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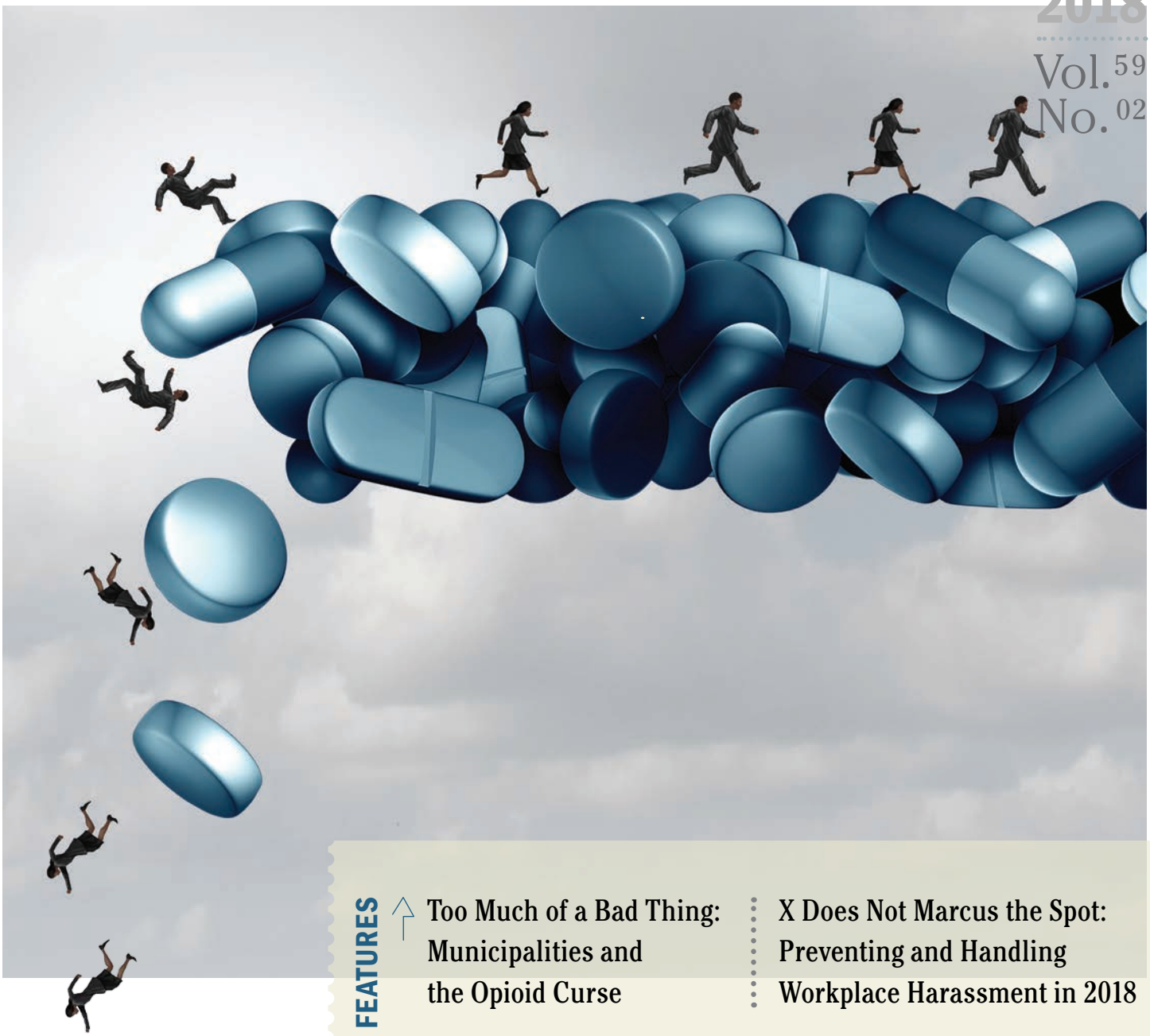

FEATURES

Too Much of a Bad Thing: Municipalities and the Opioid Curse

X Does Not Marcus the Spot: Preventing and Handling Workplace Harassment in 2018

DEPARTMENTS

CODE ENFORCEMENT: The Opioid Crisis: Does Local Code Enforcement Have a Role?

AMICUS CORNER: Claims for Indefinite Medical Leave–Can the Supreme Court Provide a Bright Line Rule?

LISTSERV: The Pledge of (Non) Allegiance: Sovereign Citizenship

CASES: Incendiary Emails and Unwarranted Parole Revocation

INSIDE CANADA: Inept Drivers, Accessory Users, Restrictive Covenants, and Vigilant Code Officers



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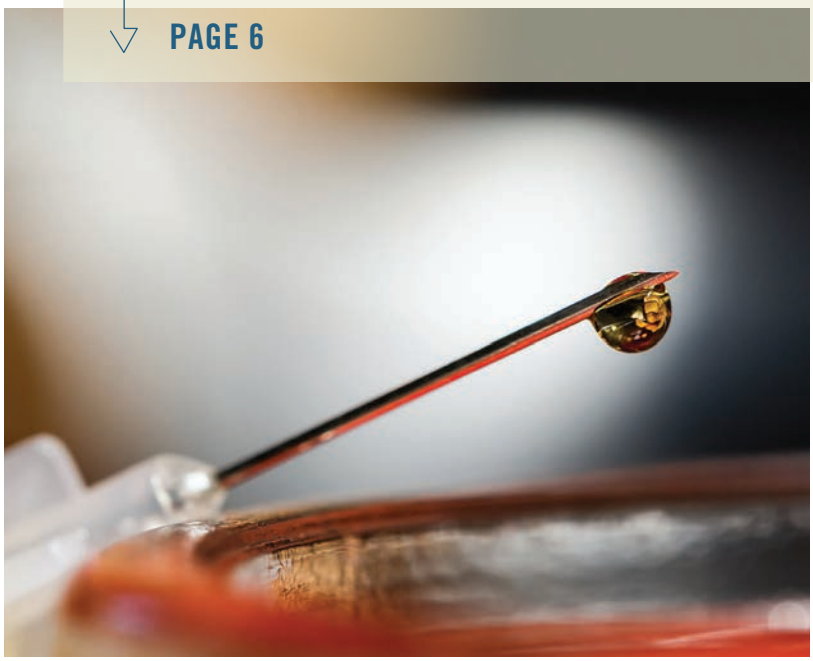
Too Much of a Bad Thing: Municipalities and the Opioid Curse

By: Erich R. Eiselt, IMLA Assistant General Counsel

America's opioid crisis is overwhelming Main Streets across the nation. Municipalities are engaged in a massive effort to hold the pharmaceutical industry accountable– and to craft solutions that will save lives.

PAGE 6



X Does Not Marcus the Spot: Preventing and Handling Workplace Harassment in 2018

By: Lawrence Lee and Michelle Faulkner, Stinson Leonard Street LLP

A multi-faceted harassment problem is silently taking shape inside your governmental offices. What actions are you, as the municipal attorney, called upon to take?

PAGE 16

DEPARTMENTS

20 AMICUS CORNER
Claims for Indefinite Medical Leave– Can the Supreme Court Provide a Bright Line Rule?
By: Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy
A circuit split leaves employers in the dark when accommodating absences of uncertain duration.

22 CODE ENFORCEMENT
The Opioid Crisis: Does Local Code Enforcement Have a Role?
By: Frank M. Johnson, Assistant City Attorney, Gaithersburg, Maryland
Nuisance properties harbor drug activity. Enforcing code provisions can help stem the epidemic.

26 LISTSERV
The Pledge of (Non) Allegiance: Sovereign Citizenship
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
The local law department meets visitors from a parallel universe.

28 INSIDE CANADA
Inept Drivers, Accessory Uses, Restrictive Covenants, and Vigilant Code Officers
By: Monica Ciriello, Ontario 2015

30 CASES
Incendiary Emails and Unwarranted Parole Revocation
By: IMLA Editorial staff

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The Holy Grail

I want a new drug, one that does what it should
One that won't make me feel too bad
One that won't make me feel too good

In 1983, Huey Lewis released "I Want a New Drug," an up-tempo jingle imagining a medication that would produce the enjoyable intoxication of romance, without any negative effects. Lewis was describing what scientists have long labored to unearth—a pharmaceutical miracle that can induce pleasure and quell pain without causing addiction.

That challenge has undoubtedly consumed mankind ever since the benefits of the opium poppy were discovered by Sumerians eons ago. It was not until 1804 that the first of opium's many remarkable alkaloids was identified. That substance, which blocked pain and produced a gauzy well-being, would take its name--morphine--from Morpheus, the Greek god of dreams. But morphine had another Greek ancestor—Janus. Its initial euphoria was soon offset by a dismal and unshakeable craving for more, at any cost.

Those who imagine that today's opioid crisis has no analog in our nation's past need only double-check their history books. The medical hypodermic syringe was developed in 1853, enabling Civil War doctors to make extensive use of morphine to assuage the brutality of battlefield medical procedures. They also distributed millions of opioid pills. Disfigured soldiers and destitute civilians were no match for the morphine molecule. As Reconstruction progressed, pain and despair produced upwards of 200,000 American addicts struggling to survive the drug's relentless grip.

It was against that backdrop that the Harrison Narcotic Act of 1914 was passed, imposing strict limits on the medical profession's prescribing of morphine, heroin or other opioids. Doctors' hesitancy to use those drugs, except in the most dire of cases, continued into the 1980's.

As we now see in abundance, that hesitation has long since disappeared. Compromised by the ambitions of an emerging pharmaceutical industry, it was replaced by a zeal to provide pills for every instance of pain, with insufficient attention to the consequences. Any municipal lawyer knows only too well what the costs have been to his or her community.

This issue of *ML* discusses the opioid curse and attempts to proffer some solutions which local governments might consider. Unless and until a holy grail—a drug which alleviates pain without driving the user to addiction—is discovered, the opioid risk will persist. IMLA is committed to supporting our members in this difficult endeavor.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER

By: Chuck Thompson, IMLA Executive Director and General Counsel



IMLA continues to champion important issues for local governments in courts around the country. While some questions involve polarizing topics, there are underlying causes that are important to all of us in local government. For example, in cases involving immigration and "sanctuary cities," the federal government seeks to challenge a court's authority to issue a "nationwide injunction" barring it from pursuing remedies against other local governments. Attorney General Sessions asserts that these injunctions have no basis as the cases were not filed as class actions; yet, the injunctions effectively prevent the government from pursuing actions against non-parties covered by the injunction's breadth.

Why is this important to local government? An easy answer rests with the relative size and ability of some local governments to litigate. The comparative cost for Chicago, San Francisco, New York or Philadelphia to litigate against the federal government is far less than the burden on smaller jurisdictions which may be represented by a lone municipal attorney or outside counsel. And where these large cities convince courts that the federal government is acting improperly, shouldn't they be able to gain for all of us the benefit of their litigation, rather than allowing the federal government's continuing illegal acts against those who cannot afford to fight? The concept that each city, county, town, village and township must individually file suit to protect itself from illegal conduct by the federal government simply fails the test of reason.

IMLA will continue to support local government plaintiffs in arguing that once a court concludes that the federal government is violating the law, the court may enter an injunction prohibiting the government from continuing to do so. Consequences flow from this position, and changes in administration can change how local governments view the policy implications of a court's decision. (Not too long ago, many in local government did not agree with conservative courts enjoining a liberal administration's efforts to develop and implement its policies). So we recognize that the legal position we take in these cases can cut across political fault lines--but we believe our stance to be correct.

We will also act where the underlying policy issues affect local government. For example, in the sanctuary cities litigation IMLA believes that a federal mandate to hold people in jail without probable cause violates the Constitution and jeopardizes the finances of local governments. We will seek to be heard on that issue.

As a non-partisan organization with members from all areas of the country, IMLA tries to adopt positions that advance local government autonomy and protect local governments from the risks of expanded liability, whether direct or vicarious. At times the issues involved may be polarizing, so we ask each member to focus not on the issue so much as the concept of autonomy. Whether a community wants to protect Second Amendment rights or impose gun control, protect a woman's right to choose or voice the rights of the unborn, be a "welcoming city" or target illegal immigration, IMLA can support the autonomy of the local government to choose which policy goals its community supports.

Along these lines, IMLA has worked with other groups that ostensibly seek to fight preemption. Clearly, fighting state and federal preemption falls within IMLA's stated purpose. But the motives that drive some of these potential partners are animated not so much in fighting preemption per se, but fighting preemption as a tool to achieve their policy goals. For our members we believe our position chooses the correct balance.

IMLA's work as an advocate in the courts achieves results. But, our work as a provider of continuing education offers more perceptible benefits. The programming for this year's Seminar may be some of the best we've ever put together and marries nicely with our advocacy program at the Supreme Court. To be candid, some local governments fail miserably in the process of seeking certiorari. Having been a local government attorney, I know that some clients will vote to seek certiorari simply because the political winds demand it, despite knowing that the chances of having certiorari granted are slim. But in cases where there's more substance to the request and more necessity in that result, understanding the process and how to frame a petition needs to be in the attorney's quiver. Similarly, when the other side files a petition, a local government attorney needs to know whether and how to respond and how to frame the response. At our Seminar this year we have gathered some of the foremost Supreme Court advocates to help teach these concepts. We're very proud of our programming for this April's event.

Along those lines, I'm very gratified to lead a great team that accomplishes a lot with very little. Amanda Kellar leads our advocacy program and has been convening our Sanctuary Cities work group, focused on achieving some of the goals outlined above. Erich Eiselt produces *Municipal Lawyer* and heads our Opioid work group, which now numbers more than 70 jurisdictions confronting the crisis highlighted in this issue. Caitlin Cutchin runs our webinar and podcasting programming, both of which have rapidly grown in scope and quality due to her energies. Each of these lawyers handles many more issues which come our way.

Our administrative team is superlative, with Jennifer Ruhe managing day to day operations including finance and membership, Trina Shropshire-Paschal leading CLE, and new team members Carolina Moore and Caroline Storer handling marketing and much more.

We are honored to serve our IMLA members, and look forward to seeing you at our Washington DC Seminar in April. ML

Too Much of a Bad Thing: Municipalities and the Opioid Curse

By: Erich Eiselt, IMLA Assistant General Counsel



Almost Heaven, But Not: Residents of "wild and wonderful" West Virginia are blessed with spectacular geography. They are also apparently wracked with unimaginable levels of pain. Between 2007 and 2012, America's pharmaceutical industry shipped more than 780 million opioid tablets into the Mountain State.[1] That quantity, 433 pills per person, would have been sufficient to medicate all 1.8 million of its residents–men, women and children–continuously for nearly seven months. Not surprisingly, West Virginia suffers today from the highest rate of overdose deaths in the country, in recent years losing more lives to drugs than to traffic accidents and firearms combined.[2]

The opioid curse is hardly confined to one sparsely-populated state in the Appalachians. Although it got its initial foothold in Eastern communities left barren by the departure of coal mining and manufacturing jobs, the crisis is now engulfing municipalities across the country, large and small, wealthy and impoverished. Its spread has been enabled in large measure by the irresponsible behavior of prescription drug makers, distributors, prescribers, pain clinics, retailers—and the lobbyists, lawyers and public relations professionals who defend and massage the facts of their damaging behavior. In 2016, more than 64,000 Americans died from drug overdose—a figure greater than the toll from the entire Viet Nam war—and the pace is increasing.[3]

The dead are the most brutal casualties of the crisis, but only a small segment. More than two million[4] of our fellow citizens have fallen into addiction, ceasing to be productive members of society, driven by insatiable drug dependency to abandon schooling and careers, concoct disabilities, avoid parental duties, and commit fraud, petty thievery and violent crime—overtaxing the services of emergency, law enforcement, correction, rehabilitation and child protective workers. The burden on local government is staggering.

Today, nearly 400 cities, counties, townships, hospitals, insurers, tribes, unions, states and other plaintiffs seek legal recourse against the opioid industry in a federal courthouse in Cleveland. Scores of similar suits are making their way through state courts across the land. At stake are many billions of dollars in damages, a change in the way opioids are allowed to be marketed and prescribed, and the safekeeping of countless lives that stand in harm's way as the epidemic rolls on.

The Opioid Flood: The path to this crisis is rich in irony. Fifty years ago, physicians were loath to prescribe narcotics, including opioids—pain relievers derived from opium—believing that the risks of addiction outweighed the benefit to patients. Only those with cancer or on death's doorstep were given an allotment to quell excruciating agony.

