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THE ROBOTS ARE COMING:
HOW CITIES CAN PLAN FOR AUTONOMOUS VEHICLES
By: Crista M. Caccaro, Assistant City Attorney, Durham, North Carolina

The question is not if, but when. Driverless vehicles will soon be a part of our transportation ecosystem. Federal, state and local authorities are racing to prepare for this new paradigm.

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PUTTING THE CART BEFORE THE HORSE – THE FCC’S “5G FIRST, SAFETY SECOND” POLICY
By: Albert Catalano, Counsel, Eric Gotting, Partner, and Timothy Doughty, Associate, Keller and Heckman, LLP, Washington D.C.

Federal telecommunications regulation has been lax as the industry’s 5G juggernaut rolls on. A few local governments have succeeded in raising critical questions, including under-researched safety issues.

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SAFETY IN THE CELL: MUNICIPAL LIABILITY FOR CUSTODIAL SUICIDE
By: Ruth F. Masters, MastersLaw, Oak Park, Illinois

When a detainee or prisoner commits suicide, the facility’s preventive measures are inevitably scrutinized. Effective training protocols—and evidence that they are being observed—is key to avoiding municipal liability.

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Public Nuisance: Monster or Liberator?

We are pleased to bring you this September-October 2019 issue of Municipal Lawyer. Each of our features, covering autonomous vehicles, 5G technology, and custodial suicide, is intended to bring leading-edge subject matter to your attention. We hope you find them valuable.

This note will focus briefly on a subject not covered in the principal ML articles, but one which is increasingly relevant to municipalities as they seek redress for their residents: public nuisance law. That cause of action is at the heart of the national opioid litigation, also discussed in this issue, and is central to a spectrum of claims that have been prosecuted by IMLA members, addressing threats ranging from lead paint to biphenyls to greenhouse gases and climate change.

This increased use of public nuisance law has aroused significant criticism from commercial interests. They see the expansion as distorting what they aver to be the original purposes of the theory—to remedy discrete harms linked to definable properties where causation can be indelibly traced to a given actor. Many of these critiques cite the Eighth Circuit’s admonition, where it reversed in favor of an asbestos defendant, in Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum, 984 F.2d 915 (8th Cir. 1993) that allowing public nuisance to serve as a cause of action “regardless of the defendant’s degree of culpability or of the availability of other traditional tort law theories of recovery…” would create “…a monster that would devour in one gulp the entire law of tort.”

Understandably, these voices assert that traditional products liability law, including its proximate cause element, is the appropriate means for resolving the municipal injury. They also argue that legislatures, not courts, are the appropriate forum to afford redress.

These arguments fall flat for many of the harms being visited on our communities, and certainly in the case of opioids. It is evident that legislative and regulatory mechanisms were incapable of actions needed to forestall the crisis. As many courts considering the onslaught of defendants’ motions to dismiss have already articulated, where the evidence shows consistent flaunting of reporting requirements and company-wide sales and marketing initiatives designed to imbed a false narrative, protestations about the misuse of public nuisance to abate a national emergency are hollow.

Through its amicus activities and other programs, IMLA continues to support our members in many of these battles as local governments strive to protect their constituents. We look forward to our ongoing partnership with you.

Best regards-

Erich Eiselt
Well, this is it. Shortly after you read this, IMLA’s 84th Annual Conference in Atlanta, Georgia will be history and my term as President will have ended. New IMLA President Patrick Baker, City Attorney of Charlotte, N.C., will be at the helm and guiding our organization through a new year. He certainly has my support and I know Patrick will be an outstanding President.

It’s been a great year, both for me and for IMLA. Looking back, it has been a year of opportunity and one in which the organization’s stature has grown as the premier voice of local government lawyers in the United States, Canada and beyond. Immediate Past President Art Pertile, and his predecessor Mary Ellen Bench made my job easy as they laid the groundwork for my administration. I can say that IMLA is probably in the best financial posture it has been in for many years and that your Board of Directors has been most attentive to its fiscal health.

When I took over in Houston in October 2018 I emphasized the importance of Membership; not only recruitment of new members but the retention of existing members. Our Board, the Regional Vice-Presidents and State Chairs have all worked hard this year to assist the Membership Committee. I thank them all for their efforts, but past effort alone is not enough. Growing the organization is vital.

If IMLA has a hidden jewel, it’s our staff. Chuck Thompson is truly devoted to the organization and does an outstanding job as the face of IMLA as he dutifully travels about the country and Canada speaking to local government lawyers. Jenny Ruhe, Director of Administration, had some big shoes to fill two years ago when Veronica Kleffner retired; Jenny has also been outstanding and I can’t brag on her enough.

One of IMLA’s greatest strengths, and probably the one area that gets IMLA the greatest recognition from courts throughout the land, is its Legal Advocacy Program, directed by Deputy General Counsel Amanda Kellar. I have come to truly appreciate Amanda’s intellect and skills as a lawyer in operating this program efficiently and always seeming to take the right course of action for local governments as a whole. It’s not an easy task, but one which she handles superbly.

Trina Shropshire-Paschal, Director for Event Information and CLE Accreditation, is completing 33 years of service with IMLA and is an invaluable resource to its operations. I always knew I could count on Trina to keep me straight this year.

Assistant General Counsel Erich Eiselt has been leading IMLA’s Opioid Litigation Work Group as members assess the best strategies to pursue compensation, as well as serving as Editor of Municipal Lawyer. The quality of this publication is top notch thanks to Erich. I believe ML is worth the price of IMLA membership alone.

I’ve also enjoyed working with Caroline Storer, IMLA’s Marketing Coordinator, on various activities this year, including our Membership efforts. Although fairly new to the IMLA staff, Caroline hit the ground running. Equally, Director of Legal Research Negheen Sanjar, who is responsible for our distance learning programs, oversees the annual Institute for Local Government Lawyers, and has been active in IMLA’s telecommunications and disruptive transportation groups, has been a pleasure to work with. And I know that Carolina Moore, whom I haven’t met, assists in much of the behind-the-scenes work that allows IMLA to function smoothly. I hope I haven’t overlooked anyone.

Two other areas of emphasis this year have been the International Committee, chaired by Ben Griffith and Tyler Wallach, who in October will be leading a mission to Germany. This trip has had good response and should be very educational for those who attend. Ben, I’m still holding out for Ireland in 2020!

The Committee on Small and Rural Communities, initially chaired by Doug Haney, has grown this year and is filling what I perceived to be a void in our organization. While IMLA has hosted seminars for the TOP 50 large jurisdictions, the majority of local governments in the U.S. are small and for the most part rural. I trust President Baker will continue to support the work of this committee during his administration.

Finally, that brings us to the Annual Conference in Atlanta, which at the time I write this is still about a month away. I hope all of you who can will come to Atlanta. The Host Committee has worked hard for nearly two years to assure this will be one of the best conferences ever. I worked on the host committee for the Savannah conference in 2005 and find it remarkable how our members still talk about that event. I trust Atlanta will do an equal job, if not surpass the 2005 conference.

In closing, it’s been a ride, but a great ride. I intend, as Immediate Past President and beyond, to stay active with IMLA and to be of service whenever and however I can. Despite the criticism and jokes made about lawyers, I truly believe the legal profession is made up of some of the most outstanding and accomplished people on this planet; municipal lawyers are undoubtedly the finest of our profession and I’m proud to have served among you.

BY ANDREW J. WHALEN
IMLA President and City Attorney, Griffin, Georgia
The Robots Are Coming: How Cities Can Plan for Autonomous Vehicles

BY: CRISTA M. CUCCARO
Assistant City Attorney, Durham, North Carolina

Imagine this: you need to get to the airport and catch your flight to the upcoming IMLA Conference. Instead of paying exorbitant airport parking fees, you hail a ride through an app on your phone. After a short wait, a ride share vehicle pulls up to the curb. The trunk opens and you load your luggage. When you climb into the back seat, you’re alone in the car. No one is driving; instead, the ride share is an autonomous vehicle (AV).

Apprehensive about this scenario? You’re not alone. According to a recent Reuters poll, half of adults in the United States think AVs are more dangerous than cars operated by people. A majority of Americans also believe that self-driving cars should be held to higher safety standards than traditional vehicles. The Reuters poll may underestimate public unease. A 2019 AAA survey found that nearly 75% of Americans are afraid to ride in fully autonomous cars. Despite this, the majority of the public also believes that most vehicles will be fully autonomous by 2029. And the public is probably right.

Currently, automotive and tech companies are in an expensive race to the top. In 2016, GM spent $581 million to acquire AV start-up, Cruise Automation. Next year, GM will likely release a fleet of electric AVs with its affiliate, Lyft, in which GM purchased a share for $500 million. Honda has committed $2.75 billion as part of an exclusive agreement with GM to develop and produce a new kind of AV. Ford has partnered with Argo AI and plans to introduce Level 4 AVs vehicles in 2021 as part of a ride-hailing service. Last year, Volvo and Uber entered into a $300 million joint venture with the goal of having its fully autonomous vehicle on the road in 2021.

Other companies have plans underway to create fully autonomous vehicles, including freight trucks, within the next five years. Some of these firms have tested their AVs on public roadways. In 2009, Google began testing its self-driving cars and by end of 2018, the company had logged more than two million miles of autonomous driving. In December 2018, Waymo, owned by the same parent company that owns Google, launched an “autonomous” ride-hailing service in Chandler, Arizona; however, that service is yet to be fully autonomous, in part because tests have revealed that self-driving technology still has significant shortcomings.

During the past several years, minor and major incidents have shaken industry and public confidence in automated driving systems. In February 2016, a Google research car “made contact” with a public bus. The car and test driver predicted that the bus would yield as the Google vehicle attempted to merge into traffic, but it didn’t. Following the crash, Google updated its software to “more deeply understand that buses and other large vehicles are less likely to yield” to its cars than other types of vehicles. Later in 2016, the driver of a Tesla Model S died in an accident while the Autopilot was activated. According to Tesla, the vehicle’s camera couldn’t detect a trailer as an obstacle because of the trailer’s “white color against a brightly lit sky” and its “high ride height,” and the car’s radar classified it as an overhead road sign. And in March 2018, a Volvo SUV owned by Uber and outfitted with Uber’s self-driving system struck and killed a pedestrian.

The number of incidents involving AVs pales in comparison to the tens of thousands of Americans who die every year in accidents involving traditional vehicles. The National Highway Traffic Safety Administration (NHTSA) projects that 36,570 people died last year in traffic fatalities in the United States. Remarkably, an estimated 90 percent of motor vehicle crashes are caused at least in part...
by human error.\textsuperscript{21} While juxtaposing human drivers and AVs may not be a fair comparison,\textsuperscript{22} advocates insist that AVs will make roadways much safer. Regardless of the specifics, the arrival of AVs is imminent, as is cities’ need to plan for and regulate them.\textsuperscript{23} This article explains the current legal framework for AV regulation in Part I and the policy implications for cities to consider in Part II.\textsuperscript{24}

I. The Legal Framework

The United States ranks highly in the technology and innovation needed to support AVs, but lags in policy and legislation and infrastructure.\textsuperscript{25} These latter two pillars of the AV Readiness Index are squarely within the realm of federal, state, and local governments. This section explores state and federal regulation of AVs to date.

A. State Regulation of AVs: A Mixed Bag

As would be expected, states have varied approaches to regulating AVs. Broadly, state legislation covers: vehicle testing,\textsuperscript{26} infrastructure requirements, licensing and registration, operation on public roads, task forces, operator requirements, privacy of collected vehicle data, and more. Nevada was the first state to authorize the AV operation.\textsuperscript{27} Florida and Arizona were also at the forefront in AV testing. In 2012, Florida passed a bill allowing AV testing after meeting certain requirements including proof of insurance.\textsuperscript{28} In 2015, Arizona’s Governor signed an Executive Order enabling pilot programs.\textsuperscript{29} More cautious states have adopted laws restricting AV testing to platooning (electronically pairing two or more vehicles to allow smaller distances between them), although some of these have later loosened the restrictions.\textsuperscript{30} Currently, the District of Columbia and the following states allow AVs on public roadways\textsuperscript{31} in testing with a driver, without a driver, or in a platoon: Arkansas, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.\textsuperscript{32}

State-level regulation of AVs does not necessarily confer municipal authority to do so. As cities know all too well, some states preempt local authority over emerging businesses and technologies.\textsuperscript{33} One jurisdiction that has not been preempted is Boston, which created a graduated system of AV testing.\textsuperscript{34} In the first phase, Boston’s model allows AV companies to test only in a limited geographical area during good weather and daylight hours.\textsuperscript{35} Once a company reaches certain milestones, permission is expanded to allow testing in other areas of the city, at night and during inclement weather.\textsuperscript{36} Additionally, Boston requires companies to enter into a Memorandum of Understanding, covering issues such as accident reporting, minimum safety standards, and, of course, indemnification.\textsuperscript{37} Not all cities have been as friendly to AVs as Boston, however. Chicago’s Board of Aldermen stalled a proposal to allow AVs in the city, citing concerns about cybersecurity and loss of jobs.\textsuperscript{38} This local resistance did not evade the eye of Illinois’ General Assembly. In 2018, the state passed a law prohibiting localities from banning AVs. Not all opposition occurs within City Hall: in Chandler, Arizona, where Waymo has been testing its vehicles, the company’s driverless test vehicles have weathered nearly two dozen attacks from irate locals over the past two years, including tire slashings and being pelted by rocks.\textsuperscript{39}

This patchwork approach has spurred industry advocates to call for federal regulation of AVs. Volvo Cars President Håkan Samuelsson argued that the United States risks losing its leading global position in the development of self-driving cars if federal legislation is not passed.\textsuperscript{40} The next section explains the current status of federal guidance on AVs.

B. Federal Regulation of AVs: Tapping the Brakes

Despite the industry’s urging, the federal government has left regulation of AVs to the states—for now. This failure is not for lack of trying. In 2017, The Safely Ensuring Lives Future Deployment and Research In Vehicle Evolution Act, also known by its clever acronym SELF DRIVE,\textsuperscript{41} was introduced in the House. The Act would have would have preempted states from enacting laws regarding the design, construction, or performance of AVs unless such laws were identical to federal standards. In its report, the House Committee on Energy and Commerce highlighted the need for uniformity by pointing out conflicts between proposed laws in North Carolina and New York.\textsuperscript{42} The SELF DRIVE Act passed the House in September 2017. A companion bill was introduced in the Senate, with an equally clever acronym of AV START Act, standing for the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act. However, the AV START Act never made it to the floor of the Senate in part because of objections from several key senators.\textsuperscript{43} Congress has renewed its efforts to regulate AVs and in August of this year, a new version of the AV START Act was circulated for comments from stakeholders. The current legislation preempts local regulation of AVs, creates a Highly Automated Vehicles Advisory Council, directs the Comptroller General to evaluate the feasibility of removing personally identifiable information from AVs, proposes a rulemaking

Continued on page 8
process—and more. With a bicameral effort behind the legislation, there is optimism that Congress will act on AVs during its current session.

While progress has been slow on the Hill, the United States Department of Transportation (USDOT) has been pressing forward. In September 2016, the NHTSA and the USDOT issued a Federal Automated Vehicles Policy that set forth a proactive approach to providing safety assurance and facilitating innovation. One year later, the NHTSA issued Automated Driving Systems: A Vision for Safety 2.0. Most recently, the agency released Preparing for the Future of Transportation: Automated Vehicles 3.0, which builds upon—but does not replace—the voluntary guidance provided in the earlier version. The current 80-page document provides best practices for states for the training and licensing of test drivers. It also offers guidance for testing entities about driver engagement methods during testing. In May 2019, NHTSA and the Federal Motor Carrier Safety Administration (FMCSA), issued advance notice of proposed rulemaking to seek public comment on the challenges of testing and verifying compliance of AVs with existing Federal Motor Vehicle Safety Standards. Clearly, AVs are a priority for federal agencies, but there is no definitive timeline for comprehensive laws. Thus, where they have not yet been preempted, cities are left to contend with AVs on their own. The next section examines the myriad issues to anticipate and contemplate as AVs arrive in municipalities.

