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Local Nuisance Ordinances: Penalizing the Victim, Undermining Communities?

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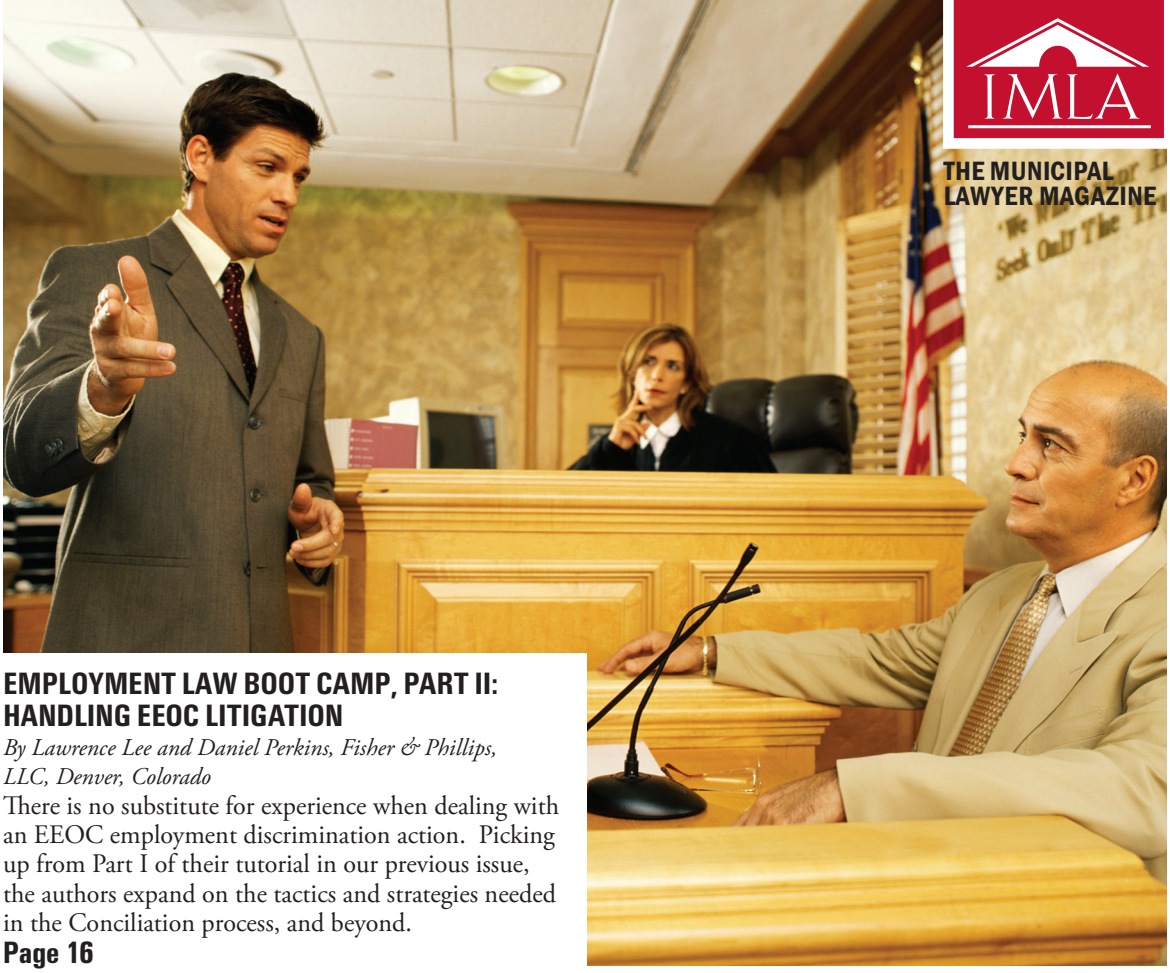

EMPLOYMENT LAW BOOT CAMP, PART II: HANDLING EEOC LITIGATION

By Lawrence Lee and Daniel Perkins, Fisher & Phillips, LLC, Denver, Colorado

There is no substitute for experience when dealing with an EEOC employment discrimination action. Picking up from Part I of their tutorial in our previous issue, the authors expand on the tactics and strategies needed in the Conciliation process, and beyond.

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LOCAL NUISANCE ORDINANCES: PENALIZING THE VICTIM, UNDERMINING COMMUNITIES?

By Sandra Park and Michaela Wallin, American Civil Liberties Union, New York, New York

Municipalities have the power to terminate leases where illegal activity recurs. But care must be taken so that "crime free housing ordinances" do not punish victims of crime or violate federal laws.

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MUSINGS ON MUNICIPAL ROADS

By Dan Crean, Crean Law Office, Pembroke, New Hampshire

Municipal maintenance of public thoroughfares can entail significant legal and financial consequences. It is critical to catalog the highways and byways for which your city is responsible—and to implement clear policies for repair and upkeep.

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EDITOR'S NOTE:

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EDITOR'S NOTE:

Dear Reader:

This issue of Municipal Lawyer leads with an article that may seem contentious. "Local Nuisance Ordinances: Penalizing the Victim, Undermining Communities?" was contributed by Sandra Parks and Michaela Wallin, both of the American Civil Liberties Union. They challenge municipalities to take a second look at the wording and application of nuisance housing ordinances, which sometimes produce unintended consequences. We think it is important to be aware of this critique and of the litigation that has already resulted on the subject.

We also provide continued insights on dealing with the EEOC in "Employment Law Boot Camp, Part II," courtesy of Larry Lee and Dan Perkins of Fisher & Phillips. In this chapter, they offer advice on the course of action if early negotiations fail and a suit is instituted.

Repeat contributor Dan Crean adds our third feature article-"Musings on Municipal Roads," which points out the importance of a municipality's knowing which are-and which are not-its roads and keeping them in proper order. His lead photo of a New Hampshire frost heave should be cooling as July approaches.

We offer a cornucopia of other knowledge: A problematic egg statute in California, the latest on the gun control dispute, and an analysis of the Federal Rules implications for government "experts." As always, we provide an update on IMLA's robust *amicus* activities and recent decisions of interest in Canada, this time originating from Quebec, Ontario, Saskatchewan and British Columbia.

Finally, we are pleased to bring to you a particularly entertaining and thoughtful ListServ article by Kelly Butler, City Attorney of Madison, Alabama. Picking right up where our long-time colleague Kelly Addy left off, she will no doubt strike a familiar chord with municipal lawyers everywhere.

Best regards-

IMLA Editorial Board

DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



IMLA members are involved in some of the most challenging and interesting legal issues of our time—First Amendment questions, environmental debates, law enforcement policies, taxation and finance, and many others.

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To Submit An Article, please contact the **Editor, Erich Eiselt, at eeiselt@imla.org** with a brief description of your topic.

Municipal Lawyer is published 6 times per year, and feature articles should be between 2,500 and 4,000 words in length.

Submitted articles are subject to review by IMLA staff, and IMLA reserves the right to edit articles (for style, clarity, length, etc.).

We look forward to hearing from you!

Questions? Please contact IMLA at info@imla.org.

LETTER FROM THE EDITOR

Professionalism in Times of Crisis

By Erich R. Eiselt, IMLA Assistant General Counsel and Editor

For the second time in three years, as our Mid-Year Conference was taking place in Washington DC, major events arose in other cities that focused the nation's attention on the role of public servants.

In May 2013, the Boston Marathon bombing shocked the country. Our collective support for Boston's first responders as they aided the fallen and pursued the perpetrators was unwavering. The aftermath of that terrible morning showed municipal workers at their best, calming the public and continuing to provide services while a manhunt played out.

Last month, news filtered through our 2015 Mid-Year Conference about spiraling civil unrest 30 miles to the north, as parts of Baltimore erupted in response to Freddie Gray's death following arrest and transport by police. This time, the national response to municipal government was slightly more nuanced. Law enforcement's critical responsibility in restoring the peace was unchallenged—but larger questions about government's role in the events and circumstances that aroused citizens to take to the streets were far more complicated.

These headlines, and many others around the country, remind us of the judgments and leadership that municipalities--and the IMLA members within them—are called upon to provide every day. As with many aspects of life, it is not in the mundane and day-to-day that one's skills and dedication are truly tested; it is in the unforeseen and extraordinary. Whether natural disasters like the cataclysmic weather patterns recently battering the Southwest or man-made violence destroying lives and neighborhoods, these crises require municipal governance at its best.

IMLA endeavors to further that goal, by promoting professional competence, transparency and respect for the rule of law. Our members enlighten one another about meeting these challenges, whether through the ListServ which we provide in conjunction with Municode, through our numerous webinars offered by leading experts, or at our conferences where formal and informal education occurs over a multi-day retreat. We have not hesitated to approach leading-edge issues, including police shootings, excessive force and qualified immunity. We bring to our stage not only domain experts from within our ranks but also participants whose viewpoints may be critical of local government policies, such as representatives from the Equal Employment Opportunity Commission, the Department of Labor, the Securities and Exchange Commission and the American Civil Liberties Union. As evidenced by our lead article, we aim to educate, and our membership is interested in that breadth of knowledge.

In that regard, we have been pleased to announce a special IMLA meeting next January in Havana, Cuba. Envisioned and instigated by IMLA's International Committee under the leadership of Ben Griffith, the Cuba trip will be an extraordinary opportunity for our own municipal attorneys to meet jurists, officials and everyday citizens in a society that has remained largely closed to Americans for more than 50 years.

Closer to home, our upcoming annual Conference in Las Vegas promises to be another excellent opportunity to enhance professional expertise and strengthen personal ties. We have already confirmed a superior slate of presenters from around the country to speak during our four-day convocation in early October. We hope you will consider joining your many IMLA colleagues who have already reserved their seats at the event.

As this month's ListServ guest contributor, Kelly Butler, City Attorney of Madison Alabama Attorney's office reminds us, the practice of municipal law is not always well understood or appreciated by our constituents. But acclaim has rarely been cited as the motivation for a career in municipal law.

It is more likely related to that defining "Moment" Kelly describes, when a municipal lawyer's judgment, experience and professionalism are called upon to protect and advance the community in exigent circumstances.

IMLA is honored to represent you and to help play a role in your service to community and country every day, and particularly in times of crisis. ML



Local Nuisance Ordinances: Penalizing the Victim, Undermining Communities?

By: Sandra Park and Michaela Wallin, American Civil Liberties Union



I. Introduction

On September 2, 2014, the Borough of Norristown, Pennsylvania approved an agreement to pay $495,000 to a tenant and her attorneys to settle a federal lawsuit challenging a local nuisance ordinance that penalized landlords or resulted in tenants' evictions when they requested or received police assistance at their homes.[1] Norristown also agreed to repeal the ordinance completely. The American Civil Liberties Union (ACLU), the ACLU of Pennsylvania, and the law firm of Pepper Hamilton LLP filed the suit in 2013 on behalf of a domestic violence victim who had faced eviction pursuant to the ordinance after requesting police protection from an abusive ex-boyfriend.[2]

Soon after, the Secretary of the U.S. Department of Housing & Urban Development (HUD) filed a separate Fair Housing Act (FHA) complaint against Norristown. That complaint resulted in a conciliation agreement requiring the Borough to engage in fair housing training and outreach and made it subject to monitoring, reporting, and recordkeeping requirements.[3]

The lawsuit against Norristown is one of a number of successful challenges against local nuisance ordinances – also known as crime-free ordinances or disorderly house laws – that penalize properties when they are the site of a certain number of calls to the police or instances of criminal or disorderly activity. Although they may aim to address community well-being and local crime, these ordinances can actually undermine public safety by interfering with the ability of residents, particularly victims of domestic and sexual violence, to seek emergency and police assistance. They also give rise to numerous legal concerns.

This article will explain the growing trend of local nuisance ordinances and their often unintended consequences on both individuals and public safety as a whole. It will then discuss the legal liability municipalities can face when enforcing nuisance ordinances, outlining recent successful challenges to these kinds of local laws. Finally, it reviews best practices for municipalities to ensure the housing security of domestic violence survivors, guard against violating individuals' legal rights, and pursue alternative responses to recurrent crime or disorderly activity in a community.

II. Nuisance Ordinances and their Unintended Consequences

Housing security and access to police assistance in an emergency are essential to a stable, productive life. For victims of domestic violence, these necessities can take on even more importance. However, many municipalities have enacted laws that penalize tenants and property owners based on police response or criminal activity occurring on a property that inhibit individuals from calling the police in an emergency.

These ordinances typically identify certain conditions that make a property a "nuisance," including conduct like disorderly conduct, assault, harassment, and stalking. While some single out domestic violence specifically for penalty, others are broad and include any violation that occurs at the home. Still other ordinances include behavior that is vaguely defined, such as "suffering or permitting the premises to become disorderly, including suffering or permitting fighting," "disruptive conduct," or behavior "that detrimentally affects the quiet and reasonable use and enjoyment" of neighboring property.[5]

Troublingly, most of these nuisance ordinances apply regardless of whether the resident was a victim of the alleged

nuisance conduct or had no way of controlling it. The mechanisms by which these ordinances identify nuisance properties differ – some impose penalties on the first instance of nuisance activity, others adopt a three-strike method, while still others use a points-based approach, assigning different numbers of points to different types of conduct and a total point amount upon which a property will be cited. However, upon reaching an ordinance's given threshold, the result is generally the same. The landlord or property owner is given a choice: either "abate" the nuisance or face penalties that can include fines, revocation of required licenses, property forfeiture, or even imprisonment. Landlords are thus pressured or even required to evict tenants after multiple police calls have been made to their apartment, even if the tenants have not engaged in criminal activity

Characteristics of Local Laws That Threaten the Safety of Residents

- Defining a nuisance as any situation where an occupant, guest or invitee commits criminal activities, or engages in disorderly conduct on the premises, regardless of whether the tenant was the victim of that conduct or could not control it.
- Defining nuisances to include crimes that are commonly associated with domestic violence, such as assault, harassment, stalking, and sexual misconduct.
- Creating a point system, three-strike rule, or other mechanism by which tenants or landlords are penalized after multiple instances of "criminal activity" or calls to the police.
- Defining triggering activity based on arrests and/or police investigations.
- Failing to give residents notice and an opportunity to explain why a local law should not be enforced. (Note: this list is not exhaustive)

These laws end up hurting residents who need emergency assistance and crime victims, especially domestic violence survivors and other vulnerable communities. In many communities, calls regarding domestic violence make up the largest category of calls a police department receives.[6] As a result, local nuisance laws have been found to cite incidents of domestic violence far more frequently than the offenses they are typically intended to target, such as those related to drugs, property damage, and weapons.[7] Upon receipt of a citation or even a warning, landlords usually are required or pressured to evict domestic violence victims who request police protection, for this is the only sure way to "abate" the nuisance as required by the local ordinance.

In addition to their devastating impact on victims of crime and domestic violence victims in particular, nuisance ordinances can disproportionately impact and be disparately enforced against persons with mental disabilities and communities of color. Persons with disabilities may need emergency medical assistance with some frequency, risking eviction under ordinances that include any 911 call as the basis for citation. The inclusion of disorderly conduct as a nuisance offense can also implicate law enforcement's interaction with persons having psychiatric disabilities and can undermine the housing security of this population. Moreover, a study by scholars at Harvard and Columbia found that a local nuisance ordinance was disproportionately enforced against communities of color, compared to majority-white communities.

African- American women can be particularly impacted by these nuisance ordinances, as they may be subject to disproportionate enforcement on the basis of both race and domestic violence.[10]

By imposing penalties based on calls to the police, these laws deter the reporting of crime and place crime victims and those needing emergency assistance in heightened danger. This was the case for a domestic violence survivor in East Rochester, New York when police warned her that, pursuant to such an ordinance, her third call for help would result in eviction. Her ex- boyfriend, who was aware of the ordinance, continued to harass and stalk her with impunity.[11] The victim would not call the police because she feared losing the home she provided for herself and her children.[12] Stripped of any real right to police protection, this family was placed in ongoing jeopardy simply because the tenant was a victim—both of her abuser and the ordinance. This chilling effect can also extend to individuals facing other types of crimes such as larceny and assault unrelated to domestic violence. They have even been enforced against individuals who called 911 seeking help in a medical emergency.

Municipalities across the country have turned to nuisance ordinances as the "quick fix" for addressing crime in their communities. Ironically, there is no evidence that penalizing entire households for calls to the police or for activity on the property does anything to control crime. Instead, there is well-documented evidence that these policies impose penalties on innocent people and discourage calls to the police, undermining public safety.

In addition to impacting public safety, increased housing insecurity for vulnerable communities like domestic violence survivors and persons with mental disabilities can cost municipalities directly. Inability to maintain safe and secure homes can exacerbate the challenges that these individuals may already face. This can result in homelessness, increased need for social services, and inability to work – all of which have ripple effects on the local economy. Thus, when municipalities take proactive measures to ensure that efforts to address crime do not result in housing insecurity or limit access to police assistance, they benefit not only survivors but also entire communities.

III. Legal Liability for Municipalities that Enact and Enforce Nuisance Laws

Municipalities put themselves at risk of liability whenever they enforce a law that penalizes tenants and/or property owners for police calls. This can implicate federal laws which prohibit housing discrimination and establish affirmative obligations to promote access to safe and affordable housing. Enforcement of nuisance ordinances may also violate the First Amendment right to petition the government for a redress of grievances, the Fourteenth Amendment Equal Protection and Due Process guarantees, and the Fourth Amendment prohibition against unlawful seizure.

Finally, states are increasingly passing legislation that affirmatively protects individuals' rights to seek police or emergency assistance without penalty.

a. Fair Housing Protections and Requirements

Nuisance ordinances are very likely to

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conflict with two federal laws requiring nondiscrimination in housing: the FHA and the Violence Against Women Act (VAWA). Municipalities can also violate federal law when they fail to affirmatively further fair housing as required of all federal housing fund recipients.

i. The Fair Housing Act

The FHA prohibits housing discrimination based upon race, color, religion, sex, familial status, national origin, or disability, whether the discrimination is intentional or arises due to disparate enforcement or disparate impact on protected classes.

Domestic violence survivors may have claims under the FHA when they are evicted, denied housing, or otherwise discriminated against due to the violence they have experienced.[15] HUD has stated that discrimination against domestic violence survivors can constitute sex discrimination, as approximately four in five domestic violence survivors are women.[16] Even when discrimination is not explicit or intentional, policies that are disproportionately enforced against or have a disparate impact on domestic violence survivors will often constitute illegal gender discrimination.[17]

Municipalities can incur liability under the FHA for enacting and enforcing nuisance ordinances that explicitly list domestic violence as a nuisance activity or that are otherwise based on gender stereotypes about abused women.[18] Municipalities may be liable for disparate treatment when they enforce a nuisance ordinance more aggressively against incidents of domestic violence or incidents involving other protected classes.[19] FHA violations can also arise regardless of intent when a nuisance ordinance has a disparate impact on domestic violence survivors, minority communities, persons with disabilities, and other protected classes.[20]

ii. The FHA's Affirmatively Furthering Fair Housing (AFFH) Requirement

In addition to guarding against discrimination, municipalities may be obligated to take proactive steps to promote fair housing for domestic violence survivors.[21] This is mandated by the FHA's requirement that federally-funded housing programs be administered in a manner which "affirmatively furthers" FHA policies.[22] Under this "affirmatively furthering fair housing" (AFFH) obligation, municipalities and other affordable housing administrators must actively take steps to assure that affordable housing is "fully available to all residents of the community."[23] Municipalities are subject to the AFFH requirement if they receive certain types of federal funding, such as funding for public housing, community development block grants, or other funding for housing subsidies.