The evolution to a society obsessed with pain and its treatment resulted from a conjunction of science and commerce. The name Sackler may be known to many; it adorns the Smithsonian Institute and the Metropolitan Museum of Art, the Sackler Museum in Beijing, art endowments at Princeton and Harvard, and medical facilities around the world. And for good reason: Arthur M. Sackler was a medical researcher, adman, entrepreneur, and one of the great benefactors of our time. Born in Brooklyn and raised during the Depression, he pursued the same avocation as his father—medicine. In 1942, he began helping to pay his school debt by taking a copywriting job at a small advertising firm specializing in the medical field.[5] As an ad agency employee, Sackler saw the opportunity to augment traditional door-to-door doctors' office sales calls with glossy, authoritative advertisements in physician-oriented journals and testimonials from domain experts. His particular gift would be to demystify and popularize drugs that were regarded as risky.

Sackler's business prowess was such that he took ownership of the advertising agency. In 1952, he convinced the staid *Journal of the American Medical Association* to include a splashy pharma advertorial among its pages.[6] That same year, Sackler and his two brothers acquired one of the firm's clients, the Purdue Frederick Company.

Purdue Frederick had long been a low-profile producer of unexciting necessities such as laxatives. But in 1980, the company developed a new mechanism for the continuous release of a morphine compound, "MS Contin." Purdue's messaging—that the newly-constituted opioid could safely be used for a broader spectrum of pain—was delivered to the medical community through a variety of vehicles, including to the 600,000 physicians who received Arthur Sackler's weekly newspaper, *Medical Tribune*, which effectively merged marketing and scholarship.[7] MS Contin became Purdue's best-seller and made the Sackler brothers multimillionaires, funding their global museum endowments and medical school generosity.

Arthur Sackler died in 1987 at the age of 73. His obituary in the *New York Times* makes extensive mention of his massive art collections and charitable activities

but barely references his links to a drug company.[8] That business, although already successful, had just begun the trajectory that would lead it to preeminence in America's opioid culture. It was better known as Purdue Pharma.

As the patents for MS Contin began to expire, Purdue looked for alternatives. In the mid-1990's it developed "OxyContin," a continuous-release oxycodone pain product. Although Sackler had died a decade earlier, the company deployed his direct-to-doctors sales strategies to the fullest. In addition to publishing targeted journals, the company sponsored or financed thousands of continuing medical education (CME) events,[9] barraging attendees with superlatives about OxyContin. Wary of the restrictions on branded advertising, Purdue also produced unbranded ads which promoted the benefits of opioids generally, flying under regulatory radar. It gathered "Key Opinion Leaders"—ostensibly independent and respected members of the medical community—who would further proselytize for its oxycodone product. And the firm's gregarious sales representatives were ever-present in doctors' offices, armed with persuasive collateral and pitches.

One key to the Purdue advertising campaign was an innocuous 1980 submission by a pair of researchers to the *New England Journal of Medicine*. The now-infamous "Porter and Jick" letter was captioned "Addiction Rare in Patients Treated with Narcotics." It described the authors' analysis of more than 11,000 hospital stays in which narcotics had been administered and their conclusion that addiction resulted in fewer than one percent of the cases.[10] Purdue and its sales force ambitiously converted that one-paragraph letter, which related only to bed-ridden recipients in a controlled hospital setting where medications were sparingly administered for short increments of time, into a wholesale endorsement for the use of opioids outside the hospital for long-term relief of chronic pain.

The strategy worked. Despite what they might have been taught in medical school, physicians came to believe that they could now treat chronic back pain, fibromyalgia, diabetic discomfort and the like by writing prescriptions for a month's supply of opioid narcotics—or half a year's—without fear of causing addiction.

That shift in prescribing behavior coincided with another emerging vector in American medicine—the elevation of "pain" treatment to previously unheralded primacy. The pharmaceutical industry was benefited when the American Pain Society, in 1996, augmented the empirical "four vital signs" of a patient's well-being (pulse, blood pressure, respiration rate and body temperature) with a new, fifth vital sign—pain.[11] By the early 2000s, it had become standard protocol for doctors, in addition to examining the traditional four indicia of a subject's health, to ask if the patient was experiencing pain. Upon hearing that their clients were feeling unacceptable levels of discomfort, medical professionals now felt pressured to solve the problem.

Despite what they might have been taught in medical school, physicians came to believe that they could now treat chronic back pain, fibromyalgia, diabetic discomfort and the like by writing prescriptions for a month's supply of opioid narcotics–or half a year's–without fear of causing addiction.

Purdue Pharma provided an answer. As a 2000 internal marketing memo exhorted, "Dedicate 70% of your time selling Oxycontin!!!!!!!!!!"[12] Purdue's sales force expanded far beyond the narrow band of doctors focused on cancer and end of life palliative care, and spread the OxyContin gospel to an exponentially larger cohort—primary care practitioners. By 2003, fully half of all those prescribing Oxy were primary care physicians. The company was able to utilize government-maintained data to determine exactly which doctors were high prescribers, and target them with multiple sales calls per year. Purdue aided their cause by providing thousands of sampler coupons giving patients up to 30 days of Oxy for free.[14] Sales rocketed from $44 million (316,000 prescriptions) in 1996 to combined 2001 and 2002 sales of nearly $3 billion (more than 14 million prescriptions).[15] The company's sales representatives, whose salaries averaged around $55,000 per year, were rewarded with more than $40 million in bonuses in 2001 alone.[16]

It would be a disservice to imply that Purdue was alone in practicing such dishonesty. Other defendants were equally adept. In December 2009, for example, pharma giant Endo paid roughly $45,000 to create a CME entitled the *Pharmacological Management of Persistent Pain in Older Persons*. The CME presented guidelines which misleadingly claimed that "the risks [of addiction] are exceedingly low in older patients with no current or past history of substance abuse," and falsely stated that "[a]ll patients with moderate to severe pain . . . should be considered for opioid therapy . . . ."[17]

While some doctors resisted these messages, the momentum towards more liberal use of narcotic medications was virtually insuperable. Many physicians simply joined the accelerating opioid parade and wrote multi-week or multi-month prescriptions for patients they had examined and had reasonably concluded were suffering from actual pain. This may have been defensible as a good faith practice supported by what appeared to be scientific validation, but it placed far too many opiates in public hands. Some of their patients would experience pain much earlier that the 12-hours-per-tablet relief promised by OxyContin, and took too many pills, too soon. Some patients merely continued to take them long after real pain had ended. Regardless, legitimate practitioners led many in their care to the same end point--physical dependence, marked by severe and debilitating withdrawal once their allotments were finished. (Purdue even provided physicians with an answer for this dilemma, garbling the Hippocratic Oath by citing pain management publications promoting the view that withdrawal behavior was actually "pseudo-addiction," best remedied by even more generous doses of Oxy.)[18]

Other doctors were grotesquely less principled. They saw the opportunity to climb aboard an opiate tsunami and ride it. "Pain clinics" began to sprout, first in Southern Ohio and West Virginia, where opioids were prescribed by medical charlatans after a brief "consultation,"

sometimes no more than 90 seconds in duration. "Patients" flooded these places, paying hundreds of dollars, often in cash, for a visit and a prescription that would authorize the purchase of tens or even hundreds of opioids. The pill mills and their operators made millions of dollars. Many prescription recipients were also complicit, indiscriminately reselling pills at a markup to anyone with cash.

After Appalachian jurisdictions began to track individual patients' prescription records, making it impossible to visit multiple pain clinics in the same day or week, Florida became a new destination of choice. A fifteen-hour drive south could yield upward of 500 opioid tablets; if purchased at low cost with a Medicaid card, the pills would generate a five-fold profit, making a single trip to the Sunshine State worth thousands of dollars. (It would not be until 2009 that Florida finally instituted tracking of individual patient opioid activity—but unlike 27 other states that make the reporting mandatory, Florida is alone in allowing voluntary tracking, which may explain why fewer than one-quarter of the state's doctors and only half of its pharmacies were tracking opioid prescriptions as of late 2017,[19] and why Florida became for a time America's favorite opioid supply house).

Whether legitimate or fraudulent, these prescribers and their patients formed the headwaters for a massive river of opiates that began to flood America. And the source for the deluge was a handful of billion-dollar pharmaceutical manufacturers and distributors, who profited abundantly. None was a more successful opioid font than Purdue Pharma. Between 1996 and 2017, it sold more than $35 billion of opioids to American users.[20] While Purdue kept the profits, quietly placing the reclusive Sackler brothers among the twenty wealthiest families in the nation, the externalities of that activity would be borne by America's taxpayers. In 2015 alone, according to a report by the American Enterprise Institute, the epidemic cost the nation over $500 billion.[21]

A Lethal Convergence: If the opioid saga merely culminated with the pharma industry's rise, it would be tragic enough. But there is more to the story. As Sam Quinones describes in exquisite detail in his award-winning book *Dreamland – The True Story of America's Opioid Crisis*, the explosion in opiate abuse originating from West Virginia, Kentucky, Ohio, North Carolina and other Eastern states coincided with—and facilitated—the flourishing of an even worse substance seeping northward across the nation's southern border: black tar heroin. The black tar enterprise, centered in the tiny opium-rich Nayarit district on Mexico's western coast, had revolutionized the delivery infrastructure of heroin in the US.

The Nayarit dealers established operations stealthily, operating amidst burgeoning Mexican immigrant communities in mid-tier Eastern cities like Columbus, Ohio and Charlotte, North Carolina. Instead of requiring buyers to approach dealers in dangerous surroundings, the Nayarit vendors used cars and beepers to locate dial-in customers and deliver the goods directly to their clientele. They carried only tiny amounts of heroin at one time, sometimes packaged in miniscule balloons which could easily be swallowed at the sight of law enforcement. Their drug was an able competitor to the white powder heroin already being peddled east of the Mississippi. Not only that, the Mexican black tar species was cheaper—cheaper than East Coast heroin and much cheaper, in many cases, than opioids.[22]

As Quinones tells it, that convergence, of an America becoming increasingly addicted to opioids and a virtually invisible network of entrepreneurs conveniently delivering a more addictive product at a lower price, created a perfect and lethal storm.

The more recent emergence of fentanyl on the menu--a synthetic opioid far more potent than oxycodone or heroin--has rapidly worsened the crisis, particularly across New England. Originally used only as an anesthetic, fentanyl is up to 100 times more powerful than morphine; a tiny dose of only three milligrams is enough to kill a full grown adult.[23] In 2016, fentanyl was involved in fully one-third of all opioid deaths, up an astonishing 540% in three years.[24] Again, dishonesty by pharma and medical professionals played a role: the CEO and other executives of Insys Therapeutics, the maker of Subsys, an under-the-tongue spray containing fentanyl, have been charged with providing enticements to doctors who would prescribe their drug to non-cancer patients. And last year, two Insys saleswomen pleaded guilty to paying kickbacks; one of them induced a physician's assistant to author, single-handedly, some 84% of all fentanyl prescriptions in New Hampshire over a two-year period.[25]

The opioid sellers are not alone in profiting from addiction. Another sad chapter in the narrative is now developing, revealing again how truly amoral the opioid profiteers can be. Amidst the many well-meaning and bona fide drug rehabilitation facilities nationwide, a new species of opportunistic depravity is emerging: the phony "sober house," where operators grab millions of governmental dollars but fail to benefit those in their care, sometimes even facilitating continued addiction to assure a steady flow of funds.[26]



How much will kill you ? A comparison of lethal doses of heroin versus fentanyl.

Photo courtesy of Bruce Taylor, New Hampshire State Police Forensic Lab

Washington's Role. Unlike the obscure sourcing of black tar heroin, the opioids—OxyContin, Percoset, Vicodin, Fentora, and a dozen more named in this epidemic—came to market only after passing rigorous testing by the United States Food and Drug Administration. While the pharma industry has seized upon FDA oversight as evidence that their products were safe when used as intended (and as grounds for dismissal of municipal suits due to federal preemption), a close study of early warnings on OxyContin suggests a lack of regulatory vigor.

The FDA approved OxyContin's original package insert in 1995. Amid the drug's clinical study information and side effect profile, the insert carried a crucial sentence: "Delayed absorption as provided by OxyContin tablets, is believed to reduce the abuse liability of a drug."[27] Purdue's marketing machine relied on that sentence to promote Oxy's non-addictive character, asserting that a 12-hour, gradual release pain medication would avoid immediate "highs" and deter would-be addicts. (The company later completely bypassed the FDA in 1998, distributing to doctors 15,000 OxyContin marketing videos which had never been submitted for regulatory review).[28] Such claims about reduced risks of addiction were completely unsupported, as subsequent depositions of Purdue officials in 2004 would reveal—the company had never confirmed any such "belief" through clinical testing. How that statement was allowed to survive FDA scrutiny is still obscure. One factor may have been the prodigious mismatch at the time between Food and Drug's staffing (39 reviewers) and their work load (more than 34,000 pharma marketing pieces per year).[29] Regardless, the dishonesty remained a part of the OxyContin packaging until 2001.[30]

That inaccuracy did not go unrebutted forever. In 2007, a DOJ prosecutor in tiny Abingdon, near coal country in southwest Virginia, extracted Purdue's guilty plea in federal court. The company admitted to falsely understating the addictive nature of OxyContin on the aforementioned labels, and to promoting the idea that Oxy's coating made it less susceptible to abuse. (Purdue's own internal research showed that tablets could easily be crushed to harvest nearly 70% of the pills' pure oxycodone—which was readily diluted in water, drawn into a syringe and injected). Purdue's CEO, General Counsel and Chief Science Officer were convicted and paid $34.5 million in penalties, while the company handed over a record $600 million.[31] Greater oversight by the FDA might have saved the DOJ thousands of hours spent in litigation and made such sanctions unnecessary.

> In an era when, as the *Charleston Gazette Mail* exposed, distributors funneled nine million opioid doses to a single pharmacy in Kermit, West Virginia (population 392) over a two-year span and individual pill mill doctors were routinely writing hundreds of prescriptions a day, it is evident that far more than 16 out of 1.6 million orders (.0001%) should have been flagged as "suspicious."

The FDA is not the only federal entity with a critical role in curbing opioid abuse. The Drug Enforcement Agency, in addition to interdicting illegal drugs, is responsible for monitoring the flow of legal but dangerous prescription medications. Known to be addictive, prescription opioids fit that parameter—they are categorized as "Class II" under the federal Controlled Substances Act.[32] Accordingly, enterprises involved in the manufacture and shipment of opioids have long been required to keep records of where their products are being sent, and to flag "suspicious orders." The DEA has the power to revoke the authority of irresponsible makers and shippers of Class II drugs.

The pharma industry has not been overly cooperative in this endeavor, benefiting from silence and under-reporting of incongruities in the opioid trade. A decade ago, the DEA assisted the DOJ in bringing to terms McKesson Corporation and Cardinal Health, two of the country's three major pharmaceutical distribution firms. McKesson paid a modest $13.5 million fine and signed a 2008 administrative agreement committing to institute tighter reporting policies.[33] Cardinal Health also settled, paying $34 million and agreeing to similar compliance.

The DEA could hardly have been more explicit in laying out its expectations going forward. A 2007 letter to the pharma industry stated:

> Registrants are reminded that their responsibility does not end merely with the filing of a suspicious order report. Registrants must conduct an independent analysis of suspicious orders prior to completing a sale to determine whether the controlled substances are likely to be diverted from legitimate channels. Reporting an order as suspicious will not absolve the registrant of responsibility if the registrant knew, or should have known, that the controlled substances were being diverted. The regulation specifically states that suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of an unusual frequency. . . .
>
> Likewise, a registrant need not wait for a "normal pattern" to develop over time before determining whether a particular order is suspicious. The size of an order alone, whether or not it deviates from a normal pattern, is enough to trigger the registrant's responsibility to report the order as suspicious. The determination of whether an order is suspicious depends not only on the ordering patterns of the particular customer, but also on the patterns of the registrant's customer base and the pattern throughout the segment of the regulated industry.[34]

The industry continued to resist. Mallinkrodt, a large manufacturer of generic oxycodone, paid $35 million after being found culpable for years of under-reporting suspicious orders.[35] In 2016, Cardinal was again cited for non-compliance, paying a $44 million settlement. And in early 2017, McKesson made a second, more punitive $150 million payment. While announcing that settlement, the DOJ documented the distributor's abysmal track record:

Continued on page 10

> The government's investigation developed evidence that even after designing a compliance program after the 2008 settlement, McKesson did not fully implement or adhere to its own program. In Colorado, for example, McKesson processed more than 1.6 million orders for controlled substances from June 2008 through May 2013, but reported just 16 orders as suspicious, all connected to one instance related to a recently terminated customer.[36]

In an era when, as the *Charleston Gazette Mail* exposed, distributors funneled nine million opioid doses to a single pharmacy in Kermit, West Virginia (population 392) over a two-year span[37] and individual pill mill doctors were routinely writing hundreds of prescriptions a day, it is evident that far more than 16 out of 1.6 million orders (.00001%) should have been flagged as "suspicious." One is left to conjecture how many new addicts, and additional deaths, resulted during this period of lassitude by McKesson, and why the DEA did not exercise more initiative to offset McKesson's flagrant lack of suspicion.