II. Policy Considerations

While safety occupies a significant portion of the discussions about AVs, many more issues arise for cities: traffic impacts, shifts in the workforce, effects on transit systems, privacy and data concerns, land use modifications, infrastructure support, equity in access, liability and insurance, and last, but absolutely not least, impacts to municipal budgets. And although AVs may seem relevant only to major cities, the International City/County Management Association (ICMA) advises that suburban and rural residents, because they often commute into larger cities, are the ones who are most likely to take advantage of self-driving technologies, and to participate in first mile or last mile AV ride-sharing from public transit hubs.

The impact of AVs on cities depends largely on whether the dominant model is shared fleets or individual vehicle ownership. A fleet model means that communities will have less need for commercial car dealerships and service stations, thereby freeing up significant tracts of land. Additionally, AV fleets will likely be electric, and cities will need to allow for a more expansive electric charging infrastructure. Experts anticipate that the shared fleet model will prevail; one authority states that AV companies “don’t actually want to sell people these cars—they want to rent us these services. They want us to pay every month, every trip.” Moreover, given the cost of sensor technology and computing power needed to deploy AVs, individual ownership will initially be too expensive. The remainder of this article largely assumes a shared AV fleet model.

A. Impacts to Cities’ Bottom Lines

Last year, a headline in Wired magazine read “Autonomous vehicles might drive cities to financial ruin.” While the reality may not be so dire, cities would be wise to plan for AVs in their budgets. State and municipal revenue from metered parking and tickets, traffic violations, vehicle registration and licensing fees, and gas taxes will clearly be affected. The Sustainable Cities Initiative characterizes the budgetary impact of AVs as a “secondary impact.” However, upon analyzing the numbers, this should be a—if not the—primary concern to cities.

One useful benchmark is fuel tax. In 2017, Delaware collected $123 million in fuel tax revenue. While that is considerable, Texas collected a massive $3.7 billion in motor fuel taxes in the 2018 fiscal year. These figures are significant because AVs will likely be electric, and are expected to consume less fuel than standard vehicles even if gas-powered. Additionally, parking revenue from meters and fines will decrease because AVs will not necessarily need to park for short periods of time, or may be sent to free spaces outside of pay-for-parking areas. A sharp decrease in parking fees could cripple a municipality like the tourist town of Rehoboth Beach, Delaware, which is predicted to generate $6 million in parking fees in fiscal year 2019—constituting 28% of the city’s overall budget and its largest single revenue source.

Not all of the news about AVs and cities’ budgets is negative. Using San Francisco as its model, scholars at the Sustainable Cities Initiative have projected that alongside a decrease in parking revenues, cities should expect to see an increase in property tax revenues. With a shared fleet model, cities will no longer need as many parking spaces and that land can be put to more productive uses that will generate property tax revenue.

In order to mitigate some of these shifts, states are enacting a robot tax. Floated by Bill Gates, the tax would be paid by companies for every robot or automated system that replaces a human worker, whether in a factory, a mine, or on the roadway. The revenue could help fund training and incentives to move people to occupations less vulnerable to automation, as discussed in the next section. Some states have already made this move. Tennessee recently enacted a law that will establish a one-penny-per-mile tax on AVs. In Massachusetts, proposed legislation would impose a 2.5 cent per mile tax on AVs, increasing when there are no passengers riding.

Even where cities cannot enact taxes, there are creative ways to generate revenue that influences AV use. Seattle proposed a tiered road-pricing mechanism, which incentivizes AVs with three or more occupants. Other mechanisms might include variable congestion pricing, Vehicle Miles Traveled (VMT) fees, and curbside use fees for pickup and drop-off. Regardless of the approach, building pricing into AV use can partially offset revenue losses. Cities are not alone in feeling a financial squeeze with the arrival of AVs; certain sectors of the workforce are also at risk, as discussed next.
Many current municipal planning processes rely on assumptions about the nature of travel—including models of vehicle ownership, route choice, and residence and work locations—that may not be true for AVs. While not always popular with the public or industry, it may be prudent for cities to approach AV regulation conservatively and plan for added traffic congestion.

B. Shifts in Cities’ Workforces
As cities adjust their budgets for AVs, they should also examine their workforces. An estimated 80 percent of the typical city police department is involved in some way with traffic control. As vehicles become able to navigate without human intervention or assistance—including that of law enforcement—cities will need to reallocate police or possibly reduce the size of their forces. On the other hand, cities may need to hire more employees in other sectors. For example, transportation planners will be needed to conceptualize a new physical infrastructure for AVs.

The largest workforce effects of AVs will be felt in industries such as transportation, and particularly the freight sector. A 2016 White House report estimated a potential displacement of 3.7 million drivers of trucks, taxis, and buses. The consequences are likely to be most significant for men of color. These lost jobs will be replaced with lower-wage jobs with few benefits, or jobs requiring additional technology-related knowledge and skills. As AV use increases, workforce shifts will challenge cities’ commitment to equity.

One way that cities can influence these outcomes is workforce development. AVs will expand job growth in a number of key industries. Electrical engineers, computer scientists, and software developers will be needed to develop vehicle control systems and the telecommunication networks required for AV functionality. To train displaced employees, cities can support apprenticeships, combining on-the-job training with classroom instruction, and AV sector-specific training—especially in higher education.

A silver lining, perhaps, is that the lower cost and increased efficiency of AV travel may enable people to commute farther, increasing access to job opportunities. But throngs of people traveling to work in AVs could also create more congestion and cripple public transit, as discussed in the following sections.

C. Traffic Impacts: Utopian or Dystopian?
It’s obvious that AVs have the potential to significantly affect traffic flows, but there is not yet a consensus about how. There are two competing perspectives on the subject.

In the utopian vision, often touted by AV manufacturers, AV fleets consist of shared vehicles, leading to fewer cars and fewer accidents and fatalities, reduced congestion, lower carbon emissions and improved air quality, and compact development patterns in which walking, biking, and transit thrive. In the dystopian version, however, the AV fleet consists of privately-owned vehicles, while zombie cars—those with zero occupancy—roam the streets, resulting in greatly increased traffic, severe reductions in other transportation modes, increased pollution and greenhouse gas emissions, and more sprawl as people live farther from work.

With such disparate predictions, it’s difficult to know how to proceed as a city. Clearly, it is imperative to account for AVs. Many current municipal planning processes rely on assumptions about the nature of travel—including models of vehicle ownership, route choice, and residence and work locations—that may not be true for AVs.
Safety in the Cell: Municipal Liability for Custodial Suicide

BY: RUTH F. MASTERS
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While Jeffrey Epstein’s death in custody has captured public interest, the problem of custodial suicide is far from new. What is new, however, is that the suicide rate in the general population has accelerated over approximately the last decade as has the rate of those committing suicide in local custody.

Not only is this acceleration of suicide inside and outside custody a source of heartache to those personally affected, but the increase has implications for public entities responsible for safeguarding those in custody. Suicide is the leading cause of death in local jails and occurs at higher rates than outside custodial settings.

The confluence of the increased suicide rate in the general population with the known increased vulnerability to suicide in custodial settings suggests that municipalities may benefit from re-examining their suicide prevention protocols. This article surveys the law regarding Monell policy claims arising from custodial suicide. And while there is no one-policy-fits-all approach, this article discusses the various theories of liability that plaintiffs have pursued and how courts have analyzed those claims.

The Rising Suicide Rate
According to the Centers for Disease Control and Prevention ("CDC"), the age-adjusted suicide rate increased on average by approximately 1% per year from 1999 through 2006 and accelerated to approximately 2% per year from 2006 through 2017. Thus, from 1999 to 2014, the age-adjusted suicide rate in the general population increased from 10.5 to 13.0 per 100,000, and by 2017, the rate had further grown to 14.0 per 100,000. Both males and females in all age groups from 10 to 74 have experienced an increase in suicide rates since 1999. Further, the increase has been more pronounced in rural areas. In 2017, the age-adjusted rate for the most urban counties was 16% higher than the rate in 1999, compared to 53% higher in the most rural counties. Put differently, by 2017, the suicide rate in the most rural counties was 1.8 times greater than in their urban counterparts.

As the non-custodial suicide rate was accelerating, the custodial suicide rate also increased – from 36 per 100,000 jail inmates in 2006 to 50 per 100,000 jail inmates in 2014. Meanwhile, the jail incarceration rate declined from 256 inmates per 100,000 U.S. residents at mid-year 2006 to 234 per 100,000 at midyear 2014. Thus, it appears that while fewer people are being jailed, the rate at which those in custody are taking their own lives is growing.

Additionally, as at least one circuit has repeatedly stated, the relevant metric regarding the constitutionality of a suicide detection protocol is the rate of custodial suicide compared to the rate in the area the jail draws from and the rate in other jails, explaining: “It is not the number of suicides that is a meaningful index of suicide risk and therefore of governmental responsibility, . . . but the suicide rate; . . . and it is not even the rate by itself, but rather the rate relative to the ‘background’ suicide rate in the relevant free population (the population of the area from which the jail draws its inmates) and to the rate in other jails.”

An Overview of the Basis of Liability
Municipal liability has its well-established roots in Monell v. Department of
Social Services.\textsuperscript{15} Monell provides that a municipality may be liable for damages under 42 U.S.C. § 1983 if the unconstitutional act complained of is caused by: (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority.\textsuperscript{16} A plaintiff seeking to impose liability on a municipality pursuant to § 1983 “must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.”\textsuperscript{17}

In general, municipalities must have policies safeguarding, although not guaranteeing, inmate health.\textsuperscript{18} This is because inmates have no ability to obtain their own treatment and must instead rely upon prison authorities to treat their medical needs.\textsuperscript{19} Deliberate indifference to serious medical needs violates the Eighth Amendment prohibition against cruel and unusual punishment.\textsuperscript{20} Further, the requirement to treat health conditions encompasses psychological treatment for serious mental illnesses.\textsuperscript{21}

Relevant to municipalities, the Eighth Amendment protection against deliberate indifference extends to pretrial detainees by operation of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{22} Consequently, a municipality may be liable if “institutional policies are themselves deliberately indifferent to the quality of care provided” and cause a plaintiff harm.\textsuperscript{23}

“Deliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.”\textsuperscript{24} “[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.”\textsuperscript{25}

Failure to Train and Policy Gaps
An overview of case law reveals that claims arising from custodial suicide are extremely fact-dependent, making general principles difficult to discern.

Specific to custodial suicide, as the Sixth Circuit has explained, public entities have a duty “to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable, and to take reasonable steps to prevent an inmate’s suicide ‘[w]here such a risk is clear.’”

Often, however, allegations fall into two categories of purported deliberate indifference: failure to adequately train on implementation of existing protocols or absence of a particular protocol in an existing policy. Both have at their heart the idea that a municipality should have done something more or better. And that theory of liability, in turn, has its roots in the failure to train case of City of Canton v. Harris.\textsuperscript{26}

Harris expanded Monell liability beyond the arena of harm affirmatively caused by enforcement of an unconstitutional policy into the realm of liability for an absence of municipal action. As the Supreme Court explained:

It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.\textsuperscript{27}

The Court, however, cautioned against liability based solely upon proof that an injury or accident could have been avoided if an officer had had better or more training sufficient to equip him to avoid the particular injury-causing conduct. “Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.”\textsuperscript{28}

Specific to custodial suicide, as the Sixth Circuit has explained, public entities have a duty “to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable’ and to take reasonable steps to prevent an inmate’s suicide ‘[w]here such a risk is clear.’”\textsuperscript{29}

The determination of whether a failure to train or to have a specific suicide prevention protocol in place violates constitutional rights is not, however, conducted in isolation. Instead, courts examine alleged training and policy gaps in the context of all aspects of an existing suicide-prevention policy. This is because “it is necessary to understand what the omission means. No government has, or could have, policies about virtually everything that might happen.”\textsuperscript{30}

Complicating the picture is the fact that there is no magic number of incidents that must occur before municipal liability for a failure to train or the absence of some particular protocol will be found unconstitutional. The Supreme Court has held that, ordinarily, a pattern of similar constitutional violations is necessary to demonstrate that an omission in a policy or training is deliberately indifferent.\textsuperscript{31}

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Without a pattern, a municipality will have no notice that the omission is causing injury. The Court, however, has also stated that evidence of a single violation of federal rights could possibly trigger municipal liability if the violation was a “highly predictable consequence” of the municipality’s failure to act. One further note on numbers: several circuits have explicitly rejected a plaintiff’s attempt to establish deliberate indifference by relying upon the number of attempted suicides, finding that attempts are not probative of whether a suicide prevention policy is deliberately indifferent.

An Overview of Failure to Train Cases
Failure to train cases have at their core the assertion that a municipality did not do enough to ensure that its policy was being implemented. Most of these claims fail because the plaintiff attempts to establish a widespread policy of deliberate indifference by relying only upon the incident involving their decedent and only upon a failure to train regarding one particular policy aspect. That approach fails to establish both the existence of a policy of not training and that the municipality is on notice that its alleged failure to train is causing a deprivation of detainees’ constitutional rights. By contrast, failure to train claims have succeeded where a plaintiff can show such widespread disregard of existing protocols by municipal employees that a policy might as well be non-existent.

For example, in a recent Fifth Circuit case, the plaintiff sued a municipality alleging, among other claims, that the employee tasked with monitoring the jail’s camera feed had not been properly trained. The employee failed to notice that the decedent had blocked the camera in his cell. The plaintiff alleged that the employee displayed “utter confusion” about her responsibility to monitor camera feeds.

The court rejected the claim, noting that appellants had no evidence of a pattern of violations stemming from deficient training and could not establish any deficiency based upon the single incident at issue. The record lacked evidence regarding the employee’s training (or lack thereof) or “evidence about the population that passes through the City’s jail or about the jail’s operations from which the possibility of recurring situations threatening to constitutional rights might be assessed.”

In another Fifth Circuit case, the court similarly rejected a claim of failure to train due to a lack of evidence beyond the incident at issue. The plaintiff alleged deliberate indifference because of a purported custom of county officials “encourag[ing] the use of lackadaisical procedures when supervising inmates and creating a situation of inability for officers to complete what they must to ensure the protection and safety of inmates in their care.”

The decedent stated at his intake process that he intended to kill himself. Pursuant to policy, the decedent was placed on suicide watch, which required a jail guard to check on him every 30 minutes. During roll call, an officer saw the decedent lying on his stomach, but did not observe his face, which was a violation of jail policy. When the officer later returned to the cell, he discovered that the decedent had hung himself.

Among other claims, the plaintiff alleged a failure to train based upon the officer’s failure to conduct the policy’s required face-to-face observation of an inmate on suicide watch. In support, the estate relied upon three prior suicides spanning a time period of 13 years. The court held that the prior incidents were distinguishable on their facts, too infrequent, and over too long a period of time to be deemed the result of an accepted practice of inadequate training.