Domestic violence survivors may have claims under the FHA when they are evicted, denied housing, or otherwise discriminated against due to the violence they have experienced. HUD has stated that discrimination against domestic violence survivors can constitute sex discrimination, as approximately four in five domestic violence survivors are women.

Recipients of federal housing funds are required to assess impediments to fair housing and take proactive measures to overcome their effects.[24] Because approximately four in five domestic violence survivors are women,[25] affirmatively furthering equal access to housing on the basis of gender requires municipalities to consider their policies' impact on domestic violence survivors. Municipalities must analyze their fair housing environment, identify fair housing issues and their causes, set and prioritize fair housing goals, and plan meaningful actions to affirmatively further fair housing.[26]

Municipalities that affirm their progress in this area while simultaneously enforcing policies that imperil the housing security of domestic violence victims risk violating their AFFH obligations. If a federally-funded housing program refuses to comply with AFFH requirements, the federal government may file suit to require the program's cooperation,[27] or may withhold funds from the noncompliant entity.[28] The requirement to affirmatively further fair housing also has been the basis for complaints by private citizens and organizations under the FHA.[29] As such, it is important for municipalities to investigate the unintended consequences of policies like nuisance ordinances that, while not targeting domestic violence survivors and/or protected classes on their face, end up hurting them.[30]

iii. The Violence Against Women Act

VAWA is a federal law that provides affirmative protections for victims of domestic violence, sexual assault, dating violence, and stalking. The law specifically addresses the housing rights and needs of survivors.[31] VAWA provides that federally-funded housing providers (including municipalities[32] and others) may not deny assistance to, terminate from participation, or evict an applicant or tenant on the basis that he or she has been a victim of domestic violence, dating violence, sexual assault, or stalking.[33] Additionally, survivors may not be evicted from their homes based on criminal activity in or near the home if that criminal activity directly relates to domestic violence, dating violence, sexual assault, or stalking.

Municipal policies that direct private landlords to evict based on criminal and other activity on the premises may conflict with VAWA when enforced against domestic violence victims in federally subsidized housing. Even when a municipality's nuisance ordinance does not explicitly require eviction, these laws can pressure landlords to evict tenants who are the target of abuse. In doing so, these laws put landlords in the middle of two legal mandates: either they violate federal law by evicting a tenant on the basis of violence against her or they violate the local ordinance by not evicting the tenant, facing steep penalties.

b. Constitutional Rights and Protections

In addition to fair housing violations that can arise from nuisance ordinance

enforcement, municipalities have been subject to claims alleging violations of the First Amendment right to petition the government, Fourteenth Amendment guarantees to Due Process, and Fourth Amendment protections against unlawful search and seizure.

Individuals have a First Amendment right to petition the government. Several courts have interpreted this right to protect communications to law enforcement agencies, which in turn extends to (1) reporting physical assault, (2) reporting criminal activity, and (3) filing a complaint with law enforcement.[35] Nuisance laws may chill First Amendment rights when they impose or threaten penalties for tenants who need police aid. The impact on domestic violence survivors is significant because domestic violence is "the single largest category of calls received by police," amounting to up to 50 percent of all such calls.[36] This can have dire, even life-threatening, consequences for tenants who need police assistance. For example, in Norristown, Pennsylvania, a survivor of domestic violence repeatedly resisted calling the police after learning of the ordinance, begging her neighbors not to call, even when she had been stabbed in the neck by her abuser.

Enforcement of nuisance ordinances may also violate Fourteenth Amendment Due Process protections.[37] Nuisance ordinances frequently fail to provide notice of or opportunity to challenge a nuisance determination to all individuals who are impacted by a potential citation. Many provide no notice at all or only notify property owners or landlords that a property risks penalty.[38] As a result, tenants may receive no notice that their home could be in jeopardy and no indication that their activities have been deemed a nuisance.

Many nuisance ordinances also have little or no process in which tenants can contest a given strike or appeal a citation.[39] Tenants then have no opportunity to explain that they were the victims of an alleged nuisance activity or had no ability to control it. When this is the case, landlords are actually incentivized to evict tenants after a single incident of alleged nuisance, as this is the only sure way to avoid future penalty.

Nuisance ordinances may also implicate Fourth Amendment protections against unlawful search and seizure. Nuisance laws frequently authorize municipalities to penalize properties by condemning them or otherwise prohibiting use of the property for a certain time frame. They may also require property inspections. These provisions can violate constitutional prohibitions against unreasonable search and seizure when they empower municipalities to take action without giving tenants sufficient notice or process.[40]

c. State Laws

State legislatures have increasingly taken notice of the negative impact of local nuisance ordinances. Several states have enacted or introduced legislation that recognizes an individual's right to request police and emergency services or prohibits nuisance ordinances from being enforced against victims of crime. Minnesota and Pennsylvania have enacted laws that expressly prohibit municipalities from imposing penalties on tenants who exercise this right. Similar bills are pending in New York, Illinois, and Iowa.[42]

IV. Recent Challenges

There have been a number of successful challenges to local nuisance ordinances by private individuals and the federal government. These challenges have resulted in settlement and conciliation agreements requiring municipalities to pay significant monetary damages, repeal or amend the laws at issue, and provide additional equitable relief.

a. Federal Lawsuits

As referenced at the beginning of this article, in April 2013, the ACLU Women's Rights Project, the ACLU of Pennsylvania, and the law firm of Pepper Hamilton LLP filed a lawsuit against Norristown, Pennsylvania on behalf of a domestic violence victim who had faced eviction from her home after requesting police protection from an abusive ex-boyfriend. The plaintiff's claims included violations of the FHA, VAWA, the First Amendment, Due Process guarantees, and similar state protections.[43] After the plaintiff defeated a motion to dismiss, the parties settled, with Norristown agreeing to pay $495,000 to the plaintiff for damages and attorneys' fees.[44] Norristown repealed the ordinance and is obligated not to pass a similar measure in the future.[45]

Following this litigation, at least two other municipalities in Pennsylvania have been the subject of lawsuits. In Blakely, Pennsylvania, two cases were filed on behalf of landlords and impacted tenants, challenging enforcement of the city's nuisance ordinance against victims of domestic violence.[46] These lawsuits were settled in February 2015, with Blakely rescinding the ordinance and paying undisclosed compensatory damages and attorneys' fees.[47] The ACLU of Pennsylvania has another lawsuit pending against the city of Wilkes-Barre. This case alleges violations of the due process rights of landlords and tenants whose rental properties were seized by the city under an ordinance that authorizes officials to evict tenants immediately and prevent landlords from renting a property for six months if anyone is suspected of illegal activity on the premises.[48]

Two other federal lawsuits against similar ordinances in New York have settled favorably for the victims of crime. East Rochester, New York settled claims brought by two victims of domestic violence who alleged that, despite facing repeated violence from their abusers, they were chilled from calling the police for fear of being evicted under a local nuisance ordinance. East Rochester amended the law to exempt crime victims from penalty and paid the plaintiffs $100,000. Hornell, New York also settled a federal challenge to its ordinance that was brought by a survivor of domestic violence, amending the law to exempt victims of similar abuse and providing additional notice and process for impacted tenants.[50]

b. Federal Executive Action

HUD has expressly recognized nuisance ordinances as a fair housing issue, pursuing action in two states against municipalities whose local ordinances unlawfully discriminate against victims of domestic violence.[51]

Following the lawsuit in Norristown, the Secretary of HUD instituted a complaint against the Borough, alleging that its enforcement of the local ordinance amounted to discrim-

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ination on the basis of sex under the FHA.52 The Department entered a conciliation agreement with Norristown in September 2014, which required the Borough to engage in fair housing training, inform residents that the ordinance had been repealed and encourage them to call the police when needed, and comply with monitoring, reporting, and recordkeeping requirements.[53]

Shortly thereafter, in October 2014, HUD filed its second Secretary-initiated complaint regarding a local nuisance ordinance. The complaint alleged that Berlin, New Hampshire unlawfully discriminated against women by enacting and enforcing a nuisance ordinance that, while not explicitly targeting domestic violence, had a discriminatory impact on women. HUD subsequently entered a conciliation agreement with Berlin in January 2015, requiring that they amend their ordinance to address its potential impact on victims of domestic violence and engage in similar training and outreach as that required of Norristown.[54]

This recent activity documents an ongoing interest by HUD in the issue. Municipalities should note that HUD's jurisdiction extends to administration of AFFH requirements – and entities found in violation of their obligations might lose federal housing funds and/or be subject to legal action as a result.

V. Recommended Practices

To avoid costly legal consequences, municipalities should examine their municipal codes and eliminate nuisance laws that may have a discriminatory impact on protected classes. They should pursue more targeted approaches to addressing public safety concerns that avoid unintended consequences for domestic violence survivors, victims of crime, and other protected groups. The following are recommended practices for addressing municipalities' concerns about community wellbeing and local crime without punishing crime victims:

a. Assess Impact of Local Nuisance Ordinances

For municipalities with ordinances that are similar to those described here, it is essential to determine whether they are effectively targeting the problems that motivated their enforcement and assess the impact of these laws on their communities. Some ordinances have been adopted in response to one community member's complaints about a disruptive neighbor or establishment, extending enforcement to the entire community without an assessment of need. Others are adopted to address drug traffic in a community but include every crime in the federal and state code as nuisance offenses. Many more are adopted without an identified local problem, simply finding an appeal in the general concept of a ban on nuisance activity and the hypothesized reduction in crime and municipal cost.[55]

When closely analyzed, local ordinances have been revealed to have unintended consequences that far exceed the targeted crimes or neighborhood problems they are aimed to reduce. For example, a study of a nuisance ordinance in Milwaukee, Wisconsin found that domestic violence was the third most cited nuisance activity, far outpacing the offenses the ordinance was purported to target, such as those related to drugs, property damage, and weapons.[56] Another study of a points-based ordinance in Binghamton, New York found that incidents of domestic violence on average received more points than any other type of incident cited under the ordinance.[57]

Because these laws are structured to sweep up a large array of alleged nuisance behavior and typically have no exception for victims of crime or for requiring other emergency assistance, they are extremely likely to have unintended consequences going beyond the reasonable goals of public safety and crime reduction. Even where there may not be evidence of direct impact on protected classes, these ordinances can have a chilling effect on individuals' willingness or ability to report crime and can encourage landlords to discriminate against individuals they perceive as likely to be the subject of these laws. This undermines the very goals advanced by proponents of nuisance ordinances.

b. Pursue Targeted Implementation of Existing Law

Instead of a one-size-fits-all approach, municipalities should pursue targeted implementation of existing law. Municipalities typically already have sufficient tools to address the problems that are most often cited as the goals of nuisance ordinances, such as drugs, noise, and property damage. As compared to existing zoning and penal laws, nuisance ordinances can be inefficient and unwieldy to enforce, and often do not afford adequate due process. Enforcement of nuisance ordinances can require many more resources than lawmakers initially realize.

Merely adding a domestic violence exception to nuisance ordinances does not effectively address the concerns of overbroad enforcement. Many incidents that arise from domestic violence may not appear that way to first responders, especially when abusers intimidate victims from reporting what happened. For example, it is common during domestic violence incidents for a victim to call 911 and hang up, due to retaliation by their abuser. Police sent to the scene may be unable to determine the circumstances that led to the call, and may even characterize the call as frivolous. The ordinance also may encourage landlords to take inappropriate actions against victims of domestic violence before a police response to the home. Moreover, an ordinance that penalizes calls to the police continues to raise significant First Amendment concerns. Every resident in need of police or emergency assistance should be able to reach out for it, regardless of the criminal activity at issue.

When thinking through the changes that would be required for an ordinance to avoid legal liability under the many claims listed above, a number of municipalities have determined that their community is better served by a repeal of the ordinance or by declining to enact one in the first place.[58] This leaves them able to

pursue the same objectives through more targeted means, while ensuring the continued availability of police assistance to those who need it.

c. Protect Crime Victims' Access to Effective Police Assistance

In addition to ensuring that they are not chilling crime victims' right to seek police assistance (or penalizing them when they do), municipalities can pursue practices to protect crime victims' access to police assistance. Municipalities should examine their policies to ensure that police responses to domestic violence calls do not discourage victims from summoning assistance. This may require oversight to ensure that officers do not engage in discriminatory practices and understand how to respond to domestic violence calls effectively and without bias.[59] Municipalities should also scrutinize the policies of any federally-funded housing they operate to ensure that, among other topics, the policies on breach of lease and review of prospective tenants do not permit negative housing action against domestic violence victims. Municipalities may also wish to incorporate discussion of domestic violence-based discrimination and First Amendment protections into training for private landlords. Finally, municipalities should consider passing laws that affirm crime victims' right to seek police assistance, and that create an affirmative defense to proceedings penalizing tenants and landlords that arise from a tenant's status as a victim of domestic violence or requests for police assistance. These affirmative practices and others are outlined in the ACLU Women's Rights Project report, Safe Homes, Safe Communities: A Guide for Local Leaders on Domestic Violence and Fair Housing.[60]

VI. Conclusion

Where municipalities are actively involved in preventing housing discrimination on the basis of police calls, they will protect the housing rights of crime victims (and domestic violence victims in particular). They will also avoid costly legal penalties, both for themselves and for local landlords. Furthermore,

In addition to ensuring that they are not chilling crime victims' right to seek police assistance (or penalizing them when they do), municipalities can pursue practices to protect crime victims' access to police assistance.

policies ensuring that domestic violence survivors--and all crime victims--receive protection, not punishment, if they contact the police will lead to greater reporting, more productive relationships with law enforcement, and increased public safety overall.

(For more information on this issue, please refer to www.aclu.org/notanuisance.)

1. Release and Settlement Agreement, Briggs v. Borough of Norristown, No. 2:13- cv-02191-ER (E.D. Pa. Sep. 18, 2014), *available* at https://www.aclu.org/womens-rights/briggs-v-borough-norristown-et-al.
2. Sandra Park, *Shut Up or Get Out: PA City Punishes Domestic Violence Victims Who Call the Police*, Blog of Rights, American Civil Liberties Union (Apr. 24, 2013, 3:24 PM), https://www.aclu.org/blog/womens-rights-lgbt-rights-racialjustice-criminal-law-reform/shut-or-get-out-pa-city-punishes.
3. Housing Discrimination Complaint, Assistant Sec'y for Fair Hous. & Equal Opportunity v. Borough of Norristown, PA, No. 03-13-0277-8 (Dep't of Hous. & Urban Dev., Jun. 5, 2013) [hereinafter Norristown HUD Complaint], *available at* https://www.aclu.org/sites/default/files/assets/hud_complaint.pdf; Conciliation Agreement between Assistant Sec'y of the Office of Fair Housing and Equal Opportunity and Municipality of Norristown, Nos. 03-13-0277-8 and 03-13-0277-9 (Dep't of Hous. & Urban Dev., Sept. 17, 2014) [hereinafter Norristown Conciliation Agreement], *available at* https://www.aclu.org/sites/default/files/assets/hud_norristown_conciliation_agreement_2014_09_18.pdf.
4. *See* Emily Werth, Sargent Shriver Nat'l Ctr. on Poverty Law, *The Cost of Being Crime Free: Legal and Free Rental Housing and Nuisance Property Ordinances* 5-20 (Aug. 2013), *available at* http://povertylaw.org/sites/default/files/files/housing-justice/cost-of-being-crime-free.pdf.
5. *See*, e.g., Matthew Desmond & Nicol Valdez, Am. Sociological Rev. Online Supplement to Article in American So-

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Musings on Municipal Roads

By: Daniel D. Crean, Crean Law Office



As this article is being written, winter, at long last, has finally yielded to spring in the Northeast, and a New Hampshire municipal lawyer's thoughts inevitably turn to municipal roads, mud, and frost heaves.[1] So, too, do the thoughts of New Hampshire municipal *road agents*. ("Road agent" is New Hampshire's and New England's quaint term for the person in charge of municipal highway maintenance. Though some taxpayers might dispute the notion, the term does not refer to a highwayman, i.e., a thief and brigand who preys on those traveling the roadways). Frost heaves are such a regular component of the spring landscape here in the Granite State that local theaters host *Frost Heaves,* a show featuring "Live comedy, music, and assorted Yankee nonsense from the most underappreciated town in New Hampshire!"[2]

The frost heave: winter's gift to spring driving.

Not every municipality across the country experiences the joys of frost heaves or mud season. Yet, every municipality inevitably faces concerns with the condition and maintenance of highways, and potential liability to users. A thoroughly unscientific study (aka an Internet search) proffers one main conclusion about local roads: sometimes municipalities are held liable for incidents occurring on their roads and sometimes they are not.

Immunity and liability vary not only from jurisdiction to jurisdiction, but also with respect to causation (e.g., inclement weather, comparative or contributory negligence, warnings, postings, and discretionary function). The National Conference of State Legislatures has a webpage discussing sovereign immunity and tort liability,[3] it reviews matters such as damage caps and punitive or exemplary damages. Though the webpage focuses primarily on state liability, it does provide information and perspective on local governments.

Municipal Liability: Knowledge and Culpability. Flippant as the above comment on municipal liability or immunity might seem, it would appear at least to be a reasonable description regarding the general state of local government responsibility to users of roads. This article seeks to provide some practical (and a little legal) guidance that might assist in protecting your municipal treasury from claims relating to highway defects. The term "defect" – or any of its multiple variants (e.g., "insufficiency") – is significant, as most jurisdictions generally hold that local government liability is premised upon some degree of culpability based on a defect in the road.[4] That means that liability associated with the duty to maintain roads is neither barred by application of sovereign immunity nor imposed strictly as a guarantor of the safety of travelers.[5]

Liability will arise under what appear to be fairly common requirements:

Municipal ownership of (or responsibility for) the road. Municipalities are generally not responsible for accidents or damages occurring on private roads or roads maintained by another jurisdiction (e.g., another municipality, a county, or the state.)

As with any general proposition, exceptions exist. Several years ago the limb of a tree located on state college property in New Hampshire fell onto a vehicle being operated on a state-maintained road, resulting in severe injuries. Under applicable law, the town in which this occurred would have no share of liability; but here the town had been designated a "Tree City" and had recently inspected the tree without noting its dangerous condition.

Road classification systems may free municipalities from responsibility for maintaining particular classes of roads. In New Hampshire, the state is responsible for class I, 2, and 3 roads. Municipalities are responsible for class 4 and 5 highways. Class 6 roads are deemed public, but municipalities have no duty to maintain them.

But as a small town north of Canterbury, New Hampshire learned, municipal immunity associated with a class 6 road is not immutable. There, a class 6 road crossed over the Merrimack River. The bridge was in a hazardous condition. The town selectmen, seeking to protect travelers from falling into the river, erected a metal bar across the road. Sure enough, a motorcyclist riding at night ran into the bar and suffered injuries.

The town pled immunity under the class 6 road statute, but the New Hampshire Supreme Court allowed the suit to go forward, finding that the town's actions were not encompassed solely by the class 6 road categorization. Instead, the motorcyclist was permitted to bring an action because of allegedly tortious municipal conduct in constructing and/or maintaining a barrier to a discontinued bridge.[6]

Notice of defects. Statutes may require that the municipality have notice of a defect or insufficiency as a necessary condition to a finding of negligence or culpability. Receipt of notice alone may not trigger liability as-- consistent with the avoidance of strict liability--a municipality ought to have some opportunity to correct or at least post some form of warning of a defect. Some statutes may require actual notice and may define the officials to whom notice must be provided.