As if the pharma industry's obstinacy was not enough to blunt the DEA's effectiveness, Congress took action that further muted the agency. In 2014, the FDA had implemented measures to reduce the duration of opioid prescriptions—from six months down to three—based on data indicating that the average patient needed relief for only 14 days, which left dangerous supplies of unused opioids for resale or consumption by other family members.[38] That type of limitation spurred pharma industry lobbyists to sound the alarm that overregulation was impeding the flow of pain relief to legitimate patients. Capitol Hill acquiesced, throwing Purdue, et al a lifeline in the form of the virtuously-named "Ensuring Patient Access and Effective Drug Enforcement Act."[39]

Ensuring Patient Access seriously hobbled the DEA, virtually halting its efforts to track and penalize suspicious opioid shipments. The law required the DEA to show cause before it denied, revoked or suspended a registration for a Controlled Substances Act violation. The show cause order had to state specifically the legal basis for the DEA's action and provide the registrant an opportunity to submit a corrective action plan.

In a November 2017 letter to Congress, a bipartisan group of 44 Attorneys General sought repeal of Ensuring Patient Access. They objected to the law's removal of a critical DEA tool—immediate suspension orders against manufacturers or distributors whose conduct posed an imminent danger to public safety. The AGs' letter quoted DEA Chief Administrative Law Judge John J. Mulrooney, II, who described the Ensuring Patient Access structure as "akin to a state legislature mandating [that] law enforcement authorities allow shoplifting suspects caught in the act to outline how they intend to replace purloined items on store shelves, or allow bank robbers to round up and return ink-stained money and agree not to rob any more banks."[40]

This legislative sabotage was just one surgical strike in a much more sustained war. A 2016 study by the Associated Press and the Center for Public Integrity determined that during the prior decade, pharmaceutical interests launched an army of 1,350 lobbyists and spent nearly $900 million to safeguard opioids, supporting some 7,100 candidates in state races around the country. In contrast, groups seeking restraints on opioids had deployed a mere $4 million.[41] (The complex interaction between politics and public safety is nowhere seen more clearly than in West Virginia itself. The state's Attorney General, Patrick Morrissey, is now tasked with protecting West Virginians from the epidemic. He previously ran a pharma lobbying firm and his wife was a lobbyist for opioid distributor Cardinal Health).[42]

To this day, the pharma industry public relations machinery continues to downplay the problem. For example, a Janssen Pharmaceuticals webpage titled "PrescribeResponsibly" continues to stress that, while "physical dependence" may result from lengthy opiate use, "addiction" is an entirely different matter: "Physical dependence with long-term use of opioids should be expected. It is important to note that physical dependence is not the same as addiction."[43] In November 2017, the American Academy of Pain Management, a pharma-funded group, wrote the FDA to rebuff consumer group initiatives which would remove extra-high octane opioids from the market.[44]

More remarkable was Purdue's full page ad in leading newspapers two weeks before Christmas 2017. Its heading was "We manufacture prescription opioids. How could we not help fight the prescription and opioid abuse crisis?" The body of the letter, while not mentioning "addiction" (and obviously omitting reference to Purdue's guilty pleas for false marketing), made the astonishing statement that "Patients' needs and safety have guided our steps." And as if to obscure the fact that, in lawsuits from coast to coast, it is resisting any payment toward remediation of the overdose epidemic, the company presented itself as an ally: "No one solution will end the crisis, but multiple, overlapping efforts will. We want everyone engaged to know you have a partner in Purdue Pharma. This is our fight too."[45]

Even Purdue's vastly enhanced warnings about OxyContin appear to reveal continued hesitancy to set the record straight. To be sure, prescribers are now alerted with this unambiguous language: "As an opioid, OXYCONTIN exposes users to the risks of addiction, abuse, and misuse. Because extended-release products such as OXYCONTIN deliver the opioid over an extended period of time, there is a greater risk for overdose and death due to the larger amount of oxycodone present . . . ." However, the same information packet does not reveal that there is no evidence showing that opioids are appropriate for long-term pain; in fact, it seems to advise the opposite: "The potential for these risks should not, however, prevent the proper management of pain in any given patient."

The Municipal Call to Arms: As the opioid industry has barreled ahead, barely blunted by a handful of settlements with federal authorities and state Attorneys General, the costs to American society spiral out of control. Much of the damage is being sustained at the local level, and municipal governments are no longer sitting idly by. One of the first to move was Chicago. In June 2014, it filed in the Circuit Court of Cook County against Purdue and four other opioid producers—Endo (maker of Opana ER and Percocet), Actavis/Allergan (Kadian), the Janssen division of Johnson & Johnson (Vicodin, Duragesic, Nucynta) and Teva/Cephalon (Actiq, Fentora).

That case was rapidly removed to Illinois' Northern District on diversity grounds. The City's (third amended) 345-page complaint sets forth the case against the manufacturers, detailing a pattern of understating the addictive propensities

of opioids, exaggerating the downside of NSAID pain relievers (nonsteroidal anti-inflammatory drugs), and in the case of Purdue, falsely stating that OxyContin tablets provided 12 hours of continuous relief. Due to defendants' misleading and fraudulent direct marketing, the complaint states, doctors improperly prescribed opioids for long term chronic pain. One harm to the City, a self-insured entity, was the purchase of nearly $14 million of opioids in fulfillment of some 400,000 spurious prescriptions.[46]

Santa Clara and Orange Counties also filed in mid-2014, against the same five manufacturers. That litigation remained in California courts, except for the action against Cephalon which was settled for a $1.6 million payment by the opioid maker to fund municipal rehabilitation facilities.[47]

A torrent of governmental suits has quickly followed. States, cities, counties, hospitals, healthcare consortia, tribes, unions and others have filed actions across the country, naming the aforementioned five manufacturers and several other makers including Mallinkrodt (producer of Exalgo). Also named are the three major pharma distributors, Cardinal Health, AmerisourceBergen, and McKesson, as well as pharmacies such as CVS, Costco and Walgreens, who too often filled prescriptions with few questions asked. A few suits have named the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which implicitly condoned hospital prescribing practices, and the pharmacy benefits managers (PBMs), who determined the types of pain relief which would be included in health plan formularies and would qualify for reimbursement to millions of insureds. Some have named individual doctors who were compensated by the pharma industry to promote inaccurate information about the risks of opioids.[48]

A spectrum of claims are asserted by the municipalities:

- false advertising, misrepresentation and consumer fraud by manufacturers through understating opioids' propensity for addiction, overstating their effectiveness, promoting unreliable clinical reports and compensating allegedly unbiased domain experts;
- fraud on Medicare/Medicaid and state/local medical programs by inducing the purchase and/or reimbursement of costs for opioids which were inappropriate for patients' needs;
- nuisance, including costs of emergency response, law enforcement, rehabilitation, child protective services, foster care, and so on;
- failure to track and report orders and delivery patterns which were obviously suspect;
- negligence in enabling the diversion of opioids for non-medical use; misfeasance by PBMs by not populating their formulary menus with less addictive alternatives to "main stream" opioids; and
- collusion among manufacturers, distributors and others to perpetuate misrepresentation, unnecessary sales, unavailability of alternatives, diversion and withholding data.

These complaints seek billions in damages. Many also demand changes in the way opioids are promoted and sold.

For their part, the defendants deny responsibility for the deaths and addictions. They point to the fact that the FDA approved their opioid products, which were packaged with explicit instructions about proper usage. This not only supports an argument that they acted with appropriate care, but that the entire debate is foreclosed by the FDA's preemptive authority over the question. To quote from Purdue's answer in the Chicago litigation:

> Federal law authorized Purdue to promote its opioid medications for their FDA-approved indications. . . . To the extent Plaintiff's claims seek to hold Purdue liable for promoting Purdue's opioid medications for their FDA-approved uses, the claims are preempted. Granting such relief would impede, impair, frustrate, or burden the effectiveness of federal law and would violate the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. To the extent Plaintiff's claims are inconsistent with the determinations of FDA based on the information provided to FDA, or otherwise assert that incorrect, incomplete or inaccurate information was provided to FDA, the claims are also preempted.[49]

The issue of proximate cause will no doubt be hotly debated. In that regard, it is interesting to note a September 2017 refusal by the Western District of Washington to grant a proximate-cause-based motion to dismiss, even where intervening Los Angeles gang activity had made the opioids available on the streets of plaintiff Everett, Washington.

(An early harbinger of the preemption outcome may have appeared in Oklahoma in early December, where a state court refused to grant Purdue's FDA preemption-based motion to dismiss and its related request that trial be delayed until Food & Drug could complete further research into the merits and dangers of opioids.)[50]

Purdue also cited statutes of limitation, failure to join indispensable parties and an absence of proximate causation, pointing to the large number of intervening actors—and actions—between themselves and the ultimate harm to localities.

The issue of proximate cause will no doubt be hotly debated. In that regard, it is interesting to note a September 2017 refusal by the Western District of Washington to grant a proximate-cause-based motion to dismiss, even where intervening Los Angeles gang activity had made the opioids available on the streets of plaintiff Everett, Washington. Despite acknowledging five separate intervening environments from opioid manufacture to addiction and death in Everett, the court was unwilling to discount causation.[51]

The pharma defendants uniformly raise the argument that correlation (an increase in deaths as opioid sales rose) does not equal causation. This stance seems belied by the facts: for example, among new initiates to illicit drug use in 2005, a total of 2.1 million reported prescription opioids as the first drug they had tried, more than for marijuana and almost equal to the number of new cigarette smokers (2.3 million).[52] More significantly, US government statistics show that nearly 75% of heroin addicts cite non-medical use of prescription opiates as their first introduction

to drug abuse.[53]

The pharma defendants have adopted other novel arguments, including challenging the legality of municipally-retained contingency litigators. In a New Hampshire case brought by the state's Attorney General, they asserted that "[w]hen a private lawyer represents the State in a matter in which the lawyer has a personal interest, that interest compromises the 'impartiality' required of all government lawyers and creates at least the appearance of impropriety." That gambit failed. Unanimously reversing the trial court, the New Hampshire Supreme Court rejected the pharma industry's contention that Cohen, Milstein, the state's contingent fee law firm, was "vested with a governmental function and in a position of public trust where its financial stake will create a conflict of interest," finding instead that "because the contingency fee agreement provides for the OAG to retain ultimate control over the investigation, the agreement does not violate due process."[54]

Still another pharma escape attempt has been rebuffed in California, although the consequences may not necessarily be advantageous for opioid plaintiffs. In a case brought by Santa Clara and Orange counties, the court refused to construe the defendants' opioid practices as "accidental" for insurance purposes.[55]

Seeking Resolution in Cleveland: In 2017, the pace of municipal opioid filings accelerated dramatically, crowding dockets across the country. The cases were all brought on a contingency basis, granting 30% or more of any recovery to law firms who would shoulder the up-front expense of taking on the challenge. (Those expenses, unless part of the firms' overhead, would be recouped from the municipalities' ultimate share). While many local firms participated, based on familiarity with municipal counsel, most cases ultimately linked to a number of select national litigation firms with significant experience in mass tort warfare. The complaints presented a similar menu of facts, citing statistics of opioid sales and deaths in their jurisdictions, and pointing to fraud, negligence, unjust enrichment, violation of consumer protections, and other tortious behavior by a common slate of defendants.

This created obvious judicial inefficiency. In October 2017, a West Virginia law firm representing some 40 municipalities moved to have all the federal opioid actions consolidated before a single court. That request went to the Judicial Panel on Multidistrict Litigation in Washington DC, a forum of seven judges whose chair is appointed by the Chief Justice.[56] In December, the JPML directed that the federal opioid cases could most effectively be litigated in a single court via multidistrict litigation. *In re: National Prescription Opiate Litigation* (17-MDL-2804) was docketed in the Northern District of Ohio on December 12, 2017, on the following rationale:

> All of the actions can be expected to implicate common fact questions as to the allegedly improper marketing and widespread diversion of prescription opiates into states, counties and cities across the nation, and discovery likely will be voluminous. Although individualized factual issues may arise in each action, such issues do not – especially at this early stage of litigation – negate the efficiencies to be gained by centralization.[57]

In its order forming the opioid MDL, the JPML transferred 62 cases to the Ohio court and appointed Judge Dan Aaron Polster, a well-respected jurist with substantial MDL experience, to oversee the opioid MDL.[58] He wasted no time in taking action. Acting on competing propositions from the 100 or more law firms already retained in various local suits, Judge Polster rapidly fashioned the architecture that will govern the process going forward.[59] At the apex of the structure are three Lead Counsel who will represent the plaintiffs. Two of these are from major class action and mass tort firms: Paul Hanly of Simmons, Hanly and Joe Rice of Motley Rice. The third, Paul Farrell, is a partner at Greene Ketchum, a five-person Huntington, West Virginia personal injury practice. Seasoned MDL lawyers from another 13 firms make up the plaintiffs' Executive Committee, with still other firms providing attorneys who serve as plaintiffs' Liaison.

Responding to initial criticisms that the original slate of plaintiffs' counsel was too narrow, Judge Polster established separate counsel roles in the MDL structure for municipalities, third party payers, Native American tribes, unions and hospitals. He has expressed a willingness to carve out additional particularized slots if other plaintiffs groups emerge and has allowed several actions by individual estates to join. The defendants also have separate counsel channels in the MDL, for manufacturers, distributors and retail pharmacy defendants.

With the MDL formed, Judge Polster has aggressively continued to consolidate the federal opioid caseload. Through March 1, 2018, he had issued nine more CTOs and moved another 310 "tag along" actions to Ohio's Northern District, bringing the total before him to nearly 370 cases.

As stated in the original Transfer Order, much of the opioid litigation will be determined within the same cluster of operative facts. The MDL should expedite and make more efficient the compilation of a record by eliminating the need for repetitious depositions and discovery requests. It should also facilitate settlement discussions; Judge Polster has made it clear that rapid resolution is his primary goal. He has expressed a mandate to avoid delaying tactics and to press onward until a full factual record has been derived, doubting that financial settlements alone are adequate. In a January 9, 2018 initial address to more than 150 lawyers gathered before him, he had this to say about the opioid crisis:

> In my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payers and individuals. . . .
>
> [W]hat I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. Because we all know that a whole lot of them have gone walking and with devastating results. And that's happening right now. So that's what I want to accomplish. And then we'll deal with the money.[60]

Polster has continued his drive. Three weeks after making his noteworthy opening comments, he had convened his first closed-door settlement session, described by seasoned litigators as highly unusual in its urgency. He has now identified individual lawyers, including two Attorneys General, who will drive future settlement discussions on behalf of stakeholders. And he has commented that, if all else fails, he will begin hearing Ohio's suit against the pharma defendants in late 2019.

The opioid MDL is reminiscent of the largest such judicial undertaking to date– the massive tobacco multi-district litigation of the 1990s, brought by 46 states against

big tobacco. Some of the same lawyers are involved, including a celebrated plaintiff's counsel in that case—Mississippian Mike Moore, former Attorney General of the state, who was drawn into the action after confronting the near-death of his nephew following a fentanyl overdose. Despite some familiar earmarks, the pharma defendants will argue that there are salient differences. For one, opioids were subjected to far greater regulatory scrutiny than tobacco. And smokers became ill while using cigarettes as intended, while opioid users often did not follow recommended dosages. But the general parameters of that war look familiar; governmental entities sued with the goal of addressing a public health crisis and imposing reform on an industry which had obscured the damaging effects of its products.

The tobacco MDL resulted not only in $246 billion in damages, but in forcing more responsible marketing practices on cigarette makers.[61] This included an explicit admission required by the tobacco MDL court and appearing even today in television and online advertising spots: "Lorillard, Altria, Philip Morris and R.J. Reynolds Tobacco intentionally designed cigarettes to make them more addictive. . . . When you smoke, the nicotine actually changes the brain. That's why quitting is so hard." That statement is only a part of a massive educational campaign to reveal the true hazards of smoking, a message aimed particularly at young audiences. It has been paid for in full by the tobacco industry.