One of the few cases finding a deliberately indifferent failure to train is Woodward v. Correctional Medical Services of Illinois, Inc. where the plaintiff adduced evidence of a systemic failure to train on implementation of suicide prevention protocols. The decedent in Woodward expressed suicidal thoughts at his intake screening and divulged a history of psychiatric hospitalizations. Despite the policy requirement of a prompt mental health evaluation, none was conducted until seven days later, at which point the inmate again expressed suicidal thoughts. Again contrary to policy, the inmate was not seen by a psychiatrist until another week later, who again noted that the inmate expressed suicidal ideation and placed him on medication. At no point did anyone implement the jail’s suicide prevention protocols, and two days after seeing the psychiatrist, the inmate hung himself.

The decedent’s estate sued the jail health care provider, Correctional Medical Services of Illinois, Inc. (“CMS”), alleging, among other claims, deliberate indifference in failing to adequately train personnel to implement suicide prevention protocols. The court rejected CMS’s argument that it could not be liable because there had been no prior suicides observing, “[t]hat no one in the past committed suicide simply shows that CMS was fortunate, not that it wasn’t deliberately indifferent.”

Further, the court concluded that CMS’s liability was not based on a single instance of flawed conduct. Instead, there was evidence of multiple failures by CMS to ensure its protocols regarding inmate safety were enforced and evidence of CMS condoning employees’ disregard of the protocols. This included CMS failing to train employees on its policies and procedures regarding the treatment of mentally ill inmates; permitting employees not to completely fill out intake forms; allowing mental health professionals to not review the intake forms; and condoning employee resistance to putting inmates on suicide watch. The court ultimately found that CMS had essentially ignored its policy, and that ignoring a policy was the same as having none at all.

Somewhat similarly, the Ninth Circuit recently addressed why a Monell failure to train claim survived summary judgment although the employee whose actions were at issue was entitled to qualified immunity. There, an employee failed to take away a detainee’s belt during processing, which he used to hang himself in his cell. The court noted that an independent audit of the police department concluded that many members had “only a passing knowledge of Department policies.” The court explained that a jury could, for instance, find that the detainee suffered a constitutional deprivation as a result of the department’s failure to ensure compliance with its policy of removing belts from detainees; or to assure proper monitoring of cell security cameras.
An Overview of Policy Gap Cases

Frequently, courts reject claims based upon alleged policy gaps due to the lack of evidence of deliberate indifference when the alleged gap is viewed in the context of the policy as a whole. They also reject claims based upon a lack of evidence that a municipality had notice its current approach was unsatisfactory and was causing injury. Underlying these outcomes is the principle in Canton that municipal liability cannot be established simply by showing that something more or better could have been done to avoid injury in the particular case at issue.

For instance, a number of cases have rejected allegations that a policy is constitutionally inadequate for failing to require that a mental health professional with specific credentials conduct suicide screening. In Perez v. Oakland County, the Sixth Circuit rejected a claim of deliberate indifference arising from the county’s practice of having non-medical personnel – in this case an inmate caseworker – make housing assignments of mentally ill inmates. The court noted that the plaintiff “provides no evidence that this practice has ever resulted in a suicide or attempted suicide by another inmate, either at the County Jail or in another jail across the country . . . and the lack of statistics to support this conclusion furthers the argument that there was a lack of foreseeability.”

The Seventh Circuit rejected a similar claim in Minix v. Canarecci. There, the jail had an agreement with Madison Center, Inc., (“Madison”) a community mental health center, to provide mental health services. Madison represented to the jail that the person who conducted the decedent’s mental health evaluation was a Qualified Mental Health Professional as defined in the Indiana Administrative Code, when she was not. Instead, the employee lacked the necessary master’s or doctoral degree in one of the specified disciplines such as psychiatry, psychology, and social work. The employee had completed course work, training, and other experience in fields such as community health, mental illness, and the treatment of prisoner. The court rejected a claim of deliberate indifference against Madison where there was no evidence that the employee’s lack of a formal license or specific degree played any role in the decedent’s suicide.

The Tenth Circuit in Ernst v. Creek County Public Facilities Authority similarly rejected a challenge to a policy of allowing licensed professional counselors and licensed professional nurses to conduct suicide-risk assessments. The court held that there is no constitutional requirement that only licensed physicians or psychiatrists conduct suicide evaluations.

Thus, a review of case law shows that to-date, avoiding deliberate indifference does not require that only those with a particular credential conduct an assessment of suicide risk.

Courts have also rejected claims that a policy is deliberately indifferent for failing to require a certain level of care of detainees identified as suicidal. For instance, in A.H. v. St. Louis County, St. Louis County Missouri’s Jail Suicide Prevention and Response Policy classified potentially suicidal inmates into three levels of oversight that differed on where they were housed, the frequency of observations, and the availability of bedding. The decedent in A.H. committed suicide while categorized in the least restrictive protocol, “precautionary status.”

Considering the suicide prevention policy as a whole, the court rejected the claim that the county was deliberately indifferent because the precautionary status protocol allowed inmates to be alone in their cells, to have bed sheets, and did not require them to be monitored more than the inmate population at large when in general housing. The court noted that the policy as a whole “detailed extensive procedures for handling potentially suicidal detainees and mandated annual employee training.” It concluded that a policy “cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicides.”

And in Lapre v. City of Chicago, the Seventh Circuit similarly rejected claims that a failure to implement a variety of specific suicide prevention protocols evidenced deliberate indifference. These alleged policy gaps included the failure to remove horizontal bars from lockup cells; the failure to install suicide kits; the failure to reassess for suicide risk detainees who returned to lockup after a court appearance or some other absence; and the failure to conduct in-person cell inspections every 30 minutes, as opposed to requiring checks every 15-minutes and allowing the checks to be made via video-feed.

The court concluded the claims failed because there was no evidence the policy as a whole was deliberately indifferent and/or no evidence of causation linking a purported policy gap to an increased risk of suicide. Although the City was aware that horizontal bars were used to commit suicide, the court found no deliberate indifference noting both that the City built newer lockup facilities without horizontal bars and that the City took other precautionary measures to prevent suicide in its facilities. Further, the plaintiff failed to adduce evidence of causation or notice of any known risk regarding the lack of suicide kits or the failure to reassess detainees upon a return to lockup.

The plaintiff also lacked evidence that in-person inspections of any particular frequency would affect the suicide risk for detainees.

By contrast, the Third Circuit in Simmons v. City of Philadelphia affirmed a jury verdict in favor of the plaintiff alleging that Philadelphia violated a detainee’s constitutional rights by failing to have in place, and train on, suicide screening protocols specific to intoxicated and potentially suicidal individuals. The evidence in that matter showed that intoxicated individuals were far more likely to commit suicide than others.

Simmons, however, is of limited value. The judges in favor of affirming relied upon differing theories regarding the relevancy of a policymaker’s state of mind and cost/benefit analysis to deliberate indifference analysis.

Conclusion

In sum, relatively few cases have held that a municipality was deliberately indifferent to its obligation to ward against custodial suicide. But given the increase in suicide in the general population and rising custodial suicide rates, municipalities may be well served by re-assessing their policies and their training to ensure compliance with constitutional standards.
In September 2018, the Federal Communications Commission (“FCC” or “Commission”) released a Declaratory Ruling with the goal of accelerating the deployment of 5G wireless broadband services across the country (“Small Cell Order” or “Order”). The Commission sees its action as needed so that the U.S. “wins the global race to 5G.”

The wireless industry promises that with fifth generation wireless network technology - or 5G as it is more commonly known - greater wireless speeds and lower latency will lead to innovation and uses such as augmented and virtual reality, the Internet of Things, smart homes, smart cities and autonomous cars. However, in order to win “the 5G race,” hundreds of thousands of small cell transmitters must be deployed on a national scale and in densely populated areas.

The FCC’s carrier-centric Order has had several controversial effects on local jurisdictions: (i) limiting state and local regulatory authority over wireless infrastructure deployment; (ii) mandating that fees for carrier use of public rights-of-way (“ROW”) and facilities within the ROW be limited to costs; and (iii) rushing the deployment of hundreds of thousands of 5G transmitters into residential areas and other public spaces without ever considering if the Commission’s decades-old Radiofrequency (“RF”) safety standards remain sufficient to protect public health and safety.

Montgomery County, Maryland appealed the Small Cell Order based on the RF issue and its case has been consolidated in the United States Court of Appeals for the Ninth Circuit with numerous appeals challenging other parts of the same order. Specifically, Montgomery County is asking the Ninth Circuit to determine whether the FCC violated the National Environmental Policy Act and the Administrative Procedure Act by failing to conduct an environmental analysis of the RF standards and potential 5G health risks, or explain why it did not consider whether its own existing RF standards will be protective of human health in a new 5G world.

The FCC’s RF Exposure Rules

The FCC has an obligation to evaluate the risks of human exposure to RF energy under various statutory and regulatory provisions, including the National Environmental Policy Act of 1969 (“NEPA”), which requires Federal agencies to assess the effects of their actions on the quality of the human environment. The Commission has long recognized its responsibility to evaluate whether FCC-regulated RF transmitters and facilities could harm the public health.

In 1985, the Commission adopted a 1982 American National Standards Institute (“ANSI”) standard for RF radiation on the environment. The ANSI standard was fairly basic and only contained one set of exposure limits. In 1992, ANSI replaced its 1982 standard and set out exposure criteria for “controlled environments” (like industrial locations only accessible to employees and contractors) and “uncontrolled environments” (typically accessible by the general public). A year later, in 1993, the FCC initiated a rulemaking proceeding to update its RF exposure standards based on the 1992 ANSI standard.

In enacting the Telecommunications Act of 1996 (“Act”), Congress required the FCC to complete its on-going RF proceeding and adopt new rules. The Act also preempted State and local governments from regulating “personal wireless service” facilities based on the effects of RF emissions if those facilities comply with the Commission’s RF regulations.

Based on scientific knowledge at the time, the rules adopted by the Commission in 1996 were designed to protect only against the thermal effects of RF exposure – that is, the excessive heating of biological tissue as a result of exposure to RF energy. The rules did not establish exposure limits...
based on potential non-thermal effects, such as cancer, neurological impacts, and immune system deficiencies.10

Also, when these rules were adopted nearly 23 years ago, the typical height for free standing wireless base station towers was between 50 and 200 feet above ground.11 Often these towers were in locations along highways and far from residential or commercial areas. In contrast to the longer wavelengths of earlier technologies which allowed cell towers to be spaced miles apart, the 5G wireless transmitters covered by the FCC’s Order will rely on higher frequency millimeter wavelengths that carry massive amounts of information only short distances.

As a result, small cell poles (such as streetlights and lamp posts) will have 5G transmitters that are less than 50 ft. off the ground and will be located only a few hundred feet or less apart in rights-of-way like sidewalks and alleyways, only yards from homes and businesses. Yet, despite this vastly different environment for 5G, in its Order the FCC summarily dismissed the requests of Montgomery County and others to reevaluate the Commission’s RF rules, instead leaving standards of over 20 years in place without any environmental evaluation.

The Montgomery County, Maryland Appeal
As noted, under the Act, state and local governments have no authority to regulate potential health impacts of RF emissions from wireless transmitters provided that those installations comply with federal safety standards. Instead, the responsibility to protect the public from dangerous RF levels lies with the FCC.12

Given that the FCC has not updated its RF exposure standards since 1996, and that an accelerated 5G deployment on a national scale will involve hundreds of thousands of small cell transmitters in densely populated areas, Montgomery County appealed the Small Cell Order and argues that the FCC had a legal duty under NEPA and the APA to reevaluate its RF standards before taking further action on the nationwide implementation of small cells. Montgomery County notes that this duty is particularly relevant in light of recent research on the health risks that potentially could be associated with 5G deployment.13

RF Exposure Research
Much research has occurred since the FCC adopted its existing RF rules back in 1996. Since that time there have been many studies of various non-thermal impacts of RF radiation. These studies have examined a number of RF-related risks, such as carcinogenicity, DNA damage and genotoxicity, reproductive impacts (e.g., low sperm counts), and neurologic effects (e.g., behavioral issues in children).14

This research and the associated concerns with non-thermal impacts is world-wide. In 2015, over 200 scientists from 42 countries, including the United States, sent a letter to the United Nations and World Health Organization stating that “[b]ased upon peer-reviewed, published research, we have serious concerns regarding the ubiquitous and increasing exposure to EMF generated by electric and wireless devices,” including cell towers. Listed RF effects include “cancer risk, cellular stress, increase in harmful free radicals, genetic damages, structural and functional changes of the reproductive system, learning and memory deficits, [and] neurological disorders.”15

In 2017, several hundred experts from the United States and around the world sent a letter to the European Union requesting a moratorium on 5G technology until the “potential hazards for human health and the environment have been fully investigated by scientists independent from industry.” They note that 5G will contribute to cumulative RF exposures – i.e., an “increase[d] exposure to radiofrequency electromagnetic fields (RF-EMF) on top of the 2G, 3G, 4G, Wi-Fi, etc. for telecommunications already in place.”16

In light of this research, some scientists and academics warn that the FCC’s current RF standards, which are limited to addressing thermal effects, may not be protective of human health. By way of example, the BioInitiative 2012 report (including updates through 2017) reviews over 1,800 studies showing various adverse health impacts from RF and, based on that research, maintains that the current FCC standards do not adequately protect the public health.17 As a result, they recommend further research be conducted on non-thermal effects before 5G is widely available.

FCC Review of RF Standards
Though the Commission has not updated its RF exposure standards since 1996, it did initiate a review of those standards in 2013, seeking comments to determine whether its RF exposure limits and policies needed to be reassessed.18 The FCC cited to both its NEPA obligations and other statutory provisions as justifying the review.19

The Commission subsequently received over 900 submissions in its 2013 docket, many of them focusing on non-thermal risks posed by RF radiation.20 However, its review of the RF standards stalled and to date the Commission has not made any determinations in this proceeding (or any other proceeding) on whether the current RF standards remain protective of human health or whether the installation and operation of 5G small cells will pose health risks.21

The FCC’s Small Cell Order
Prior to the release of the FCC’s Small Cell Order, a number of local jurisdictions raised concerns about the current RF standards and their ability to protect local citizens in a 5G environment. Montgomery County repeatedly urged the FCC to reevaluate the standards and determine if they remain protective of human health. Representatives of the County met with Commission leadership and filed comments requesting that the FCC delay rulemakings aimed at speeding small cell rollouts until the 2013 RF proceedings were completed.

Several other local governments and associations, scientists, and individual citizens also requested that the FCC complete the 2013 proceedings before expediting the rollout of 5G technology and otherwise expressed concerns about the substantially out-of-date RF standards.22

In its Order, the Commission responded to these serious and legitimate concerns about public health with a single terse footnote, stating “[w]e disagree” with concerns raised about RF emissions from 5G small cell facilities. The FCC emphasized “nothing in this Declaratory Ruling changes the applicability of the Commission’s existing RF emissions exposure

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rules.” 25 There was no discussion by the FCC of potential non-thermal RF effects or any indication when it would complete the 2013 RF proceeding.

Questions to be Addressed by the Ninth Circuit
The Ninth Circuit will now decide whether by refusing to substantively address RF/public health issues in the Small Cell Order, the FCC violated NEPA and/or the APA. Specifically, the issues before the Court are:

Did the FCC violate NEPA when it failed to either: (i) explain why that statute does not apply to the Order; or (ii) conduct an environmental analysis of the RF standards and potential 5G health risks?

and

Did the FCC violate the APA when it failed to either: (i) explain why it did not consider whether the 1996 RF standards protect against potential 5G health risks; or (ii) address relevant public health and safety issues when adopting the Order? 26

The FCC’s NEPA Violation
Under NEPA, it is the “policy of the federal government” to “assure for all Americans a safe and healthful environment.” 27 In particular, for “major Federal actions significantly affecting the quality of the human environment,” the agency must prepare a “detailed statement” on the “environmental impact of the proposed action” (called an Environmental Impact Statement or “EIS”). 28 At a minimum, the agency must prepare a preliminary Environmental Assessment to determine whether the potential for such an impact exists and an EIS is therefore required. 29 While NEPA does not impose any substantive environmental mandates, it does require that agencies follow certain procedures for assessing environmental impacts of their decisions. 30 Unfortunately, the FCC proceeded to implement its Small Cell Order without any environmental analysis and otherwise failed to explain how the Order is somehow exempt from this requirement. Instead, the FCC responded to comments urging it to complete its 2013 review of the RF standards before finalizing the Order by simply stating that it “disagreed” with commenters who opposed the ruling on the basis of concerns regarding RF emissions. There was zero analysis by the Commission as to whether the current RF standards – enacted nearly 23 years ago – will be protective of human health in a new 5G environment.