New Hampshire even requires the notice to be in writing – yet, the statute also states that municipalities are deemed to have notice if "(t)he selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge." [NHRSA 231:92, I (b).] One difficulty posed by these actual notice requirements is proving that a designated official did not observe a defect, particularly one that is reasonably obvious. (To address that situation, this article includes a suggested policy to establish reporting requirements and a system for docketing and responding to both formal written notices and actual, observed defects).

Time to review and cure. A feature of this type of liability is that a municipality ought to have some time to review a claimed defect and that, practically, it cannot cure the defect immediately. The claimed inability to act may be for budgetary, weather-related, or lack of personnel, or because action may be complicated or require appropriations or engineering work. The ability to defer correction, though, is accompanied by a requirement to act promptly, at least to the extent of posting warnings or taking some other protective action.

Receipt of notice alone may not trigger liability as-- consistent with the avoidance of strict liability--a municipality ought to have some opportunity to correct or at least post some form of warning of a defect.

Possible Municipal Lawyer Preventive Maintenance Practices. Over the course of some 35-plus years of municipal lawyering, including serving as a municipal official in various posts, I have encountered situations in which a lack of knowledge about municipal roads and records affected exposure to liability. The following list of questions may not apply to all municipalities, but they do cover a number of instances in which knowing the answers may serve as a one means of "preventive maintenance."

1. Do You Know Where Your Roads Are?
- –Identification of roads by classification or other factors:
  - Extent, width, length?
  - Verification of status[7]?
- –Location of road rights-of-way:
  - Maps or as-built plans;
  - Is a defect located in the road or somewhere else?
- –When was the last time roads were mapped or catalogued?

2. Have You Received "Notice" of a Defect Without Knowing It?
- –It's not just the highway work crew that is "charged" with noticing AND reporting highway defects (and potential defects)!

3.Have You Assumed Liability for Roads (or Other Areas) that Are Not Public?
- –If so, are they "roads" or "premises" (or some other term), liability for which may be governed by statutes other than road laws?
- –Are these properties "paved with gold" for plaintiffs?

4. How Does the Public Know if a Road Is Municipally Maintained?
- –Can they tell by a road sign?
- –Do they need to look at maps in municipal office or website?
- –Do they need a crystal ball?
- –If there was a sign, is it still there? – Can it still be seen?

5. Are Officials/Boards/Employees Singing the Same Tune?
- –Do planning board, zoning board, governing board, road agent, and other municipal "agents" or "representatives" (official or not):
  - Know and agree on road status and maintenance?
  - Know what to say when asked about status or maintenance?
- –Are official statements consistent? Do you know if they are consistent?

6. What Is Done with Notices of Defects?
- –Do all people charged with notice know what to do when they see something or have something reported to them?
- –Do individuals who are not statutory recipients of notice know what to do if somebody tells them about a problem?
- –Is there a system for follow-up?
- –Is there a system to follow up on the follow-up?
- –What is done with records? [You do keep records, right?]

7. Is it Appropriate to Restrict Road Use by Any Types of Vehicles – Seasonally or Year-Round? If So, Do Municipal Officials Know:
- If it can be done?
- Who does it?
- How is it done? Are there studies required?
- Who is notified?
- What gets posted?
- How is the restriction changed or removed?

8. How Do "New" Roads Get Created?
- –By accident or design?
- –When does a road shown on a

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Municipal Roads Cont'd from page 13

plat approved by a planning board become a public road – a municipal road – a maintained road?
–Does everyone know the process?

Policy and Practice Considerations. In a state with exposure to liability for municipal roads, procedures that set forth municipal practices in light of existing capabilities, particularly in inclement weather conditions, can create some insulation from, or a defense to, claims. In those states in which a notice of insufficiency may trigger liability, a degree of protection may be created by adopting and using policies to establish reporting and tracking procedures for handling and responding to such notices.

Even in states where notice is not a key component in liability, these types of procedures may assist in preventing an accident or damage or injury – which, after all, is a goal all municipalities and municipal attorneys share.

The following policies are premised upon New Hampshire laws which turn on some form of notice being given as a predicate to liability (and, it is hoped, offer some insights about other municipal protocols).

Sample Policy #1. Winter and Inclement Weather Policy and Priorities. Pursuant to RSA 231:92-a, the Board of Selectmen hereby establishes this policy and procedure for winter and inclement weather road maintenance.

Part A: Policy Objectives.

1. Objective. The Town seeks to provide timely, efficient and cost-effective winter maintenance, snow removal, and ice control on public highways, bridges and sidewalks under its jurisdiction for the safety and benefit of residents and the general motoring and pedestrian public.

2. Procedure. The objective stated in Section 1 may be achieved by implementation and execution of the procedures and tasks outlined in Part B, the Town's Winter Operations Standard Snow Removal and Ice Control Procedures. *[Due to many variables that are inherent in New England weather, each storm or weather event may require different efforts or emphases on maintenance tasks which, together, determine the overall winter maintenance, snow removal or ice control strategies]*

In a state with exposure to liability for municipal roads, procedures that set forth municipal practices in light of existing capabilities, particularly in inclement weather conditions, can create some insulation from, or a defense to, claims.

3. Level of Service. It is not reasonably possible to maintain snow- and ice-free roads or sidewalks during a storm. The Town intends to utilize reasonable and feasible effort, within the means available, to provide practical, safe use of municipal facilities during and after winter storms.

(A) As a general policy, the Town will commence snow removal operations upon accumulations of _____ inches of snowfall. The Road Agent may, at his or her discretion, based upon weather information reports or prevailing conditions, elect to not commence snow removal until greater or lesser amounts have accumulated.

(B) Snow removal or road or sidewalk treatment operations may be suspended at any time when continuing operations would pose a hazard to persons or property.

(C) Pre-treatment and ice control may be implemented prior to, during, or after a storm, as determined to be appropriate. Treatment chemicals vary in effectiveness with temperature and will be applied as conditions warrant.

(D) Sidewalk snow clearance will be conducted as soon as practicable, subject to availability of personnel and equipment. The need to maintain safe roadways will generally take priority. The sidewalks which are to be cleared are those located at _____. Property owners may assist the Town in sidewalk safety by clearing snow from sidewalks in front of their properties, provided that the snow so removed is not placed in the streets. *[Note: Any provisions of Part B (operating procedures) concerning sidewalks and priority of treatment need to be consistent with this policy statement.]*

4. Direction. The Road Agent, or the Road Agent's designee, shall direct all winter maintenance activities for the Town.

5. Implementation. This policy, including the standard operating procedures set forth in Part B, is intended to serve as the normal procedure for winter maintenance, snow removal and ice control for the Town. One or more of the following events or circumstances, (among other factors) which may delay or prevent the implementation of this policy, may affect all or any part of normal operating procedures:
–Equipment Breakdown
–Snow Accumulation in Excess of One Inch per Hour
–Freezing Rain or Other Icing Conditions
–Traffic Congestion
–Emergencies
–Personnel Illness
–Other Events Beyond the Reasonable Control of the Town

6. Notice. This policy may be posted in appropriate public places in the Town as determined by the Selectmen. Residents are encouraged to familiarize themselves with this policy as it describes conditions that one might expect to encounter before, during and after a winter storm event.

*[Part B: **Operating Procedures** is omitted from this article as it would state specific priorities, available equipment and related matters for individual communities.]*

Sample #2. Reporting, Prevention and Notification Policy Sample.
[Note: Adoption of a policy such as this may demonstrate that the municipality is undertaking reasonable preventive practices. Even if a policy is not adopted, it is recommended that a municipality undertake actions as suggested in this sample policy. A policy is preferred as this may invoke "discretionary function immunity."]

Municipal Road and Sidewalk Liability: Avoiding or Lessening Liability through Preventive Policies

As part of the obligations of the Town to carry out its responsibilities and duties of maintaining class V (and IV) roads

and public sidewalks in accordance with RSA 231:90 - 231:93, the (Council/ Board of Selectmen/Manager/Board of Commissioners) adopts this policy.

1. Purpose and Intent. The New Hampshire Legislature has enacted laws to specify conditions under which a municipality may be held liable for insufficiencies in highways and sidewalks which it must maintain. This policy adopts procedures seeking to facilitate compliance with the law and to carry out obligations in a reasonable and meaningful way within the limits of available resources.

2. General Standards. The Town will make reasonable attempts to keep its class V (and IV) roads and public sidewalks free from insufficiencies as defined by RSA 231:90, II. Because of the nature of the municipality and the number of miles of maintained roads and sidewalks, the Town cannot practically assure that all roads and sidewalks will be safe and free from defects of all kinds at all times. Some roads are "rural" roads that are often unpaved and "rough." *[Describe sidewalks, if appropriate].* While the Town will make reasonable efforts to keep roads safely passable by normal passenger vehicles traveling at safe speeds under then-existing conditions and sidewalks safely usable by prudent pedestrians, operators of motor vehicles and pedestrians are required to exercise due caution and common sense to prevent injury to persons (including themselves) and damage to property.

3. Road Classification. To assist operators in safely using roads, the Road Agent, in cooperation with the (Council/Selectmen/ Manager/ Commissioners), shall inspect and review the existing Municipal road system.

(A) Roads shall be classified according to the following standards:

- Thoroughfares
- Local service roads
- Rural or scenic roads
- Limited use roads
- Roads closed to passenger vehicles.

(B) The classification of a road under paragraph (A) shall not be deemed a guarantee that the road is sufficient at any given time for use as indicated nor that the road will be maintained to any given standard. Instead, the classification is merely an indication of the general quality of the road and the type of maintenance it usually receives.

(C) The classification of existing roads shall be completed by ___, 20__. Upon completion of the classification, the Selectmen/Municipality Manager shall determine the feasibility and wisdom of posting all or a portion of the road system to indicate road classifications as so designated. Classification shall be updated as frequently as practicable.

(D) As part of this review, the Road Agent shall attempt to post any roads or sidewalks or segments thereof which are observed to contain potential safety hazards that are not reasonably discoverable or avoidable by a prudent user. The (governing board) may determine if it is necessary to take further action beyond posting.

4. Notices of Insufficiency. This section describes usual procedures for handling notices of insufficiency in accordance with RSA 231:90 - :92. These procedures supplement the municipality's inclement weather policy adopted pursuant to RSA 231:92-a and are not intended to replace or impose a higher standard of care than that stated in said policy. Only a notice which conforms in all respects to RSA 231:90 and this policy shall be deemed to comply with that statute.

(A) In accordance with RSA 231:90, a written notice of insufficiency must be delivered to (one of the Selectmen or Village District Commissioners) or the municipal Road Agent (or other title, e.g., Public Works Director) (or in a city, the Mayor or Street Commissioners) with a written copy of the notice provided to the Municipal Clerk. In addition, the municipality delegates the authority to receive notices on behalf of said officials to (insert, for example, staff in the municipal office.) The notice must be signed by the individual(s) providing the notice, and shall contain each signer's name printed legibly, along with the signer's address and telephone number or other means of contact. In addition, the notice shall:

(1) Contain the date and time of the notice;
(2) Contain the date and time at which the insufficiency was observed;
(3) Describe, at least in general terms, the location of the insufficiency with such detail as may permit it to be found without undue difficulty; and
(4) Describe in reasonable detail the nature of the insufficiency.

(B) The municipality may provide forms upon which notices of insufficiency may be filed, but an individual need not use that form if the notice conforms to the requirements of law and this policy.

(C) The municipality encourages other municipal officials and employees who may receive notice of an insufficiency to advise individuals to report the insufficiency as required by law and to advise appropriate officials of conditions called to their attention. However, the municipality cannot assure that any notice which is provided in a manner other than that specified for a formal notice under this section will actually be received by the appropriate official/employee and therefore must require that notices be provided as required by law and this policy.

(D) Upon receipt of a notice of insufficiency, the individual receiving the notice shall first indicate on the notice or an appropriate form the exact time and date on which the notice is received and the identity of the person with whom it is filed. Upon receipt, the (road agent or governing board or other official) shall determine if the notice conforms to the requirements of this policy and the law. It is the municipality's intent to implement action to investigate any claimed notice of insufficiency which is reasonably identified in a notice even if the notice does not formally conform to the requirements of law and this policy, but the municipality does not thereby waive any immunity

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Employment Law Boot Camp (Part II): Handling EEOC Conciliation and Future Litigation, and Considerations For Next Steps

By: Lawrence Lee and Daniel Perkins, Fisher & Phillips LLC.



Recap:

In Part I of this Boot Camp series, we explored the initial charge and investigation process at the Equal Employment Opportunity Commission through a fictional example involving the City of Wonderland Police Department and a former female police captain, Catrina, who filed a charge alleging sex, national origin, age, and disability discrimination. You may recall that as the City Attorney, you were tasked with investigating and responding to Catrina's charge in an effort to resolve the matter at the administrative stage. But, what happens when early resolution attempts are unsuccessful? At the EEOC, the agency file will then get transferred to an investigator. What are your rights and responsibilities, and what are those of the charging party? The answer often depends on how the EEOC resolves the charge. Astute employment counsel must plan for any eventuality, as the course of future litigation or resolution efforts depend greatly on your understanding of how the process works.

What are the different things that can happen with the EEOC's Investigation?

When we left off with Catrina's charge in Part I, we had examined the intricacies of the EEOC's investigation and how you, as the handling Attorney for the City of Wonderland, could best address the claims and allegations to maximize your chances of a favorable agency decision. But once the investigation is over, what is it that the EEOC can do with the information it has gathered? At the end of an investigation, the EEOC makes a determination on the merits of the charge. Not surprisingly, the range of outcomes of the EEOC's investigation is greater than merely a favorable or unfavorable finding.

How the EEOC characterizes the investigation results can be very important to the ultimate resolution of the charge and to any litigation that might follow. If, at the end of its investigation, the EEOC concludes that the information obtained does not establish a violation of the law, the charging party will be issued a letter called a "Dismissal and Notice of Rights." This informs the charging party that he or she has the right to file a lawsuit in federal or state court within 90 days from the date of receipt of the letter. Putting aside situations in which a charge is resolved by private settlement or administrative closure (which includes a variety of non-merits-based reasons), the "Dismissal and Notice of Suit Rights" (commonly referred to as a "No Cause" Determination) is the most common investigation result. In Fiscal Year 2014, 66.5 percent of all charges alleging Title VII discrimination claims (sex, race, color, national origin, and religion), and 59.4 percent of all charges alleging violations of the Americans with Disabilities Act, nationally, resulted in "No Cause" Determinations.

These findings are the most desirable for respondents, like the City of Wonderland, because they are issued after the EEOC has investigated and looked at the available evidence. A "No Cause" Determination provides a sense of validation to the accused employer, but more importantly, it forecloses the possibility of further EEOC involvement in the employment dispute. While a charging party still has the right to bring her claim before a court of law, the "No Cause" Determination means that neither the EEOC nor the U.S. Department of Justice will bring that case on the charging party's behalf. Therefore, if the charging party wishes to seek judicial relief, she must find an attorney and pursue the matter at her own expense. Quite obviously, the "No Cause" Determination is the prime objective for all respondents in these matters.

The outcome the City of Wonderland and all respondents work to avoid at all costs is the "Reasonable Cause" Determination which is communicated to the parties through a "Letter of Determination." As the name implies, this type of finding occurs when the EEOC's investigation reveals significant problems with the employer's position such that there is reason for the EEOC to believe that discrimination has occurred. While these findings stop short of determining that discrimination *actually* occurred, they are troublesome to respondents because they trigger further intrusive EEOC administrative processes and carry the threat of culminating in

litigation brought by the EEOC itself (or the U.S. Department of Justice) on the charging party's behalf. "Reasonable Cause" Determinations carry with them increased expenses and invariably mean that if the matter is to be resolved without court involvement, the resolution is likely to be expensive. But perhaps the most misunderstood consequence of a "Reasonable Cause" Determination is the triggering of the EEOC's obligation to exhaust its resolution efforts through the process of conciliation.

What is Conciliation and Why Should we consider it?

If the EEOC issues a Letter of Determination, the letter will include an invitation to the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. Conciliation is a voluntary process that resembles mediation, but without the neutral third party communicating settlement offers and responses. The parties must agree to any resolution negotiated through conciliation and neither the EEOC nor the respondent can be forced to accept any particular terms. The EEOC is required to attempt to resolve its findings of discrimination on charges through the conciliation process prior to bringing any action in court. In other words, the "conciliator" is the EEOC, usually the investigator that had recommended a finding of reasonable cause of discrimination. Recently, the Supreme Court affirmed federal courts' authority to review the adequacy of the EEOC's conciliation efforts, putting more pressure on the federal agency to ensure that the Commission gives employers an opportunity to resolve claims before the courts get involved. *See Mach Mining, LLC v. EEOC,* 575 U.S. ___ (2015).

For many employers, conciliation feels like a forced settlement. Often, the terms initially offered are draconian, consisting of expensive training obligations, conspicuous postings of employee rights, and most significantly, a substantial monetary payment to the charging party. While it is true that resolution of a charge through conciliation generally carries greater obligations on the employer and larger monetary payments than a private settlement of the claim, resolution through the administrative conciliation process often cost respondents far less than litigating the matter at a later time in court. Furthermore, the EEOC strongly encourages parties to take advantage of the conciliation opportunity because the next step is for the EEOC to consider the matter for litigation. Finally, if a charge is not resolved through the conciliation process, then the EEOC, itself, may step in the shoes of the charging party and sue the employer with the help of the Commission's litigators. Compared to defending a lawsuit, conciliation may be the more efficient, effective, and inexpensive method of resolving employment discrimination charges, despite some of the frustrations in dealing with what appears to be unreasonable demands for settlement by the charging party and her counsel. The tricky part of conciliation is, if the charging party is represented by an attorney, the opposition may have a "pie in the sky" initial settlement demand simply because the claimants and her counsel know that the EEOC had already found cause and has now been emboldened to push the envelope in conciliation for a more than ridiculous monetary settlement demand. In such situations, it is critical that the employer's counsel get fully prepared to call the charging party's lawyer to the mat at the conciliation when an initial six-figure settlement offer is made through the EEOC.

Compared to defending a lawsuit, conciliation may be the more efficient, effective, and inexpensive method of resolving employment discrimination charges, despite some of the frustrations in dealing with what appears to be unreasonable demands for settlement by the charging party and her counsel.

How to Approach Conciliation.

If the EEOC makes a "Reasonable Cause" Determination against the City of Wonderland, the responsible City employment counsel should first approach the decision of whether to participate in conciliation by putting aside any personal feelings about the determination. For example, the City of Wonderland's Police Chief may be disappointed that the personnel issue made it this far through the EEOC process and now has disdain for Catrina, who was provided an inordinate amount of peace officer training, promotions and support over her long tenure. Once the Letter of Determination is issued, there is no opportunity to reargue the finding and, despite any disagreements with the propriety of that finding, the task at hand is to determine the best way to resolve the matter. In some instances, conciliation may not make sense. Start with a thorough review of the Letter of Determination and any specific factual findings to which the EEOC points in support of its conclusions (there may not be much). Do an honest analysis of the agency's reasoning, including critically reading and checking the cite history of any cases cited by the investigator in support of the findings. It is not uncommon for the EEOC to view crucial facts in a manner that is calculated to provide support for the charging party's side of the dispute; however, the reviewing city attorney should honestly evaluate the reasoning, putting aside any natural biases. Furthermore, the astute employer's counsel will understand that "easy" defense cases rarely reach the conciliation phase; in cases that reach conciliation, there is usually one or more sufficiently adverse facts that regardless of the finding, if the matter ends up in court, it will present a challenge to defend.