Such a result—massive financial recovery and changes in marketing—would be a clear success for municipalities around the country, particularly if the funding were directly applied to remediate the opioid scourge. Exactly what such corrective mechanisms would be is not yet clear, as Judge Polster has recognized. Perhaps plaintiffs in the national MDL could take a page from New York City's "Healing NYC" program which articulates some of the steps needed to turn back the opioid tide. Its recommendations stretch from far-reaching educational initiatives for grade schoolers to supplying substantial amount of naloxone (an opioid antagonist which rapidly ameliorates the effects of an opioid overdose) to the City's police force.[62]

Education of prescribers to undo the mythology perpetuated by big pharma will clearly need to be a priority. A study published in the *American Journal of Public Health* indicates the challenges to reversing medical misconceptions: although a sustained campaign of "reverse detailing" among a group of New York prescribers made significant progress, nearly 40% still did not know that there is no evidence showing opioids to be effective for chronic pain—or the daily opioid "methadone milligram equivalent" (MME) maximum which should not be exceeded to avoid addiction.[63] Confusion and misperception continues among the medical community, despite the significantly heightened warnings which now accompany prescription opioids.

> [W]hat I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. Because we all know that a whole lot of them have gone walking and with devastating results. And that's happening right now. So that's what I want to accomplish. And then we'll deal with the money.

On a broader scale, additional remedial actions might include:

- Further changes to the labeling of opioid products, expressly discouraging their use for long term chronic relief—coupled with far-reaching educational campaigns to restrict opioid use by the medical community;
- More rigorous review by the FDA and other regulatory bodies of pharmaceutical marketing activities, including pharma-sponsored CME events, particularly with respect to interpretation of test data;
- Development of a nationwide database linking state-based records of opiod prescribers and their clientele;
- Encouraging the disposal of unused opioids, along the lines of the national initiative just announced by Walmart;[64]
- Creation of safe injection spaces where those already addicted can obtain clean needles and reduce the hazards of infection and disease (the first such program was announced by Philadelphia's mayor in January 2018, albeit not welcomed unanimously);[65]
- Restoration of DEA powers, including the roll back of Ensuring Patient Access provisions--making real the obligation by makers and distributors to track and report suspicious orders;
- A sustained information campaign about the addictive potential and lethality of opioids, aimed particularly at young people, introduced across broadcast, print and social media channels;
- Expanded programs to rehabilitate the addicted, via the orderly and controlled dissemination of methadone, buprenorphine[66] and other approved opioid antagonists—coupled with cognitive-behavioral therapy and contingency management techniques;[67]
- Broader availability of naloxone and other contra-overdose weapons to law enforcement, EMS, college and high school personnel—and to the public on an over-the-counter basis (in fact, some pharmacy chains have begun to sell both nasal and injectable naloxone without a prescription in 45 states, but this information is not widely disseminated);[68] and
- Diversion programs which move drug addicts, where appropriate, out of the criminal justice system and into rehabilitation programs.

Other remedial steps--although clearly outside the purview of Judge Polster--might include criminal penalties, including jail time, on those who intentionally perpetrate fraud regarding narcotic pharmaceuticals and enable their diversion, and to expanded availability of medical marijuana to quell pain. Various studies have confirmed a drop in opioid deaths in jurisdictions where medical cannabis has been legalized, which would be undermined by the recently-announced federal initiative to enforce strictly the CSA proscriptions against marijuana. The DEA (or if necessary, Congress) could require a re-evaluation of the relative merits and detriments of cannabis, authorizing and funding wide-

scale clinical studies which might change its CSA status.

There are tangible examples of how opioid settlement dollars might be beneficially deployed. One is seen in New Jersey. Last April, Governor Christie initiated a $15 million broadcast campaign featuring accounts by those who fell prey to opioid addiction--and were able to survive through state-provided rehabilitation efforts.[70] The spots have been ubiquitous through the state and end with Christie himself imploring those at risk to call "844-REACHNJ" for help. In February 2018, the campaign was extended. And in West Virginia, $20.8 million recovered by the state in opioid settlements is being used to expand operations at nine treatment centers around the state. [71]

Where to File? While the MDL is now moving with its own momentum, it is not the only forum in which to proceed. Numerous municipalities around the country have opted to file in state court. Where there is statutory bias preserving state jurisdiction or diversity is incomplete, state actions will survive removal to the MDL (giving plaintiffs who file in-state in Delaware, California, Missouri, New Jersey, New York, Ohio and Pennsylvania, where the manufacturers and distributors are incorporated or maintain corporate headquarters,[72] virtual certitude of avoiding federal court). But why would a local government want to reamain in-state rather than become part of the ground-breaking and ambitious process being driven by Judge Polster?

The answers are many: a partiality for jurors drawn from a local county rather than the larger federal district; a preference for non-unanimous verdicts rather than the federal requirement for jury unanimity; the desire to maintain closer control over their action; and the reduced burden of litigating nearby rather than traveling halfway across the country. Some localities may worry that their outside counsel is not among the roster of key spokespeople elevated by the MDL judge. And some municipal attorneys may be apprehensive that particularly egregious wrongdoing and compelling injuries documented within their communities' claims will be overlooked in the grand scheme of the MDL as it strives to develop a unitary and comprehensive factual record. (This concern is among a litany of criticisms some have leveled at MDLs generally[73] and seems particularly real for smaller jurisdictions given the fact that there are no population-based classes in Judge Polster's structure).

There is also the possibility that a local action will be fast-tracked, proceeding more rapidly than the MDL: for example, in *State of Oklahoma v. Purdue Pharma L.P.*, a case brought under the Oklahoma State False Claims Act, the judge has already announced May 28, 2019 as the start date for trial.[74] And although the MDL is ostensibly only a discovery mechanism, which then remands cases to their local federal court for actual litigation, the fact is that more than 95% of all MDL cases never return to their originating jurisdictions. [75]

But there are also detriments to avoiding federal jurisdiction. Unless state law provides otherwise, home-grown fraud and conspiracy claims may lack the treble-damage punch of federal RICO statutes. Oklahoma's action, which is based solely on state law and has avoided removal to federal court, cites $52 million in unwarranted state medicaid payments for opiods a figure that will not be trebled.[75] Where the locality's fact pattern and claim is not sui generis, it may be more efficient to have a nationally-known mass tort powerhouse arguing on its behalf in the Northern District of Ohio rather than facing the defendants' considerable machinery—even if the locality's individual voice is lost in the MDL chorus.

Among the many localities opting to avoid the MDL and remain in-state is New York City. It filed a claim against the opioid defendants in late January 2018—in the Supreme Court of New York County, Manhattan's trial-level tribunal. Naming six makers and three distributors of opioids, New York alleges "hundreds of millions of dollars" in damages and specifically references a $160 million cost to fund the aforementioned HealingNYC program over the next five years. The City's complaint will likely join those of another 20 New York jurisdictions which have been consolidated before a single judge in Suffolk County—a virtual "in-state MDL." The judge presiding over those cases has invoked urgency analogous to that of Judge Polster, taking the unorthodox step of refusing to stay plaintiffs' discovery even though the pharma defendants' motions to dismiss are still pending.[76] In New York, the plaintiffs' in-state claim will not be blunted by the absence of the federal RICO count, because the behavior complained of violates New York Social Services Law section 145(b) – which allows treble damages.[77]

Apart from the state court versus federal court issue is the more seminal question of whether to file at all. Smaller localities may not have sustained injury sufficient to support their own suits and may be better served by supporting a statewide action brought in *in parens patriae* by their Attorney General, although resulting recovery may not ultimately make its way to the local municipality's treasury. Other jurisdictions will not easily be able to shoulder the substantial document marshaling and database production responsibilities of an opioid plaintiff. In some cases, contingency firms will take on the cost of document production for their clients, but that possibility may diminish dramatically for smaller-sized municipalities or those with fewer appreciable damages. (For example, some contingency agreements specify that electronic document handling and storage is an additional expense not covered within the law firm's overhead, meaning it will be deducted from the municipality's recovery).

There are various sources of data to help a locality determine its odds. In terms of documenting the defendants' misdeeds, information about geographic opioid sales is available from the Centers for Disease Control.[78] More granular statistics—the chain from manufacturer to ultimate purchaser, including opioid sales by individual pharmacies—is held in the DEA's ARCOS (Automation of Reports and Consolidated Orders System) database.[79] While the agency has resisted wholesale production of that data, seeking to protect ongoing investigatory work, Judge Polster has explicitly ordered that plaintiffs' counsel and the DEA agree on whatever redactions and protective language is necessary to make the ARCOS data broadly available.[80]

As important as documenting the pharma industry's misdeeds is the plaintiff's requirement to substantiate its own damages. These consist of payments for opioids—whether the municipality purchased them directly or reimbursed such purchases by healthcare providers, pharmacies and insurers. Also included may be worker's compensation costs and expenses for addiction treatment and rehabilitation. Nuisance costs might include law enforcement, EMS, hospitalization, foster care and the like—although defendants may raise the municipal cost recovery rule, which has been held to bar damages for functions which the municipality is already obligated to provide.[81] And plaintiffs which are not self-insured may face difficulty in demonstrating

actual compensable costs; that right will more properly accrue to their third party payers and insurers.

Moving Forward: A thorough evaluation of these data is critical. One set of facts may lead only to fruitless and burdensome litigation, while another may culminate in significant recovery that can help the municipality remediate its opioid tragedy. The responsibility of municipal attorneys to assess their localities' prospects, to discern the optimal avenue to obtain recourse, and to select the outside counsel best positioned to handle its case, is daunting.

It seems beyond question that, whether they move in federal court or at their local judiciary, many more of the nation's 35,000 municipal governments will be taking action against the opioid defendants. Their spotlight on the industry's reckless and fraudulent activity is helping American society to de-stigmatize those who succumb to the epidemic. The courage of parents and partners, be they in underprivileged neighborhoods or wealthy enclaves, to admit and to publicize the fact that their loved ones have died of an opioid-related overdose is significantly amplifying the urgency for resolution.

Regardless of the pharmaceutical industry's assertions of innocence and well-financed defensive stratagems, there can be little doubt that the war being prosecuted by municipalities will have a major impact in bringing about change. One minor indicia of success was Purdue's announcement, on February 10, 2018, that it would no longer promote OxyContin to America's doctors and was laying off half of its sales force.[82] That step will be mirrored, hopefully, by other pharma defendants and could begin to contain the crisis going forward. Unfortunately it can do nothing for the nation's already-addicted.

Another potential step forward—although of unknown import at this time—was contained in an announcement by Attorney General Sessions on February 27, 2018. He asserted that the federal government is continuing to take bold actions to counter the epidemic, including an aggressive campaign to stop internet-based sales of fentanyl and other opioids, a "surge" of DEA agents to target pharmacies and prescribers exhibiting unusual dispensing patterns, and the placement of all fentanyl analogues into Schedule I of the CSA, and announced that the United States will be filing a Statement of Interest in the opioid MDL.

Whether transformational solutions to the opioid curse will arise from municipal litigation in a Cleveland courtroom remains to be seen. But as Judge Polster repeatedly reminds his audience, every day another 150 Americans are dying of overdose. There is no time to lose.

Notes

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16. *Id.*
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18. "Pseudo addiction is a term which has been used to describe patient behaviors that may occur when pain is undertreated." *Definitions Related to the Use of Opioids for the Treatment of Pain: Consensus Statement of the American Academy of Pain Medicine, the American Pain Society, and the American Society of Addiction Medicine*, American Society of Pain Medicine, 2001, *available at* https://www.asam.org/docs/default-source/public-policy-statements/1opioid-definitions-consensus-2-011.pdf
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21. Alex Brill, *New state level estimates of the economic burden of the opioid crisis*, AEIdeas, Jan. 16, 2018, *available at* https://www.aei.org/publication/new-state-level-estimates-of-the-economic-burden-of-the-opioid-epidemic/
22. The market price for opioids was as much as $1 per milligram of active ingredient, meaning an OxyContin 120 might sell $80 or more on the street. In 2011, black tar heroin was selling in

Continued on page 32

X Does Not Marcus The Spot: Preventing And Handling Workplace Harassment In 2018

By: Lawrence Lee and Nicole L. Faulkner, Stinson Leonard Street LLP



The County of Pristine is a desired location for entrepreneurs in the high tech industry, younger families, and dog lovers. The County's socio-economic status is middle to upper class, and crime and divorce statistics are among the lowest in the nation. You are the Pristine County Attorney, and today you receive a knock on the door from the County's Human Resources Director, Carla Jones, requesting your legal advice concerning County Manager, Marcus Cebelius.

Deputy County Manager Tina Pohler, who directly reports to Marcus, has reported that he is harassing her, and she needs help from HR for fear of adverse reprisal. Marcus is the long-time County Manager and is well respected by the County Commissioners as well as most of Pristine County's department officials. However, neither you nor Carla are surprised by the allegation, because there have been occasional rumors over Marcus' tenure that he flirts with other female staff. Carla wants to keep things quiet as there are 30 employees in the office and she is afraid of a #metoo flurry of distraction.

The County has thorough anti-harassment and anti-retaliation policies. Carla conducted an informal investigation and through her promise to maintain confidentiality to the following three reporting parties, she discovers concerning information about Marcus' behavior:

Tina and Marcus briefly had a "more than friends" relationship for three months, until Tina broke up with Marcus because he was overly pressuring her to leave her husband. Since the breakup, Marcus has excessively texted and left voicemails for Tina to reconnect their relationship. Tina now feels uncomfortable working with Marcus, who is her direct boss and has significant power and influence in County government on hiring and firing decisions. The County employee handbook contains a provision that prohibits relationships between supervisor and employees, which may result in discipline of both parties by the appropriate hiring and firing authority.

Tina also told Carla that another female employee in the County Manager's office recently reported to Tina that Marcus was acting inappropriately with her. Susan Fey, the County Manager assistant, described to Tina that Marcus gets "handsy with me" when they are alone.

Carla conducted an in-person interview of Susan, who reported that Marcus tried to provide her a friendly hug at an office recognition party, which she resisted. Recently, according to Susan, Marcus grabbed her posterior while simultaneously telling her that she had "a stray hair on her hiney." Marcus then made a comment to Susan that she would be promoted because she allows him to be himself around her. Susan revealed that she told Jacob Ladere, her boyfriend and past Pristine County Commissioner, about Marcus' inappropriate and sexual behaviors. Susan expressed concern to Jacob that Marcus would "continue to assault" her and that she would lose her job if "he ever found out that I was talking to you." Susan suggested that Carla should speak with Mindy Warfield, the County's third party contractor who works closely with the County's IT department.

Carla conducted a phone interview of Mindy, who initially expressed her reservation in providing any information for fear that she may lose Pristine County as one of her larger client accounts. After Carla convinced Mindy that their "conversation will be kept strictly confidential," Mindy reveals that after a lunch with Marcus to discuss renewal of her contract with the County, he "attacked her with kisses on her neck" without consent or reciprocation and suggest that they to a motel "to seal the deal." Mindy reveals that Marcus then hugged her and would not let her go. She kicked him in the groin and drove off. Since that time, Mindy has sought counseling for the incident.

As the County Attorney, you immediately realize there are a lot of details and potential concerns to unpack here. You realize that all of this information portends potential sexual harassment liability, but what types of behavior actually rise to the level prohibited by law? Who does the law protect—only employees or also outside contractors? It appears Marcus may have behaved poorly for some time—at what point is an employer (the County) obligated to get involved? What are the employer's obligations once it knows of the potential issue?

Title VII Refresher: Sexual harassment, Legally-Defined

Sexual harassment is a form of sex discrimination prohibited under Title VII. Sexual harassment is defined as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly

> a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

This definition has been interpreted to encompass two more commonly known terms: quid pro quo harassment and hostile environment harassment. Quid pro quo harassment occurs when an employee suffers a tangible employment action based on that employee's response (or nonresponse) to unwelcome sexual demands. This is the classic "sleep with me or you're fired" scenario, but can also include any granting or denial of some other benefit in the workplace that constitutes a significant change in employment status. If no tangible employment action occurred, conduct may still be unlawful under the hostile environment analysis. To rise to the level of a hostile environment, conduct must be "severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." Petty slights, annoyances, stray remarks, or isolated incidents (unless extremely severe) will not typically rise to the level of a hostile environment as defined under the law.

Sexual harassment can occur when the victim is a man or a woman and does not have to involve the opposite sex. The harasser can be the victim's supervisor, a co-worker, a supervisor from a different department, or even a non-employee. Importantly, the conduct must be unwelcome.

Who Is Protected Under Title VII?