The FCC’s decision to move forward with 5G infrastructure without considering the health effects of RF violates NEPA. The Order itself is a “major federal action,” within the scope of NEPA, because it involves “[a]doption of official policy, such as rules, regulations and interpretations” pursuant to the APA. 31 In the FCC’s own words, the Order was an exercise of Commission authority to “issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act.” 32 Moreover, the Order is a “major federal action” because it is an activity that is “potentially subject to federal control and responsibility” or is “regulated” by a Federal agency. 33 There is no question that the Small Cell Order regulates activities that are subject to Federal control and responsibility - it specifically establishes rules that municipalities must follow when reviewing carrier applications for the installation of small cells and the provision of 5G services in public rights-of-way. 34 In addition, the Small Cell Order “may significantly affect the quality of the human environment.” 35 5G deployments and operations will see the densification of transmitters in neighborhoods and public spaces in close proximity to households and businesses. Commenters noted that recent studies, conducted after the 1996 RF standards were adopted, have raised concerns about public health and safety, including potential RF-related risks associated with the anticipated use of 5G millimeter waves. No scientific certainty or consensus, however, is required to constitute a significant effect. 36 The point of NEPA is not for agencies to make the determination that significant effects on the human environment will occur, but rather to “insur[e] that available data is gathered and analyzed prior to the implementation of the proposed action.” Therefore, even if studies have not conclusively shown that RF emissions pose a substantial risk of non-thermal effects, the FCC cannot ignore its NEPA obligations to review and analyze this critical issue. NEPA is designed to force agencies, like the FCC to confront head-on, rather than ignore, these uncertainties. 37

What is particularly troubling with the FCC’s refusal to review its RF standards is that State and local governments are completely dependent on the FCC for the protection of their citizens from the dangers of RF emissions. In the 1996 Act, Congress directed the FCC to promulgate RF standards that are protective of human health, while preempting state and local governments from regulation in this area. 38 In fact, the FCC has stated repeatedly that only it has the authority under NEPA and other statutory provisions to set and maintain safe RF exposure levels. 39 Yet despite this mandated obligation to protect the public health, the FCC ignored its NEPA obligations in the rush for nationwide migration to 5G.

The FCC’s APA Violation
Similar to the FCC’s shortcomings under NEPA, the FCC also violated the APA because it failed to consider whether the current RF standards will fully protect the health and safety of citizens living and working directly adjacent to 5G small cells and did not explain why it ignored this relevant factor. Under the APA, courts will strike down agency action as arbitrary and capricious if the agency has, among other things, “entirely failed to consider an important aspect of the problem.” 40 The FCC itself has recognized that it has a continuing obligation to revise the RF standards as research on potential RF health impacts and wireless technology evolves. 41 In the last 23 years, significant research has been conducted and scientists and academics have warned that the FCC’s current RF standards may not be protective of human health. It goes without saying, moreover, that wireless technology has evolved. When the FCC’s current RF standards were adopted in 1996 the first ever flip phone had only been on the market a few months, which boasted cutting-edge features like the ability to receive SMS text messages and a vibrate function in place of a ring tone. 5G technology will look completely different.

Whether the 1996 RF standards remain protective of human health, including any
potential non-thermal risks, is a relevant factor that the FCC should have considered when promulgating the Order. By the Commission’s own admission, the Order will hasten the deployment of 5G facilities and the provision of services.41 This means more small cells, in more locations, and sooner than later. Because RF safety issues were implicated by the Small Cell Order it was incumbent on the FCC to determine whether the Order would increase harmful RF exposures in residential and public areas, particularly in light of the fact that countless 5G antennas spaced only about hundred feet apart will be placed in close proximity to homes and businesses.42

The Rest of the Story – The FCC Finally Takes Action
Just as this article was going to publication - and with the Montgomery County lawsuit still pending - the FCC announced that FCC Chairman Ajit Pai was circulating a proposal to fellow Commissioners that would maintain the Commission’s RF exposure limits. According to the press release, the item would resolve the 2013 Notice of Inquiry that sought public input on whether to strengthen or relax existing RF exposure limits. In addition, the item would establish a uniform set of compliance guidelines – regardless of the type of service or technology involved - for determining how entities will assess their compliance with the RF standards. Finally, the item would seek comment on establishing a rule for determining compliance with the RF exposure standard for devices operating at higher frequencies.

Conclusion
Regardless of any potential benefits that deployment of 5G infrastructure will bring to improve broadband availability across the country, the FCC - the sole authority for health and safety concerns related to RF – should have completed the review of its RF standards before opening the floodgates for the deployment of hundreds of thousands of small cell transmitters. At a bare minimum, the Commission should have explained its decision to summarily reject the comments submitted by Montgomery County, other local governments and associations, scientists, and individual citizens raising RF concerns.

Notes
2. Id. at par 1.
5. See Report and Order, GEN Docket No. 79-144, 100 FCC 2d 543 (1985); Memorandum Opinion and Order, 58 RR 2d 1128 (1985); see also ANSI C95.1-1982, American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz, ANSI, New York, NY.
7. Id. at *8.
11. Id. at 20.
13. Id. at 2.
15. Id. at 15.
16. Id. at 15-16.
20. Id. at 22.
21. Id. at 24-26.
22. Small Cell Order at n.72.
23. Brief at 4-5.
26. 40 C.F.R. § 1508.9.
28. 40 C.F.R. § 1508.16(b)(1).
30. Id. at 24.
31. 40 C.F.R. § 1508.18.
32. Brief at 40.
35. Found. for North Am. Wild Sheep v. United States Dept. of Agric., 681 F.2d 1172, 1179 (9th Cir. 1982).
36. Brief at 46.
38. Brief at 37-38.
40. Brief at 11-12, 19, 52.
41. Id. at 53.
42. Id. at 54.
Who Wants to be Audited?

This week the sleepy little Town of Lexington had a visit from the group known as “First Amendment Auditors.” They walked around the building filming various employees and didn’t really bother anyone or ask any questions. Their visit was very short, and they interacted with only a handful of employees. Then they went on their merry way without further ado.

First Amendment Auditors were discussed on the listserv earlier this year. In case you haven’t heard, First Amendment Auditors is a loosely knit American social movement, categorized by its practitioners, known as auditors, as activism and citizen journalism that tests constitutional rights; in particular the right to photograph and video record in a public space. Auditors also believe that the movement promotes transparency and open government. However, audits are reportedly often confrontational in nature. Some auditors have also been known to enter public buildings carrying a weapon leading to accusations that auditors are engaged in intimidation, terrorism, and the sovereign citizen movement. Auditors respond that the accusations are overblown and that their conduct is legal and not a threat. Auditors tend to film or photograph government buildings, equipment, access control points and sensitive areas along with the law enforcement or military personnel present. Auditors have reportedly been unlawfully detained, arrested, assaulted, had camera equipment confiscated, weapons aimed at them, had their homes raided by a SWAT team, and shot for video recording in a public place. (Google)

These events have prompted police officials to release information on the proper methods of handling such an activity. For example, a document sponsored by the International Association of Chiefs of Police states that the use of a recording device alone is not grounds for arrest, unless other laws are violated.

The “First Amendment Audit” phenomenon doesn’t appear to be led by any particular organization, but rather, seems to be made up of individuals who are interested in making videos of their encounters with law enforcement officers or other public officials. If the encounter results in an actual or perceived violation of the auditor’s First Amendment or other protected rights, then the video likely will be posted on social media and/or serve as the basis for a claim or suit. A violation may come about if the auditor is denied the right to take photos or videos in a public place, or is detained for “suspicious” activity or other reasons.

Other “audit” scenarios could take place during public comment periods at governing body meetings. If the auditor is denied the right to speak on a particular topic during public comment, or to speak in a particular fashion, a First Amendment or other claim might result. (CIRSA)

Some listserv members shared their experiences with “First Amendment Auditors” visiting their cities… They report the following:

“A few years ago, we had a group of these folks come into the lobby of the police department and start filming. A supervisor came out and asked if he could help them. They said their spiel, and the supervisor, said, “Okay, let me know if you need anything.” They filmed a little while and left, and when they posted the video, said something nice about the department. Of course, they didn’t seek access to any secure areas.”

“I think that the key to dealing with these people is to be friendly and otherwise not engage, to the extent possible, of course.”

“We have had several come to visit us. I think overall the visits have been boring from a First Amendment auditor perspective, but Google them and you can watch several of their videos.”

“My city had an audit performed. Nothing remarkable about it.”

Not all stories from around the country have a happy ending, however. Recently, one Colorado municipality agreed to pay a “First Amendment Auditor” $41,000 to settle a wrongful detention claim.

One city (remaining anonymous) reports that three law enforcement officers can be seen on video leaving their station as a self-professed “First Amendment Auditor” and two colleagues are standing in the lobby. The three begin following the officers out of the station, at which point one officer can be seen standing in front of the door as one of the “auditors” tries to exit.

At this point, the angry “auditor” erupts in explicit language and homophobic slurs. One officer indicates he and his group he thought they were staying inside the building, and then warns another “auditor” not to open the door on him as he briefly stands in the doorway of the station.

A moment later, the officer walks away from the door and is followed out by an “auditor” and the others in his group. The “auditor” continues cursing at the
officers as his colleagues press them for their names and badge numbers. The three officers continue walking to an unmarked car, telling the group that they don’t have time to give out their information because they are on assignment.

In an interview one auditor maintained that cursing at the officers, which he does often in many of his videos, is part of his First Amendment rights. “I just cuss at them, but I’m never going to fight them or nothing,” he said. In this particular city, officials said that the “auditor” chased after, jostled and shouted insults at the officers on duty, all of which constituted crimes of disorderly conduct.

Whether these “audits” end up in either of the above categories or not, it is important to note and understand that video recording in a public forum is protected behavior under the First Amendment. Some cities report “auditors” becoming aggressive such as above, while others report them being polite and very businesslike.

Cities may want to make sure their employees have a basic understanding of how to handle such an audit. An article on the website of the International Association of Chiefs of Police reminds us that “members of the public, including media representatives, have an unambiguous First Amendment right to record public officials in public places, as long as their actions do not interfere with the official’s duties or the safety of officials or other. Officers should assume that they are being recorded at all times when on duty in a public space.”

The association suggests the following as part of any policy dealing with such situations:

- Persons engaged in recording activities may not obstruct police actions. For example, individuals may not interfere through direct physical intervention, tampering with a witness, or by persistently engaging an officer with questions or interruptions. The fact that recording and/or overt verbal criticism, insults, or name-calling may be annoying, does not of itself justify an officer taking corrective or enforcement action or ordering that recording be stopped, as this is an infringement on an individual’s constitutional right to protected speech.
- Recording must be conducted in a manner that does not unreasonably impede the movement of emergency equipment and personnel or the flow of vehicular or pedestrian traffic.
- The safety of officers, victims, witnesses, and third parties cannot be jeopardized by the recording party.

Our visit here in Lexington went well, and the auditor left as previously cited. You can see our incident on YouTube at https://www.youtube.com/watch?v=yl-Nrw_DXO6c, or Google Lexington SC First Amendment Audit. Interesting he claims our “safety is not all that good,” as he sees a wasp nest up on the third floor of the building under the eaves. Chances are this is quite common, but we do periodically review and handle such things.

I would suggest anybody who “receives such an audit,” ignore the auditors to the extent possible. Most of them will likely go away harmlessly. If you encounter a situation such as the “cursing auditor,” ignore them until such time as there may be a public safety issue at hand.

This behavior is an example of the perils of being a public employee. We do not enjoy the same protections as a private sector employee. In the private sector, the “cursing auditor” could be put on trespass and banned from coming onto the property. But, as public employees we are required to allow ourselves to be harassed and pestered.

Here in Lexington, we once received alleged threats to the building by a citizen, but were told we could not put the individual on trespass notice because he is a citizen and we are a public place. This individual made several employees feel every uncomfortable and fear for their safety. However, we were told the behavior “had not risen to the level” constituting a public safety threat. Again, a private employer could have banned the person from the property.

Wow, times flies. Twenty-five years ago to the day, the Town of Lexington was racked by a series of tornadoes. A feature was shown on a local TV station discussing the effects. In some wooded areas, you can still see where the F4 tornado leveled forestry. Summer heat is well upon us, and our tornado and hurricane season continues on into the fall. The IMLA Disaster Preparedness Committee has assembled a library of helpful documents to assist in a variety of areas should your city unfortunately suffer from such a disaster. Please let us know if we can expand it in any particular area.

Time for a little levity, as I usually attempt in my closing... More stories from the courtroom... In one trial a witness was asked if he was related to the defendant. The witness, who was the husband of the accused woman, answered “No, sir.” The court house full of people began murmuring. The judge pounded his gavel and the witness explained, “If I was related to her then I couldn’t have married her.” The judge literally had to cover his face to conceal the laughter.

In another case, two subjects were on trial for a burglary/home invasion. The female resident was in bed in the house. She became the prime witness. (She also phoned the cops from her bedside table.) She was elderly and English was not her first language.

The prosecutor asks her if she can identify the men she saw in her house. The witness seems confused so the Judge says to her, Madam, he is asking you if the gentlemen who broke into your house are in the court today. At this point, the two guys behind the defense table stand up and say “We’re right here your honor.”

The prosecution rests, your honor…
To Petition or Not to Petition, that is the Question

In 2015, Justice Kennedy wrote a concurrence in Direct Mktg. Ass’n v. Brohl, in which he sent a very strong signal to the legal community about an issue that in his view, the Supreme Court should reconsider. Talking about the continued viability of Quill v. North Dakota, which required a retailer to have a physical presence in a state in order for a state to require the business to collect use taxes, Justice Kennedy stated:

[Quill] should be left in place only if a powerful showing can be made that its rationale is still correct...The instant case does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate case for this Court to reexamine Quill and Bellas Hess.¹

What happened next was entirely predictable. South Dakota passed a law directly at odds with Quill, sought to enforce it against three large online retailers that did not collect use taxes and had no physical presence in the state. Those companies sued and each court to hear the case concluded the South Dakota law was unconstitutional under Quill. The case was appealed to the Supreme Court, which accepted the case as an amicus: City of BY: AMANDA KELLAR IMLA Deputy General Counsel and Director of Legal Advocacy

Deciding to Petition

So how do you decide if you should file a petition for certiorari? One good indicator is if you get a strong dissent from a panel decision or dissent from denial for rehearing en banc, which happened in a case in which IMLA will participate as an amicus: City of
Boise v. Martin. In this case, the Ninth Circuit held that the city’s anti-camping ordinance, which made it a misdeemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time,” violated the Eighth Amendment. Specifically, the court held that the ordinance violated the Eighth Amendment “insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.” The court indicated that the Eighth Amendment places substantive limits on what the government may criminalize and where the “conduct at issue here is involuntary and inseparable from status...given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping,” the government cannot “criminalize conduct that is unavoidable consequence of being homeless...” The court explained that its holding was limited to the circumstances where there were no beds available in shelters.