If any reasoning and factual support cited in the decision reasonably support the decision, then it may make sense to take advantage of the conciliation process. First, the respondent loses nothing by listening to the demands of the charging party and the EEOC. There is no compulsion to agree, and if the conciliation process fails, the worst that can happen is that the federal agency files suit, a prospect that is equally likely if conciliation had been refused in the first place. It should be noted that in Fiscal Year 2014, the EEOC reported 1,138 unsuccessful Title VII conciliation efforts and filed 76 lawsuits with Title VII claims. Thus, less

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than 10 percent of unsuccessful conciliations resulted in lawsuits filed by the agency. Of course, this statistic does not included private lawsuits filed by charging parties, which are decidedly more common. Although the threat of litigation initiated by the EEOC may be relatively low, private lawsuits are substantially more likely when a Reasonable Cause Determination has been made.

Second, conciliation inevitably delays the EEOC's decision about on whether or not to file suit and further delays any suit that might be brought by the charging party on her own. This additional time may be used effectively to prepare for an eventual civil suit, whether that suit is filed by the EEOC or the charging party. When litigation is imminent, additional time to prepare can be critical to a defendant's success.

Finally, conciliation offers substantial opportunity to resolve a troublesome charge without the unpredictable and emotional involvement of judges and juries. While the resolution may be more onerous and more costly than a similar private settlement obtained before the EEOC's determination, the process offers some certainty of resolution at a "reasonable" price. Conversely, future litigation could easily result in substantial defense fees and ultimately, an unfavorable jury verdict punctuated by high compensatory damages awards that are invariably the product of juror emotions.

Given that conciliation is voluntary and carries no obligation to agree, there is almost no downside to participating if a "Reasonable Cause" Determination is issued; but it can be a frustrating process and test of the employer's patience. The conciliation process, however, provides one last bite at the apple to settle a difficult case containing unfavorable evidence against the employer before the higher–stakes game in a federal lawsuit, and if approached rationally and open-mindedly, conciliation can serve to resolve these cases at a much more reasonable price than litigation will provide.

Litigating Discrimination Claims in Court.

In some cases, however, litigation cannot be avoided: An irrational or angry charging party and an opposing counsel that is a "true believer" will not listen to a reasonable offer, or the EEOC won't budge on its back pay request and training requirements. In such instances, the employer may have no choice but to litigate. In some of those instances, the litigation may be commenced by the EEOC on the charging party's behalf, but in the overwhelming majority of instances, any litigation that results from a charge of discrimination will be a private lawsuit filed by the charging party and his or her attorney. The approach to a government lawsuit can be quite different than a typical private suit. For example, the City of Wonderland's decision-makers, whether it is the mayor or a delegated authority, may direct their employer's counsel to defend the case to the bitter end so as to send a message to other police officers thinking about filing a claim that the City is willing vigorously defend against claims filed by employees. Or, perhaps, one member of city council will be so offended by Catrina's disparaging statements made against the City of Wonderland that he or she will harbor negative feelings and take the Reasonable Cause Determination personally. Although reasonable minds usually prevail, the temptation to take an aggressive stance against the EEOC and a Charging Party for a claim that has been determined as one of reasonable cause is usually pretty high and requires an objective legal assessment of options and potential outcomes.

Litigating Discrimination Lawsuits against the EEOC and Private Litigants

Lawsuits filed by the EEOC are rare occurrences and have become rarer in the past several years. The average number of lawsuits filed by the agency has hovered around 150 per year since Fiscal Year 2012, approximately half the average total number of lawsuits filed each year between 1997 and 2012. Nevertheless, if a charge resulting in a Reasonable Cause Determination is not resolved, either through private settlement or thorough the EEOC's mediation or conciliation efforts, the respondent employer risks facing an agency-driven civil lawsuit.

Whether the EEOC will file suit on behalf of the charging party depends entirely on the review of the matter performed by agency attorneys and criteria determined by each EEOC office's regional director. While any case could be at risk for an agency-driven lawsuit, the likelihood of such action is greatly increased in instances where: (1) there are class action issues or multiple plaintiffs involving a pattern or practice of bad behavior; (2) the respondent employer is a large or well-known company; (3) novel or unprecedented issues exist which might provide the EEOC with an opportunity to achieve favorable court resolution to advance the agency's policies; or (4) the respondent employer has a history of having meritorious charges filed against it. This is not to say that the absence of any/all of these four factors will ensure that the EEOC won't file suit on the charging party's behalf. There have been instances in which an agency-directed lawsuit is filed on behalf of an individual charging party in what appears to be a routine and unremarkable case. For whatever reasons, occasionally, the EEOC chooses to champion a case that otherwise does not meet its usual criteria. Employers, private and public, should not assume that their case will not draw the attention of the EEOC's litigation unit.

In any lawsuit brought by the federal government, the dynamics are significantly different than in private lawsuits brought by charging parties. First, the EEOC has the benefit of having worked up the case for many months with information provided by both sides. The charge investigation process allows free discovery for the EEOC and provides a solid base from which to establish the agency's theory of the case. In many instances, EEOC-driven lawsuits may focus less on discovery of the particular facts pertaining to the charging party, but more heavily on the employer's past employment practices, its policies, and the broader impact of those policies and practices on the employer's employees.

Second, the EEOC is a federal government agency with the full power, force, and resources of the federal government behind it. Because the agency files so few lawsuits, it can afford to litigate discovery disputes and other issues that can be less intrusive in private lawsuits. While the costs associated with litigating these disputes against the EEOC may not rise as dramatically for municipal employers like the City of Wonderland as they do for private sector employers that must hire and pay outside counsel, the EEOC's methodical and measured approach to litigating its cases can prove wearisome and onerous. When litigating such cases, the responsible City Attorney should be prepared for a thorough and prepared opponent who is guided by objectives that are meant to achieve relief for both the charging party and the agency. Therefore, injunctive relief and other relief not specific to the charging party will often be sought.

Any employer's counsel, whether on the City payroll or external counsel, should approach a government-initiated lawsuit with an understanding that addressing the claims of the individual employee is only the tip of the iceberg. The EEOC will push for non-monetary concessions, including the posting and training requirements it sought during conciliation. Any resolution short of a defense verdict or successful dispositive motion will have to include these considerations. Furthermore, the government will seek to defray its costs by seeking attorneys' fees and, if the case is brought in conjunction with a private suit, there will be a request for fees by the plaintiff's private attorney as well. It doesn't take much to see that litigating against the EEOC can get expensive and cumbersome very quickly. In all such cases, therefore, the City Attorney should seek to limit the issues in the case as much as possible to the individual plaintiff's circumstances.

The fact that lawsuits by the EEOC may be difficult and expensive does not imply that the reverse is true for private lawsuits. Although the added layer of federal government bureaucracy may not be present, private lawsuits – which account for the vast majority of discrimination claims that appear in court – may be equally contentious and expensive. In almost all such cases, when the EEOC has found Reasonable Cause,

Any employer's counsel, whether on the City payroll or external counsel, should approach a government-initiated lawsuit with an understanding that addressing the claims of the individual employee is only the tip of the iceberg.

the EEOC's Letter of Determination may become an important evidentiary issue. Plaintiffs will want to introduce that letter as evidence of discrimination, while defendants universally seek to exclude the letter as inadmissible hearsay. Most courts will permit the letter's introduction into evidence for dispositive motion and trial purposes, a fact that should be heavily considered at the outset, as inclusion of the letter often destroys the chances of filing a successful summary judgment or other dispositive motion and may highly influence any jurors who hear the case.

Any employer's counsel should have a firm grasp on the facts of the case by virtue of thorough and thoughtful collection of evidence during the EEOC's investigation. Any harmful facts or facts that will be contested should be outlined and studied so that the attorney for the City can devise a theory of the case that minimizes the importance of such facts and highlights the favorable facts. Thorough discovery on these points is crucial to successfully defending a discrimination claim, and a well-conducted deposition can be the difference between achieving summary judgment and facing trial. In all such cases, a methodical approach is recommended.

Initial Case Considerations.

When the lawsuit is received, the City Attorney should meticulously review the claims for any potential defects or affirmative defenses and develop a plan to attack each individual claim. Any claims that arguably can be attacked on a motion to dismiss should be flagged and considered for such a motion to narrow the important issues and focus the case on the claims that truly matter. The attorney must carefully consider affirmative defenses and always include the "mixed motive" defense that the challenged employment action(s) would have occurred whether or not any discriminatory animus existed. This defense, if sufficiently proven, may allow a defendant found liable for discrimination to avoid damages (but not attorneys' fees).

Discovery Issues

Once the plan of attack is devised and the answer has been filed, the attorney must undertake carefully constructed discovery to support its plan. In most cases, the liability evidence is readily available. In employment disputes like Catrina's most of the documentary evidence will already be in the Defendant City's possession. Items such as performance reviews, employment history, prior discipline, etc., are often found in the defendant's own records. Furthermore, investigation reports, witness statements, and other event-specific evidence often is available in the EEOC's investigation file. Therefore, the majority of discovery, both written and oral, will focus on three areas: (1) defining the discriminatory conduct; (2) plaintiff's allegations of damages; and (3) efforts to reduce or mitigate damages.

With respect to the first item, plaintiffs through counsel often file complaints that contain general allegations of discrimination only, and their EEOC charges often contain little additional detail. Although the EEOC's investigation file may contain additional allegations and specific facts, in most instances, defense counsel will not have a firm grasp on *all* of the acts by his/her client that the discrimination plaintiff contends contributed to the discrimination he/she allegedly suffered. The City attorney can utilize written discovery first to inquire into the number of discriminatory acts, a description of them, the identities of witnesses to such acts, and a variety of additional useful information to begin narrowing the scope of the discrimination claim.

In addition, employer's counsel will want to send interrogatories inquiring into medical/psychological treatment for alleged mental anguish, as well as document requests for doctor's/counselor's notes, bills, etc. In situa-

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tions involving plaintiffs that have been terminated, like Catrina, employer's counsel must not forget to inquire into the plaintiff's job hunting efforts and ask for documentation of those efforts, such as job applications, cover letters, evidence of interviews and networking efforts, new employer records confirming salary/wages and other benefits, and a host of other items that can be used to challenge a plaintiff's allegations of damages.

Some cases may involve expert testimony, such as economics experts who will opine about the plaintiff's future earnings and earning capacity and make calculations intended to establish the plaintiff's damages. In other cases, the plaintiff might retain an expert in counseling or psychology who will discuss the "devastating impact" of the discriminatory act(s) of the defendant on the plaintiff and validate his/her request for exorbitant compensatory damages. In such cases, employer's counsel should be prepared to retain defense experts or rebuttal experts to challenge those opinions and offer explanations that support more reasonable damages numbers.

Depositions

In most single-plaintiff cases, the employer's counsel will have few depositions to take. Usually, the plaintiff will be deposed and perhaps a witness or two. Counsel should carefully plan depositions around information obtained in written discovery. Again, much of the plaintiff's deposition should be devoted to ferreting out all allegedly discriminatory acts and locking down the plaintiff's allegations so that the universe of discriminatory conduct is explicit and can be directly addressed in dispositive motions or with counter-evidence at trial. The goal is to know everything the plaintiff will put before the jury so that there are no surprises or allegations that the defense attorney has not already heard and prepared for. Additionally, deposition of the plaintiff can be used to test the reasonableness of efforts to reduce actual or compensatory damages through job-searches and medical/counseling treatment. For instance, if Catrina testifies that she saw a counselor twice a week for a year to address her severe mental anguish over being discharged from the City of Wonderland's Police Department, her testimony may seem reasonable at first blush. However, at the deposition, Catrina may very well testify that despite her counseling, she did not seem to get any better, but kept going to the counselor because she was hoping it would eventually help. At trial, a shrewd employer's counsel might argue that Catrina's continued counseling with that same counselor for a year was unreasonable because it clearly wasn't working, yet she failed to do something else, such as medication or a new counselor, to try to mitigate her damages.

Therefore, it is critical that a City attorney or employer's counsel that is defending or overseeing an employment discrimination lawsuit have a strong knowledge of the underlying facts and a firm grasp on the important legal issues to maximize the City's chances once the matter moves from the administrative EEOC process to the judicial system in state or federal court.

Conclusion

There is no guarantee that the City of Wonderland will successfully resolve Catrina's allegations with the EEOC. While the City can point to Catrina's foul language and her violation of workplace rules as legitimate reasons for her discharge, Catrina has good evidence concerning the proximity of her harassment complaint and the date of her discharge. In our example, Catrina's early settlement – before filing her charge – may preclude her from suing if the charge is not resolved; however, it cannot preclude the EEOC from investigating, issuing a Letter of Determination, and bringing suit on its own. The City of Wonderland must plan for any eventuality and be prepared to litigate should informal attempts to resolve the matter fail. The discrimination arena is fraught with landmines that can sink even the most well-intentioned attempts to resolve EEOC claims. Preparation, forethought, and knowledge of the process is key to successfully defending against such claims and achieving a resolution that is best for the local government. ML



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Missouri v. Harris: California's Eggs-traterritorial Reach

By: Tukie Falade, IMLA Associate Counsel

As U.S consumers become increasingly conscious of the origins and quality of the food they eat, states are enacting legislation to address animal welfare and food safety concerns. Given the broad scope of the industry, food safety laws in one jurisdiction often impact producers and consumers in another. Consequently, these laws raise important legal questions about the extent to which a state may regulate food production when such regulation impacts commercial activity outside its borders. More specifically, food safety laws implicate the so-called "dormant" Commerce Clause, which implicitly prohibits states from regulating interstate commerce. Lawsuits seeking to enjoin these statutes will ultimately shape the boundaries within which states and local governments may regulate food production extraterritorially.

As a case in point, a California law regulating the production and sale of eggs recently gave rise to a federal lawsuit. At issue in *Missouri v. Harris*[1] is a 2010 California statute[2] which prohibits the sale in the state of shelled eggs for human consumption, if they are produced by hens confined in a manner such that they are unable to lie down, stand up, fully extend their limbs and turn around freely.[3] The statute requires a minimum of 116 square inches of space per bird, which is nearly twice the current industry standard of 67 square inches.[4] In effect, the law requires all egg producers nationwide, regardless of where they are located, to comply with California's animal care standards as a condition of selling eggs in the Golden State.

In an effort to enjoin enforcement of the law, six of the largest egg producing states – Missouri, Alabama, Iowa, Kentucky, Nebraska and Oklahoma – brought suit in federal district court on Commerce Clause grounds.[5] The plaintiffs contend that the statute is unduly burdensome because it would force out-of-state farmers to "forgo California's markets altogether or accept significantly increased production costs just to comply with California law."[6] The plaintiffs sued under the theory of *Parens Patrie*, which permits a state to invoke federal jurisdiction if it can assert an injury to a "quasi-sovereign interest," meaning an injury to a "sufficiently substantial segment of its population."[7]

The federal district court in California's Eastern District did not reach the merits. It found that the plaintiffs lacked standing because they failed to show how a large segment of their state populations would be injured by the California statute, noting that the law would only apply to egg producers in their states, not all citizens.[8] Moreover, the court was unpersuaded by the plaintiffs' claim that the law would increase the cost of eggs, thereby harming consumers in their states. The court reasoned that a potential increase in egg prices was too speculative to establish a showing of injury sufficient for standing under *Parens Patrie*.[9] Accordingly, the court dismissed the case without leave to amend.[10] The plaintiffs appealed, the results of which are still pending. [11]

Meanwhile, the law went into effect on January 1, 2015.

This article will evaluate the merits of the Commerce Clause challenge to California's egg law and discuss the implications of the law, if upheld.

The Commerce Clause grants Congress the authority "[t]o regulate commerce... among the several states."[12] This express grant of authority to Congress has been interpreted as an implicit prohibition on the states' ability to regulate interstate commerce, even when Congress has not acted.[13] This implied limitation is known as the "dormant" aspect of the Commerce Clause. As a general rule, state and local laws are unconstitutional if they place an undue burden on interstate commerce.

The conventional approach to analyzing Commerce Clause claims is two-fold. First, a court must determine if the state or local law discriminates against out-of-state actors, either on its face or in purpose or effect. All laws having a discriminatory commercial effect are *per se* invalid, and will only be upheld if necessary to achieve an important purpose that cannot be served by alternative nondiscriminatory means.

Second, if the state law is not discriminatory, a court must conduct a balancing test, articulated by the Supreme Court in *Pike v. Bruce Church, Inc*.[14] Under the *Pike* test, a nondiscriminatory law will be upheld if its burden on interstate commerce is outweighed by the benefits of the law.

The California egg law is facially neutral because it makes no distinction based on the origin of the eggs. However, a facially neutral law can be invalidated if its purpose or effect is to discriminate against out-of-state interests. The stated purpose of the law is to "protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella."[15] The complaining states disagree, alleging that the law was enacted as a protectionist measure to "level the playing field" for California farmers, who would be competitively disadvantaged if out of state egg producers were not subject to the same restrictions.[16] However, a review of the legislative history does not support this contention.[17] As such, it does not appear that the law was enacted with discriminatory purpose.

There are two principles developed through the case law that determine if a law has a discriminatory effect. A law

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SECOND LOOK

Controlling a Local Government's "Expert" Employee

by Pete Haskel, Executive Assistant City Attorney, Dallas, Texas

Cities and other local government organizations (LGOs) are blessed with many employees who are experts in their fields. These valued employees can (and sometimes do) qualify as expert witnesses under Federal Rule of Evidence 702 and state equivalents. The also often serve as consulting experts in anticipation of and during litigation to which their LGO employer is a party. However these valuable employees[1] can also present problems for government litigators. There are many contexts in which such problems might arise, but here are three:

1. A litigation party's lawyer wants to use to use the expert employee as an expert witness in an action to which the LGO is not a party (but may be a potential party or may have an interest in the outcome).
2. The government is not a party to litigation and the employee wants to "moonlight" for one of the parties as a consulting or testifying expert in the same field as the employee's government work.
3. The government is a party to litigation, has not designated the employee as an expert but opposing counsel (or maybe even another party on the same side of the "v") wants to depose or call as a trial or hearing witness the employee and elicit the employee's expert opinions.

Here are some considerations for addressing such problems – but no simple solutions.

Experts Unaffiliated with a Party Cannot be Involuntarily Subpoenaed. Federal Rule of Civil Procedure 45 provides in relevant part:

> To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
>
> (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

Fed. R. Civ. P. 45(d)(3)(B).

Several states have similar rules or judicial doctrines – often with exceptions for compelling need or similar situations. *See generally,* Annot., *Right of independent expert to refuse to testify as to expert opinion*, 50 A.L.R.4th 680 (Originally published in 1986) (viewed on WestlawNext, May 14, 2015). However, does an LGO have standing under Rule 45 and state law counterparts to move to quash a subpoena directed at an employee for expert testimony? Rule 45 motions should work if the employee does not wish to testify under subpoena – but what if the employee wants to testify? Perhaps the motion belongs exclusively to the employee? I have found not cases on point. But the LGO could probably make the employee use vacation time and, unless the employee were an "always on duty" peace officer or the like, perhaps ask the employee to emphasize that the witness was not speaking for the government.[2] Could the LGO seek protection from the court such as a finding, jury instruction, or other measure to the effect that the employee's opinion was the employee's alone and not necessarily the official view of the LGO? This might insulate the LGO from later use of the testimony as a statement of an employee within the scope of employment. *See* Fed. R. Evid. 801(d)(2)(D). But I have never heard of a court granting such relief for the benefit of a non-party. Perhaps the most effective approach would be to suggest to the attorney for the party against which the employee would be testifying that cross-examination questions that emphasized that the witness was not representing the position of the LGO would weaken the impact of the witness' opinion.