Employers with fifteen or more employees are subject to Title VII. An individual who works for a covered employer is protected if he or she was an employee at the time the alleged harassment occurred. The test for whether a person is an "employee" is fact specific, but generally does not include independent contractors. Simply ascribing the label "contractor" to a person performing work for an entity, however, may not be sufficient to avoid liability. A court would examine a non-exhaustive list of factors to determine whether that individual is actually in an employment relationship, including the amount of control the entity has over the work. An employee can have multiple employers who may be subject to Title VII liability as joint employers. A similar fact-specific test applies here as well: does the entity have the ability to hire and fire the individual? Which entity has the power to discipline or retain direct supervision of the employee? There are many factors that come into play here, but employers (both public and private alike) should be aware for the potential of joint-employer liability.

What Triggers an Employer's Legal Obligations?

Knowledge. When the complained of conduct is between two employees, "an employer is responsible for acts of sexual harassment in the workplace where the employer (. . . or supervisory employees) knows or should have known of the conduct." The parenthetical here in the regulation is key: "or supervisory employees." When an employer's managers/officers have knowledge… the employer has knowledge.

Appropriate Response. Once an employer knows (or has reason to know) of potentially unlawful behavior (whether by coworkers or supervisors), its legal obligation is to take "immediate and appropriate corrective action." In other words, ignoring signs or looking the other way in the face of a complaint can land an employer in hot water. But, if an employer learns of an issue and immediately remedies the issue, this gives the employer a strong defense against future claims of harassment (as long as that remedy was appropriate and the behavior did not continue).

Prevention. When the complainant alleges that a supervisor is the doer of the misdeed, the employer's liability is assumed unless the employer can show that it not only took immediate corrective action, but that it took affirmative steps to prevent harassment in the first place. Note here that an employer has an affirmative duty to take reasonable steps to prevent harassment in the workplace. Reasonableness is not specifically defined; but, to start, employers and municipalities should be looking at their written policies and formal supervisor training (including signed acknowledgments of attending the training).

Knowledge, prevention, and appropriate responses are not, by any means, get-out-of-jail-free cards for employers. Particularly in a hostile environment claim (versus quid pro quo), if a tangible employment action has been taken (e.g., the complaining employee was fired), the employer's argument that it tried to prevent and respond appropriately may be inconsequential.

Responding to a Complaint of Sexual Harassment

What is an "appropriate corrective action?" There are no black and white rules to guide an employer here. If the EEOC were to investigate a claim of sexual harassment, it would look at the situation as a whole: the nature of the alleged sexual advances and the context in which the alleged conduct occurred. Employers should do the same.

While employers should, of course, ensure that all complaints and ensuing investigations are handled with discretion, confidentiality should not be promised. An employer is obligated to respond and take remedial action, and the employer's figurative hands may be tied if it learns information that it has promised would remain confidential (or it must break the promise of confidentiality and thereby destroy the credibility of its investigatory process).

Retaliation

Title VII is intended to prevent discrimination and harassment in the workplace and encourage employees to report such misconduct without fear of punishment. An employee who complains is protected from retaliation (also known as "reprisal"). An employee who participates in an investigation is similarly protected from retaliation. The



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elements of retaliation are (1) protected activity (a complaint or investigation participation), (2) some materially adverse employment action, and (3) a causal connection between the protected activity and the adverse action. For a complaint to allege "protected activity," it need not specify any particular magic words. The complainant does not need to say, "I feel this is a hostile environment based on my sex." Further, the conduct about which the employee complains need not ultimately rise to the severe and pervasive level required under the law. The complaint itself garners some protection—not impenetrable if the adverse action is based on legitimate business reasons, but employers should proceed with caution.

Considerations for the Pristine County Attorney

As the County Attorney in this scenario, you should advise as to (1) whether the County has any current legal exposure with respect to the allegations brought forward by Tina, Susan, or Mindy, (2) what is an appropriate corrective remedy, if applicable, with respect to Marcus, and (3) whether there are any issues with the County's current policies or procedures related to sexual harassment in the workplace.

Susan and Mindy

Susan and Mindy both presented serious allegations during the investigation of Tina's complaint. Susan reported misconduct that implicates both hostile environment and quid pro quo claims. Marcus' comment about, and grabbing of, her posterior have the potential to create an intimidating/offensive environment. Is it an isolated incident? A stray remark? His comment that Susan could get a promotion if she continues to allow him to be himself (presumably, his posterior-grabbing self) is an alarming comment that is well on its way to quid pro quo. Mindy's comments, similarly, should be sounding internal alarms for the County Attorney: unwelcome sexual physical contact (kisses on the neck) and a suggestion to head to the motel to "seal the deal." However, setting aside for a moment what the County should do with Marcus as a responsible employer (regardless of the actual legal risk associated with claims from Susan or Mindy), the County has several defenses for consideration.

First, Mindy is likely not an employee. Further analysis is needed to ensure that the County does not exercise joint control over Mindy that could impose any joint-employer liability, or that the County does not exercise control on its own such that the label "contractor" is inappropriate. Assuming she is truly an independent contractor, she is not covered by Title VII for purposes of a potential claim against the County.

Second, although aware of Marcus' flirtatious nature, the County had no direct knowledge of either Susan or Mindy being harassed. Mindy told nobody, and Susan told only her boyfriend who was no longer a county employee (he was the past Commissioner). The analysis is drastically different with respect to Susan if Jacob was still the Commissioner when she confided in him, but that does not appear to be the case. Recall, a supervisory employee with knowledge means that the knowledge is imputed to the employer. Supervisors have a legal obligation to "tell" even if romantically involved with the complaining employee. Depending on the jurisdiction, you should still expect that a Plaintiff's attorney would attempt to impute liability on the County for the past Commissioner, Susan's boyfriend, having knowledge of Marcus' harassment.

Tina

Tina's complaint passes some of the initial threshold questions. Title VII applies as the County employs fifteen or more employees. She is a covered individual because she is employed by the County. She has put the County on notice of a potential sexual harassment issue, which should be evident based on a few key allegations: relationship gone south between boss and subordinate, excessive unwelcome advances regarding their sexual/romantic relationship, discomfort in the workplace and intimidation because of Marcus' power as her boss. True or not, the County is on notice and must investigate accordingly.

The conduct. Is the conduct unwelcome and severe and pervasive as to create an intimidating, hostile, or offensive working environment? Maybe. The initial relationship was not unwelcome, but the excessive voicemails and text messages certainly were (according to Tina). She has expressed a fear of quid pro quo (i.e., Marcus has power and the relationship is over so she is apprehensive). She has not, however, alleged any actual changes to the terms or conditions of her employment to constitute an adverse action. The investigation at this point does not feel complete.

Investigation. Carla took some great first steps with her informal interviews. However, a key component is missing—she did not interview Marcus. Unless the County is presented with conclusive undisputed evidence of Marcus' behavior (e.g., the smoking gun email...and, frankly, even if there was a "smoking gun"), Marcus should be given an opportunity to respond to the allegations.

Knowledge: As the County Attorney, you should be concerned about the fact that neither you nor Carla are surprised by these allegations. Your knowledge, and Carla's knowledge, is the County's knowledge. The details surrounding these prior "occasional rumors" are important to understand whether the County has already shirked its duty to implement appropriate corrective action. If evidence exists that these prior rumors were substantive enough that a reasonable person in your shoes, as the County Attorney, would have at least looked into it, the County may be exposed for failing to prevent/remedy harassment. It is imperative that the County respond appropriately, now, to Tina's allegations.

Immediate Action. Two items. Based on the specificity and nature of the allegations by three different female reporting parties, and depending on policy and practice, the County would be best served to place Marcus on administrative leave and have him work from home as well as advise him that communications with all staff and vendors must henceforth be made by email. It is important to interview Marcus before forming a final conclusion as to appropriate discipline, if any. Has Marcus ever been spoken with or disciplined in the past for similar behavior? Even though Susan and Mindy's allegations may or may not present legal risk by way of a Susan/Mindy claim, the new knowledge of his alleged misconduct toward them should be taken seriously not only because that is what a responsible employer should do, but also to protect the County from risk of a future claim

should Marcus continue his [alleged] bad behavior. The spectrum of potential discipline ranges from a written warning ensuring that Marcus understands he is to avoid any conduct that could give even the perception of this type of behavior moving forward, to immediate termination. If these allegations went public, would the County be comfortable standing behind the decision it made?

First Important Take Away: Immediate Training and Bystander Empowerment

If Marcus has not already been dismissed from his employment, to go along with his severe warning/reprimand, he should be required to attend harassment and awareness training. For most employers and municipalities, directing an alleged offender to training seems like an obvious [minimal] response. However, prevention is part of an employer's defense against a claim of supervisor sexual harassment. Written policies and self-guided auto-pilot online "tutorials" only go so far. The goal is not simply mass exposure to the law and the material, the goal is understanding and actual prevention. All employees (including supervisory employees) should receive a uniform message as an initial step, followed by separate training sessions for employees in supervisory roles. This training should include topics such as reporting to appropriate individuals when rumors are abuzz, not unlike the rumors that the County Attorney and Carla were aware of in the County of Pristine. This training should include interactive analysis of real-world scenarios (e.g., talk about the County of Pristine!).

Employees should be encouraged to confront unwelcome situations in the workplace directly. Employees should also have a clear roadmap of the various (at least two) reporting resources to whom a complaint can be made. While it may not be advisable to implement a policy whereby a non-supervisor employee would actually be disciplined for failing to report harassment in the workplace, it's important that all employees understand that withholding information may mean that the employer escapes liablity.

Presently, a growing number of workplace trainers are incorporating the concept of bystander empowerment into their harassment training methods to employees and management. The crux of this concept is to re-educate the majority of employees or managers that would traditionally ignore or "bystand" witnessed harassment. Such training focuses on taking affirmative steps towards productively and contemporaneously addressing inappropriate workplace behavior before it either turns into full-fledged harassment (or continued harassment). Depending on workplace culture and the employer's policy and enforcement on anti-harassment measures, the County under these facts is a good candidate for having a bystander empowerment component added to its harassment training –both for employees and administration/management.

Two Additional Take Always

1. The County should have a qualified internal I.T. manager or independent forensic expert immediately capture and preserve screen shots of all electronic information that may be sitting in the employer's servers. Presuming that the County's employee handbook establishes that such information shall be considered employer property, the scope of such a search would include but not be limited to all emails, word processing documents, and texts (if connected to the county servers through employer-issued mobile phones or software) that are relevant to the allegations or denials of harassment.

2. Carla should avoid providing promises of confidentiality to reporting parties as a means of enticing disclosure. Doing so will result in an unfulfilled and false assertion if any of the employees file an administrative claim or lawsuit against the County. As part of the subpoena or disclosure process, the employer is required to turn over copies of its written notes or witness statements made during the internal harassment investigation.

For future reports of harassment, the County should consider contacting its external employment counsel or a third-party workplace investigator to evaluate the allegations of harassment against Marcus. That approach may create better separation and a stronger position, provided that law or regulation allows such information to be kept confidential. If, however, the County maintains a practice of conducting reports of harassment internally through its Human Resources department, then it should avoid guaranteeing that the statements are confidential. Carla should, instead, inform the County employees being interviewed that any statements made to her during her workplace investigation fall under the anti-retaliation policy found in its employee handbook.

Notes

1. 42 U.S.C. §2000e-2(a); 29 C.F.R. § 1604.11.
2. 29 C.F.R. § 1604.11.
3. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, https://www.eeoc.gov/policy/docs/harassment.pdf (last modified Mar. 29, 2010).
4. *Id.*
5. EEOC, Harassment, https://www.eeoc.gov/laws/types/harassment.cfm (last visited Jan. 23, 2018).
6. *Id.*
7. EEOC, Facts About Sexual Harassment, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Jan. 23, 2018).
8. *Id.*
9. *Id.* 42 U.S.C. § 2000e(b).
10. EEOC Compliance Manual, 2-III(A), https://www.eeoc.gov/policy/docs/threshold.html#2-III-A (last visited Jan. 23, 2018).
11. *Id.*
12. EEOC Compliance Manual, 2-III(B), https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii-(b) (last visited Feb. 28, 2018).
13. 29 C.F.R. § 1604.11(d).
14. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, https://www.eeoc.gov/policy/docs/harassment.html (last visited Feb. 28, 2018).
15. EEOC, Facts About Sexual Harassment, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Jan. 23, 2018).
16. Employers also should not require that non-supervisory employees participating in the investigation keep the details confidential, but that is a topic for another article addressing the National Labor Relations Act and the prohibitions against "chilling" an employee from discussing the terms and conditions of their employment. https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm
17. *Id.*
18. *Id.* at II.
19. *Id.*



Amicus Corner

Claims for Indefinite Medical Leave – Can the Supreme Court Provide a Bright Line Rule?

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

One of the most vexing problems for employers is the interplay between the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Many employers mistakenly terminate an employee's employment once she has exhausted her FMLA leave even though she still requires additional leave. Such an assumption forgets that the ADA potentially allows for additional leave as a reasonable accommodation and that the employer is, at the very least, required to engage in an interactive dialogue with the employee to determine how much leave the employee requires and if the request is reasonable or in the alternative, if granting the additional leave poses an undue hardship to the employer. See e.g., *Delgado Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 128 (1st Cir. 2017) (noting that a leave of absence or a leave extension can constitute a reasonable accommodation under the ADA "in some circumstances."); *Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413, 419 (5th Cir. 2017) (indicating that "taking leave that is limited in duration may be a reasonable accommodation to enable an employee to perform the essential functions of the job upon return"); *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (noting a leave of absence might be a reasonable accommodation in some cases).

EEOC guidance similarly provides that unpaid leave should be considered as a reasonable accommodation even when the employer does not ordinarily offer such leave as an employee benefit and even where the employee has exhausted leave under the FMLA or other state laws.

But how much leave is too much leave under the ADA? At what point can an employer, who is stretched thin by a lengthy absence say that the leave request would pose an undue hardship? Employers have struggled with these questions and courts are generally reluctant to provide bright lines. One area that has seemed relatively clear was that a request for indefinite medical was not an accommodation the employer had to provide. Indeed, even the EEOC counsels employers that they have "no obligation to provide leave of indefinite duration."

While the EEOC views the issue of an indefinite leave as imposing an undue hardship, some courts indicated that such a request renders the employee not "qualified" under the statute. After all, the ADA requires that the employee be qualified – that is to say, the employee must be "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of" the relevant "employment position." 42 U.S.C. § 12111(8); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 396 (2002). These courts conclude that if employees request indefinite medical leave, they are not "qualified" because they cannot perform the essential functions of the job. See *Moss*, 851 F.3d at 418-19 (concluding that a request for "indefinite leave" meant that the employee "could not establish that he could 'perform the essential functions of his job'..." and therefore the employee was not qualified under the ADA); *Minter v. District of Columbia*, 809 F.3d 66, 69-70 (DC Cir. 2015) (indicating that a physician's certificate providing that an employee was "totally disabled" and that the disability was "indefinite" meant that the employee was "indisputably not a 'qualified individual'" under the ADA"); *Peyton v. Fred's Stores of Arkansas, Inc., 561 F.3d 900, 903 (8th Cir. 2009)* (holding that an employee who requests indefinite leave "cannot as a matter of law, be considered 'otherwise qualified' under the ADA). Still other courts finding that claims for indefinite leave are incompatible with the ADA reason that these requests are facially unreasonable. *See Robert v. Bd. of County Comm'rs of Brown County, 691 F.3d 1211, 1218-1219 (10th Cir. 2012*) (concluding "the only potential accommodation that would allow [the employee] to perform the essential functions of her position was an indefinite reprieve from those functions—an accommodation that is unreasonable as a matter of law"); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225-26 (11th Cir. 1997) (holding request for indefinite medical leave was unreasonable as a matter of law within the meaning of the ADA).

Regardless of how the courts have analyzed the question, however, the overwhelming majority have concluded that employees cannot bring claims under the ADA where their request involves an indefinite medical leave. Unfortunately, employers in the Sixth Circuit (and perhaps the First and Ninth as well) have a different rule to contend with. The Sixth Circuit has steadfastly indicated that there should be no per se rule that an unpaid leave of indefinite duration could never constitute a "reasonable accommodation" under the ADA. *See Cehrs v. Northeast Ohio Alzheimer's Research Ctr.,* 155 F.3d 775, 782 (1998). In other words, the Sixth Circuit has rejected such a bright line rule.

More recently, Nashville, Tennessee fell victim to the Sixth Circuit's rule (or lack thereof). Metropolitan Government of Nashville and Davidson County v. McMahon involves a public health nurse who worked for Nashville's health department and who suffered from

depression and anxiety. She took a medical leave and exhausted her FMLA leave while out on leave. She was then transferred to another clinic away from the "toxic environment" (she claimed her supervisor was causing her depression and anxiety) and worked successfully in the new clinic for four months. Unfortunately, there was not an open position at the second clinic and the nurse with whom she had swapped locations had agreed to move only for a short duration. Ms. McMahon was then transferred back to the original clinic, but under a different supervisor.