The city petitioned the Ninth Circuit for rehearing en banc, which was denied. Judge Smith dissented from the denial of en banc rehearing and explained the significance of this decision:

Under the panel’s decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel’s reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel’s opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness... Such a holding leaves Cities with a Hobson’s choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

In his dissent from the denial of rehearing en banc, Judge Smith points out the practical realities of trying to determine the number of beds and homeless people in the jurisdiction each evening and that in fact in some jurisdictions like Los Angeles, the task is “simply impossible” even when thousands of volunteers devote dozens of hours it still takes three days to complete.

A dissent like this is helpful when drafting a petition for certiorari because your arguments as to why the Supreme Court should hear your case will be more powerful when coming from a well-respected member of the federal judiciary as opposed to one of the litigants. In addition to highlighting circuit splits (which should be your primary argument in a petition for certiorari), you will also want to explain why the case is important. When a judge does this for you, it can really hammer the point home.

In deciding whether to file a petition for certiorari you also should research if the Court has recently rejected the issue you would be seeking certiorari on. If it has, you will need to distinguish your case from that prior case and explain why your case is the better “vehicle” than the previously rejected one. Vehicle problems for a case exist when there are subsidiary issues that could prevent the Court from addressing the question presented in the petition, like standing or waiver of a particular argument. Another common vehicle problem, according to Timothy Bishop and Jeffrey Sarles at Mayer Brown, include where the “lower court gave alternate grounds of the decision that are sufficient to support its judgment.” You should evaluate not only prior cases that the Court rejected and see if they raise such vehicle problems, but you also should consider if your case has such a vehicle problem. If it does, that doesn’t definitively mean you should not petition for certiorari, but you should factor it in to your decision.

Finally, another thing to consider in filing a petition for certiorari is whether you can line up amicus support. Having non-parties file in support of your position and explain both the importance of the issues as well as the fact that the issues in the case are broader in scope than simply impacting the particular parties can be persuasive and ultimately help tip the scales in your favor when the Court weighs whether to grant certiorari.

IMLA filed an amicus brief at the petition stage in support of the County of Maui in County of Maui v. Hawaii Wildlife Fund, and the Court ultimately granted certiorari and will be hearing the case in its 2019 term. The issue in this case is whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. The County in the case was able to get three amicus briefs filed at the certiorari stage, well above average, which included thirteen organizations, associations, and agencies (including IMLA) and 18 states. Having a wide coalition of amici support your position at the certiorari stage is incredibly valuable and will increase your chance of having the Court grant certiorari.

For more information about IMLA’s legal advocacy program or to discuss amicus support in a case you are handling, please contact me at akellar@imla.org

Notes
2. The Court granted certiorari on this question in Gamble v. United States, this term, but ultimately declined to overrule the separate sovereigns doctrine.
3. Rule 10 provides:

   Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

   Continued on page 37
Benefits, Seatbelts, Unresponsive Landlords and More

Employment: City May Change Accommodation Based on Fewer Hours Worked

City of Toronto v. Canadian Union of Public Employees, Local 79, 2019 ONSC 4045 (CanLII)
http://canlii.ca/t/j1j5c

The City of Toronto (“City”) sought judicial review of an arbitration which held the City failed to accommodate an employee (“grievor”) with a disability. The grievor had worked at the City for many years, originally in a full-time capacity, reducing to four days per week and 1999 as a result of disability, and then to three days per week in 2010. Despite working part-time hours, the employee remained in the full-time bargaining unit as a result of seniority, receiving full, paid health care coverage and vacation accruals until the collective agreement with the union expired in 2016. At that time the City put the union on notice that it was going to stop permitting part-time employees from working in the full-time bargaining unit when they had no reasonable expectation of returning to full-time hours; affected employees would be given a two-year transition period before the changes became effective. The grievor then filed a grievance. The grievance went to arbitration, where the arbitrator determined the City’s actions were discriminatory, because the City could not alter the grievor’s accommodation without showing an undue hardship, and the grievor was again placed back in the full-time bargaining unit.

HELD: Judicial review granted.

DISCUSSION: In reviewing the decision, the Court noted that the arbitrator demonstrated an understanding of the City’s management rights and the authority to unilaterally transfer the grievor from full-time to part-time. However, the arbitrator in reviewing Ontario Nurses’ Association v. Orillia Soldiers Memorial Hospital (1999), 42 O.R. (3d) 692 determined that altering the grievor’s existing accommodation without demonstrating undue hardship was a violation of s.17 of the Human Rights Code, R.S.O. 1990, c. H.19 (“Code”) which states that a tribunal shall not find a person incapable unless satisfied that the needs of a person cannot be accommodated without undue hardship. In arriving at this conclusion, the Court noted that the arbitrator misapplied the analysis of Ontario Nurses’ Association and ultimately created a new test to be applied when an employer changes an existing accommodation.

In the present case, the arbitrator concluded that the City had met its legal duty to accommodate the grievor’s disabilities, and had indeed gone beyond the strict legal requirements by keeping him in the full-time bargaining unit while he was working part-time hours. At this point of her reasons, one would have thought that the logical conclusion would be that the grievance must fail. Employees in the full-time unit receive greater benefits than those working part-time hours. For example, the City pays 100% of the cost of benefits for full-time employees in the full-time unit, while the City pays a pro-rated percentage for those in the part-time unit. As well, some of the benefits are different in terms of payment for shifts missed because of sickness and injury. In accordance with Orillia Hospital, the employer does not discriminate by failing to provide the added benefits to which a full-time employee is entitled to a person working part-time hours, even if the person is working part-time because of disability. The difference in treatment with respect to compensation and benefits is because of the number of hours worked, not because of disability, and the employer is not required to compensate the disabled employee for time not worked. However, the arbitrator did not stop her analysis here. She decided that the accommodation that had been provided to the grievor was “the provision of part-time hours within the full-time agreement, and continuation of the paid benefits and pension calculation of a full-time member” (at p. 29). She then created a new test to be applied in respect of s. 17 of the Code when an employer changes an existing accommodation (at p. 28): The new test was not put forward by either party, nor could either party find case law supporting it. As a result, the arbitrator had arrived at an unreasonable conclusion. The judicial review requested by the City was granted and the arbitration award quashed.
Housing: Unfairness is not Necessarily Discrimination
Schlonies v. Grey (County), 2019 HRT0 546 (CanLII), http://canlii.ca/t/hzd3l

The Corporation of the County of Grey (“County”), owns and operates subsidized housing where the Applicant resides. The Applicant filed an application against the County alleging discrimination under the Human Rights Code, R.S.O. 1990 c. H19 (“Code”) with respect to occupation of accommodation because of disability, age, and receipt of public assistance. The County responded that it did not violate the Code.

HELD: Application dismissed.

DISCUSSION: The Tribunal proceeded by way of a summary hearing to determine, if all the allegations by the Applicant were true, the Applicant’s claim had a reasonable prospect of success. Both submissions were reviewed by the Tribunal in accordance with Dabic v. Windsor Police Service, 2010 HRTO 1994. The Applicant alleged tenants who paid market rent were treated better by the County than those who received public assistance and also alleged the County failed to prohibit the bullying by other tenants. However, despite raising the grounds of age and public assistance in her application, the Applicant did not submit arguments addressing these claims in submissions. Instead, the Applicant alleged that the County retaliated against her for filing the human rights application, by failing to have repairs done in her unit for extended periods of time.

The Tribunal found that none of the allegations raised by the Applicant, although potentially unfair, related to or had any connection to a Code ground. The Tribunal outlined its authority to deal with allegations raised surrounding unfairness, noting that although it may cause harm, unless there is evidence that one or more protected grounds of the Code is violated, it is not legal discrimination. As a result, the Tribunal had no jurisdiction to deal with the matter and the application was dismissed.

Trials: Buckle Up—Burden of Proof not met in Seatbelt Conviction
York (Regional Municipality) v. Clarke, 2019 ONCJ 545 (CanLII) http://canlii.ca/t/j1q8n

The Appellant was issued a Part I certificate of offence and was found guilty of not properly wearing a seatbelt while driving in the Region of York (“Region”) contrary to the Highway Traffic Act, R.S.O. 1990, c. H.8 (“HTA”). At trial, before the Justice of the Peace (“JP”), the Regional police officer provided evidence that he had observed the Appellant driving without a seatbelt, but also noted that when the Appellant was pulled over his seatbelt was on. The Appellant argued the contrary, particularly that he was wearing his seatbelt at all times. The JP accepted the officer’s evidence, and the Appellant was convicted. The Appellant appealed the finding of the JP.

HELD: Matter acquitted.

DISCUSSION: A matter commenced by a certificate of offence may be appealed. In these circumstances a court has broad authority to review an appeal. The Court relied on Justice Duncan’s opinion in R. v. Gill, which distinguished between appeals proceeding under a Part I, Part III or the Criminal Code, [2003] O.J. No. 4761 (Ont. C.J.). Finding that the court may review the record of a Part I to reach its own conclusion of the issues and is not limited to only intervening in a decision that was deemed to be unreasonable.

The Court heard the appeal, and the Appellant submitted that the burden of proof principle outlined in the Supreme Court of Canada decision of R. v. W.(D.), [1991] 1 S.C.R. 742 were not properly applied and as a result the JP incorrectly convicted him. W.D. outlines the proper application of the burden of proof when there is a discrepancy of evidence presented to a court. It prohibits a court from concluding that a standard of proof is met simply because the court prefers evidence of one witness over another. The Court held that W.D. applied in this matter, as the Appellant and the officer provided inconsistent evidence. The JP failed to rely on and apply W.D. as the JP did not provide an explanation as to why the Appellant’s evidence was rejected. The Court expressed further concern particularly surrounding the officer’s evidence which stated that, it was possible although unlikely that the Appellant was not wearing his seatbelt. This evidence suggested that the JP failed to consider whether the officer’s evidence even established guilt beyond a reasonable doubt. The Court held that it would be contrary to justice to order a new trial and acquitted the matter.

Trials: No Extension of Time without Prospect of Success
Slausky v. Edmonton (City), 2019 ABCA 302 (CanLII) http://canlii.ca/t/i1x4z

The Applicant, a property owner in the City of Edmonton (the “City”) received a property tax assessment. The Applicant filed a complaint regarding the assessment to the Edmonton Composite Assessment Review Board (“Board”). On the first day of the hearing the Applicant requested a postponement which the Board subsequently denied. As a result of the Boards decision, the Applicant alleged bias. The hearing was ad-
THE OPIOID WARS – NOTES FROM THE FRONT

As the most serious public health crisis in modern American history rolls on, claiming thousands of lives and consuming billions in remedial costs, courts across the country remain flooded with lawsuits by states and municipalities seeking recourse. The defendants—manufacturers, distributors, pharmacies and others—continue to assert a litany of rationales why they should bear no responsibility for the billions of opioid pills indiscriminately fed into our nation’s healthcare system over the past 25 years. While the ultimate outcome of the opioid litigation remains far from clear, there are numerous developments to report as this ML goes to print:

Oklahoma’s J&J win: On August 26, 2019, Judge Thad Balkman of the District Court in Cleveland County, Oklahoma issued plaintiffs their first major victory in the opioid wars, holding that Johnson & Johnson’s misrepresentations caused over-prescribing and created a public nuisance in Oklahoma.1 He found that the state was entitled to $572 million in abatement costs, an amount that would cover one year’s funding for the healthcare, social services, rehabilitation, law enforcement, judicial and other resources needed to begin turning the opioid tide. While the state argued that abatement monies would be required for at least 20 years at a total cost of $17.8 billion, Judge Balkman found that only one year’s worth of expenses had been definitively described.

While the judgment was characterized as a win by J&J counsel, and opioid defendants’ share prices immediately rose on the news, that reaction seems short-sighted. The total take by the Sooner State in the news, that reaction seems short-sighted fed into our nation’s healthcare system over the past 25 years. The total take by the Sooner State in the news, that reaction seems short-sighted fed into our nation’s healthcare system over the past 25 years. The total take by the Sooner State in the news, that reaction seems short-sighted fed into our nation’s healthcare system over the past 25 years. The total take by the Sooner State in the news, that reaction seems short-sighted fed into our nation’s healthcare system over the past 25 years. The total take by the Sooner State in the news, that reaction seems short-sighted fed into our nation’s healthcare system over the past 25 years.

A massive settlement mechanism: While the Oklahoma trial was playing out, the national multi-district opioid litigation (MDL) before Judge Dan Polster in the Northern District of Ohio—now comprising almost 1,900 plaintiffs—moved ahead.2 In June, various Plaintiff’s Executive Committee (PEC) members launched an ambitious proposal to facilitate an omnibus settlement: the certification of a nationwide “Negotiation Class.”3 Incorporating all 24,500 municipalities recognized by the US Census Bureau, the Class would include all municipalities that have already filed opioid cases (whether in the MDL or in-state) as well as all those that have not.

The proposal, which the PEC asserts will meet the class action requisites of FRCP 23(b), is a leap of faith for plaintiffs, in that the size of the ultimate settlement is speculative at this point. The only metric known in advance is the relative share of the total that each participating county will receive, based on three factors, equally weighted, arising within their boundaries: the amount of opioids delivered there (measured in “morphine milligram equivalents”-MMEs); the number of opioid-related overdose deaths; and the number of opioid use disorder (OUD) cases. What is unknown is the percentage that each entity within a county would receive—the figure for cities, towns and other localities is subject to negotiation with the county, and thereafter to resolution by a Special Master appointed by the court to determine the allocation (Settlement Allocation).

Proponents point out that the Negotiation Class is endorsed by more than 50 plaintiff counties and cities, large and small, named in the Motion for Certification, whose legal representatives pledge to work towards transparency and fairness in bringing the idea to fruition. They stress that, even if municipalities approve the proposal and allow the Class to be certified, the ultimate settlement will not become a reality unless a “super-majority” of municipal plaintiffs vote in favor—meaning 75% of municipalities that filed suit in the MDL as well as 75% of non-filing municipalities (with each municipality having one vote), 75% of the voting populations of filing and non-filing municipalities, and 75% of filing and non-filing municipalities based on their respective Settlement Allocations.

While jurisdictions that had not filed in federal court before the June 19, 2019 Negotiation Class motion are ostensibly on equal footing with those who had filed, the proposal calls for 25% of all settlement dollars to be allocated to the early-filers’ legal fees and expenses.

The proposal is not without naysayers. It has generated strenuous objection from the opioid defendants, who argue that the “Negotiation Class” mechanism does not comport with numerous FRCP 23 requirements, conflicts with Supreme Court precedent, is beyond the authority of the court and could lead to a complete dead-end once the parameters of the
actual settlement are known. Some 40 state Attorneys General have objected on the grounds that the mechanism deprives them of their rightful role as advocates on behalf of their residents. Other critics question how the interests of plaintiff groups not included among the 24,500 Negotiation Class municipalities, such as hospitals, tribes, unions, healthcare plans and neonatal abstinence syndrome (NAS) babies, will be handled. But the entities covered by the Negotiation Class proposal—municipalities—seem overwhelmingly willing to consider it, given that fewer than ten jurisdictions filed objections in response to Judge Polster’s invitation for comment. At his hearing on August 6, 2019 (open to listen-in by the public), Judge Polster expressed appreciation for the innovative approach and sounded supportive. On August 19, 2019, he issued an order identifying a group of seven Interim Negotiation Class Counsel who will represent the Class if and when certified.³ Polster declined to name the primary architects of the Negotiation Class—well-known partners in major mass tort firms that simultaneously represent states and municipalities in the opioid litigation—opting for other practitioners who he feels are not conflict- ed. He also included the city attorneys of New York, Chicago and San Francisco—but no counsel from counties or smaller localities. The proponents have established a website as a central clearinghouse of information, including specifics about the Settlement Allocation percentages, at www.Opioidsnegotiationclass.com.