Personnel Rules on Moonlighting and First Amendment. LGO's usually have broad latitude to adopt personnel rules that prohibit or limit off-duty employment – particularly employment related to the employee's government job. Of course state law, collective bargaining agreements, and other local considerations can limit that power. But what additional restrictions on that power of LGOs might flow from the First Amendment as applied to regulating employees' expert testimony on a subject related to their employment? The Supreme Court has stressed

> the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). *See generally*, Annot., *Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties*, 163 A.L.R. 1358 (originally published in 1946) (viewed on WestlawNext May 14, 2015)(collecting

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cases). There is little question that a public employee's fact testimony at a trial (at least at a criminal trial and at least under subpoena) will be protected by the First Amendment if the employee's routine duties do not include testifying. *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) ("[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes"). Will *Lane* also apply to expert opinion testimony related to but not in the course of a government employee's job? Will it matter whether the employee was compensated as an expert?

Sixteen years before *Lane v. Franks*, the Fifth Circuit sustained a preliminary injunction against enforcing this State of Texas policy on the ground that it discriminated against speech based on content:

> Because of an inherent conflict of interest, none of the funds appropriated by this Act shall be expended in payment of salary, benefits, or expenses of any state employee who is retained as or serves as an expert witness or consultant in litigation against the state, unless the state employee serves in that capacity on behalf of a state agency on a case in which the state agency is in litigation against another state agency.

Appropriations Act 1997-99, art. IX, § 2(5); Tex.Sess.Law Serv. at 6352, *quoted in Hoover v. Morales*, 164 F.3d 221, 223-24 (5th Cir. 1998). Six years later the same court sustained claims of civil rights conspiracy arising from Texas A&M's retaliation against instructors who gave expert testimony for the plaintiffs in a civil rights excessive force case. *Kinney v. Weaver*, 367 F.3d 337, 361 (5th Cir.) (en banc), *cert. denied*, 543 U.S. 872 (2004). However, the Ninth Circuit has established a slightly less pro-employee standard, and apparently would only protect expert testimony given under subpoena if the testimony related to a matter of "public concern," *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1105 (9th Cir. 2011), relying on *Connick v. Myers*, 461 U.S. 138 (1983), and related case law. With that qualification, however, the Ninth Circuit's approach is similar to that of the Fifth Circuit.

I suspect that *Lane v. Franks* will not weaken the First Amendment protections granted by such decisions to truthful opinion testimony by local government employees, even if the testimony relates to the same subject for which the LGO employs them. However, "false statements knowingly or recklessly made" may not be entitled to protection. *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 574 (1968) – if the LGO or a maligned supervisor can prove "malice"

State and Local Ethics, Conflicts and Unlawful Gratuity Standards. However, if an LGO were careful to avoid content-based prohibitions, it might be permissible to bar an employee from receiving compensation for expert testimony, or to enter into a contract with the party soliciting the employee's testimony, depending on the precise terms of applicable laws and rules on conflict of interests and unlawful gratuities. *Cf.*, *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 737 F. Supp. 399 (E.D. Mich. 1989) (denying on ripeness and standing grounds motions of airline and aircraft manufacturer for judicial declaration that former branch chief of aircraft systems in FAA and FAA employee involved in certification of aircraft could testify as expert witnesses without violating Ethics in Government Act). For example, it might be impermissible for a building inspector to enter into a contract with a developer on whose projects the inspector often works, or to accept payment for testimony closely related to the employee's work. Elimination of the profit incentive may or may not reduce the employee's interest in testifying – but enforcement must not be aimed primarily (or perhaps at all) at this result.

The Federal "Housekeeping" Rules Approach. Nevertheless, several federal agencies attempt to restrict employee testimony by adopting regulations under the purported authority of the so-called federal "housekeeping" statute, which generally empowers departmental secretaries to control agency records and employees. 5 U.S.C. § 301.[3] However, at least since a 1958 amendment added the last sentence to section 301, courts have often (perhaps usually) rejected broad federal agency assertions that regulations adopted under the statute can validly allow an agency head to refuse to make department employees available to testify under a valid subpoena in litigation to which the United States is not a party. *See, e.g., Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 777 (9th Cir. 1994) (with annotated explanation of legislative history); Federal Rules of Evidence, *Official Information–The Housekeeping Act*, 26A Fed. Prac. & Proc. Evid. § 5682 (1st ed.), viewed on WestlawNext May 14, 2015) (thorough discussion of § 301 history and application).

Consistent with the idea that expert opinion testimony cannot usually be compelled, some federal agencies persist in resisting subpoenas for their employees' expert testimony in cases where the United States is not a party. For example, the SEC General Counsel has the purported power to limit "non-expert, non-privileged, factual ... testimony" by SEC employees, in such cases, but not to authorize employees' expert testimony. 17 C.F.R. § 200.735-3(b)(7)(ii), (iii). I have not found an opinion invalidating that approach.

Litigation Where Government Employer is a Party. What discovery rule or likely protective order might prevent the following scenario: The opposing party discovers the identities of the key city employees who might have expertise on a subject relevant to litigation, via interrogatories, depositions, or even pre-litigation open records requests. The opponent then deposes each of those employees looking for someone who disagrees with the LGO's position on any key issue or who has a low opinion of the LGO's designated expert's expertise. The opponent will run no appreciable risk in eliciting answers favorable to the LGO –the LGO would be unlikely to find any way to get those statements in evidence except perhaps under the rule of optional completeness if the opposition were to introduce only portions of a witness' deposition. *See* Fed. R. Evid. 106. Any jurors would expect LGO employees to

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Cases of Interest

By Monica Ciriello, Student-at-Law

City Permitting Accumulation of Ice and Snow on Sidewalk Is Grossly Negligent

***Bramer v. City of Hamilton*, 2015 ONSC 713 (CanLII) http://canlii.ca/t/gj3mr**

The plaintiff slipped and fell on a sidewalk in the City of Hamilton in 2009. The plaintiff alleges that the City is grossly negligent in failing to maintain the surface of the sidewalk in a safe and proper state of repair, permitting an accumulation of ice and snow contrary to the City's own bylaw and therefore liable pursuant to s.44 of the *Municipal Act*. The plaintiff further alleges that the City was negligent in failing to maintain in a proper state of repair a metal pedestrian handrail that ran beside the sidewalk in question. The City admits that the sidewalk in question falls within its responsibility to maintain, but denies any negligence. The City claims to have exercised reasonable care in discharging its responsibilities either in respect of the sidewalk surface or in respect of the handrail.

HELD: The City is liable to the plaintiff

DISCUSSION: Section 44(9) of the *Municipal* Act renders a municipality liable for personal injuries caused by snow or ice on a sidewalk only in a case of gross negligence. As indicated in *Crimson v. Toronto (City)* 2010 ONCA 44 gross negligence is more than just a breach of duty of care, which is determined upon the facts of each particular case. It has long been recognized in Canadian case law that citizens in Canada must be taken as being familiar with Canadian winters and be taken to know that sidewalks and streets can be slippery at that time of the year. Nevertheless, the Court held that the defendant was grossly negligent. Its employees did no snow removal, or sanding or salting for many days prior to the fall, during which time snow accumulated on a particularly steep and well–used sidewalk. The City also failed to utilize independent contractor services available in the five days before the fall. The Court concluded that the facts of this case squarely fall within the parameters of gross negligence as described in *Crimson.*

With regards to the handrail, the failure of the defendant to properly maintain its pedestrian handrail in a proper and useable condition is appropriately considered as a factor supporting the finding of gross negligence on the part of the City. The condition of the handrail did not cause the fall; the snow and ice did. A handrail in proper condition may well have prevented the fall, just as proper snow removal and salting and sanding may have. The Court considers the unusable condition of the handrail to have been proven, but it is an element supporting the finding of gross negligence, rather than being a separate actionable wrong upon proof of simple negligence in failing to maintain it.

School Trustee Reinstated Despite Missing Municipal Elections Act Deadline

***Singh v. Peel District School Board and The Clerk of The City of Brampton/ Corporation of The City of Brampton*, 2015 ONSC 3092 http://canlii.ca/t/gj16t**

Gurratan Singh and Harkirat Singh were candidates in the municipal election for the City of Brampton. Both applicants campaigned together and shared campaign resources and expenses. As required under s.78 of the *Municipal Elections* Act "*MEA*" the applicants were required to file with the Clerk of the City of Brampton a financial statement and an auditor's report reflecting the revenue and expenses of their election campaigns by 2:00pm on March 27, 2015. After a mix-up, Harkirat ended up filing his financial statements and auditor's report five days late and Gurratan was six days late. The *MEA* set out consequences of failing to comply with these provisions in that under s.80(1) and (2), a candidate who fails to comply with s. 78 forfeits any office to which he or she was elected, the office is deemed vacant, and the candidate is ineligible to be elected or appointed to any office to which the *MEA* applies until the next regular election has taken place.

Harkirat was successful in his campaign and was ultimately removed from his position, and Gurratan (an unsuccessful candidate) was prevented from running for any office until after the next election. The applicants each sought an order granting them relief against penalties imposed by the *MEA* for having failed to file a financial statement by the established deadline.

HELD: The City should extend the deadline for filing.

DISCUSSION: In granting the candidates their requested relief from forfeiture, Justice Woolcombe applied the test established by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*

Justice Woolcombe indicated that the applicants could have exercised greater due diligence to ensure the documents were submitted in accordance with the *MEA*. However, their conduct was a far cry from that described in *Ecker v. Hamilton-Wentworth Catholic District School Board* 2012 ONSC 2246, where in declining relief in a similar situation, the court stated: "the applicant's conduct bespeaks indifference to the necessity of complying with campaign financing rules rather than acting in good faith.

I would find indifference rather than inadvertence in all the circumstances." The court held that missing the deadline was 'inadvertent' and notwithstanding the importance of the deadline and the need to comply, the penalty was too harsh for the unintentional failure.

Bylaw Upheld: Taxicabs Prohibited From Using Drive-Thru Liquor Outlets
***Duffield v. Prince Albert* (City), 2015 SKCA 46 (CanLII) http://canlii.ca/t/ghdpj**

The appellants are hotel owners who off-sale liquor by means of a "drive-thru" service. The City of Prince Albert's bylaw amended the taxicab bylaw to prohibit taxicab owners and taxicab drivers from driving their taxicabs through off-sale, drive thru liquor outlets in the City. The appellants asked the Court of Queen's Bench to quash the bylaw for two reasons. First, the procedure for its passage did not comply with the requirements of *The Cities Act*. Second, the subject matter of the bylaw is *ultra vires* the bylaw making powers of the City, because it regulates the sale of alcohol (a provincial concern). The Court of the Queen's Bench dismissed the appellant's application, and the appellants appealed.

HELD: Appeal dismissed.

DISCUSSION: With regards to the first ground of appeal before the Saskatchewan Court of Appeal, the appellants argued that the first, second and third reading of the proposed bylaw took place at the same council meeting without the unanimous consent required by s. 77 of *The Cities Act*. The Court concluded that the procedure used by City Council was appropriate. The Court of Appeal agreed with the Chambers judge that the wording of the proposed bylaw were not such that they change its 'essential character' and that minor changes are expected between readings and do not make the bylaw a new act with new procedural requirements on every change. The change was to add owners in addition to drivers of cabs. As such, it cannot reasonably be said that the bylaw was completely different by the time it received its second and third reading. The Court concluded that the passage of the bylaw complied with *The Cities Act*.

On the second ground of appeal, the Court of Appeal did not reach the conclusion that the bylaw is not *ultra vires* as easily as did the Chambers judge; however the Court ultimately did uphold the Chambers judge decision. The Court reviewed the record and the presumption that cities act in good faith. A review of the record indicated that the bylaw as passed was focused on regulating the activities of taxi cab drivers and taxicab owners, which is a legitimate exercise of its municipal power. It was far from obvious that council acted in bad faith when enacting the bylaw. Moreover, the record indicated council never intended to pass a bylaw to regulate- in pith and substance- the sale of alcohol. Rather, it appears, council's objective was always- in pith and substance- to regulate the taxicab business so as to mitigate the safety risks to taxicab operators arising from their patron's use of drive-thru off-sale liquor outlets.

Judge Throws Out Claim Against City for Abuse of Zoning Powers
***Prince George (City) v. Geisser*, 2015 BCSC 697 (CanLII) http://canlii.ca/t/ghf0r**

The City of Prince George commenced this proceeding in February 2011. It sought, *inter alia*, orders that Colleen Geisser cease storage of shipping or cargo containers on the Property without enclosing them and removing such containers if they were not enclosed. The City had received a complaint about the containers being moved on the property in the summer of 2010. The City contends that Geisser's property was not properly zoned for a commercial warehousing and storage function. Further, in 1991 had Geisser signed a restrictive covenant for the property, on behalf of her company Gypsy Holdings, that also excluded warehousing and storage.

Geisser's position was that the City knowingly permitted her to use the property for warehousing and storage purposes for many years. In 1991, there was a structure used for storing cars, tools, boats put up and in 2008 she moved two 40-foot containers onto the property. Geisser filed a counterclaim in which she made the allegations that the City misappropriated a portion of her property located at 3505 Pierreroy Road in Prince George, BC to build or widen a portion of Landsdowne Road, deliberately used the zoning bylaws process to interfere with her ability to earn an income and dealt with her in a malicious manner including making threats, abusing its powers, and invading her privacy interests with the intent to cause her harm. The City's position is that Geisser's claims are frivolous and vexatious.

HELD: Counterclaim dismissed.

DISCUSSION: The Court began by relying on the principals outlined in *Bradshaw v. Stenner*, 2010 BCSC 1398 assessing the credibility of a witness. When applying these principals the Court concluded that on the key issues where there is a dispute between the parties, Geisser's evidence is not credible; mainly because Geisser's evidence is motivated by her strong belief that she was wronged by the City for many years. Regarding Geisser's first claim relating to the misappropriation of her property for the purpose of road construction, the claim was dismissed. The belief that a misappropriation occurred was based on erroneous conclusions Geisser reached with respect to the methodology utilized by registered land surveyors. The second claim related to the City allegedly having improperly used the zoning process to prevent Geisser from using her property for commercial storage purposes. This claim was passed on a misunderstanding of the zoning process. The third claim related to malicious acts of the City's employees designed to embarrass Geisser. The Court concluded that again, there was no credible evidence.

City Can Terminate Private Practice Lawyer Working As Municipal Prosecutor
***Donovan c. Montreal (City of)*, 2015 QCCS 2277 (CanLII) http://canlii.ca/t/gj5k9**

Beginning in 1977 Mtre. John Donovan a private practice lawyer, acted as a prosecutor for the Municipal Court of the City of Westmount. In 2000 Westmount merged with the City of Montreal. Following the merger, Donovan worked as a part-time Municipal Court prosecutor for Montreal. Montreal then had to decide whether or

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2015 Nominating Committee Board of Directors Vacancies!

Pursuant to the IMLA By-Laws (amended October 2, 2013) IMLA is announcing the 2015 Nominating Committee. The Committee encourages people interested in being nominated for Vacant Positions on the IMLA Board of Directors and for IMLA Regional Vice Presidents to make their interest known to the Committee. In addition to filling vacancies, the Committee is charged with nominating the Board's officers: including, Treasurer and President-elect.

The Nominating Committee is as follows and will be meeting during the Las Vegas Annual Conference at the Rio on Sunday, October 4th at 9:15AM, Meeting Room TBA. Please contact the committee in advance and plan to attend the meeting if you are interested in submitting your name or the name of another member for nomination:

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There are several current IMLA Board members whose terms will be expiring in 2015; at least two of these are not eligible for reelection due to term limits. There may be additional vacancies. The Nominating Committee is charged with trying to find candidates who will work to increase the value of IMLA to its members, strengthen the organization and ensure the diversity of the Board geographically and through gender and ethnicity.

IMLA Regional Vice Presidents are also selected by the Nominating Committee and it has been our practice in the past to nominate the current Regional Vice Presidents unless there is a vacancy. The current copy of the amended By-Laws can be found on IMLA's web site at www.imla.org and describes the qualifications for service on the Board or other office.

The Board of Directors hopes that all interested members will apply.

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Second Amendment, Second Time Around

By Erich R. Eiselt, IMLA Assistant General Counsel and Editor

The national debate over the contours of gun regulation continues to reverberate in courtrooms across America. While the Supreme Court determined, in *Heller* and *McDonald*, that there is an unquestionable constitutional right to possess firearms for self-defense within one's own residence, it did not analyze every nuance of that right and left open many other Second Amendment questions.

Gun Possession in the Home: For some, *Heller* and *McDonald* laid to rest any argument that a state or municipality can limit the possession of handguns, by competent adults, for personal self-defense within the home.

But not so fast. The issue is far from settled, judging by the dimensions of a California case just denied certiorari by the Supreme Court. In *Jackson v. City and County of San Francisco*, No. 12-17803 (9th Cir. Mar 25, 2014), the Ninth Circuit upheld two of San Francisco's firearm and ammunition regulations, which "limit but do not destroy Second Amendment rights."

The first regulation relates to handgun possession within a residence. San Francisco Police Code section 4512 provides that "[n]o person shall keep a handgun within a residence owned or controlled by that person unless" (1) "the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice," or (2) "[t]he handgun is carried on the person of an individual over the age of 18." S.F. Police Code art. 45, § 4512(a), (c)(1). Violations of section 4512 are punishable by a fine of up to $1,000 and up to six months in prison. Id. § 4512(e).

The second challenged provision prohibits the sale of ammunition, including the so-called "hollow-point" bullet, that (1) has "no sporting purpose," (2) is "designed to expand upon impact and utilize the jacket, shot or materials embedded within the jacket or shot to project or disperse barbs or other objects that are intended to increase the damage to a human body or other target," or (3) is "designed to fragment upon impact ." S.F. Cal., Police Code art. 9, § 613.10(g).

Plaintiffs are citizens of San Francisco "who presently intend to keep their handguns within the home in a manner ready for immediate use to protect themselves and their families." They and other gun-rights organizations brought suit, challenging the regulations on Second Amendment grounds and moving for a preliminary injunction. The district court denied that motion.

The Ninth Circuit affirmed. It acknowledged that *Heller* confers "an individual right to keep and bear arms" and that the District of Columbia's requirement that "firearms in the home be rendered and kept inoperable at all times" made it " impossible for citizens to use [firearms] for the core lawful purpose of self-defense." But it cited *Heller's* often quoted caveat that the Second Amendment does not preclude certain "longstanding prohibitions" and "presumptively lawful regulatory measures," such as "prohibitions on carrying concealed weapons," "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," "laws imposing conditions and qualifications on the commercial sale of arms," and prohibitions on "the carrying of 'dangerous and unusual weapons."