However, even though she was working for a different supervisor, she ended up going out on another leave after about a month, asking for leave of indefinite duration. Specifically, her physician provided a letter stated that it was "not possible to predict" when she could return. Nashville wrote her a letter explaining that there were unpaid leave days available under the rules and under their policies, but that her current request must be denied because it was for "indefinite duration." Nashville informed Ms. McMahon that she had to return to work at the expiration of her paid leave. McMahon did not request any of the allowable unpaid leave days and never provided a return-to-work date. Instead, she resigned, stating that she "should not be working for [Nashville] at this time." Had she not resigned, she would have had a disciplinary hearing per union rules, where the topic of her requested leave would have been discussed.

McMahon sued, claiming Nashville's termination of her employment and failure to provide a reasonable accommodation violated the ADA. The district court denied summary judgment and the case went to a jury, which returned a verdict in her favor the ADA claim. On appeal, the Sixth Circuit rejected Nashville's argument that McMahon was not a qualified individual under the ADA due to her request for an indefinite leave. The Sixth Circuit concluded that she was qualified to perform her job under the ADA based on her having successfully done so for four months at the alternate location after her prior medical leave. The court noted that there was "no basis to conclude that another period of leave would not restore her ability to return to work." The Sixth Circuit similarly rejected Nashville's argument that a request for indefinite leave is not a reasonable accommodation, reasoning that Nashville should have proposed some form of definite leave in response to her request, given that she had unpaid leave available to her under Nashville's own policies.

Nashville has petitioned the Supreme Court for certiorari on the issue of whether a disabled employee who requests indefinite leave is not qualified under the ADA, as a matter of law, which Nashville notes is a question on which the circuits are split.

IMLA is filing an amicus brief in support of Nashville in this case. As the nation's largest employer (collectively) local governments have a significant stake in employment discrimination cases, particularly where, as here, a court seeks to expand the scope of liability under the ADA. As the petition points out, claims for leave of an indefinite duration are quite common, and they can put a tremendous strain on employers should they be required to hold the position open for the person on an indefinite leave. Holding jobs open for an indefinite period is not only costly and difficult for employers, but it is unfair to the remaining employees who have to shoulder more burdens while they wait for the position to be filled or for the person to return, without knowing when that will be. Studies show that workers who are covering for the absent employee are often more stressed themselves and their morale suffers.

In addition, a rule that someone requesting indefinite leave is not a qualified individual under the ADA would result in more cases being dismissed at the summary judgment or even 12(b)6 stage, cutting down on litigation costs for local governments, which can be significant under the ADA. In its amicus brief, IMLA argues that employees with disabilities should be accommodated where possible (and where it is not an undue hardship), but requests for indefinite leave are simply too burdensome and disruptive for employers; therefore, the Court should accept the Petition and provide a bright line and uniform rule for employers around the country on this important issue. ML

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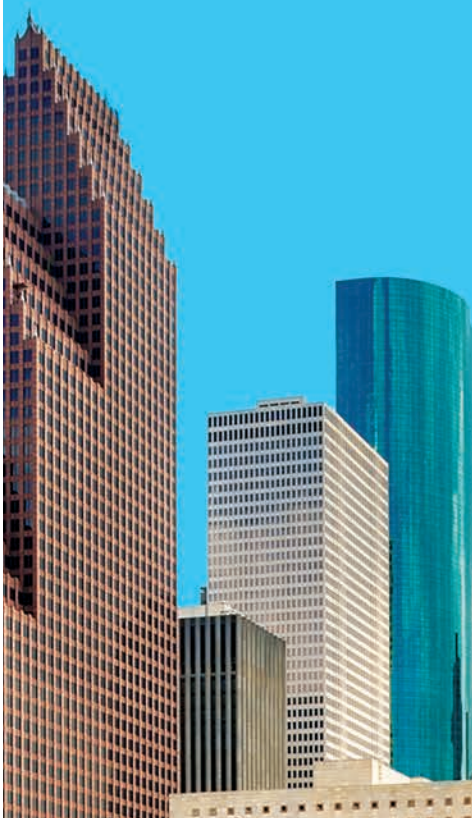




Code Enforcement

The Opioid Crisis: Does Local Code Enforcement Have a Role?

By: Frank M. Johnson, Assistant City Attorney, Gaithersburg, Maryland

News reports from all regions make it clear that no community – small or large, rural or urban, wealthy or not – is immune from the heroin/opioid crisis. Massachusetts Governor Deval Patrick was in 2014 the first U.S. state governor to declare that the crisis constituted a public health emergency. Declaring a public health emergency can bring more resources to address the problem and empower health and human services agencies to more quickly put additional resources in place, including treatments and medication that can reverse the impact of an overdose. Since the first 2014 declaration, seven other Governors (so far) have followed, according to the Network for Public Health Law and other news reports:

Virginia Governor Terry McAuliffe on November 21, 2016;

Alaska Governor Bill Walker on February 14, 2017;

Maryland Governor Larry Hogan on March 1, 2017;

Florida Governor Rick Scott on March 13, 2017;

Arizona governor Doug Ducey on June 5, 2017;

South Carolina Governor Henry McMaster on December 18, 2017; and

Pennsylvania Governor Tom Wolf on January 10, 2018.

The U.S. Centers for Disease Control and Prevention (CDC) reported on December 30, 2016 that opioid overdose deaths hit a record-high of 33,000 nationwide. Following that, a White House commission recommended a national declaration, and on October 16, 2017, President Donald Trump declared the crisis a national health emergency.

It's hard to argue that the word "crisis" is an overstatement. Multiple reports over the last several years show that South Carolina Governor Henry McMaster's reference to the crisis as a "silent hurricane" is accurate. News articles show continual increases in overdose deaths, affecting almost every community. For example, a Boston Globe article from August 10, 2015, reported on the "mounting death toll" from overdoses in both Kentucky and Massachusetts, noting this is one area on which Republican Senate Majority Leader Mitch McConnell, representing Kentucky, and Democratic Senator Ed Markey, representing Massachusetts, can agree more resources are needed.

The numbers certainly prove the point. An October 27, 2017 report on Opioid Addiction by the International City/County Management Association (ICMA) noted an over 200% increase in overdose deaths in 2012 in Lee County, North Carolina. The Pike County Courier on January 17, 2018 reported an increase of overdose deaths of more than one-third for 2017, as compared to 2016. Jo Martin of the Maryland Reporter reports that from 2010 to 2016, overdose deaths rose by 66% in Maryland. Overall, the Network for Public Health Law reported in November 2017 that in a single year, from 2014 to 2015, the nationwide death rate from widely-used synthetic opioids such as fentanyl and carfentanil, increased 72%. As such, the Associated Press reported in an October 27, 2017 article that the CDC reports a more than ten-fold increase in overdose deaths in 2016, totaling 64,000, as compared to 1988 – during the crack cocaine crisis – when less than 5,000 were reported.

The impacts from today's ongoing opioid crisis are widespread, affecting families and individuals as well as communities. Even as almost every report calls for more resources, many efforts are underway – private and public, and at the federal, state and local levels – to try to address it. The role of emergency providers, including police, doctors and treatment facilities, seems clear enough. But other agencies are also involved, and this article will explore the role of local code enforcement in addressing community concerns with illegal drug use in the midst of this 21st century drug crisis.

The historical background. Illegal drug use (and illicit use of otherwise legal drugs) are not new problems but have been issues in the United States for more than a century. This started with opium use even before the Civil War, and was followed by the initial development of heroin and cocaine by drug manufacturers towards the end of the 19th century. At that time, such drug use was not illegal, even without a prescription. As it was first introduced, cocaine was an accepted energizer, as is coffee today. But as Mike Stobbe of the Associated Press reported on October 27, 2017, that changed when some became addicted to cocaine, and then as a link to violent crime and prostitution followed.

The first national anti-drug effort resulted in the Harrison Narcotic Tax Act of 1914. That law, according to a 1972 summary by Consumer Reports, didn't make narcotics or cocaine illegal, but imposed a special tax and requiring a prescription for any legal use – thus making use without a prescription effectively illegal. As a practical matter the Great Depression and World War II limited widespread use of illegal (or costly) drugs, in favor of cigarettes and alcohol. But after World War II, a new era of drug use began. The October 2017 Associated Press article reported that drug use bloomed with the development of amphetamines and methamphetamines for weight loss and depression, but diminished with restrictions in the 1960's and 1970's. At that time, heroin and later cocaine, in the

form of "crack," which could be smoked, became dominant illegal uses. Both distribution and use of these illegal drugs was widespread, leading to urban blight and neighborhood decay in many areas, as well as increased violent crime.

Development of the opioid crisis. The current opioid addiction crisis began in the mid 1990s, with the introduction of a drug called OxyContin, which news reports indicate was intended to be a safe and effective opioid to use for months, Instead, as the October 2017 AP report states, patients became addicted, which became worse with aggressive marketing directly to consumers. Many also turned to less expensive illegal alternatives, such as heroin and synthetic opioids, including fentanyl and carfentanil. These synthetics increased the problem, in part because they can be so powerful – and thus dangerous. Indeed, they are so powerful that they pose serious risks to police officers and detection dogs, according to a June 2017 report by Lakeview Health Drug & Alcohol Rehab of Jacksonville, Florida. That report indicates that many officers now carry naloxone, (the nasally-introduced version of which is known as Narcan), which serves as an antidote as it can reverse (or at least reduce) the impact of an opioid overdose.

The impact of the opioid crisis. As the 2017 International City/County Management Association (ICMA) report stated, "The opioid addiction crisis is affecting communities of all sizes," and each report indicates that overdose deaths have for almost every region more than quadrupled over the last few years. Nor is the impact of this drug use targeted to certain populations or income levels. As a Columbia University Mailman School of Public Health report noted on September 26, 2017, the epidemic is "not confined to affluent young white residents," but "affects all neighborhoods, races, ages, and socioeconomic backgrounds." Nor, the report notes, is it limited to youth, as the age of impact varies, such that, in 2016, the median age of overdose was reported to be 37. The point is that many of us are impacted, even beyond the dramatic increase in overdose deaths. Families are devastated, and it is reported that tens of thousands more children are in foster care nationwide – which reports are backed up by reports of increases in each community.

The impact in neighborhoods and the role of code enforcement. Local governments have been responding, and the "front line" starts with those who respond to emergency calls, including fire stations and emergency medical services providers, as Joe Lawlor reported in an April 1, 2017 article in the Portland (Maine) Press-Herald. But there are longer-term actions that can also be put in place. Vacant or poorly maintained property can, as in past decades, still serve as the sites for drug abuse, as multiple reports verify. For example, the (Delaware) News Journal reported, in an online story dated July 17, 2017, that vacant properties can serve as a site for drug deals. The Florida Regional Community Policing Institute, in a February 2013 presentation, noted the reality that abandoned properties can foster illegal behavior – with narcotics use, sale and manufacture topping the list. Indeed, they cite an Austin, Texas report that unsecured vacant buildings had more than three times the number of calls to police for drug violations, twice the number of calls about violence, and nearly twice the number of calls about theft. The April 2017 article in the Portland Press-Herald similarly reported that "a bountiful supply of cheap rental housing," especially when they aren't maintained, "enables the drug problem to fester . . ." As the Washington State Municipal Research and Services Center reports, such illegal drug use, can reduce safety for community residents, housing values and the overall quality of life.

Especially where vacant or dilapidated housing has an impact on allowing drug use, local code enforcement can address community needs, in hand in hand coordination with police, other emergency responders, and health and human services agencies. Some recent and some reports from years past show how this can work. A 1998 report in Crime Prevention Studies, Volume 9, page 261, entitled "A Co-Production Model of Code Enforcement and Nuisance Abatement" studied code enforcement efforts in Baltimore, Maryland, and concluded at that time that code enforcement efforts to enforce building code, nuisance and safety laws can be effective in supporting communities against the impact of illegal drug use. The report concluded this was possible when code enforcement staff used a cooperative strategy, in coordination with other agencies or community groups.

Indeed, more recent reports show that such code enforcement efforts can be the critical element in eliminating a drug use site from a vacant or nuisance property within a community – even as the impetus establishing the ability to respond may have, in many cases, been established more than a decade ago. The Washington State Municipal Research and Services Center's 2015 report on Drug Nuisances indicates that in 1988, the State of Washington enacted Chapter 7.43 of the Washington Revised Code, which authorized local code enforcement officials to seek closure of a building or unit within a building for one year upon a finding that a "drug nuisance" exists, which Washington Revised Code §7.43.010(1) defines as a building or unit used for manufacturing, delivery or storage of any controlled substance, including heroin or opioids. And that 1988 law requires the court, upon such a finding, to order closure of the building or unit. While building closures may be an extreme step, the 2015 report indicates that the threat of such an order, combined with expedited procedures established by Washington Revised Code §7.43.050, has assisted in gaining cooperation from the property owners – and stopping the illegal drug use. Indeed, a 2015 report from Snohomish County, Washington emphasizes how these laws have been relevant today in addressing more than 200 nuisance properties – almost all of which have been home to illegal drug use.

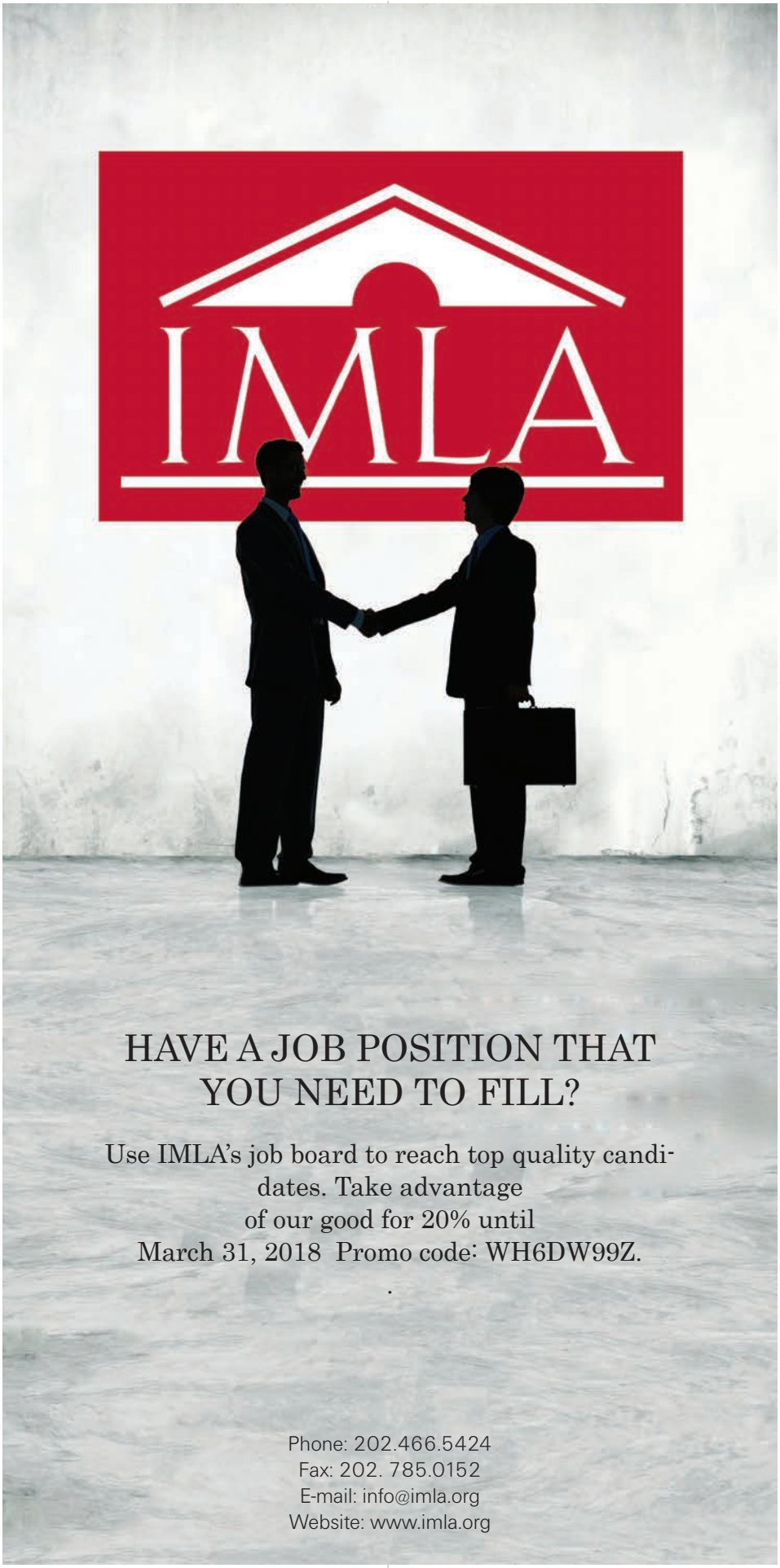
Even as laws from prior decades can provide a means to address illegal drug use, the effort doesn't stop simply by eliminating drug use at a specific location. The Snohomish County report indicates that as such properties are closed, addicted persons living there are, with the assistance of health and human services agencies, enrolled in detox programs and placed in more secure housing.