Whether the Negotiation Class can instigate a massive settlement before the bellwether Track One MDL trial (with Ohio’s Summit and Cuyahoga counties as plaintiffs) begins in late October 2019 is doubtful, but it may facilitate resolution as the larger litigation accelerates. Potentially significant for MDL settlement purposes may be Judge Polster’s order on August 19, 2019 granting the Track One plaintiffs’ motion for summary judgment on their argument that defendants were unambiguously obligated to report suspicious orders and required to cease filling any such orders pending DEA evaluation. That clarification is particularly damaging to the opioid distributors, who are among the largest, most highly capitalized defendants in the litigation.

The impending Track One trial has already moved two defendants to settle with Ohio’s Cuyahoga and Summit counties (home to Cleveland and Akron, respectively). Endo will pay $10 million to avoid trial and Allergan will deliver $5 million.⁴ At least one major defendant is already actively seeking a way out of the opioid war completely: in late August, Purdue offered up to $12 billion to resolve its entire liability, with Sackler family members contributing $3 billion of the total.

If the nationwide tobacco settlement of two decades ago is any reference, the Negotiation Class, or a subsequent iteration thereof, may ultimately succeed as single settlements emerge. In the case of Big Tobacco, four individual states extracted large payments from the defendants before the massive $206 billion national settlement was achieved.

Controversy about who should control settlement funds: Even as settlement prospects are embraced, plaintiffs are not in accord about how funds would be shepherded. In May 2019, as damaging revelations about its Sackler family leadership emerged days before the televised trial began, Purdue settled with the State of Oklahoma for $270 million.⁵ Oklahoma Attorney General Mike Hunter oversaw distribution of the funds: $195 million went to opioid research facilities at Oklahoma State University, $60 million was paid to lawyers and $12.5 million allocated to municipalities. Various Oklahoma cities and counties immediately filed documents to dissociate themselves from any such settlement and asserted their own prerogative to continue litigation. The AG’s distribution scheme also led to rapid response by the Oklahoma legislature which required that, from now on, any such settlements be deposited into the state treasury. When Teva subsequently settled with Oklahoma, its $85 million payment was deposited into the Oklahoma treasury as mandated.

The Oklahoma controversy is a microcosm of larger disagreements about who should receive and control settlement dollars. More than one Attorney General has openly requested that the state’s cities and counties refrain from entering the opioid wars. That tension is visible in the Negotiation Class discussions as AGs disavow the concept, while NAS babies, hospitals, tribes and others fight to preserve bargaining power. More discord has emerged recently: on August 22, 2019 former Ohio Governor John Kasich and former Ohio State University President Gordon Gee announced formation of a nonprofit, dubbed “Citizens for Effective Opioid Treatment,”⁶ to distribute all settlement monies derived from the Ohio Track One cases to hospitals and healthcare educators in the state—eliciting expressions of dismay from local Summit and Cuyahoga officials who have long been on the front lines abating the crisis.

The Sackler family cannot evade responsibility: As noted above, Purdue’s settlement with Oklahoma seems to have been induced, at least in part, by potential Sackler family exposure. That same concern is being triggered elsewhere. Purdue documents produced in the massive MDL before Judge Polster revealed the extent to which individual Sackler family members controlled the company and profited therefrom. While Polster closeted these records in the MDL pursuant to his comprehensive protective order (discussed below), he made them accessible by state Attorneys General for their own opioid actions. One such AG, Maura Healey of Massachusetts, took the opportunity in connection with her Commonwealth of Massachusetts v. Purdue Pharma L.P.⁷ litigation to expose some of the suppressed information. In her amended complaint, Healey cited numerous Purdue corporate documents that revealed an obsession by Sackler family members to boost Oxycontin sales and market share.⁸ Board minutes also illustrated an extraordinarily generous sequence of distributions to directors even as the opioid epidemic was reaching crisis levels, exceeding some $4 billion in payouts over a five-year period.

Other jurisdictions have been likewise unsympathetic towards efforts to shield the Sacklers. In Texas, the in-state “mini-MDL” underway in Harris County held that similar information about Sackler family activities could be revealed.⁹ On August 21, 2019, the Kentucky Supreme Court declined to review a lower court ruling allowing access by STAT to previously sealed Purdue records, including Continued on page 26
The Opioid Wars cont’d from page 25

voluminous emails and lengthy depositions of Sackler family members. And in Suffolk County, New York, where Judge Jerry Garguilo is presiding over opioid cases brought by 58 Empire State counties and two dozen cities, the Sackler’s motions to dismiss on the grounds that they could not be sued personally for actions taken as corporate directors have been denied.

Materials in court documents cannot all be “under seal” and kept confidential: Not long after AG Healy’s controversial disclosure of hitherto secret information about the Sacklers, the issue of confidentiality itself took center stage in the MDL. Judge Polster’s expansive Protective Order covering MDL filings shielded a vast trove of data from public view, including the massive “ARCOS” database—a compilation by the DEA of all shipments of pharmaceuticals around the nation, in microscopic detail, showing deliveries by brand, by distributor, and by individual pharmacy. The Washington Post and Charleston, West Virginia’s HD Media sought access to the ARCOS data on FOIA grounds but were rebuffed by Judge Polster in July 2018, citing the Protective Order and the DEA’s need for continuing secrecy to avoid revealing potentially ongoing investigations into suspicious activities. But in June 2019, the Sixth Circuit reversed, finding the Protective Order itself to be overbroad and in need of substantial revision.

In July 2019, Judge Polster issued a revised Order, specifically finding that ARCOS data from 2006 to 2012 could not legitimately be germane to current under-cover DEA enforcement actions and must be revealed. Within days after that ruling, the media outlets had their ARCOS data. On July 27, 2019, the Washington Post published a major article describing the flow of billions of opioid doses across the nation, including an interactive table allowing readers to track shipments into their own communities, to their local pharmacies, and to the numerous “pain centers” that arose spontaneously as the crisis deepened.

The lead sentence of that article aptly summarized the story:

America’s largest drug companies saturated the country with 76 billion oxycodone and hydrocodone pain pills from 2006 through 2012 as the nation’s deadliest drug epidemic spun out of control, according to previously undisclosed company data released as part of the largest civil action in U.S. history.

The aforementioned Sixth Circuit invalidation of Judge Polster’s Protective Order has already had further impact: CBS recently cited the decision in its request for access to documents filed by Teva/Cephalon in the Oklahoma litigation describing marketing strategies for their Actiq opioid product. (It should hardly be assumed that this reflects a major sea-change the overwhelming tendency by American courts at every level to allow filings to remain sealed. While it is beyond the scope of this discussion, various critics point to excessive and unjustified secrecy accorded opioid defendants in their court filings over the past decades as keeping bad behavior out of the public eye, permitting continued transgressions and exacerbating the disaster).

Purdue is hardly the primary opioid manufacturer: The newly-harvested ARCOS data not only revealed exactly which localities and retail outlets were the epicenter of the opioid crisis (such as Kermit, West Virginia, a town of 400 residents whose two pharmacies received more than twelve million opioid doses between 2007 and 2012—more than 30,000 per person. It also put into sharper focus the role that previously little-known manufacturers played in the epidemic. While Purdue Pharma had been the de facto poster child for the opioid crisis and overwhelmingly named in thousands of municipal suits, other names came to the fore.

Among the newly-highlighted opioid makers is Mallinckrodt, a 100-year old St. Louis company that recently moved its corporate headquarters to Ireland in a tax-based inversion. Mallinckrodt’s SpecGX subsidiary is estimated to have single-handedly supplied about 1/3 of all opioid pills in the US, and nearly 2/3 of all such pills sold in Florida. The company’s 30 milligram blue hydrocodone pills were so well known that they were simply referred to on the street as “30-Ms.” Also revealed was Par Pharmaceuticals, an Endo subsidiary that generated billions in opioid sales. Another name to receive greater scrutiny, thanks to the aforementioned three-week televised trial in Cleveland County, Oklahoma, was Johnson & Johnson/Janssen. A much-respected household name, J&J long portrayed itself as a bit player in the opioid crisis because its fentanyl products—Duragesic and Nucynta—are delivered via a patch and because it held only a minor market share. But the Oklahoma trial, driven by AG Mike Hunter, brought to light much unflattering information about the company, including the fact that J&J previously owned Tasmanian Alkaloids, for many years the world’s largest purveyor of pure opium to the US pharmaceutical industry, and Noramco, a major producer of APIs (active pharmaceutical ingredients) for other opioid makers. J&J internal documents show the company’s dogged focus on specific high-prescribers; its sales representative call reports reveal hundreds of visits to targeted doctors. J&J’s marketing efforts promoted not only their own products but opioids in general, while citing outdated studies which downplayed the risk of addiction. These factors will now no doubt fuel further opioid litigation against J&J around the country.

Law enforcement is accelerating its push in the opioid war:

Federal and state authorities have rightly been criticized for their feeble responses to signs of foul play in the opioid crisis. Modest fines, failure to require adherence to Prescription Database Monitoring Programs (PDMPs) and outright complacency no doubt allowed the epidemic to flourish. This was evident in the recent Oklahoma trial, where testimony by state pharmacy authorities revealed repeated instances of minor sanctions against druggists who indiscriminately filled massively suspicious prescriptions.

But as the national furor has elevated, enforcement activities have toughened. Hundreds of phony pain centers have been shuttered and their operators, including scores of prescribers and pharmacists, are facing criminal charges. In April 2019, the DOJ announced its single largest opioid enforcement operation, arresting 60 healthcare workers in Alabama, Kentucky, Ohio, Tennessee and West Virginia. The group, which included 31 doctors, wrote more than 350,000 illegal prescri...
Dear IMLA Members:

The IMLA Board of Directors has reviewed IMLA's bylaws and is offering several amendments to the membership. The complete IMLA bylaws including proposed amendments are available for review on the IMLA website (IMLA.org) at “About” and “News.” Most of the proposed amendments are non-substantive; however, some amendments are substantive and for purposes of a vote by members are individually described below:

1. Substantive amendments:
   a. Amend Article II:
      i. Section 1 by deleting numerical limitations on the number of State and Provincial Chairs and increasing the number of board members;
      
      ii. Section 2 by amending “Special District” to include state municipal leagues, association of counties, associations of municipalities, and associations of special districts;

   b. Amend Article III:
      i. By adding a new section that clarifies that the annual meeting occurs during the annual conference;
      
      ii. Amending the provision on voting to require that to be eligible to vote the member’s dues must be current;

   c. Amend Article VI:
      i. By authorizing the Awards Committee to approve awards other than The Charles S. Rhyme Lifetime Achievement Award, which must still be approved by the Board;
      
      ii. By authorizing the Executive Director to approve IMLA filing an amicus brief on behalf of IMLA in appropriate cases.

At the Annual Meeting these amendments will be put to the vote of the membership. To make the process efficient, the amendments will be put to the membership as follows:

1. Approval of the amendment to increase the term limits of the board of directors from two terms to three. Yes or No

2. Approval of including a Municipal League or Association of municipalities, counties or special districts within the definition of special district and allow full membership on the board of IMLA. Yes or No

3. Approval of the other substantive amendments as described above. Yes or No

4. Approval of the non-substantive amendments. Yes or No

5. Authorize the Executive Director to correct scrivener errors should any be found. Yes or No

If for some reason a member believes that any other amendment should be segregated for separate vote, upon a request by that member and ten additional members, that issue can be segregated for a separate vote.

If you have any questions, please forward them to Chuck Thompson, IMLA Executive Director, or to the IMLA Board of Directors.
Autonomous Vehicles cont’d from page 9

transit ridership by an average of 12 percent.82 AVs may accelerate this trend, and where public transit ridership falls, levels of investment in public transit will decline.83 Equity remains a vital part of the conversation, because the rise of AVs will put struggling sections of cities at a particular disadvantage.84 Unemployment tends to be lowest in isolated, majority-minority neighborhoods,85 where the main barrier to employment is access to transport.86

Improved transit systems may persuade users to maintain or increase ridership. Theoretically, one way to do this is to increase the frequency of service. Practically speaking, as dollars for public transit dwindle, this option is probably not viable on its own. Another option, already used in many larger cities, is to provide transit-only lanes. In-vehicle travel time on buses has to be faster to compete with vehicular travel. A particularly creative solution is to provide comprehensive trip-planning information, so the public has the ability to evaluate their travel options with information on travel time, cost, and environmental impact.87

Another option for public transit is to become autonomous.88 Buses on fixed routes are easiest to transition to AV use. Vehicles and transit schedules can be “right-sized” so fleets are used effectively, reducing empty buses.89 Additionally, autonomous buses could potentially free up public funds because transit operating costs are mostly labor. A driverless model could radically increase public transit frequency, the single most important factor in transit ridership. Ultimately, “people need to see autonomous public transit, and see that it gets them where they need to go just as efficiently, in order for them to choose that over their own car, a ride provided by Uber or Lyft, or, someday in the future, their own driverless car.”90

E. AV Infrastructure Support in Technology and the Built Environment

Simply put, smart cars (and buses!) need smart cities.91 For now, most AV applications depend on vehicles with limited connectivity needs. Higher speed uses, such as platooning trucks, rely on vehicle-to-vehicle communications and higher levels of connectivity. These applications demand increasing bandwidth on existing wireless networks, but are currently constrained by the absence of sensor and communication technology embedded in infrastructure. Self-driving cars, and especially connected vehicles, will need significant support to work properly.92 This means providing radio transmitters to replace traffic lights, higher-capacity mobile and wireless data networks to handle vehicle-to-vehicle and vehicle-to-infrastructure communication, and roadside units to relay real-time data about weather, traffic, and other conditions.93 Atlanta, as an example, “may need 50,000 environmental sensors, 20,000 pedestrian and mobility sensors and 10,000 cameras” to support its plan to move ahead with AVs.94

Some states are already building this infrastructure. Colorado’s Department of Transportation is installing roadside units along Interstate 70, which are expected to communicate with driverless cars by sharing information about upcoming road hazards and current driving conditions.95 Virginia has launched SmarterRoads, a cloud-based portal that will provide raw data pertaining to road conditions, incidents, work zones, multi-modal transportation, and road signs to the AV industry, third-party enterprises, and the public.96 And Wisconsin is using road widening as an opportunity to install infrastructure for AV communication.97

Not all improvements to support AVs demand as much effort and money. AVs need clear lane markings and signage in order to operate effectively. An AV at a 2016 Los Angeles Auto Show behaved erratically due to poor road markings, indicating that local governments can ease AV integration by attending to basic roadway maintenance, such as striping.98 Moreover, the APA advocates that when cities are reimagining streets with AVs, they should design roadways for mixed traffic—not just AVs and conventional vehicles, but also pedestrians and cyclists—so as to avoid conflicts between different modes. Cities should look to recapture this right-of-way and repurpose streets for bikers and pedestrians.99 The next section is a more comprehensive discussion of how to handle this newly available land.

F. Land Use: Sprawl or Density for All?

Undoubtedly, AVs will disrupt city land use patterns. Self-driving vehicles could encourage unnecessary driving and exacerbate sprawl, or, conversely, a network of predominantly shared AVs could reduce the need for parking and road expansion, creating the potential to repurpose space.100 The outcome depends, in part, on parking-related zoning regulations, including the conversion of parking lots and decks, curbside management, and placement of infrastructure such as electric charging stations.

