from the U.S. Constitution.[24]

In *Steele v. Houston*, the Texas supreme court also concluded that the police had violated the Texas constitution on facts again similar to the Lechs', and noted that a government is not excused from its duty to pay for taking property "by labeling the taking as an exercise of police powers."[25] However, the court in *Steele*, like in *Wegner*, was interpreting its own state constitution, and not the U.S. Constitution. And the Texas constitution mirrors the Minnesota constitution by providing that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation…"[26] The court relied explicitly on the text of the Texas constitution in coming to its conclusion, noting "[t]he Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental

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immunity for the taking, damaging or destruction of property for public use."[27]

Conclusion

The Lech case has garnered significant media attention and with renewed interest from pro bono counsel, it seems likely that the Lechs will seek Supreme Court certiorari (they are in the process of petitioning the Tenth Circuit for rehearing en banc). However, *Wegner* and *Steele* should not provide any real help to the Lechs in arguing there is a split in authority on this issue, which is the most important consideration for the Supreme Court in granting certiorari.

And while the Lechs present many policy-based arguments, it is worth noting that local governments also have policy concerns. For example, if a claim exists under the Fifth Amendment in this case, it would also seem to call into question the emergency exception, which has historically been applied to deny compensation where property is destroyed to avert a public emergency, such as a fire. As the Supreme Court has aptly noted:

> We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History*, where it is mentioned, that the *Lord Mayor* of *London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, **for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.**[28]

The example of London burning should be a cautionary tale for courts considering allowing takings claims to move forward where government actors are acting pursuant to their police powers, rather than eminent domain. Certainly, if the police had to factor in a takings claim into the calculus in this case, the neighboring homes would not have burnt down, but it's very possible that police officers or the suspect could have been gravely injured or killed. Fortunately, for all involved, that was not the case. ML

Notes

1. Lech v. Jackson, No. 18-1051, 2019 U.S. App. LEXIS 32393, at *3 (10th Cir. Oct. 29, 2019).
2. *Id.*
3. *Id.* at 3-4.
4. *Id.* at 4.
5. *Id.*
6. *Id.*
7. *Id.*
8. Meagan Flynn, *Police blew up an innocent man's house in search of an armed shoplifter. Too bad, court rules,* Washington Post (Oct. 30, 2019), available at: https://www.washingtonpost.com/nation/2019/10/30/police-blew-up-an-innocent-mans-house-search-an-armed-shoplifter-too-bad-court-rules/ (hereinafter "Washington Post Article").
9. *Id.*
10. The Washington Post was not the only news outlet to run stories on this case with a slant toward the Lechs. An article that ran in Forbes that was written by the attorney who now plans to represent the Lechs on appeal, the story states: "In apprehending a suspect wanted for a few dollars' worth of goods, the police did damage costing Lech $400,000." Andrew Wimer, *Innocent Property Owners Deserve Compensation When The Police Cause Destruction,* Forbes Media LLC (Dec. 3, 2019), available at: https://www.forbes.com/sites/instituteforjustice/2019/12/03/innocent-property-owners-deserve-compensation-when-the-police-cause-destruction/?fbclid=IwAR3PcbMYxlSrX6b8RCxy09Niu1XjYt7lRPxM4Gbs33Rg8Sn6mguapIV7lSg#101237515030 (hereinafter "Forbes Article").
11. *See supra* note 8, Washington Post Article. While the Washington Post Article does mention the suspect shooting at the police, the Forbes Article fails to even mention this crucial fact. *See* Forbes Article, *supra* note 10.
12. Washington Post Article, *supra* note 8 (emphasis added).
13. *Lech,* 2019 U.S. App. LEXIS 32393, at *4.
14. *Id.* at *12 (internal quotations omitted).
15. *Id.* at *13.
16. *Id.*
17. *Id.* at *13-14.
18. *Id.* at *14-17 citing Bachmann v. United States, 134 Fed. Cl. 694, 698 (Fed. Cl. 2017) and AmeriSource Corp. v. United States, 525 F.3d 1149 (Fed. Cir. 2008).
19. *See* Zitter v. Petruccelli, 744 F. App'x 90, 93, 96 (3d Cir. 2018) (unpublished); Johnson v. Manitowoc Cty., 635 F.3d 331, 333–34, 336 (7th Cir. 2011) AmeriSource Corp, 525 F.3d. at 1153-54; Bachmann v. United States, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017).
20. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 40 (Minn. 1991).
21. *Id.* at 41-42.
22. Minn. Const. Art. I, section 13 (emphasis added).
23. U.S. Const. amend. V.
24. *Wegner* 479 N.W.2d at 41-42.
25. Steele v. Houston, 603 S.W.2d 786, 789 (Tex. 1980)
26. Tex. Const. Art. I, § 17
27. *Steele,* 603 S.W.2d at 791.
28. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 155 n.7, 73 S. Ct. 200, 203 (1952) (internal quotations omitted) quoting Respublica v. Sparhawk, 1 U.S. 357 (1788) (emphasis added).