Nuisance laws can also assist in stopping illegal drug activity at specific sites within a neighborhood. For example, the City of Columbus, Ohio's Ordinance §4701.10 empowers code enforcement officials to serve a Notice of Violation, requiring correction and compliance within a "reasonable time," for any building code violation, but Ordinance §4704(f) also defines a "public nuisance" as any building in which a

felony violation or pattern of criminal gang activity has occurred. Using a similar state law in Florida, Florida Statute § 823.05, the City of Jacksonville reports that it will order property to be maintained in compliance with applicable building codes – or drug activity to cease – subject to enforcement of the abatement order by court, which can include issuance of an injunction under Florida Statute § 60.05 and 06.

Even where a nuisance law may not specify drug use or distribution as a public nuisance, the day to day activities involved, which may include noise, excessive occupancy, or illegal activity in plain sight, may all establish a nuisance under local laws protecting "quiet enjoyment," or even common-law nuisance, as reported in the 1998 Crime Prevention Studies article, Vol. 9, page 261. Similarly, municipalities and counties can also, as reported by the Florida Regional Community Policing Institute in 2013, enforce a lack of building maintenance against a property owner or resident, and citations and the possibility of court orders requiring abatement of such violations can lead to correction or closure of the property. As an August 15, 1994 article by Dan Tracy in the Orlando Sentinel noted, such efforts by code enforcement inspectors can play a critical role as they coordinate with police and emergency responders. Such code enforcement efforts can, in some cases, resolve longer-term neighborhood issues when a specific property is the location of illegal drug activity. And in extreme cases raising health and safety concerns, demolition can, as a more recent 2013 online report by WALB News from Charlotte, North Carolina indicates, eliminate the blight altogether.

The basic purpose of code enforcement is to solve problems, and as part of that, protect the quality of life enjoyed by residents in our cities and counties. Police, emergency responders, and public health agencies are all directly impacted by the opioid crisis, and are all too often called upon to respond immediately to emergencies, often – and increasingly – including opioid overdoses. In addressing longer term efforts, enforcement offices can, in some cases using laws put in place decades ago, take direct steps against a vacant or dilapidated property hosting the drug activity in the first place and then offer treatment and resources to addicts and other affected persons. ML

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The Pledge of (Non)-Allegiance: Sovereign Citizenship

By Brad Cunningham, Municipal Attorney, Lexington, South Carolina

Very recently, we have had a couple instances of a problem many of you have probably also encountered in conducting the business of your local government. We have seen an increase in our dealings with "sovereign citizens." While this is not a new issue in our country, it seems to be growing in popularity.

Our first sovereign citizen, who objected to the use of the term, was pulled over by the police for speeding. Although he produced a valid South Carolina Driver's License, he claimed not to be "driving," but "traveling." His claim is that he cannot be regulated from "travel," citing very old case law that states a person cannot be denied their free right to "travel" the highways and byways of the United States. Unfortunately, his theory left out the part that indicated this right was subject to reasonable restrictions for the safety, protection and well-being of citizens.

The subject was with the police officer on the video, and when the officer tried to hand him a ticket he claimed he "did not need it." He asked the officer if he was "under arrest," and when the officer said "no" the driver announced that he was going to leave. The officer tried handing the ticket to him again, and he began to roll up his window. The officer then slipped the ticket through the window just as it was almost closed.

Although this gentleman claimed he did not have to come to court, he did so anyway, to make his arguments. First, of course, was the lack of jurisdiction argument because the court was not a legitimate court established by the U.S. Constitution. The defendant claimed the Supreme Court, the U.S. Magistrate Courts and Admiralty Court were the only legitimate courts that were allowed to operate under the Constitution. Our Judge, well versed on sovereign citizen issues, was not impressed. Throughout the trial he continuously asked the defendant to "move on," or "hurry" when he drifted into these arguments. It did not end well for the defendant, as a jury unanimously found him guilty. Apparently, the jury was not impressed with his arguments either.

Our second sovereign citizen employed the tactics more intensely. She was pulled over for speeding as well, and failed to produce a valid driver's license. She did, however, produce a passport and papers purporting to show that she was a Diplomat from a sovereign entity with a very long name which we will not repeat. She claimed that the passport was all she needed to drive legally in the United States. Not impressed, the officer gave her a ticket and summons for the traffic violation and also one for driving without a valid license.

A check with the Department of Motor Vehicles shows that her license had been suspended several times in the past, and she was likely ineligible to receive a new one. Before the case came to trial, she filed several complaints against the officer, using papers and language she had apparently "bought" somewhere. The complaints went so far as to name the officer's spouse as well. They were sent to everybody including the Governor.

The court case was called and the defendant showed up with family accompanying her. When her case was called, she was the only defendant left in the courtroom. She addressed the judge and claimed to be the "trustee," for the defendant. The judge asked her for her name, and she replied "I am a woman." The judge asked her if she was the defendant, and she said she was the "trustee" for the defendant. The judge again asked her name, and the circular discussion was repeated twice.

This time, the judge cautioned her, advising "We are not going to do this all day. I'm going to ask you some questions one more time, and if you fail to answer me I am going to hold you in contempt of court. Do you understand?" The defendant replied that she did. (I am not using her name for purposes of this column).

"Are you the defendant?" the judge asked. "I am the trustee for the defendant," she answered. "What is your name, trustee?" replied the judge. "I am a woman," she replied. This time the judge advised the officer on duty to take her into custody.

"I am not the defendant. I am the trustee," screamed the woman. She continued screaming her arguments. "I am a woman. I do not consent to this." The family had to be stopped from approaching the arresting officers. The defendant continued to resist, and it took four officers to subdue her. As they carried her out, she screamed "I'm being kidnapped."

Once removed from the courtroom, the defendant maintained a calm and polite demeanor, and kept so even through her booking at the jail. She has yet to return to court to address the initial traffic charges.

While neither of these defendants liked the term, and even objected to the use of it, both displayed tactics commonly used by and associated with the Sovereign Citizen Movement. Having heard of the movement, and being familiar with some of the tactics of its members, I decided to do a little reading and gather some information on the movement. Many of you may already know much of this, but it starts with the basics.

So-called "sovereign citizens" are a loosely organized collection of individuals and groups who believe they are "above the law and true defenders of the Constitution," according to an ABC report. According to the report, "they follow their own set of rules and many refuse to pay taxes." They basically challenge the legitimacy of the Government, even though they claim to be defenders of the Constitution that created the Government.

Although most sovereign citizens claim to be and are actually peaceful, there are members of the movement that have turned to violence. During a routine traffic stop in Arkansas, one sovereign citizen burst out of his vehicle and shot two police officers with an assault rifle.

Many years ago, an angry Michigan hunter wrote a letter to the State Department of Natural Resources avowing that he was "no longer a citizen of the corrupt political corporate State of Michigan and the United States of America." He claimed only to be answerable to the "Common Laws," and revoked his signature on hunting and fishing licenses which he viewed as "contracts that fraudulently bound him to the illegitimate government of Michigan."

That angry hunter later became known to the world as Terry Nichols, an accomplice to Timothy McVeigh who was convicted of the Oklahoma City Federal Building bombing in 1995. Apparently, McVeigh and Nichols subscribed to a growing right-wing anti-government ideology of which adherents have been increasingly plaguing public officials, law enforcement officers and private citizens with a variety of tactics designed to attack the government and other forms of authority. In various circles, they may also be known as Constitutionalists, Freemen, Preamble Citizens, Common Law Citizens and non-foreign or non-resident aliens.

The Federal Bureau of Investigation classifies the Sovereign Citizens Extremist Movement as "domestic terrorism." The FBI describes these anti-government extremists as those "who believe that even though they physically reside in this country, they are separate or "sovereign" from the United States. As a result, they believe they don't have to answer to any government authority, including courts, taxing entities, motor vehicle departments, or law enforcement."

The FBI reports that many sovereign citizens don't pay their taxes, and hold illegal courts that issue warrants for judges and police officers. They clog up the court with frivolous lawsuits and liens against public officials to harass them. In our case here in Lexington, as has happened in others, the Defendant presented allegedly fraudulent diplomatic papers, claiming to be a diplomat form another country. This raised eyebrows at the federal level.

Indeed, the FBI reports that illegal actions committed by these groups include murder and physical assault, threatening of judges, law enforcement officers and other government personnel, impersonating police officers and diplomats, use of fake currency, passports, license plates and driver's licenses, and mortgage fraud and redemption schemes.

The FBI reports examples such as this: Two California citizens were convicted of an insurance fraud scheme where they set up their own company and sold "lifetime memberships" to customers in which they promised to pay any accident claims against their members. They collected millions of dollars, but paid out very few claims.

In another FBI case in Missouri, three sovereign citizens were convicted of taking part in a conspiracy using phone diplomatic credentials. They charged a fee for a diplomatic ID card which they claimed entitled the holder to enjoy immunity from paying taxes and being stopped or arrested by law enforcement.

In Nevada, four men affiliated with the movement were arrested on federal money laundering, tax evasion, and weapons charges. Two of the suspects allegedly laundered more than a million dollars via what authorities believed was a bank fraud scheme.

Regular seminars are conducted across the country to teach the theories of groups affiliated with the Sovereign Citizen Movement. Even when jailed, sovereign citizens often continue their activities teaching other prisoners their tactics. Prisoners sometimes engage in sovereign citizen activities such as filing bogus liens against law enforcement officials and their families.

In one such instance, a convicted drug dealer in Connecticut filed more than $12 billion in liens against federal judges and prosecutors. According to federal officials, the man learned how to harass people with liens from a fellow prisoner associated with the Montana Freemen.

Currently published information regarding the Sovereign Citizen Movement and related groups is in abundant supply in libraries, government offices and, of course, on the internet. The FBI urges citizens to be crime- smart, and not to fall for the bogus claims and scams of sovereign citizens. Further, the FBI urges citizens to contact the Bureau if they encounter or have any information on such suspicious activities or crimes.

Back in to Lexington, our sovereign citizen, aka "The Trustee," is due to return to court very shortly after being a guest of Lexington County for the past 30 days.

Stay tuned for further developments.

I hope to see as many of you as possible at the IMLA Mid-year Seminar in Washington D.C., where I can let you know the results of the second visit to court by The Trustee.

The prosecution rests, your honor... ML





Inside Canada

Inept Drivers, Accessory Uses, Restrictive Covenants, and Vigilant Code Officers

By: Monica Ciriello, Ontario 2015

Failing to Appear in Court Results in Default Judgement

Morin v Edmonton (City), 2018 ABQB 104 (CanLII) http://canlii.ca/t/hqcp7

While in a City of Edmonton (City) parking lot, the Appellant backed up her motor vehicle and hit a red-light camera pedestal which was owned by the City. The City filed a claim for damages against the Appellant. The Appellant failed to appear and a default judgement in the amount $7858.97 was granted in her absence. The Appellant unsuccessfully filed an application with the Provincial Court to have the default judgement set aside. The Appellant appealed dismissal of the application.

HELD: Appeal dismissed

DISCUSSION: The Provincial Court Judge applied the test outlined in *Palin v. Duxbury* 2010 ABQB 833 to determine whether to set aside the Appellants' default judgment. To satisfy that test, the Appellant must: 1) have an arguable defence; 2) not deliberately let judgement go by default and have some excuse for the default, such as illness or a solicitor's inadvertence; and 3) after learning of the default judgement, must have moved promptly to open it up. In assessing the facts of the matter against the criteria, the Provincial Court Judge found that the Appellant did not have an arguable defence. The Appellant was in control of the motor vehicle, chose where to park and assessed whether the parking spaces were of adequate size for the motor vehicle. The City was not at fault.

On appeal of the Provincial Court Judge's decision, the Appellant argued that the standard of review should be correctness as the question of whether there was an arguable defence, is one of law. The Court agreed that by itself it was a question of law. However, the Provincial Court Judge intertwined the facts to assess the legal test and as such the Court found that it was a question of mixed fact and law. As a result, the Court could only overturn the Provincial Court Judge's decision if there was a 'palpable and overriding error' in arriving at its decision. The Supreme Court of Canada (SCC) has provided insight into what is meant by the phrase "palpable and overriding error" in a variety of cases. The SCC indicates that it something that is characterized as "unreasonable" or "clearly wrong." In reviewing the steps taken by the Provincial Court Judge to arrive at his decision, evidence was properly reviewed, the Court digressed that more evidence could be brought out in trial, but that is not to say the Provincial Court Judge did not review the evidence before him. As a result, the Provincial Court Judge did not make a palpable and overriding error in reaching his decision to dismiss. The appeal was dismissed.

Municipality Maintains Autonomy over Development and Implementation of Servicing within Their Communities

Don Black Investments Limited v. Middlesex (County), 2017 CanLII 47807 http://canlii.ca/t/h51lb

Two development companies, Don Black Investments (DBI) and South Winds Development Co. (South Winds) sought to develop neighbouring subdivisions in the Municipality of Middlesex Centre (Municipality). DBI proposed to develop its property into a mix of dwellings and townhouses, commercial development, a school block and a park space. However, it faced several issues with the Municipality's official plan, zoning bylaw, and waste and storm water services. A suggested permanent solution for the services would be to locate them on South Winds' property. DBI requested that it provide interim waste and storm water at its own cost and risk until a permanent solution was available. The Municipality failed to respond to DBI's draft plan conditions within the statutory timeframe. This led DBI to appeal to the Ontario Municipal Board (OMB). Prior to appearing before the OMB, DBI and the Municipality worked together to resolve over 40 issues, except one; whether it was reasonable for conditions of the draft plan approval to provide for the option of interim servicing at the discretion of the Municipality. South Winds objected to the wording of the draft plan conditions that allowed for an interim servicing option to be permitted by the Municipality.

HELD: Conditions are reasonable.

DISCUSSION: Despite the narrow question before it, the OMB considered whether the draft plan conditions agreed to between DBI and the Municipality were reasonable in light of section 51(25) of the *Planning Act (Act)*; whether proper regard was had for subsections 51(24) and 2 of the *Act*; and whether the wording of the conditions was consistent with the Provincial Policy Statement and the County and Municipality Official Plan. Section 51(25) of the *Act* allows for conditions to be imposed by the OMB if they are "reasonable, having regard to the nature of the development proposed for the subdivision". South Winds suggested that by allowing conditions that would let the Municipality determine whether an interim servicing should be permitted would result in uncertainty as to how the DBI subdivision would be serviced. The OMB disagreed, and stated that there was no uncertainty. The conditions supported by the Municipality, County and DBI was reasonable and certain; it was certain that DBI would provide full municipal services and it was certain that DBI would connect to the preferred full servicing solutions once such servicing was available. South Winds argued that any reference to interim servicing and "to the satisfaction of the Municipality" should be deleted in its entirety. The Municipality argued removing the language was unlawful as it suggested that the jurisdictional authority that it had over servicing within its jurisdiction would be removed. The OMB concluded that it was would be unreasonable to impose the

changes as proposed by South Winds.

South Winds further argued that the servicing approach of the Municipality harmed its ability to develop its lands and were contrary to the Provincial Policy Statement. The Municipality disagreed, indicating that the conditions did not harm South Winds' ability to develop its lands, but instead provided for orderly development that would have proper regard under section 51(24) and 2 of the *Act* and was consistent with the Provincial Policy Statement. The OMB agreed. All concerns raised by South Winds with respect to the condition were considered unfounded.