If shared AVs are the standard, municipalities probably will be able to reduce their required parking spaces. And the dimensions, location and design of AV parking structures will likely not need to take humans into consideration, resulting in reduced space requirements. Additionally, fewer parking garages may be needed in urban areas, which may lead to conversion into micro-housing unit communities, elevated parks, luxury homes, apartments, and offices.101 Of course, when they are not being used, AVs will have to go somewhere. Cities should think about the best locations for AV storage, recharging, and maintenance. Municipal lawyers may want to assess whether their jurisdictions’ current zoning definitions are adequate for new uses such as AV staging, support services, and electric recharging. Additionally, land use regulations should incorporate guidance for locating and designing on-street drop-off and pickup areas.102 Providing safe and easy access for riders of hailed AVs may require changes to curb access and traffic flows.103 In tackling the AV parking puzzle, Chandler, Arizona is poised to be the first city to adjust its zoning laws to incentivize AVs through parking reductions and creating standards for AV loading zones.104

AVs will likely change the retail landscape, particularly for e-commerce businesses. Truck drivers are limited to driving no more than 11 hours in one sitting, and their wages accounts for 75% of shipping costs.105 AVs in deliv-
G. Dealing with All the Data
Generally, privacy concerns around AVs fall into two categories: “government access to and use of locational and other personal data, and the private, primarily commercial, use of the personal data.” The Bloomberg Aspen Initiative on Cities & Autonomous Vehicles speculates that AVs could be the most important opportunity in history for a city to expand the scope and quality of data about its goings-on. Municipal lawyers know that collection of data about residents is particularly sensitive and raises constitutional concerns. The potential benefits of AV data are compelling, given that automated systems could capture individualized information such as vehicle speed, position, arrival rates, and rates of acceleration and deceleration. This data could allow for a greater optimization of traffic patterns; for example, through manipulation of traffic signals. The data could also provide insights for street and curb space management, and even for noise pollution. Ultimately, users’ privacy will be critical. In crafting AV regulations, cities will need to approach data privacy thoughtfully. This section explores privacy issues and touches on cybersecurity risks involving AVs.

Regarding AV data and privacy, cities have a chance to address a void in existing United States law. The federal Drivers’ Privacy Protection Act protects motor vehicle records from disclosure only by state motor vehicle departments. Moreover, the Electronic Communications Privacy Act does not necessarily prevent a service provider, such as a shared AV owner, from capturing and using a vehicle’s electronic or stored communications. There have been several attempts to address this gap. The Security and Privacy in Your Car Act (SPY Act) instructed NHTSA to develop privacy standards that would force manufacturers to be more transparent in how vehicle data are collected, stored, and used. However, the SPY Act never made it out of Committee. Like federal law, state law has generally failed to address the privacy problems with AVs.

The lack of federal and state oversight does not mean cities can avoid privacy concerns. AVs will create many of the same legal questions as cellular data, GPS technology, and Internet usage. Courts have already begun to answer some of these questions through the lens of the Fourth Amendment. In U.S. v. Jones, the Supreme Court confronted the acquisition of information without a warrant that generated “a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.” In Jones, the government placed a GPS device directly on a vehicle, prompting the Court to find that the government’s action was a search. However, the Court did not rule on the reasonableness of the search, and as Justice Scalia opined, what is considered a reasonable intrusion into privacy may shift as technology advances.

For now, the “third-party” privacy doctrine appears to be solid ground, in terms of AV privacy; it affords a loophole in Fourth Amendment constraints where the government can ostensibly obtain AV locational data from private, third-party sources to whom the vehicle users have granted access. Some argue, though, that this loophole could be eliminated by expanding the definition of “papers” under the Fourth Amendment to include data held by third parties.

Ultimately, lawyers cannot be certain how courts will treat governmental use of location data from AVs, especially if the government is not involved in the installation of tracking technology. When accessing or making use of AV data, local governments should proceed cautiously to ensure they are within constitutional parameters.

One of the largest privacy concerns is the capability for (and likelihood of) AV companies to monetize the information. As with smartphones, AVs will generate a tremendous amount of tracking data that will prove valuable for advertising and marketing purposes. One think tank estimates that car data monetization will generate a whopping $450-750 billion by 2030. For now, the industry has agreed to regulate itself. In 2014, 20 automakers signed a voluntary set of automotive privacy principles, effective with 2017 models, agreeing to ask permission before using or sharing sensitive information about occupants, and to limit what they share with government and law enforcement. While there may be some justifications that AV consumer privacy laws should develop at the state level, it is doubtful that these laws would be broad and comprehensive enough to regulate AVs. Due to the interstate qualities of AVs, a federal approach—such as the one currently underway at the NHTSA and the Federal Trade Commission—makes more sense.

Finally, there is a very specific threat to data privacy: cyber-attackers. AVs and their supporting infrastructure will inevitably hold personal data which will be of interest to cyber-criminals. Many experts believe that the installation of ransomware could pose a considerable threat to connected cars. Undoubtedly, AVs will be vulnerable to malicious attacks, which implicates AV technology producers from a liability standpoint, but also presents significant safety concerns for consumers as well as cities, which enforce traffic and criminal laws and respond to emergencies.

While consumer protection and cybersecurity protection are not the bailiwicks of local government, municipalities should still press AV operators to understand how data about their residents will be collected, used, and protected.

H. Not Boilerplate: Liability and Insurance
Who is to blame if a self-driving car gets in a wreck? The answer, not surprisingly, is complicated. In order to resolve the question of fault, the courts will indeed need to consider “novel and in some cases challenging questions.” For now, responsibility for AV accidents will fall on the human driver, the AV technology providers, the car manufacturer (which could be the same entity as the AV technology provider), and, in some instances, cities.

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This section describes how the legal system may eventually apportion fault in AV accidents.

Much of the complexity about liability lurks in autonomy Levels 3 and 4, during the handover from vehicular control to human control. Experiments have found time lags in drivers retaking control and other delays with humans returning to baseline driving performance. This has led companies such as Waymo and Ford to advocate for fully autonomous cars that avoid the need for handovers—the process through which control shifts to the vehicle. As the Harvard Business Journal points out, this may be too large a leap. With no driver as backup, there is a risk that AVs will be thrust into environments that they can’t yet navigate. The best route is for regulators to establish standards that define an effective handover, and reasonable time periods for a driver to retake control.

Despite this dilemma, legal scholars are confident existing tort and contract legal frameworks are sufficient to address liability questions surrounding AVs. From a legal perspective, AV liability should shift from the compensation regime applied to conventional driving, largely premised on vehicular negligence, to a compensation regime that increasingly implicates product liability. As technology enables increasing automation of vehicles, AV manufacturers will increasingly bear the burden for liability. While more general theories of tort liability are viable, products liability has emerged as the dominant theory for AV litigation. Thus, the remainder of this section focuses on manufacturer liability.

In a products liability case, liability usually depends on defects, of which there are three types: manufacturing defect, design defect, and failure to warn. A manufacturer’s liability for manufacturing defects in AVs will be largely limited to quality-control problems with the hardware of the operating system, including the cameras, lasers, radars, and other physical components of the system or vehicle. Experts predict, though, that much of the AV product liability litigation will not involve manufacturing defects.

In contrast, AV software is considered part of the AV’s operating system, and defects in software implicate design defects claims. AV users will probably argue that manufacturers did not design the AV adequately to protect its occupants during a crash. Under the “risk-utility” analysis more commonly applied by courts in design defect claims, manufacturers will stress the extraordinary safety benefits of AVs, while consumers will allege that designs can be improved.

Finally, when AV litigation arises based on failure to warn claims, manufacturers will argue that they cannot warn for every imaginable scenario. Yet, the enormous amounts of data available to manufacturers could lead to enhanced obligations. Practically speaking, as regulators craft legislation to clarify the legality of operating AVs on public roads, it is impossible to answer all of the associated liability questions that need to be addressed. Luckily, products liability law has proven to be remarkably adaptive to new technologies.

The Brookings Institute has proposed several guiding principles as governments at the federal, state, and local level grapple with liability issues. First, Congress should not preempt state tort AV remedies, except that liability of commercial AVs should be addressed federally. Second, manufacturers of non-AVs should not be liable for alleged defects introduced through third party conversions in an AV. Additionally, while clarification of liability will take time to sort out, NHTSA’s guidance document offers a first-step recommendation: states should explicitly define what is meant by “drivers” of AV for the purpose of traffic laws and enforcement. NHTSA recommends that when the AV systems are monitoring the roadway, the surrounding environment, and executing driving tasks (Levels 3 through 5), the vehicle itself should be classified as the driver, and licensed human operators classified as drivers for Levels 1 and 2 functionalities. This guidance from the NHTSA is instructive for cities, as cities will need to align their municipal codes with trends in state and federal law.

Besides manufacturers, insurance companies possibly stand to lose the most when it comes to AV liability. AV technology could shrink the auto insurance sector by $137 billion by 2050. The number of total claims submitted to insurance companies is expected to decline, but the cost per claim is anticipated to increase due to the expensive components integrated into AVs. Additionally, while AVs have the potential to increase safety and reduce accidents, the severity of those accidents will be much greater if AV systems fail.

State Farm, the nation’s largest automobile insurer, notes that the industry will need to overhaul the way it measures risk for auto insurance, which could significantly impact insurance rates. Likely, as a condition of providing insurance for drivers of AVs, insurers may require greater access to data that could be used to reconstruct the actions of the “driver” —whether human or automated—before an accident.

For cities, insurance impacts are relevant for two reasons. First, cities may specify insurance requirements for AVs in their jurisdiction, and need to understand the demands by the insurance industry. Second, cities may employ their own AVs, as part of solid waste management or public transit, and will need to budget accordingly for changes in insurance rates.

Conclusion

Cities need to start planning now for AVs, which clearly create a litany of issues: impacts to municipal budgets, shifts in the workforce, traffic impacts, effects on transit systems, equity in access, infrastructure support, land use modifications, privacy and data concerns, and liability and insurance.

The American Planning Association (APA) urges that localities not take a “wait and see” approach. The APA has numerous checklists that identify AV action items: developing a fact sheet on autonomous technology; forming an internal working group with stakeholders from critical departments, such as IT, transportation, and economic development; and identifying internal barriers for regulation or adoption, such as budgets or legacy technology contracts. The APA resource also recommends how to engage city residents and community stakeholders about AV technology.

Undoubtedly, law and policy will play a critical role in shaping the trajectory of AV development and deployment on municipal streets, and local government lawyers will have a significant role in paving the way.
Notes
1. There are five levels of vehicle automation, which are the industry standards established by the Society of Automotive Engineers (SAE). Detailed descriptions of these levels are published in the Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles, SAE Recommended Practice J3016. The guide is available online at https://www.sae.org/standards/content/j3016_201806/

The SAE levels are as follows: Level 1 automation allows small steering or acceleration tasks to be performed by the car without human intervention, but anything else is fully under human control; Level 2 is like advanced cruise control or original autopilot systems on some Tesla vehicles, so the car can automatically take safety actions, but the driver must stay alert at the wheel; Level 3 requires a human driver, but the human is able to assign some safety-critical functions to the vehicle; Level 4 is a car that can drive itself almost all the time without any human input, but might be programmed not to drive in unmapped areas or during severe weather; and Level 5 means full automation in all conditions. See Jon Walker, The Self-Driving Car Timeline—Predictions from the Top 11 Global Automakers, EMERJ (May 14, 2019), https://emerj.com/ai-adoption-time-lines/self-driving-car-time-line-themselves-top-11-automakers/.


3. Id.


5. Id.


7. Id.


10. Id.


15. Id.


17. Id.


19. The State of California Department of Motor Vehicles collects reports on accidents involving autonomous vehicles regardless of fault. This year, there have been thirty-three accidents. See State Of California Department Of Motor Vehicles, Report Of Traffic Collision Involving An Autonomous Vehicle (OL. 316), https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/testing/last visited (June 24, 2019).


24. This paper cannot possibly cover every facet of autonomous vehicles and cities; it is intended to give municipal lawyers an overview of the legal and policy issues most relevant for their clients. A comprehensive resource providing a foundation for this paper is Autonomous Vehicle Technology, infra note 124, and other municipal lawyers would likely find it useful.


26. Consumer Watchdog has recommended several safeguards for cities that want to allow AV testing—including that the AV must have a trained test driver, behind a steering wheel and brake pedal capable of assuming control. See Consumer Watchdog Backs Banning Robot Cars in Chicago Until Feds Act on Safety Regulations, CONSUMER WATCHDOG, https://consumerwatchdog.org/privacy-technology/consumer-watchdog-backs-banning-robot-cars-chicago-until-feds-Continued on page 32
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act-safety (last visited June 24, 2019).
32. See id.
33. Several states, including Alabama and Louisiana, have subsequently adopted legislation.
35. Id.
36. Id.
42. North Carolina requires the steering wheel, brakes, and other equipment used to operate a vehicle be stowed away so that an occupant cannot assume control while the vehicle is in self-driving mode, and New York law requires a driver to keep one hand on the steering wheel at all times; therefore, a car designed to comply with North Carolina’s law cannot also comply with New York law. See H.R. REP. NO. 115-294, at 12 (2017), available at https://www.congress.gov/115/crpt/hrpt294/CRPT-115hrpt294.pdf.
44. The NHTSA is an agency of the USDOT. According to its website, it is responsible for reducing deaths, injuries and economic losses resulting from motor vehicle crashes, which it accomplishes by setting and enforcing safety performance standards for motor vehicles and motor vehicle equipment, and through grants to state and local governments to enable them to conduct effective local highway safety programs. A search of NHTSA's website for “autonomous vehicle” returns 775 results.
48. There could also be a hybrid, where those who own an AV can ride to work, then profit off of their otherwise unused AV by renting it to a ride-sharing company during working hours.
49. See Lienert & Caspari, supra note 2.
53. After safety, of course!
54. Barnes, supra note 52, at 1. Delaware’s state gas tax rate is 23 cents per gallon.
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57. Id.

58. Id. This is atypical, though, as parking related revenues usually are not large portion of most cities’ revenue streams. See Benjamin J. Clark et al., The Impacts of Autonomous Vehicles and E-Commerce on Local Government Budgeting and Finance 6, Sustainable Cities Initiative (Aug. 2017), https://www.researchgate.net/publication/324665812_The_Impacts_of_Autonomous_Vehicles_and_E_Commerce_on_Local_Government_Budgeting_and_Finance.

59. See Clark, supra note 58.

60. While tax creation is not usually within the authority of cities, they can advocate for it at the state level. This effort would be worthwhile, as the numbers are staggering. Due to displacement of humans in occupations vulnerable to automation—such as truck drivers, bus drivers, and taxi drivers—the federal income tax shortfall could exceed $13 billion annually. See Stanford Turner & Greg Rogers, A Robot Tax Would Help or Harm the Transportation Sector—Maybe Both, Eno Center For Transportation (Apr. 14, 2017), https://www.enotrans.org/article/robot-tax-help-harm-transportation-sector-maybe/.

61. See id.

62. Id.


64. Id.


66. Neef, supra note 47.


68. Turner & Rogers, supra note 60.

69. Rouse, supra note 63, at 11 (describing remarks by Laurie Schintler of George Mason University at a symposium convened by the American Planning Association (APA), NLC, Mobility e3, George Mason University, Mobility Lab, the Eno Center for Transportation, and the Brookings Institution).

70. Philip Barnes et al., Economic Impacts of Connected and Automated Vehicles in Delaware, University Of Delaware Institute For Public Administration (May 2018), http://udspace.udel.edu/bitstream/handle/19716/23152/CAV-Economics-2018.pdf.