The *Jackson* court also referenced *Heller's* teaching that mere rational basis review was insufficient for Second Amendment analysis: "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant . . . and would have no effect." Here, core Second Amendment rights were undeniably at stake, requiring an analysis of the degree to which the San Francisco Code provisions burdened those rights:

> As Jackson argues, there are times when carrying a weapon on the person is extremely impractical, such as when sleeping or bathing. Therefore, as a practical matter, section 4512 sometimes requires that handguns be kept in locked storage or disabled with a trigger lock. Having to retrieve handguns from locked containers or removing trigger locks makes it more difficult "for citizens to use them for the core lawful purpose of self-defense" in the home. Heller, 554 U.S. at 630. Section 4512 therefore burdens the core of the Second Amendment right.
>
> This is not the end of our inquiry, however. . . . Unlike the challenged regulation in Heller, id. at 629, section 4512 does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home. Rather, section 4512 regulates how San Franciscans must store their handguns when not carrying them on their persons. This indirectly burdens the ability to use a handgun, because it requires retrieving a weapon from a locked safe or removing a trigger lock. But because it burdens only the "manner in which persons may exercise their Second Amendment rights," Chovan 735 F.3d at 1138, the regulation more closely resembles a content-neutral speech restriction that regulates only the time, place, or manner of speech. The record indicates that a modern gun safe may be opened quickly. Thus, even when a handgun is secured, it may be readily accessed in case of an emergency. Further, section 4512 leaves open alternative channels for self-defense in the home, because San Franciscans are not required to secure their handguns while carrying them on their person.

Applying intermediate scrutiny, the *Jackson* court found that San Francisco had shown that section 4512's requirement that persons store handguns in a locked storage container or with a trigger lock when not carried on the person "is substantially related to the important government interest of reducing firearm-related deaths and injuries."

The hollow bullet ban also survived Jackson's motion for injunction. The Ninth Circuit found that the limitation was "substantially related to San Francisco's important interest of reducing the lethality of ammunition." Even if a less-restrictive alternative was available (such as prohibiting hollow-point bullets in public only), "intermediate scrutiny does not require the least restrictive

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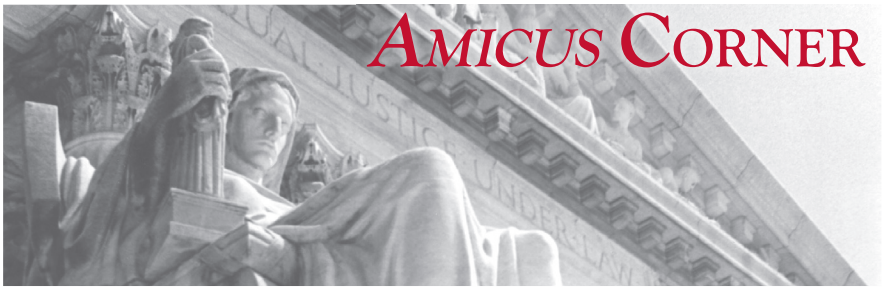

IMLA In Full Stride

By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

IMLA filed an amicus brief in *Franchise Tax Board of California v. Hyatt*, a petition-stage Supreme Court case. In *Hyatt*, a former resident of California moved to Nevada after he had earned hundreds of millions of dollars in licensing fees during the time that he lived in California. In 1993, the Franchise Tax Board of California (FTB) audited his California tax returns and concluded that he owed the state millions in unpaid income taxes, interest, and penalties. The former California resident responded by filing suit against FTB in Nevada state court, alleging that FTB had committed fraud, intentional infliction of emotional distress and other torts in the course of the audit. The Nevada Supreme Court upheld a jury verdict against FTB.

This case had previously been before the US Supreme Court in 2003, *see Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003) (*Hyatt I*). In *Hyatt 1*, the FTB argued that because California law gave it complete immunity for claims arising from tax administration, the Full Faith and Credit Clause required Nevada to respect that immunity. The Supreme Court held that the Nevada courts were not required to apply California law giving FTB complete immunity; instead, they could hold FTB liable to the same extent that a comparable Nevada government entity would be liable, "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark." That case recognized that "States' sovereignty interests are not foreign to the full faith and credit command," and signaled that a state may not "exhibit[] a 'policy of hostility to the public Acts' of a sister State." 538 U.S. at 499.

The case was then remanded and after the jury awarded Hyatt hundreds of millions of dollars in damages the decision was again appealed. Relevant to our purposes, this time the Nevada Supreme Court held that the discretionary-function immunity for a governmental entity and its employees was not applicable in this case because the Nevada Court recognizes an exception to that immunity for bad-faith conduct. The Nevada Supreme Court also held that FTB was not entitled, under principles of comity, to the Nevada statutory cap on damages that is available to Nevada governmental entities. The court concluded that allowing FTB to utilize the damages cap would violate Nevada's public policy because the state's interest in providing relief to its citizens outweighs the principles of comity.

In support of FTB's petition for certiorari, IMLA's brief focuses on the issue of discretionary function immunity and how narrowing the scope of that immunity will impede local governments' functionality and harm the public interest. IMLA argues that given the nature and scope of municipal activities, local governments are particularly susceptible to intentional tort claims--and by carving out an exception to the immunity for bad-faith conduct the court threatens municipalities' policymaking abilities for the critical services that municipalities provide. Moreover, the nature of intentional tort claims will necessarily make these lawsuits extremely costly both in terms of distraction from government officials' duties and from a monetary standpoint. Further, IMLA argues that the erosion of the immunity in these cases will likely dissuade talented and bright individuals from entering public service.

IMLA also submitted amicus briefs both at the petition-stage and merits-stage in two cases that were recently decided by the Supreme Court: *City and County of San Francisco v. Sheehan* and *Comptroller of the Treasury of Maryland v. Wynne.*

In *City and County of San Francisco v. Sheehan*, two police officers were called by a social worker to take Sheehan into custody for an involuntary mental evaluation after she had threatened a social worker with a knife. When the officers arrived, they opened the door to Sheehan's residence and she threatened to kill them and brandished a knife. They closed the door to her residence and called for backup. However, they then made the determination to reenter her residence before backup arrived to effectuate the arrest, in order to prevent Sheehan from harming herself or others. When they reentered, Sheehan rushed them with a knife. The officers tried to use pepper spray to stop her and when that didn't work, they shot her several times. She survived and sued under 42 U.S.C. § 1983 and the ADA.

The Ninth Circuit concluded that the first entry was lawful (under the warrantless search exemption to render emergency assistance or respond to exigent circumstances) as was the officers' ultimate use of deadly force under the circumstances. However, the Ninth Circuit held that the officer's second entry into Sheehan's residence was unlawful under both the Fourth Amendment and ADA. The court held that the second entry was unreasonable under the Fourth Amendment, on the basis that it was unreasonable to make an otherwise lawful entry when the officers could have desisted from their efforts to arrest Sheehan in light of her resistance and mental illness, and used different tactics that might have resulted in a different outcome. Regarding Sheehan's claim under the ADA, the Ninth Circuit held that the "reasonable accommodation" requirement of Title II of the ADA applies to officers' conduct in the course of an arrest – including an arrest of a violent individual like Sheehan. The court further held that the

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Questions That Must Be Answered

By: Kelly Butler, City Attorney, Madison, Alabama

Who Does This?

Somewhere between law school graduation and the date of this writing, I became a municipal lawyer. I don't think I really meant to do it, but here I am just the same. I'd lay money that most of you didn't hit the doors as a 1L aiming to set the legal world on fire by sitting behind your computer writing and writing and writing until carpal tunnel surgery is the only way to stop small children from shrieking at the sight of your claw-like hands. And I'm pretty sure you didn't take Conflict of Laws so that you could settle political squabbles which are really better suited for the playground or a Jell-o pit. But somehow, someway, at some point, municipal law found me just like it found you…and we just couldn't let it go. Maybe it provided a measure of stability to an otherwise unstable bottom line in your solo practice. Or maybe a box of files greeted you at the door on your first day as a BigLaw associate, said box handed over by a giggling partner who you swear skipped a little as he made his hasty retreat from your cozy office. Or maybe you're like me: you had an opportunity fall in your lap at the right point in your career and you managed, amazingly, to not screw it up. (Truth hurts, eh?)

You probably realized pretty quickly what every other municipal lawyer already knew: that we are the red-headed stepchildren of the legal world. (No offense to the ginger bonus children reading this.) Our little part of the profession accounts for a tiny-point-tiny percent of the country's lawyers and, for the most part, we get treated like even less. If you really look at us, though, we are an interesting microcosm of the larger Bar, sort of like the adult males left to fend for themselves on the Titanic. We come from all walks of life, a wide range of socioeconomic backgrounds, and varied cultures, but none of that matters when we go looking for help. Generally, we are left to fend for ourselves. I think that's why we have such unique personalities in the practice of municipal law – we have to be strong (or weird) enough to be okay with watching everybody else get the lifeboats while we're clinging to the random timber that floats by in the dark. (Shout out to the state municipal leagues and IMLA for being the biggest and strongest timbers we could ever ask for, by the way.)

What Do You Do? Seriously….

When I clerked for my judge, and later when I was in private practice, I didn't need to say much to explain my job to High School Cheerleader I Haven't Seen in Years: "I work for a judge" seemed to sufficiently explain my work and impress those who wondered what I'd been up to since I ran screaming from graduation. Later, during the years of private practice, I found I had to expound a little to help Captain Perky Skirt understand my career choice: "I own a small boutique firm (*I have an office that looks really cool but I haven't paid myself in four months*) where I specialize in a wide range of business-related transactions (*I write boring documents that would make your brain melt and I also clean the toilets*) and represent a select list of high-profile defendants (*most of my clients are career losers selected for me by the presiding judge from the tall stack of indigent defense requests*) and private clients who pay top dollar to have me on their side (*I once got paid with a deep-fried turkey…and it was delicious*)."

Since February 6, 2001, though, the answer has been way more difficult to give. I get the "what do you do" question quite often from non-lawyer friends and family and, more often than I find comfortable, from fellow municipal employees and elected officials. Fourteen years as a municipal lawyer and I still don't have a good answer. And by "good answer," I mean an answer that makes me sound really cool, because, let's face it, the truth is pretty boring. I mean, come on … we write ordinances and resolutions and legislation and contracts and leases and deeds and bid documents and all kinds of stuff that nobody – and I do mean NOBODY – else gives a crap about until they get a question from a reporter or a subpoena from the sheriff. And the rest of what we do from day to day – especially those of us who are in-house (read: easily accessible and not on a clock) – is akin to being an ER doctor. One of the ways I describe my department is that it's like a triage ward – we treat 'em and street 'em and get our people back to work as quickly as possible, hopefully healed and now armed with better information than they had when they got to us.

Usually, though, the most accurate descriptions of what we do are in terms nobody else understands ("I spent all day drafting a revamp of our SOPs for street cuts and a revision of our SOGs for processing trench failure complaints") and in terms nobody wants to hear ("Let me break down WHY we shouldn't enter into this 91-page agreement for a multi-million dollar deal without reading it first"). However, because we are all drifting in this icy water together, I offer for your perusal and use 15 painfully accurate, bite-size, somewhat dignified answers about our beloved legal niche, each suitable for dinner parties and family gatherings when the inevitable, "So what DO you do?" comes up:

I read. A lot.

I write. A lot more.

I talk on the phone, but only when

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Kelly Butler A 1996 graduate of the University of Alabama School of Law, Kelly is a soon-to-be-middle-aged municipal attorney who spends most of her time wishing death to the city phone system and e-mail server. During lucid moments, she is the City Attorney for the City of Madison, Alabama, and manages a department of a whopping five employees (counting her) who are the hardest-working team in the business (most of the time counting her). When not in the office or with her face in her phone checking e-mail, she enjoys spending 37.8 minutes a week with her firefighter-husband and trying to buy the love of her eight-year-old daughter due to a severe case of Working Mommy Guilt. She is also the current Vice President of the Alabama Association of Municipal Attorneys and loves speaking at AAMA seminars and conferences when they have run out of options and nobody else is available.

Supreme Court Continued from page 27

means of furthering a given end." (citing *Ward v Rock Against Racism*, 491 U.S. 781, 798 (1989)).

In sum, these limits on gun possession within the home are not prohibited, at least for the Ninth Circuit:

> We recognize the significance of the Second Amendment right to keep and bear arms. "[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." McDonald, 130 S.Ct. at 3042. But we also recognize that the Second Amendment right, like the First Amendment right to freedom of speech, may be subjected to governmental restrictions which survive the appropriate level of scrutiny.

Jackson and gun-rights proponents filed for certiorari before the Supreme Court. They did not succeed.

On Monday, June 8, the Court denied cert in *Jackson*, over the dissent of Justices Thomas and Scalia. Justice Thomas voiced his concern over the direction being taken by the Ninth Circuit:

> Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition.

The bottom line is that considerable work remains to be done in clarifying the metes and bounds of gun possession within the home.

Public Carry: If there is continued ambiguity about guns in the home, the picture is even less clear on the issue of public carry, where an obvious schism is developing among the federal judiciary.

The Nation's Capital: Washington DC is the most recent jurisdiction to be rebuffed in its efforts to control public gun carry. Last month, the US District Court for the District of Columbia granted a preliminary injunction to three plaintiffs--supported by the Bellevue, Washington-based Second Amendment Foundation--who challenged the District's "good reason" requirement for the issuance of a concealed carry gun permit. In *Wrenn v. District of Columbia*, no. 1:15-cv-162 (D. D.C. May 18, 2015) US District Court Judge Frederick Scullin found that the plaintiffs had shown a sufficient likelihood of winning on the merits such that the law should be held in abeyance pending judicial resolution.

Applying intermediate scrutiny, Scullin determined that the District's law inhibited the public carry of handguns, undermining the Second Amendment:

> The District of Columbia's arbitrary "good reason"/"proper reason" requirement, however, goes far beyond establishing such reasonable restrictions. Rather, for all intents and purposes, this requirement makes it impossible for the overwhelming majority of law-abiding citizens to obtain licenses to carry handguns in public for self-defense, thereby depriving them of their Second Amendment right to bear arms. (citation omitted).

Washington D.C. has hardly been timid about attempting to limit gun possession and usage, even after its indoor use restrictions were resoundingly stricken in *Heller* in 2008. Last year, *Palmer v. District of Columbia,* no. 1:09-cv-14082 (July 26, 2014), invalidated the District's predecessor regulations restricting concealed carry. At issue in *Palmer* was D.C. Code § 7- 2502.01(a) which provided that "no persons or organization in the District shall possess or control any firearm, unless the persons or organization holds a valid registration certificate for the firearm" and D.C. Code § 7-2502.02(a)(4) which stated that individuals who are not retired police officers may only register a handgun "for use in self-defense within that person's home."

Under these predecessor laws, applicants were required to "give a brief statement of your intended use of the firearm and where the firearm will be kept." Empirical evidence was that virtually no public carry permits were issued.

The *Palmer* plaintiffs challenged the DC Code provisions on Second Amendment grounds—as well as under Equal Protection and Right to Interstate Travel principles because only District residents could apply for the public carry permits.

The same Judge Scullin had presided over *Palmer*. He applied *Heller's* dictate, extended to the states via *McDonald*, that the Second Amendment right to keep and bear arms is held by the individual and is not limited to a communal, militia-based context. And he advanced the logic that "bearing" a firearm cannot be confined to self-defense within a residence. The predecessor D.C. Code provisions were deemed unconstitutional and their enforcement was permanently enjoined.

Within weeks after *Palmer*, the DC Council promulgated new regulatory language. While acknowledging the right of the public to carry firearms in public, the new legal framework added a "good reason" requirement—the applicant had to articulate that he or she had a "good reason to fear injury to his or her person or property or ha[s] any other proper reason for carrying a pistol." D.C Code §22-4506(a). The Code provided various elements which might support a "good reason" applicant, including "evidence of specific threats or previous attacks," employment requiring the carrying of large amounts of cash or valuables, or the need to protect vulnerable family members with mental or physical disabilities.

The "good reason" hurdle proved to be mountainous. Once again, the empirical evidence was damning--the new framework did not result in increased issuance of DC public carry permits by Chief Cathy Lanier's police department. Some accounts cited the number at fewer than ten permits issued for this city of over 600,000 residents. Last month, *Wrenn* enjoined the DC "good reason" law.

The Ninth Circuit: Judge Scullin's legal analysis in *Wrenn* relied in large measure on precedent from the Ninth Circuit. In 2014, that court had considered San Diego's "good cause" scheme in *Peruta v. City and County of San Diego*, no. 10-56961 (Feb. 13, 2014). *Peruta* arose under the rubric of California's broad prohibitions against concealed carry of a firearm and public carry of a loaded firearm generally (Cal. Penal Code § 25400 et seq.). The California scheme allowed for licensing of concealed carry upon an applicant's showing of "good moral character," completion of a specified training course, and establishing "good cause." Id. §§ 26150, 26155. The state delegated to each California municipality the power to issue a written policy setting forth the procedures for obtaining a concealed-carry license. Id. § 26160.

San Diego County's policy interpreted the "good cause" requirement to mean "[A] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way." Good cause

was "evaluated on an individual basis" and might arise in "situations related to personal protection as well as those related to individual businesses or occupations." But concern for "one's personal safety alone is not considered good cause."

The *Peruta* court, in a 2-1 split, found the San Diego "good cause" policy to be so restrictive as to eviscerate the Second Amendment's grant of individual rights to carry handguns in public for self-defense. In so doing, the Ninth Circuit spotlighted the growing judicial fissure on public-carry rights:

> By evading an in-depth analysis of history and tradition, the Second, Third and Fourth Circuits missed a crucial piece of the Second Amendment analysis. They failed to comprehend that carrying weapons in public for the lawful purpose of self defense is a central component of the right to bear arms.... And further, they failed to comprehend that regulations on the right, although permissible to an extent, could not go so far as to enjoin completely a responsible, law-abiding citizen's right to carry in public for self-defense. Such regulations affecting a destruction of the right to bear arms, just like the regulations that affect a destruction of the right to bear arms, cannot be sustained under any standard of scrutiny. (citation omitted).

Indicative of the dynamic and fiercely-contested tenor of the Second Amendment debate, San Diego's "good cause" battle may not be over, and Judge Scullin's well-intentioned reliance on *Peruta* may prove to be premature. The Ninth Circuit agreed to rehear *Peruta* on June 16, 2015, en banc. And at least one well-placed NRA observer predicted that, based on the likely staffing of the en banc proceeding, a reversal of *Peruta* may be in the offing.

The Seventh Circuit: The Seventh Circuit has spoken authoritatively on the public carry issue. In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), Judge Posner struck down Illinois' blanket prohibition on carrying ready-to-use firearms outside the home:

> A blanket prohibition on carrying gun in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment, though there is no proof it would. In contrast, when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need. .... Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.

In Seventh Circuit, however, the right to public carry is not unlimited. That court recently upheld a ban on public carry of certain types of firepower--assault weapons and large-capacity magazines. In *Friedman v. City of Highland Park*, No. 14-3091 (7th Cir. Apr. 27, 2015), the Court of Appeals catalogued the types of firearms which would have only been available for use by a militia—and held that accordingly, military-grade assault weapons could not be possessed by the general public today. It also found a sufficient legal basis to sustain intermediate scrutiny:

> Unlike the District of Columbia's ban on handguns, Highland Park's ordinance leaves residents with many self-defense options. True enough, assault weapons can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers. Householders too frightened or infirm to aim carefully may be able to wield them more effectively than the pistols James Bond preferred. But assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in aggregate. Why else are they the weapons of choice in mass shootings? A ban on assault weapons and large-capacity magazines might not prevent shootings in Highland Park (where they are already rare), but it may reduce the carnage if a mass shooting occurs. That laws similar to Highland Park's reduce the share of gun crimes involving assault weapons is established by data.