"Naturally and Normally Incidental" Leads to a Broad Interpretation of an Accessory Use in a Zoning Bylaw

Hutchinson v. Corporation of Norfolk County, 2018 ONSC 181 (CanLII) http://canlii.ca/t/hppg8

The Applicant, is a neighbour of Debono Greenhouses Ltd (Debono) and a resident of the Corporation of Norfolk County (County) collectively, the Respondents. Debono relied on wood chips as fuel to heat its greenhouses, consuming 10,000 cubic metres of chips annually. Debono ground trees brought to property from demolition sites and stored the chips on the premises. The Applicant complained to the Ministry of Environment and Climate Change (Ministry) and the County arguing that Debono's storage and grinding of wood chips created excessive noise, potential environmental concerns, property devaluation and it was not permitted under the Zoning Bylaw. The Ministry rejected the Applicant's environmental complaint. Following an internal investigation, the County concluded that Debono's operation was an accessory use to the greenhouse operation and therefore permitted under the County's Zoning Bylaw. The Applicant sought a declaratory order from the Court against the Respondents that the storage and grinding of the wood chips is contrary to the Zoning Bylaw.

HELD: Application dismissed.

DISCUSSION: Relying on the Ministry's assessment, the Court promptly rejected the Applicant's subjective and speculative arguments regarding noise, property devaluation and environmental concerns. The Court concentrated on whether Debono's use of wood chips was in compliance with the Zoning Bylaw. As indicated in *Suprun v. Bryla*, 2007 ONCA 800 the interpretation of a municipal bylaw is the function of the court, no deference is awarded to the finding of the County. The Court outlined the two principles that must be observed when interpreting a bylaw; first, that each case depends on its own and second, the words used in the bylaw are important *Conlin v. Prowse,* [1993] O.J. 2923 (Ont. Gen. Div.).

The Court concentrated on the second principle; having reviewed the language of the Zoning Bylaw, it found that the wood chip activity was not a permitted use. However, when reviewing the language of an accessory use, the Court arrived at a different result. The Zoning Bylaw defined accessory use as "a use naturally and normally incident to, subordinate to and exclusively devoted to a principal use and located on the same lot therewith." The phrase "naturally and normally" would therefore permit Debono's wood chip activity as an accessory use as long as the Court concluded that such use was not unnatural or abnormal. The Court contrasted this language with the other municipal bylaws that use the phrase "customarily incidental" when referring to accessory uses. The Court provided a discussion on the different phrases relying on the dissenting decision in *Conlin:* "customarily incidental" leads to a restrictive interpretation that would limit accessory uses to those demonstrated as common in the area. [While] "naturally and normally incidental" was said to be much broader and would permit the innovation accessory uses". The Court found that Debono's greenhouse operation, the principle use, required fuel and the wood chips were ground and stored to provide such fuel; therefore, the chips would not be on the property but for the principle use making the wood chips an accessory use.

Restrictive Covenant on Title Provides City Immunity Following Landslide

Kennedy et al v. City of Castlegar, 2018 BCCRT 35 (CanLII) http://canlii.ca/t/hq9s1

The Applicants own property (lot 2) in the City of Castlegar (City) which backs onto a creek. They argue that the City failed to maintain a culvert and a restrictive grate at the opening of the culvert that it previously installed, and as a result of the City's negligence, the Applicant's property was damaged due to blockage of the culvert. The City argued that it was not involved in the culvert installation, that the Applicant's damage was the result of a landslide along the creek for which the City has no authority as it is under provincial jurisdiction. Furthermore, the City cites a restrictive covenant that was registered on the Applicant's property which provides the City immunity to this claim.

HELD: Application dismissed.

DISCUSSION: Despite the variety of arguments raised by the Applicants, the Tribunal decision only concentrated on the restrictive covenant cited by the City finding it to be the determinative factor for the matter before it. The Applicants did not dispute the presence of the restrictive covenant on their property but argued that it was registered on its property by error. The Applicants' property was subdivided into Lot 1 and Lot 2 in 1979, and at that time the City registered a restrictive covenant on both lots. The restrictive covenant outlined the City and Province of British Columbia as the grantee and the property owners as the grantor. It explicitly outlined that the grantor "will never require or have any claim against the grantee." Furthermore, the restrictive covenant runs with the land and is perpetual, meaning it will apply to all future property owners. In 1985 the property owner of Lot 2 called the City and requested the removal of the restrictive covenant on Lot 2 and to remain solely on Lot 1. The Applicant relied on this memorandum to determine that the restrictive covenant was registered by error. The Tribunal concluded that this memorandum was simply a request, and the Applicants failed to prove that the City had agreed to remove the restrictive covenant. As a result, the Tribunal held that the restrictive covenant applies to the Applicant and the City is therefore not liable for any damages.

Safety is the Responsibility of Property Owner

Lacey v City of Calgary, 2018 ABPC 30 (CanLII) http://canlii.ca/t/hq6xv

The Plaintiff, a residential property owner in the City of Calgary (City) brought a negligence claim against the City alleging that a Safety Codes Officer (SCO) acting on behalf of the City breached the duty of care owed. The Plaintiff was in the process of demolishing the sidewalk on his property when a bulldozer hit his building, dislocating a portion of the brick veneer wall. Acting on complaints from the public, the SCO examined the Plaintiff's property, concluding that it was no longer safe and in danger of collapse. The SCO informed the Plaintiff that the building was no longer considered safe for occupants, the demolition

Continued on page 32



Cases

Incendiary Emails and Unwarranted Parole Revocation

By IMLA Editorial Staff

Section 1983: Email Sent by Municipal Officer, but in Capacity as Private Citizen, Does not Constitute Action "Under Color of State Law"

Conner v. Castro, No. 17-50462 (5th Cir. **Feb. 23, 2018).**

Affirming the lower court, the Fifth Circuit found that a disrespectful email sent by a municipal officer was not grounds for a claim of retaliation against the municipality, because the communication was not made in an official capacity and was not "under color of state law."

Madeleine Connor (Connor) is a resident of Lost Creek, Texas which was recently annexed into Austin. The Lost Creek Municipal Utility District was set up after annexation – a municipal entity – to construct sidewalks in the area. Connor played a couple roles: she was the president of the Lost Creek Neighborhood Association and was hired by a neighbor, in her capacity as an attorney, to file suit to enjoin construction of the sidewalks. After contentious meetings between the Municipal Utility District, the Neighborhood Association and Connor in her capacity as an attorney, she amended the filing to add herself as a plaintiff and sought damages under § 1983, alleging she was retaliated against for exercising her First Amendment rights. The case was initially brought in state court but, with the addition of the retaliation claim, was removed to federal court. After various procedural events, the sole issue that survived appeal to the Fifth Circuit was whether the actions Connor alleged were retaliatory could be attributed to the Municipal Utility District – i.e. were done "under color of state law." The district court held they were private actions and Connor challenged that holding.

The Fifth Circuit opinion recounted the unpleasant history of wrangling over the sidewalks, including Connor being "jeered, shouted down, booed, cat called, and laughed at [] for more than two hours during a neighborhood association meeting," and ultimately being recalled as the Neighborhood Association president. As to the issue of whether these acts of "retaliation" could be attributed to the Municipal Utility District as a government entity, the Circuit found Connor's claim fell short. At issue was an email sent from the director of the Municipal Utility District to Connor's employer, Colonel Paladino, the executive director of the Texas Veterans Commission where Connor was the Interim General Counsel and being considered for appointment to General Counsel. The email stated that "Connors has made it her mission to drain the budget of the Lost Creek Limited District, a governmental entity engaged in facilitating the transition of Lost Creek recently annexed by the City of Austin," and characterized Connors as "a devious attorney with no morals, no credibility, and no integrity, who's [sic] goal to further cripple veterans and other disabled citizens as a manifestation of her Borderline Personality Disorder with histrionic features, and a vendetta against men as her former husband learned the hard way."

The Circuit made quick work of its deliberation, disagreeing with Connor's argument that because the email involved government issues it could be characterized as "under color of state law" for a §1983 case. Instead, the Circuit focused on the facts that 1) it was sent from a personal email, 2) signed by the author with his affiliation listed as the Austin Institute LLC (not the Municipal Utility District), and 3) that the author self identifies as simply "Chuck" and a "retired FBI executive" (not a director of a government entity). As such nothing in the email "supported any allegation that McCormick, [the director of the Municipal Utility District], acted under color of state law, rather than as a private individual, when he sent it to Connor's employer." The lower court was affirmed.

http://www.ca5.uscourts.gov/opinions/unpub/17/17-50462.0.pdf

Immunity: Acts of "Advocacy" Qualify for Prosecutorial Immunity; But Recommending Denial of Parole is Not Advocacy

Patterson v. Van Arsdel, **No. 15-35838 (9th Cir. Feb. 23, 2018)**

An Oregon Release Officer cannot claim the protections of prosecutorial immunity where his action did not involve an act of advocacy.

James Van Arsdel (Van Arsdel) was employed as the Yamhill County, Oregon Circuit Court Release Assistance Officer. His duties included investigating and initiating revocation of pretrial release for criminal defendants who appeared to have violated the terms of their release agreements.

In 2012, Sarah Patterson (Patterson) was arrested on charges of theft and possession of a controlled substance. She entered into a pretrial release agreement that required her to comply with all laws while on release. In March 2012, while on pretrial release, she was arrested on domestic violence charges. At Patterson's arraignment on the domestic violence charges, Van Arsdel moved in open court for a revocation of her pretrial release and for her arrest.

Judge Stone, the criminal-calendar duty judge, orally denied Van Arsdel's motion and subsequently wrote "Denied" on both the revocation form and the arrest warrant. Van Arsdel was visibly displeased. That day, he provided

to Judge Tichenor, another judge on the Circuit Court, an unsigned warrant for Patterson's arrest. He did not attach a revocation form, and did not disclose that Judge Stone had orally denied the revocation motion and arrest warrant earlier in the day.

Judge Tichenor was not then assigned to the criminal duty roster, and only judges on that roster were responsible for handling revocation matters. However, Van Arsdel regularly socialized with Judge Tichenor outside of work, including "Saturday golf games and weekly Tuesday morning [B]ible study sessions." Van Arsdel's wife was Tichenor's judicial assistant, and her initials appeared on Van Arsdel's unsigned warrant. Judge Tichenor signed the warrant that day.

Ten days thereafter, Patterson was arrested and jailed pursuant to the warrant signed by Tichenor. She was released two days later, after Van Arsdel confirmed to a deputy that the arrest warrant was defective.

Patterson filed under 42 U.S.C. § 1983, arguing that Van Arsdel violated her Fourth Amendment rights by instigating an unreasonable seizure. The district court held that Van Arsdel was entitled to absolute prosecutorial immunity, and Patterson appealed.

The sole question presented on appeal was whether Van Arsdel was protected by absolute prosecutorial immunity. Officials are absolutely immune against suits under § 1983 that arise from their performance of prosecutorial functions, even if the acts in question were committed in bad faith. Such immunity "is an extreme remedy, and it is justified only where 'any lesser degree of immunity could impair the judicial process itself.'" *Lacey v. Maricopa County*, 693 F.3d 896, 912 (9th Cir. 2012).

Acts of advocacy are entitled to absolute immunity, while administrative and "police-type" investigative acts are not. To qualify as advocacy, an act must be "intimately associated with the judicial phase of the criminal process." For such acts, absolute immunity furthers the doctrine's core goal of preventing retaliatory lawsuits that may impose "unique and intolerable" burdens upon prosecutors. Actions classified as "advocacy" include initiating a prosecution and presenting the state's case, appearing at a probable cause hearing to support an application for a search warrant, and preparing and filing a motion for an arrest warrant.

However, "When a prosecutor steps outside of the advocate's role," his or her conduct is protected only "to the extent that any other individual would be protected performing the same function." This means that prosecutors are protected by qualified, rather than absolute, immunity when they perform activities outside their core role as courtroom advocates.

The determinative question here was whether Van Arsdel was engaged in prosecutorial advocacy when he provided Judge Tichenor the bare unsigned warrant for Patterson's arrest. The Circuit Court found that he was not. It had not yet addressed this precise fact pattern but found an analogy in parole officer precedents: Parole board members have absolute immunity for adjudicative actions and for other discretionary decisions related to the processing of parole applications, but enjoy only qualified immunity for investigating potential parole violations and submitting recommendations regarding revocation. In undertaking those actions, the Circuit has found that a parole officer fulfills a function that is "more akin to a police officer seeking an arrest warrant, than to a prosecutor exercising quasi-judicial authority."

The Circuit looked to a Supreme Court decision which declined to accord a police officer prosecutorial immunity in a §1983 action for false arrest where the officer had presented a magistrate with felony complaints charging various individuals with violating controlled substance laws, with unsigned warrants, and with affidavits that did not establish probable cause. The officer argued that he was entitled to absolute immunity because his actions were equivalent to those of "a prosecutor who asks a grand jury to indict a suspect." The Court rejected that argument, holding that the officer's acts were "further removed from the judicial phase of criminal proceedings" and did not implicate the policy concerns that necessitate absolute immunity for prosecutorial functions.

The Ninth Circuit evaluated Van Arsdel's functions under the Oregon Revised Statutes, which provide that Release Assistance Officers "shall, except when impracticable, interview every person detained" and "verify release criteria information." They may submit formal recommendations to a judge, but may make release decisions only if "delegated release authority by the presiding circuit judge for the judicial district." Van Arsdel had not been delegated such authority; rather, he was only authorized only to make recommendations to a judge.

Van Arsdel unsuccessfully pointed to *Cruz v. Kauai County*, 279 F.3d 1064 (9th Cir. 2002). There, a prosecutor filed a motion to revoke a defendant's bail, attaching an affidavit in which he personally testified to facts supporting revocation. The Circuit held that the prosecutor was not entitled to absolute immunity because he "stepped outside of his prosecutorial role, and into the role of witness"—but in a footnote, the court had written that that the prosecutor would have been entitled to absolute immunity for the decision solely to file the revocation motion because such an action is "a traditional prosecutorial function." Van Arsdel argued that his actions were functionally indistinguishable from that of a prosecutor who files a motion to revoke bail.

The court was not persuaded. Van Arsdel had never submitted a motion to Tichenor. And if he had, the motion would necessarily have required his affidavit reciting facts supporting issuance of the warrant. This would have doomed his argument: "It is settled law that an official may not receive absolute prosecutorial immunity for reciting facts in support of an arrest warrant." Reversed and remanded.

DISSENT: Judge Fernandez disagreed, citing the fact that Patterson had not argued the proposition cited by the majority and had therefore waived that argument. "Although I fully understand the majority's desire to offer Patterson relief from the alleged unconscionable actions of Van Arsdel . . . I do not agree, however, that we should undermine existing law for the purpose of righting Patterson's wrong and punishing Van Arsdel's alleged malversation."

http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/23/15-35838.pdf ML

Inside Canada Cont'd from page 29

site did not have the proper safety fence, and no permit from the City had been issued. As a result of the Plaintiff's inaction to reduce the danger on the property, the SCO hired a third-party contractor to erect a safety fence and secure the wall of the Plaintiff's building. The work by the third-party contractor cost approximately $17,000 which the City levied against the Plaintiff's property. The Plaintiff claimed that he was owed a duty of care by the City and the City breached that duty, and as a result the Plaintiff suffered damages.

HELD: Claim dismissed.

DISCUSSION: The City's defence was that it did not owe the Plaintiff a duty of care, and even if the Court found there was, the City did not breach it. In particular the City relied on its authority under s. 551(1) of the *Municipal Government Act*, RSA 2000 which provides a municipality the ability to take whatever actions necessary to eliminate an emergency, and s. 47(1) of the *Safety Codes Act*, RSA 2000 (*Act*) authorizing an SCO faced with an imminent serious danger to take action to remove the danger.

The Plaintiff argued that the SCO acting for the City had a duty of care to inform him of the requirements be followed so as to comply with the *Act* and the *Alberta Building Code 2014* as well as educate the public on these requirements. The Court found that the legislation stated the contrary. The *Act* put the onus on the owners of the property to ensure that all of their activity met the requirements of the Act and there was no obligation on the SCO. Therefore, no duty of care was owed.

The Plaintiff further unsuccessfully argued that once the SCO found the Plaintiff was not in compliance with the *Act* the SCO had a duty to issue an order that outlined the steps to comply. The legislation did not support such a claim. The *Act* states that the SCO may- but is not required to-issue an order and as a result, the City's SCO was not obligated to take such action. The Court found that the SCO acted accordingly under the *Act* by hiring the third-party contractor to reduce the danger posed by the Plaintiff. In referencing the exclusion of liability clause in the *Act*, the Court found that even if it erred in finding that the no standard of care was owed, the City would not be liable if it had acted in good faith [*Condominium Corporation No. 9813678 v. Statesman Corporation* ABQB 493]. The Plaintiff did not prove that the City acted in bad faith when it hired the third-party contractors. The claim was dismissed. ML

Too Much of a Bad Thing Cont'd from page 15

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Continued on page 34

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