72. Some advocates take this a step further. Securing America’s Future Energy (SAFE), a group of industry and automotive leaders, argues that AVs will generate productivity gains in the employment sector: A one percent improvement in accessibility to a region’s central business district improves regional productivity by 1.1 percent. Similarly, a 10 percent increase in average speed, leads to a 15-18 percent increase in the labor market size., This, in turn, leads to a 2.9 percent increase in productivity. See Amitai Bin-Nun, et al., America’s Workforce and the Self-Driving Future, Securing America’s Future Energy (June 2018), https://avworkforce.secureenergy.org/wp-content/uploads/2018/06/Americas-Workforce-and-the-Self-Driving-Future_Realizing-Productivity-Gains-and-Spurring-Economic-Growth.pdf.

73. See Tech Policy Lab, supra note 67.

74. These two visions were described by Creighton Randall of the Shared-Use Mobility Center at the symposium convened by the American Planning Association (APA) and other stakeholders. See David C. Rouse, supra note 63, at 21.

75. For a detailed discussion of incorporating AVs into comprehensive plans, functional plans, and subarea plans, see Rouse, supra note 63, at 22.

76. See Tech Policy Lab, supra note 67, at 10.


78. Rouse, supra note 63.

79. Milam & Riggs, supra note 65.


81. Id.

82. Neef, supra note 47.

83. See Milam & Riggs, supra note 65.

84. See Crawford, supra note 51. At the same time, and not without its own merit, AVs will be transformative for individuals who are physically unable to drive, such as elderly individuals who have “retired” from driving, disabled individuals, and adults without drivers’ licenses.

85. Id.

86. Policy analysts stress that AVs will exacerbate disparity, even for those not dependent on public transit. Early on, AVs will be financially unfeasible for low-income individuals. Consequently, affluent drivers who can afford to purchase AVs will receive the full benefit of enhanced speed and safety in dedicated lanes, while the less affluent are left with slower, more dangerous conditions. Some AVs will pay a smaller share of gas tax revenue even as they travel greater miles compared to conventional vehicles. Under the current pay-at-the-pump model, traditional vehicles will effectively be subsidizing AV users. See Philip Barnes & Eli Turkel, Autonomous Vehicles in Delaware: Analyzing the Impact and Readiness for the First State 23, University Of Delaware Institute For Public Administration (April 2017), https://www.bidenschool.udel.edu/ipa/content-sub-site/Documents/autonomous-vehicles-2017.pdf.

Autonomous Vehicles cont’d from page 33

118. Nonetheless, some significant questions remain following Riley v. California, 573 U.S. 373 (2014), where the Court decided that a warrantless search of a cellphone as part of an arrest was unconstitutional, but did not establish a clear standard for what warrant is necessary to search a cellphone. Lower courts are split between the “container” analysis (a smartphone is a “container” and a warrant essentially need only describe the phone and the probable cause) and the “computer” analysis (smartphones are computers with tens of thousands of files; thus, to satisfy the Fourth Amendment, a warrant must describe the phone and files sought, as well as explain the probable cause). This is important because the Fourth Amendment law developing now will shape how AVs are eventually treated under the law.


122. Barnes & Turkel, supra note 86, at 14.


125. See id.


128. Some local governments are fortunate enough to have statutory tort immunity and may not be liable for defects in the intelligent infrastructure that will aid AV navigation.


130. Oliver, supra note 93.

131. VENTURER, supra note 129.


133. Smith, supra note 127.


135. For example, self-driving cars could be viewed by courts as unreasonably dangerous activities, and manufacturers or owners could therefore be held strictly liable. Another claim theory could be breach of warranty, if AVs fail to perform as they should. Negligence may still remain relevant, too; a negligence claim would “focus on whether the car’s decision or act showed a lack of reasonable care under the circumstances, not whether the computer could have been better designed.” See Torts of the Future: Autonomous Vehicles, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (May 2018), https://www.ali.org/media/filer_public/6a/26/6a26ebc5-3dfa-4c60-b1ba-7e596819e4f3/dc-656837-v1-torts_of_the_future_autonomous_emaible.pdf. The U.S. Chamber Institute for Legal Reform additionally suggests no-fault insurance and a victim compensation fund as options in lieu of tort liability altogether. See id. at 6.


138. See Anderson, supra note 136, at 123.


140. See Villasenor, supra note 132.

141. Id.


144. Barnes & Turkel, supra note 86, at 13.


146. One change auto insurers are making is basing policies on the number of miles driven. See James M. Anderson, supra note 136, at 18, fn 8.

147. Rouse, supra note 63, at 18.

148. Id. at 35-36.
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3. Id. The Bureau of Justice Statistics defines “jails” as “correctional facilities that confine persons before or after adjudication and are usually operated by local law enforcement authorities. Jail sentences are usually for 1 year or less. Jails also—receive individuals pending arraignment and hold those awaiting trial, conviction, or sentencing remit probation, parole, and bail-bond violators and absconders temporarily detain juveniles pending transfer to juvenile authorities hold mentally ill persons pending transfer to appropriate mental health facilities hold individuals for the military, for protective custody, for contempt, and for the courts as witnesses release inmates to the community upon completion of sentence transfer inmates to federal, state, or other authorities house inmates for federal, state, or other authorities because of crowding in their facilities sometimes operate community-based programs as alternatives to incarceration.” https://www.bjs.gov/index.cfm?ty=st-p&tid=12.

4. Lapre v. City of Chicago, 911 F.3d 424, 430 (7th Cir. 2018).

5. This article does not address claims against individual employees.


9. Id.

10. Id.

11. Id.

12. BJS 2016 Report, Table 4, https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243. 2014 is the last date for which the Bureau of Justice Statistics has published a suicide rate. https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243. For this reason, the comparisons between the rise in suicide in the general population and the custodial population are imprecise.


14. Lapre, 911 F.3d at 432, quoting Boncher ex rel Boncher v. Brown County, 272 F.3d 484, 486-87 (7th Cir. 2001).


16. Id.


18. Estelle v. Gamble, 429 U.S. 97, 103 (1976); Lapre, 911 F.3d at 431; Lopez v. LeMaster, 172 F.3d 756, 759 (10th Cir. 1999).


20. Id. at 104-05.

21. Brown v. Plata, 563 U.S. 493, 503-07 (2011); Bays v. Montmorency County, 874 F.3d 264, 269 (6th Cir. 2017); Cox v. Glanz, 800 F.3d 1231, 1248 (10th Cir. 2015); Minix v. Canarecci, 597 F.3d 824, 831 (7th Cir. 2010); Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006) (surveying cases).

22. E.g., Rouster v. County of Saginaw, 749 F.3d 437, 446 (6th Cir. 2014), Minix, 597 F.3d at 831.


27. Id. at 390.

28. Id. at 391.


30. Calhoun v. Ramsey, 408 F.3d 375, 380 (7th Cir. 2005).


32. Id.

33. Brown, 520 at 409.

34. A.H. v. St. Louis County, i, 891 F.3d 721, 729 (8th Cir. 2018) (stating that, “if anything” statistics on attempted suicide show a policy “was effective in avoiding the unfortunate reality of inmate or detainee suicide.”); Pirtman v. County of Madison, 746 F.3d 766, 780 (7th Cir. 2014) (“The bare fact that other inmates attempted suicide does not demonstrate that the jail’s policies were inadequate, that officials were aware of any suicide risk posed by the policies or that officials failed to take appropriate steps to protect an inmate who attempted suicide.”).

35. Garza v. City of Donna, 922 F.3d 626, 631 (5th Cir. 2019).

36. Id.

37. Id. at 637.

38. Id. at 638.

39. Id.

40. Fuentes v. Nueces County, 689 F. App’x 775, 778 (5th Cir. 2017).

41. Id. at 776.

42. Id.

43. Id.

44. Id.

45. Id. at 778.

46. Id.

47. Id. at 778-79.

48. 368 F.3d 917 (7th Cir. 2004).

49. Id. at 923.

50. Id. at 924.

51. Id. at 925.

52. Id.

53. The court viewed CMS as standing in the place of a government entity because CMS took over the public function of being a jail administrator. Id. at 927 n1.

54. Id. at 929.

55. Id. at 927-29

56. Id.

57. Id. at 929.

58. Horton by Horton v. City of Santa Maria, 915 F.3d 592 (9th Cir. 2019).

59. Id. at 596.

60. Id. at 605.

61. Id.

62. Perez v. Oakland County, 466 F.3d 416 (6th Cir. 2006), Minix v. Canarecci, 597 F.3d 824 (7th Cir. 2010), Ernst v. Creek County Public Facilities Authority, 697 F. App’x 931 (10th Cir. 2017).

63. Perez, 466 F.3d at 420.

64. Id. at 431.

65. Minix, 597 F.3d at 828.

66. Id. at 832

67. Id.

68. Id. at 832-33.

69. Ernst, 697 F. App’x at 934.
journeyed with the understanding that the alleged bias would be addressed when the hearing convened. The bias claim was denied, and the Applicant successfully filed a leave to appeal. The Court held that the Board had demonstrated prejudice by expressing annoyance with the Applicant's requests and as a result quashed the Board’s decision, ordering the matter to be sent back before the Board and heard by a new panel. The Applicant filed a notice of appeal, which was denied by the case management office as a result of numerous defects, including that it was filed late. The question before the Court was whether it should grant an extension.

HELD: Application dismissed.

DISCUSSION: As per the Rules of Civil Procedure, the Applicant had to file the notice of appeal within 30-days after the decision was issued; if filed thereafter, the Court has the authority to extend the time or strike the appeal. The Applicant’s primary argument was that the notice of appeal was timely: the Court’s decision was issued on January 30, with the costs portion of the decision issued February 15. The Applicant argued that as per Rule 14.8(1)(b) the one-month time should not have started until the costs portion of the decision was issued. Under this Rule, time runs from the date of the decision, which is the latter of (a) or (b), if reasons are given later, the date the later reasons are issued. The Court disagreed, noting that Rule 14.8(1)(b) does not apply because full reasons were already provided, and Rule 14.8(1)(b) is used when a decision is made with reasons “to follow,” allowing an applicant to file an appeal after knowing all the reasons to challenge. As a result, the time to file the notice of appeal had expired 30 days after the January 30 issuance date, requiring the Applicant to obtain an extension of time from the Court. The Court determined that the Applicant’s appeal proposed no reasonable prospect of success as most of the claims brought forward were moot. The application was dismissed.

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;
(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
The Opioid Wars cont’d from page 26

ations and dispensed some 32 million opioid pills to 28,000 patients. They not only received lucrative per-visit cash payments (and in some cases, other inducements) from desperate clientele, they then submitted fraudulent reimbursement requests to federal health programs. Some face as much as 30 years behind bars.

The day of reckoning has come, albeit too late, for a wide spectrum of opioid enablers. One of the most notorious, interviewed on CBS’s “Sixty Minutes” days before this article went to print, is Florida doctor Barry Schultz, now serving 157 years in state prison. He pocketed upwards of $6,000 a day in an illicit prescription business that beggars belief, including one “patient” for whom Schultz provided 23,000 maximum-strength oxycodone tablets in an eight-month period. Other overprescribing doctors have been charged with more serious offenses: manslaughter and even murder, as in the case of a 72-year old California physician arrested in August 2019 in connection with five opioid overdose deaths among his patient population.

Sanctions against corporate opioid miscreants have been fewer in number, but noteworthy. In May 2019, a Boston jury convicted CEO John Kapoor and four other executives of Insys Therapeutics of racketeering and bribery in their efforts to push sales of the company’s sublingual fentanyl film, Subsys. Each could be imprisoned for 20 years. And in July 2019, the DOJ obtained a record $1.4 billion in civil penalties and forfeitures against Reckitt Benckiser, PLC, a British maker of suboxone, a key element in Medically Assisted Treatment (MAT) for opioid addicts. The company was charged with promoting excessive use of its product, while falsely suggesting that the tablet form of suboxone was more prone to misuse than its higher-priced film variety and erecting a “patent thicket” of faux enhancements to delay generic competitors.

“Confidential Government Information” is more than a catchphrase: In February 2019, the MDL Track One case (Summit and Cuyahoga Counties) became the situs for a textbook argument about a government lawyer’s ethical obligations when moving from one side of a litigation to the other.

Carole Rendon had served in the U.S. Attorneys’ Office in Cleveland for eight years, becoming an integral part of the region’s opioid task force. In that role, she met with a wide span of local government officials dedicated to fighting the epidemic, discussing enforcement activities, healthcare responses, abatement programs, allocation of funds and the like. In March 2017, she left her post and was hired three months later by the BakerHostetler firm, soon ascending to the leadership of a team defending Endo, an opioid defendant.

ABA Rule 1.11 has this to say about government lawyers who move to the private sector:

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

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Rendon and BakerHostetler asserted that she did not possess any such “confidential government information” but Judge Polster was unconvinced. After a publicly-accessible hearing on the issue, during which various municipal participants in the task force stated that they had shared information with Rendon based on a tacit understanding that she was working cooperatively with them, Judge Polster determined that her continued participation in the Track One case would be prejudicial to Summit and Cuyahoga counties. He ordered that she, and the firm, be disqualified from representing Endo in the Track One litigation, but not barred from the MDL generally. (While likely not related to the disqualification issue, Endo did settle out of the Track One case in late August as noted above).

Positive momentum for plaintiffs, with few exceptions: The Oklahoma outcome and Judge Polster’s recent summary judgment order in favor of plaintiffs are merely two of the more significant wins by municipalities over the past two years. In courts across the country, the opioid defendants’ motions to dismiss, whether on the grounds of causation, federal preemption, statutes of limitation or otherwise have been overwhelmingly defeated. A few judges have sided with the defendants. In January 2019, Judge Thomas Moukwawsher of Hartford Superior Court dismissed an opioid action brought by 37 Connecticut municipalities, stating “Their lawsuits can’t survive without proof that the people they are suing directly caused them the financial losses they seek to recoup.” 10

Delaware AG Kathleen Jennings’ nine-count complaint largely survived a February 2019 decision, but the state’s Superior Court, after distinguishing Ohio’s more expansive nuisance statute, dismissed Delaware’s public nuisance claim:

In Delaware, public nuisance claims have not been recognized for products the state has failed to allege [such] control by defendants … Thus, all defendants’ motions to dismiss the nuisance claims must be granted.11

Perhaps the most positive development for defendants occurred in May 2019, as Judge James Hill of Burleigh County District Court converted a motion to dismiss into a definitive summary judgment motion and tossed North Dakota AG Wayne Stenehjem’s case against Purdue Pharma.12 He cited the fact that the company’s products had been approved by the FDA and questioned Stenehjem’s causation arguments: “The connection between the alleged misconduct and the prescription depends on multiple independent intervening events and actors. The state’s effort to hold one company to account for this entire complex public health issue oversimplifies the problem.” The decision was affirmed on appeal and is now being challenged in the North Dakota Supreme Court.

Conclusion: These solitary outliers stand in sharp contrast to the lengthening string of victories for the opioid plaintiffs. Momentum finally appears to be growing for addressing the underlying crisis, to be funded by significant payments to municipalities. Behind the scenes, discussions between the parties must surely be transpiring. Barring an early compromise, all eyes will be on Judge Polster’s courtroom in Cleveland less than two months from now.

Notes
4. Order Appointing Interim Class Counsel (MDL, Aug. 19, 2019).
10. In re Texas Opioid Litigation, no. 18-36587 (Dist. Ct. Harris Co.).
15. Dave Collins, Judge dismisses opioid crisis lawsuit against drugmakers AP, Jan. 9, 2019. https://www.apnews.com/7caee70d51f3e4bead124055f0c328
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