The Contrary View—"Terra Incognita": While the Seventh Circuit found adequate guidance in *Heller* and *McDonald* to define a right of self-defense in public, the Fourth Circuit discerned no such talisman. Judge Wilkinson expressed his concerns in *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011):

> [T]here may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that 'self-defense has to take place wherever [a] person happens to be,' appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. The whole matter strikes us as a vast terra incognita that courts should enter only upon necessity and only then by small degree.

The Second Circuit: Foremost among the jurisdictions upholding limits on public carry is the Second Circuit and its decision in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). There, the court considered a New York regulatory scheme similar to those in Maryland, Massachusetts, Hawaii and New Jersey—which would likely face stiff challenge in other circuits. New York law generally prohibits possession of a firearm absent a license. (N.Y. Penal Law § 265.01 et seq.). Licenses are limited to those over 21 years of age, of good moral character, without a history of crime or mental illness, and "concerning whom no good cause exists for the denial of the license." (N.Y. Penal Law § 400.00(1)(a)-(d), (g)). While certain occupations (bank messengers, jail employees, judges), pursuits (hunting and target practice) and certain locations (residences, places of business) will elicit a license, permission for concealed carry will only be granted "when proper cause exists for the issuance thereof." (N.Y. Penal Law § 400.00(2)(f). "Proper cause" is not defined in the statute, but New York State courts have opined that applicants must demonstrate "a special need for self-protection distinguishable from that of the general community." "Good moral character plus a simple desire to carry a weapon" is insufficient, nor is living or being employed in a "high crime area."

The *Kachalsky* court referenced Judge Wilkerson's "terra incognita" description of the Supreme Court's input on a right

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not it would continue to use Donovan or rely on and use its internal legal employees as city prosecutors. In 2010 Donovan was advised in writing that Montreal was going to use its full time lawyers to act as Municipal prosecutors, and his services would no longer be needed. Donovan alleged that Montreal had no right to terminate his services since it had to respect the resolution adopted on June 2, 1992 by Westmount, confirming that the latter retained his services as a Westmount Municipal Court prosecutor. Donovan also argued that if he was to be terminated, Montreal had to give him appropriate notice before terminating his service.

HELD: Motion Dismissed.

DISCUSSION: The Court held that Montreal was able to terminate the services of Donovan. At the time Montreal terminated Donovan's services, the Westmount resolution was obsolete. The Court relied on the *Act Respecting the Exercise of Certain Municipal Powers In Certain Urban Agglomerations,* which delegated to Montreal the competence concerning municipal court affairs. Furthermore, the agreement relating to the delegation of activates of penal proceedings before Montreal Municipal Court signed by Westmount in 2006 permitted Westmount to use the services of prosecutors other than those used by Montreal-but Westmount had never subsequently retained the services of Donovan. It was Montreal that continued to retain Donovan, and therefore Montreal was able to put an end to Donovan's services.

With regards to notice, the Court indicated that Donovan was terminated because Montreal decided to use its own employees to act as Municipal Court prosecutors. Therefore it is clear that Donovan was not Montreal's employee. The Court agreed with the position put forward by Montreal that Donovan was bound by a service contract and was subject, as any lawyer, to the *Code of Ethics of Advocates*. The Code of Ethics provides that a lawyer may not, at any time, limit the right of the client to consult another lawyer. Montreal argued that requiring a client to give his lawyer prior notice of termination of service would be in violation of the client's right to choose his lawyer. ML

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to self-defense outside the home. The Second Circuit grudgingly "assumed" that such a right may exist—but proceeded to uphold a restrictive "proper cause" permitting scheme by applying intermediate scrutiny in the form of an "interest-balancing test:"

> Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest."

Freed of the requirement to find narrow tailoring, the Second Circuit determined that maintaining public safety was an important governmental interest and the New York "proper cause" process served that interest– in stark contrast to the recent DC Circuit analysis in *Wrenn*.

High Court Reprise? *Heller* and *McDonald* resolved narrow questions about gun possession—and left many other questions unanswered. Subsequent interpretations of those decisions and their implications for limits on firearms, whether in the home or in public, have diverged widely, as evidenced in *Wrenn, Peruta, Moore, Kachalsky, Jackson* and other Circuit Court holdings. While the general momentum is shifting unmistakably towards less restriction on the right "to keep and bear arms," the real meaning of the Second Amendment will clearly require continuing explication by the Supreme Court. ML

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issue of the reasonableness of the accommodations proposed after this incident by Sheehan's litigation expert (i.e., that the officers should have allowed Sheehan to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

The Supreme Court granted certiorari on two issues: (1) whether the ADA requires police officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of an arrest; and (2) whether it was clearly established for the purposes of the Fourth Amendment that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable due to the anticipated resistance of an armed and violent suspect within the residence.

IMLA's brief argued, among other things, that individual police officers should not be required to perform an analysis regarding what accommodations are necessary under the ADA, but rather, police should be afforded broad discretion in these circumstances.

In a 6-2 opinion, the Court dismissed the first issue regarding the ADA as improvidently granted, declining to rule on an important issue for local governments.

Regarding the Fourth Amendment issue, the Court noted that the "real question" was "whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability." Despite having reframed the question presented on the Fourth Amendment issue, the Court declined to rule on this constitutional question. The Court instead rested its holding on the fact that the law was not clearly established at the time of the events, thereby entitling the officers to qualified immunity. In so holding, the Court reversed the decision of the Ninth Circuit, admonishing that it has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established at a high level of generality... Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." The Court explained that under the circumstances, a reasonable officer could have concluded that the second entry into Sheehan's home was justified both under the continuous search rationale and the exigent circumstances rationale.

The second case decided by the Court on May 18, 2015 in which IMLA had participated as an amicus was *Comptroller of the Treasury of Maryland v. Wynne.* In *Wynne,* local governments were dealt a loss by the Court when it held that Maryland's tax scheme was unconstitutional under the dormant Commerce Clause.

The Maryland tax scheme at issue had two components: a state tax and a county tax. The county tax is based on where the individual is domiciled and maintains a principal residence. Maryland provides residents who pay income tax to another jurisdiction for income earned in that other jurisdiction a credit against Maryland state taxes, but Maryland does not provide a credit against its county taxes. Nonresidents

who earn income from sources within Maryland must pay the state income tax as well as a "special" nonresident tax in lieu of the county tax. The result of Maryland's tax structure is that some Maryland residents who earn income outside the state may be subject to so-called double taxation because a credit is only offered on the state tax and not on the county tax.

In a 5-4 opinion, writing for a sharply divided Court, Justice Alito concluded that Maryland's personal income tax scheme violates the dormant Commerce Clause. The majority concluded that Maryland's tax structure creates a risk of double taxation, is inherently discriminatory and that it fails the "internal consistency" test. The majority noted that the state's tax scheme operates as a tariff, which the Court concluded is "fatal because tariffs are 'the paradigmatic example of law discriminating against interstate commerce.'" The Court explained that Maryland's tax scheme "fails the internal consistency test because if every State adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce."

The Court brushed aside arguments made by the Solicitor General (which were also advanced by IMLA and other state and local government groups) that residents of a county reap the benefits of local government services, like schools, roads, and police and fire services, and a state should therefore have the ability to tax the income of residents for those services, regardless of where that income was earned.

In the principal dissent, Justice Ginsburg argued that the dormant Commerce Clause does not invalidate a tax scheme where the discriminatory effect results from the operation of two otherwise lawful tax statutes. She also argued that it is well-established that states have the authority to tax all of their residents' income, wherever earned, and that it is a policy decision that should be left to the states and Congress to decide whether they want to offer tax credits for income that is taxed by other states. She concluded by noting that the Court is ill equipped to make these types of policy decisions.

The dissent brought together an unlikely confederation. Joining Justice Ginsburg were Justices Kagan and Scalia. Justice Scalia also wrote his own dissent arguing that the dormant Commerce Clause does not exist, because the Constitution says nothing about prohibiting state laws that burden interstate commerce. Justice Thomas joined the Scalia dissent and issued his own, arguing that even if there is a "dormant" Commerce Clause, it could not have been intended to apply in this manner. **ML**

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ciological Review, 2913 Vol. 78: *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* 2 (2013), *available at* http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf (appendix comparing nuisance property ordinances across municipalities).

6. Andrew Klein, U.S. Dept. of Justice, Nat'l Inst. of Justice, *Practical Implications of Current Domestic Violence Research: Judges* 1 (2008), available at https://www.ncjrs.gov/pdffiles1/nij/grants/222321.pdf.

7. *See* Desmond & Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, Am. Sociological Rev. vol. 78, no. 1, 131 (2013), *available at* http://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr0.pdf (finding that domestic violence was the third most commonly cited offense under a nuisance ordinance in Milwaukee, Wisconsin); Soc. Science Research Council, *Technical Note: Nuisance Ordinance Enforcement in Binghamton, New York* 2 (2015) (on file with author) (finding that incidents of domestic violence received the largest share of points in enforcement actions under a nuisance ordinance in Binghamton, New York).

8. Desmond & Valdez, *supra* note 7, at 132 (finding that eviction was the most common abatement strategy in response to citation under the Milwaukee nuisance ordinance).

9. *Id.* at 125-130.

10. *Id.* at 138.

11. Second Amended Complaint, Grape v. Town/Village of East Rochester, No. 07- CV-6075-CJS (F) (W.D.N.Y. July 6, 2007) [hereinafter Grape Complaint], *available at* http://www.nhlp.org/files/Grape%20WDNY%20nuisance%20 2d%20compl.pdf.

12. *Id.*

13. *See* Desmond & Valdez, *supra* note 7, at 117; Soc. Science Research Council, *supra* note 7.

14. Carmela Decandia et al., Nat'l Ctr. on Family Homelessness, *Closing the Gap: Integrating Services For Survivors of Domestic Violence Experiencing Homelessness 2 (2013), available at* http://www.familyhomelessness.org/media/371.pdf; Ctrs. for Disease Control & Prevention, *Costs of Intimate Partner Violence Against Women in the United States* 18–19 (2003), *available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf; National Alliance on
Mental Illness, *The High Costs of Cutting Mental Health: Homelessness* (2011), *available at* http://www2.nami.org/Template.cfm?Section=About_the_Issue&Template=/Cont entManagement/ContentDisplay.cfm&ContentID=114535

15. Memorandum from Sara K. Pratt, Deputy Sec'y for Enforcement and Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev. to FHEO Office Directors and FHEO Regional Directors, *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women* Act 3-4 (Feb. 9, 2011) [hereinafter FHEO Guidance on Housing Discrimination Against Domestic Violence], *available at* http://www.hud.gov/offices/fheo/library/11-domestic-violence- memo-with-attachment.pdf.

16. *Id.*

17. *Id.* at 5. Currently, the U.S. Supreme Court is considering the question of whether disparate-impact claims are cognizable under the Fair Housing Act. Texas Dep't of Hous. Cmty. Affairs v. Inclusive Communities Project, 135 S. Ct. 939 (2015), motion granted, No. 13-1371 (S. Ct. Jan. 9, 2015).

18. *See* Complaint ¶ 39, Briggs v. Borough of Norristown, No. 2:13-cv-02191-ER (E.D. Pa. Apr. 29, 2013), ECF 9 [hereinafter Briggs Complaint], *available at* https://www.aclu.org/files/assets/2013.04.29 - verified_first_amended_complaint.pdf.

19. FHEO Guidance on Housing Discrimination Against Domestic Violence, supra note 15, at 4; *see, e.g.*, Soc. Science Research Council, *supra* note 7, at 2.

20. FHEO Guidance on Housing Discrimination Against Domestic Violence, supra note 15, at 5; *see*, e.g., Briggs Complaint, *supra* note 18.

21. Norristown HUD Complaint, *supra* note 3; Norristown Conciliation Agreement, *supra* note 3; Conciliation Agreement between Assistant Secretary of the Office of Fair Housing & Equal Opportunity and City of Berlin, New Hampshire, No. 01-15-0017-8 (Dep't of Hous. & Urban Dev., Jan. 29, 2015) [hereinafter Berlin Conciliation Agreement], *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=TownBerlin.pdf.

22. 42 U.S.C. §§ 2918a(c)(3)(B), 3226(c)(3)(B)(xxi), 3608(e), 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 12872(c)(2)(E), 12873(c)(2)(E), 12892(c)(2)(E), 12893(c)(2)(E), 1437aaa-2(d)(2)(M), 1437c-1(d)(16); 24 C.F.R. §§ 91.225(a)(1),91.235(c)(4), 91.325(a)(1), 91.425(a)(1)(i), 91.520(a), 570.487(b), 570.421(a)(1)(iv), 570.601(a)(2), 570.704(b)(8)(v), 570.904, 903.1, 903.2(d), 903.7(o), 905.308(b)(1), 960.103(b), 982.53(c).

23. U.S. Dep't of Housing & Urban Dev., Office of Fair Hous. & Equal Opportunity, *Fair Housing Planning Guide* 5-4 (1996), *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

24. *Id.* at 4-3, 4-4.

25. Shannan Catalano, U.S. Dep't of Justice, *Special Report Intimate Partner Violence*, 1993-2010 3 (2012).

26. Affirmatively Furthering Fair Housing Assessment Tool: Solicitation of Comment—60-Day Notice, 79 Fed. Reg. 57,949, 57,950 (Sep. 26, 2014).

27. *See, e.g.,* Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970).

28. Affirmatively Furthering Fair Housing Proposed Rule, 78 Fed. Reg. 43,710, 43,712 (proposed July 19, 2013) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576, and 903).

29. *See, e.g.,* Complaint, U.S. ex rel. Lockey v. City of Dallas, Tex., No. 3:11-CV- 354-O (N.D. Tex. Jan. 23, 2013), 2013 WL 268371.

30. *See infra* Part V.

31. 42 U.S.C. § 14043e et seq.

32. Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, Docket No. FR-5720-P-02, 21 (proposed March 25, 2015) (to be codified at 24 CFR pts. 5, 92, 200, 574, 576, 578, 880, 882, 883, 884, 886, 891, 960, 966, 982-83), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=5720p02vawa2013proprule.pdf (defining covered housing provider to include "state or local government[s]" that have "responsibility for the administration and/or oversight of VAWA protections" and noting that "VAWA protections

and responsibilities are not limited to PHAs, owners, and managers of assisted housing.")
33. 42 U.S.C. § 14043e-11(a)–(b).
34. 42 U.S.C. § 14043e-11(b); 24 CFR § 5.2005.
35. *See* California Motor Transport Co. v. Trucking Unlimited, 405 U.S. 508 (1972); McDonald v. Smith, 472 U.S. 479, 482 (1985); Jackson v. New York State, 381 F. Supp. 2d 80 (N.D.N.Y. 2005) (holding that a plaintiff's actions in seeking enforcement of an order of protection was protected by the First Amendment); Anderson v. City of N.Y., 2000 WL 1010984 at *4 (E.D.N.Y. 2000) (finding that the right to petition "arguably extends to. . . [the] right to lodge complaints with the police."); Meyer v. Bd. of Cnty. Comm'rs of Harper Cnty., Okla., 482 F.3d 1232, 1243 (10th Cir. 2007) (quoting Morris v. Dapolito, 297 F. Supp. 2d. 680, 692 (S.D.N.Y. 2004)) (finding that "[f]iling a criminal complaint with law enforcement constitutes an exercise of 1st Amendment right to petition" . . . even an "attempt to report a criminal offense is protected by the First Amendment.").
36. Klein, *supra* note 6, at 7.
37. Mariemont Apartment Assn. v. Village of Mariemont, 2007 WL 120727 at *7-8 (Ohio Ct. App. Jan. 19, 2007) (finding a procedural due process violation because the ordinance did not provide for a pre-deprivation hearing, failed to establish a time frame for filing an appeal, and allowed for only a short stay of enforcement); Cook v. City of Buena Park, 126 Cal. App. 4th 1, 9 (Cal. Ct. App. 2005) (finding that a nuisance ordinance violated procedural due process by not mandating descriptions of the observed criminal activity upon which tenants could be evicted, giving a landlord just ten days to initiate an unlawful detainer action, and requiring the landlord to prevail in the unlawful detainer action).
38. Werth, *supra* note 4, at 19.
39. *Id.* at 19-20.
40. *See, e.g.*, Complaint, Peters v. City of Wilkes Barre, No. 3:2015-cv-00152 (M.D. Pa. Jan. 22, 2015), *available at* http://www.aclupa.org/our- work/legal/legaldocket/peters-v-wilkes-barre/.
41. Minn. Stat. § 504B.205, subdivisions 2, 3 ("preempts any inconsistent local ordinance" that requires an eviction or penalizes a landlord in response to calls for police or emergency assistance and protects tenants' right to call the police in response to any conduct at the property); 53 Pa. Cons. Stat. Ann. § 304 (provides protections for any resident, tenant, or landlord who faces penalty under a local ordinance because police or emergency services responded to abuse, crime, or an emergency at a property. It also authorizes remedies in court against any municipality that violates these protections.).
42. New York Assembly Bill A.1322 (2015), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A01322&term=2015&Summary=Y&Actions=Y&Memo=Y&Text=Y; Illinois General Assembly Bill SB 1547 (2015), available at http://www.ilga.gov/legislation/billstatus.asp?DocNum=1547&GAID=13&GA=99&DocTypeID=SB&LegID=88215&SessionID=88; Iowa House Bill HF493(2015), available at https://legiscan.com/IA/bill/HF493/2015
43. Briggs Complaint, *supra* note 18.
44. Release and Settlement Agreement, *supra* note 1.
45. *Id.*
46. Complaint, Rizkalla v. Borough of Blakely, No. 3:14-cv-02433 (M.D. Pa. Dec. 22, 2014); Complaint, Hazleton v. Borough of Blakely, No. 3:14-cv-02473 (M.D. Pa. Dec. 24, 2014); Terrie Morgan-Besecker, *Domestic violence victims sues Blakely over "disruptive conduct" ordinance*, The Times Tribune, Dec. 24, 2014, *available at* http://thetimes-tribune.com/news/domestic-violence-victims-sues-blakely-over-disruptive-conduct-ordinance-1.1807608.
47. Terrie Morgan-Besecker, *Blakely settles disruptive ordinance lawsuit*, The Times Tribune, Feb. 14, 2015, *available at* http://thetimes-tribune.com/news/blakely-settles-disruptive-conduct-ordinance-lawsuit-1.183299.1.
48. Complaint, Peters v. City of Wilkes Barre, No. 3:2015-cv-00152 (M.D. PA., Jan. 22, 2015), *available at* http://www.aclupa.org/our-work/legal/legaldocket/peters-v-wilkes-barre/.
49. *See* Anna Stolley Persky, *A Call for Help: An Ordinance That Evicts Tenants for Seeking Police Aid Is Putting Abused Women Out on the Street*, ABA J., Sept. 2013, at 14, 15; Grape Complaint, *supra* note 11
50. Stipulation of Settlement and Discontinuation, Peeso v. City of Hornell, No. 6:11-cv-06306 (W.D.N.Y. filed Nov. 14, 2011).
51. Norristown HUD Complaint, *supra* note 3; Norristown Conciliation Agreement, *supra* note 3; Berlin Conciliation Agreement, *supra* note 21.
52. Norristown HUD Complaint, *supra* note 3.
53. Norristown Conciliation Agreement, *supra* note 3.
54. Berlin Conciliation Agreement, *supra* note 21.
55. *See* ACLU Women's Rights Project, *Nuisance Ordinances Undermine Law Enforcement Responses to Domestic Violence* (2015); Werth, *supra* note 4, at 12- 16.
56. Desmond & Valdez, *supra* note 7, at 131.
57. Soc. Science Research Council, *supra* note 7, at 2.
58. *See*, e.g., Release and Settlement Agreement, *supra* note 1; Kyle Wind, *Vandling council scraps sweeping proposed nuisance law*, The Times Tribune, Jul. 30, 2015, *available at* http://thetimes-tribune.com/news/vandling-council-scraps-sweeping-proposed-nuisance-law-1.1527957.
59. *See, e.g.*, U.S. Dep't of Justice, Civ. Rts. Div., *Investigation of the New Orleans Police Dep't* 44 (Mar. 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf (finding "Inadequate policies and procedures, deficiencies in training, and extraordinary lapses in supervision have contributed to a systemic breakdown in NOPD handling of sexual assault investigations. . . [as well as] domestic violence cases, although not to the degree evident in sex crimes."); U.S. Dep't of Justice, Civ. Rts. Div., *Investigation of the Puerto Rico Police Dep't* 57-58, 65-66, 100 (Sept. 2011), http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf (identifying department-wide failure to address domestic violence and sexual assault and identifying insufficient training as one cause of the pattern and practice of gender-biased policing).
60. ACLU Women's Rights Project, *Safe Homes, Safe Communities: A Guide for Local Leaders on Domestic Violence and Fair Housing* (2015) (available at www.aclu.org/safehomes). M.

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or limit of liability which otherwise would apply.

(1) As soon as practicable, a determination shall be made as to whether an insufficiency exists. If it is determined that no insufficiency exists, the (designated official) promptly shall so advise the person filing the notice, and shall include a statement of the reasons why no insufficiency exists.

(2) If an insufficiency is found to exist, the municipality shall take one or more of the following actions as appropriate to the circumstances and shall, at an appropriate time, notify the person filing the notice of the actions taken or planned.

(a) If the insufficiency was temporary and no longer poses a hazard, the (official) shall determine the likelihood of another occurrence and what action, if any, is required to prevent or post warnings of such conditions. In most such cases, the posting of warnings is not required unless there is a reasonable likelihood of a recurrence of the insufficiency.

(b) If the insufficiency is not temporary, the (official) shall as soon as practicable post warning of the insufficiency. Within 72 hours after receipt of the notice of insufficiency, the (official) shall develop a plan to remedy the insufficiency. The plan shall be implemented in good faith within a reasonable time. If the insufficiency is not immediately remedied, appropriate warnings shall be continued. The municipality may take reasonable interim action and shall determine if warnings continue to be required. The reasonableness of any proposed action shall consider the requirements that the expenditure of municipal funds may be made only in accordance with proper procedures.

5. Municipal Observations and Inspections.

(A) *Scheduled and Regular Inspections.* As part of its routine road and sidewalk maintenance, the municipality will seek to conducts periodic inspections of their condition.

(B) *Actual Notice Observations.*

(1) In accordance with RSA 231:92, I (b), any official or employee designated in subparagraph (5) (B) (2) of this policy who has actual notice or knowledge of an insufficiency by means other than a written notice filed in accordance with section 4, shall promptly report such insufficiency to (official) who shall take the same action as would be taken if the insufficiency was reported by written notice.

(2) The employees/officials required to act under subparagraph (5) (B) (1) are the following: (Selectman/Commissioner/Mayor/the Municipal Manager or Municipal Administrator/Municipal Clerk/any on-duty Fire or Police Personnel/Road Agent/Public Works Director).

(C) *Informal Observations.* Only knowledge by or notice to those officials or employees designated in paragraph (5) (b) shall impose an obligation to act as provided by RSA 231:92. While the municipality is not designating or authorizing any other municipal officials and employees to receive notice or otherwise commit the municipality to act, in the interest of safety and efficiency, all municipal officials and employees are encouraged to be observant of highway and sidewalk conditions and to advise (official) if they observe conditions which they believe might pose a problem. Any such observation provided to the municipality shall not constitute formal or actual notice or knowledge on the part of the municipality unless made in accordance with section 4 or an official designated in paragraph (5) (B) (2) has actual knowledge of an insufficiency through personal investigation or observation.

6. *Inclement Weather Practices.* In accordance with RSA 231:92-a, insufficiencies or hazards caused by snow, ice or other inclement weather shall be handled pursuant to the municipality's inclement weather policies and procedures.

Conclusion

This framework may not be appropriate for every municipality (particularly those fortunate enough to measure annual snowfall in millimeters and below-freezing days in the single digits, if at all). But the proposition that each jurisdiction should be fully aware of the roads for which it is liable, and that procedures for notice and remediation of defects be thoroughly spelled out, should apply to virtually all municipalities, whether ice-bound or tropical.

Notes

1. According to Wikipedia, "frost heaving" or "frost heave" is "an upwards swelling of soil during freezing conditions caused by an increasing presence of ice as it grows towards the surface, upwards from the depth in the soil where freezing temperatures have penetrated into the soil (the freezing front or freezing boundary). http://en.wikipedia.org/wiki/Frost_heaving.

2. http://www.frostheaves.com/.

3. http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx.

4. For example, New Hampshire imposes liability when a road for which a duty exists is "insufficient."

> II. For purposes of this subdivision, a highway or sidewalk shall be considered "insufficient" only if:
>
> (a) It is not passable in any safe manner by those persons or vehicles permitted on such sidewalk or highway by state law or by any more stringent local ordinance or regulation; or
>
> (b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway at posted speeds or upon such sidewalk, in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state of repair of the highway or sidewalk, including any warning signs, and prevailing visibility and weather conditions. [NHRSA 231:90, II.]

5. Of course, each jurisdiction has its own set of rules governing liability. Sometimes the requirement that municipalities have notice of defects or insufficiencies is stated as arising from the notion that local governments are not required to be guarantors of public safety on all public roads.

6. Bancroft v. Town of Canterbury, 118 NH 453 (1978).

7. A New Hampshire town learned the "hard way" that lack of definitive statements of a road's classification, accompanied by inaccurate statements by a town official could lead a court to rule that a class VI or private road would be deemed a public road that the town had a duty to maintain, Turco v. Barnstead, 136 N.H. 256 (1992). ML

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will be deemed to have a discriminatory effect if it imposes a burden on out-of-state interests that in-state interests will not bear,[18] or the state law excludes virtually all out-of-state actors from a market.[19] A review of the relevant case law suggests that California's egg statute does not so burden or exclude out-of-state actors, and therefore the law does not have a discriminatory effect.

Accordingly, the constitutionality of the law will ultimately hinge on the *Pike* test.

Under *Pike*, the Court considers whether the objectives of the law can be achieved through reasonable and less restrictive alternatives, [20] and the extent to which the statute in question has "extraterritorial effects." [21] Based on these factors, challengers may argue that California's egg law does not survive the *Pike* test.

The stated purpose of the egg law is to promote consumer health and safety. Opponents of the law will argue that this interest can be achieved through less burdensome means, such as California's adoption of a robust labeling scheme or public service campaign to educate consumers.

Out of state producers also assert that the extraterritorial effects of the law make it unconstitutional. California, the most populous state in the country, imports one-third of its egg supply and can purchase as much of 30 percent of the eggs produced in a single state.[22] Because California represents such a substantial portion of the market, the state can significantly impact standards for egg production on a national scale. The ability of a single state to create *de facto* national production standards in an industry as important and far-reaching as food production may be challenged as wholly inconsistent with the purposes of the Commerce Clause. Enforcement of the law would seem to require California to become actively involved in monitoring egg production nationwide. To detractors, such a result would fly in the face of federalist principles, as the authority to regulate commerce among the states lies primarily with Congress. Moreover, they assert, if the law is upheld it would create a dangerous precedent, because it would establish legal footing for California and other states to enact conflicting legislation.

The need for uniform food safety standards is important to provide clarity and stability to producers and consumers alike. However, efforts to enact federal legislation that would preempt California's legislation have stalled.[23]

Notwithstanding the arguable invalidity of the law under the traditional Commerce Clause analysis, the law seems likely to survive. The Ninth Circuit has upheld similar animal welfare statutes.[24] In addition, over the last two decades, the Supreme Court's interpretation of the dormant Commerce Clause has shifted.[25] Under *Pike*, the justices retain substantial discretion. The Court has deviated from traditional dormant Commerce Clause analysis, as evidenced by its increasing willingness to carve out new exceptions to the general prohibition on state regulation.[26] As such, it appears that the Court would not block such a law.

In any event, for now the Commerce Clause has not deprived the egg-laying chickens in the Golden State—and their hard-working kin in other states that export eggs to California—of the right to 116 square inches of personal space.

Notes

1. Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 840950 (E.D.Cal. Feb. 3, 2014).
2. AB 1437, Gen. Assemb. (Cal. 2010) (Codified in Cal. Health & Safety Code §§25995-97).
3. Cal. Health & Safety Code §25990.
4. Cal. Code Regs. 3 tit. 3 § 1350, providing in part that "[a]n enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird."
5. Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 840950 (E.D. Cal. Feb. 3, 2014).
6. Amended Complaint at 2, Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 1245038 (E.D. Cal. Mar. 3, 2014).
7. Missouri v. Harris, 2014 U.S. Dist. LEXIS 141337 at 25-28 (E.D. Cal. Oct. 1, 2014)
8. *Id.* at 28-38.
9. *Id.*
10. *Id.* at 48.
11. Notice of Appeal, Missouri v. Harris, No. 2:14-CV-00341 (E.D. Cal. Oct. 24, 2014).
12. U.S. Const. Art. 1, § 8
13. James L. Buchwalter, *Construction and Application of Dormant Commerce Clause,* 41 A.L.R. Fed. 2d 1 (2009) ("Although the Commerce Clause is a power-allocating provision giving Congress preemptive authority over the regulation of interstate commerce, it is also a substantive restriction on permissible state regulation of interstate commerce.").
14. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
15. Cal. Health & Safety Code § 25995.
16. Amended Complaint at 3, Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 1245038 (E.D. Cal. Mar. 3, 2014).
17. In an effort to show discriminatory intent, plaintiffs rely primarily on reports by state *administrative agencies* that were issued *after* the law had already been passed by the state legislature. *See* Maine v. Taylor, 477 U.S. 131, 149-50 (1986) (finding that comments made by a state administrative agency after the statute's enactment constituted weak evidence of legislative intent).
18. *See* Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333 (1977); West Lynn Creamery v. Healy, 512 U.S. 186 (1994) (invalidating laws that imposed burden only on out-of-state competitors).
19. *See e.g.* C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994); Brimmer v. Rebman, 138 U.S. 78 (1891); Deans Milk Co. v. Madison, 340 U.S. 349 (1951).
20. *Pike*, 397 U.S. at 142; *See e.g.* Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 473 (1981) (upholding state law banning plastic milk containers because there was no less restrictive alternative).
21. See e.g. Healy v. Beer Institute, 491 U.S. 324, 336-37 (1989) ([T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."
22. *See* Amended Complaint at 10, Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 1245038 (E.D. Cal. Mar. 3, 2014);
23. Dan Wheat, *Push for national chicken cage standards stalls*, Capital Press http://www.capitalpress.com/Nation_World/Nation/20150102/push-for-national-

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chicken-cage-standards-stalls (last updated Jan. 5, 2015, 2:39 PM).
24. *See e.g.* Ass'n des Éleveurs de Canards v. Harris, 729 F.3d 937, 2013 U.S. App. LEXIS 18154, 2013 WL 4615131 (9th Cir. 2013) (affirming the denial of an injunction to prevent the enforcement of a California statute that forbids the sale of products resulting from force fed birds in the state, finding no Commerce Clause violation).
25. *See generally*, Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. (2013); http://digitalcommons.law.lsu.edu/lalrev/vol73/iss4/5.
26. Denning, *supra*, note XXV. ML

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threatened with physical harm.
I receive 1.2 million e-mails every day and have time to answer four of them.
I answer lots of questions from people in my doorway who wonder if I have a minute and then leave an hour later.
I counsel and console.
I reprimand and admonish.
I advise (and get ignored).
I advise again (and get ignored again).
I try to convince co-workers that I truly don't remember anything about divorce law.
I hand out a lot of phone numbers for lawyers that do divorces.
I get ignored some more.
I pick my battles and refuse to be ignored when it really matters.
I protect my client's representatives to the extent they are watching out for its best interests.
I protect my faceless client like a fat kid covers the last piece of cake.

Okay. But Why?

sigh If I could definitively answer that question, I could save all of us a lot of money in the therapist's office and at the liquor store. I suppose, if I'm completely honest with myself, I like being part of something as critically important as local government. We're never going to be wealthy lawyers by the world's standards and most of us are never going to be legendary legal gods, two things that, I sheepishly confess, bothered me the first few years of my municipal career. I guess it's true, though, that with age comes wisdom and I have left those concerns further and further behind me as I've become more and more aware of the direct impact local government has on the quality of life for the people around me. (It also could be that with age comes laziness and I just don't feel like expending the energy to worry anymore. You'll have that.)

I have to say, though, that my "why" recently has become clearer. When I began writing this article, things were rolling along as usual: too much to do and not enough time to do it, but it all was general, garden-variety municipal work. And then, in a moment, life changed and work stopped and attention shifted to matters larger and more intense than I could have ever imagined.

The details of my Moment aren't important because, for each of us, there has been or will be a Moment that defines our "why." A Moment may be the result of a natural disaster ravaging your city or a school shooting or a bad decision or a political scandal or one of the billion other things completely outside of the individual, direct control of a city attorney. Trust me: the genesis doesn't matter when you define your "why." Nothing matters as you realize that your presence as legal counsel for your city right then, in that Moment, matters more than anything else you've done in your career and instinctively you know that it will greatly matter in all of the hours and days and weeks and months to follow. Your presence, your help, your mind, your experience will make a difference for this client and its people and you suddenly realize why you do this. It's because protecting this faceless client is as much a part of who you are as the color of your eyes and you know that this is why you were put on this spinning terrarium – to protect and serve and defend in this Moment and in all the little "m" moments to follow.

You were put here to pick up these pieces and help your city put itself back together. You are here to handle the Moment, counsel shaken employees who are suddenly willing to listen, and send them back to the comfort of their daily work with the confidence and knowledge that they've got it now.

You do it because that's who you are. It's who you were made to be.

And after everyone else has moved past the Moment, you will continue to deal with it and its consequences and its mind-numbing minutiae that nobody else will ever see. But you see it, you live it, you breathe it, you lose sleep because of it ... because you're still there, camped out in the Moment long after it's over.

That's just what you do.

In fact, you've been in the damn Moment armpit deep from the time it happened and you know you'll stay in it until the file is finally closed and stored away. You'll do that for the employees and the electeds and the department heads so they can return to the important work they do for your client and for its citizens. You'll handle the Moment and still manage the zillion other issues that won't stop coming just because you've had your Moment. You'll keep going because your city and its operation under the unique laws that govern its ultimate success or failure is in your hands. You'll stay in that Moment for as long as it takes because municipal law found you and you couldn't let it go and now it's who you are. It's what you proudly do even if it seems nobody understands what it is or why you do it.

Hear me, though: I understand. I know what it is you do and I get why you do it.

And I'm floating on this timber with you. ML

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support the LGO's position – giving little weight to such evidence even if they heard it. By contrast, any opinion adverse to the LGO from the LGO's own expert employee would be pure gold for the opponent. Designating all your expert employees as consulting experts in an attempt to insulate their opinions from discovery will probably not work even if done in good faith because the limits on discovery about consulting experts usually applies only to consultants specially retained for the litigation, not to general employees. *See* Notes of Advisory Committee on Rules—1970 Amendment, Fed. R. Civ. P. 26 (discussing Rule 26(b)(4)(B) [now 26(b)(4)(D)]).[4] Time and resources permitting, the LGO's lawyer could question each such employee and obtain an affidavit neutralizing the employee's usefulness as a hostile expert witness if the affidavit were truthful. Otherwise, my best suggestion would be to encourage LGO's to hire and train their expert employees carefully so that they hold in common the significant opinions relating to the subject of their work. In some instances the most effective deterrent to such tactics will be that the adverse party will be equally or more vulnerable to this approach as the LGO.

Conclusion. An LGO has a strong likelihood of success in helping an employee who does not want to testify as

an expert (in a case where the LGO is not a party) quash a subpoena. But an LGO trying to prevent a willing employee from testifying as an expert will face substantial difficulties – particularly if the employee receives a subpoena and does not wish to quash it. Local law and agreements permitting, an LGO's personnel policy or ordinance restricting the right of employees to testify as experts in litigation to which the LGO is not a party could be enforceable if the factors for determining availability relate to the efficiency of government operations and allocation of resources and not on the anticipated content of the testimony. LGO's can almost certainly require the employee who wants to testify as an expert to take vacation time if that requirement were not imposed only when the anticipated testimony could hurt the LGO. But if instead an LGO refused to grant vacation for any testimony, and continued to pay the employee regardless of the nature of the litigation or of the testimony, might the LGO be able to retain greater control of content? I do not know but I doubt it. I think this would be viewed as a wrongful, perhaps criminal, attempt to influence testimony. Keeping the employee on duty might help the LGO prohibit expert compensation to the employee – thereby perhaps weakening the employee's motive to testify. But keeping the testifying employee on duty also weakens the force of the argument that the witness' testimony is not given on behalf of the LGO and therefore should not be admissible as an employee's statement as a hearsay exclusion under evidence rule 801(d)(2)(D. Also, the more that restrictions on an employee's availability relate to whether the testimony will later harm the LGO employer, the more likely that the LGO could face civil rights liability on the theories adopted by the Fifth and Ninth Circuit cases cited above. The LGO might explore the possibility of invoking conflict of interest, other ethics rules, and unlawful gratuity prohibitions, but should be careful to do this, if at all, using carefully considered content-neutral standards. Where the LGO is a party to litigation, it is very difficult to prevent an employee with expertise from being deposed or called as a witness by another party.

Notes

1. Different but often related problems are presented regarding consultants and other contractors used by LGOs. For example, will an LGO's ediscovery vendor testify for adverse parties or testify in a case unrelated to the LGO but generate testimony that might be used to impeach the vendor as a witness for the LGO in later litigation? LGO's probably can draft contracts to avoid some but probably not all such problems. I am not going to discuss contractor issues here. But for both employees and contractors, we should consider that any clauses in contracts or personnel policies that restrict the subject matter or content of their potential expert testimony will be used to oppose their expert qualifications and, if they do testify as experts, to impeach the weight of their expert opinions if the LGO ever tries to use them as testifying experts. ("Q. Isn't it true that your contract prohibits you from testifying to an opinion adverse to the city?"). Also consider that, as with expert employees, any attempt to limit testimony may run into free speech and anti-competition arguments. In addition, what effective enforceable remedy could an LGO have for breach of a contract clause relating to the vendor's expert testimony? Would a court award damages to an LGO based on a vendor's truthful testimony? Finally, what value would any conceivable contract provision have if it could not bind former employees of a vendor – and I strongly doubt that a contract between an LGO and a vendor, even if incorporated into a vendor's employment contract with its experts, could bind the expert to any extent useful to the LGO after the expert left the vendor's employment.
2. The LGO would have to be very careful to avoid even appearing to be trying to tamper with the witness' testimony. I recommend that any attempt to get relief be accomplished only in open court.
3. § 301. Departmental regulations
The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.
4. However, some jurisdictions prohibit one party from calling another party's expert as a witness. *See* e.g., Spino v. John S. Tilley Ladder Co., 448 Pa.Super. 327, 353-54, 671 A.2d 726, 739 (1996), *aff'd*, 548 Pa. 286, 696 A.2d 1169 (1997). **ML**



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