

Cities Need Love, Too: Obtaining the Equivalent of Individual Constitutional Rights by Invoking Procedural Laws and Rules

by Pete Haskel

Generally, a municipality is not a "person" with the right to assert most individual federal constitution claims or defenses against its own State, or against a person acting under color of state law.[1] Municipalities cannot challenge state actions on federal constitutionality grounds because they are not "persons" within the meaning of the Due Process Clause.[2]

However, a specific federal statute can give a local government standing to assert federal rights, and sometimes, a municipal official can get standing to assert federal constitutional rights against a state or a against an adversary acting under the color of state law.[3,4] In addition, procedural rules often provide litigants with rights equal to those of all other litigants in a proceeding, regardless of the litigant's governmental, corporate, or individual status.[5]

Too often, though, local government lawyers simply assert that their client has due process or equal protection rights that are being violated. I have seen this, in particular, when a city appeals from an adverse state administrative agency determination. Sometimes, municipal counsel gets away with it, perhaps because courts and opposing counsel are so used to constitutional rights assertions that they forget to limit the application of the Bill of Rights to "persons."[6] But when one is called on the carpet for taking this position, the results can be embarrassing.[7]

Instead of citing constitutional provisions, counsel should look, instead, to statutory and regulatory provisions, which will often get us where we need to go. Alternatively, or in addition, consider whether individual officers or employees have federal rights that can be asserted—if you do not mind dragging them into the litigation.

If all else fails, in desperation we can appeal to the court's sense of fundamental fairness, especially if our argument, claim, or defense sounds in equity. The argument can be phrased in terms of the other party's "unclean hands" and the right to fairness and justice for our client. The broad theory is that a party is disentitled to relief through its dishonesty, misrepresentation, illegality, unfairness, or otherwise unconscionable conduct when seeking equitable relief from a court.[8] Note, however, that this doctrine was traditionally confined to cases involving equitable remedies and was not available in claims for damages, although "adjudications in state and federal courts evidence the expansion of unclean hands into matters of legal relief."[9]

Notes

1. "The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment." Risty v. Chicago, R.I. & P. Ry. Co., 270 U.S. 378, 390 (1926). I am limiting this discussion to federal rights; State laws will determine what, if any, right a municipality might have to assert State constitutional rights or protections

2. City of East St. Louis v. Circuit Court for Twentieth Judicial Circuit, St. Clair County, Ill, 986 F.2d 1142 (7th Cir. 1993); *see* South Macomb Disposal Auth. v. Washington Tp., 790 F.2d 500 (6th Cir. 1986) (municipal corporation was not a "citizen" within the meaning of the 14th Amendment and could not assert denial of privileges and immunities under 42 U.S.C. § 1983). For a detailed discussion, *see* City of Worcester v. Worcester Consol St Ry. Co., 196 U.S. 539, 550-553 (1905) (leaving open possibility that, perhaps, property owned by city in its proprietary capacity might be entitled to Fifth Amendment protection, but otherwise accepting doctrine that for federal constitutional purposes, a city is a mere creature of the state legislature, not eligible for federal constitutional protection).

3. *See* Aguayo v. Richardson, 473 F.2d 1090, 1100-01 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (Friendly, J.) ("The district court held that the City had standing to assert the statutory claims against the federal defendants, as is not here disputed, but that, under *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L.Ed. 1015 (1933), it had no standing to assert constitutional claims. While this may be true with respect to New York City itself, we see no sufficient answer to the argument that *Bd. of Education v. Allen*, 392 U.S. 236, 241 n. 5... (1968), requires a recognition of standing on the part of plaintiff Sugarman to assert constitutional claims. Like the school board members in that case, he is faced with what he deems a conflict between his oath to support the United States Constitution and his duty under state law to carry out the New York projects.").

4. For some time, I have been waiting for the right set of facts to revive a reverse-*Monell* argument. *Monell* held that a city could be eligible to be a civil rights suit defendant as a "person acting under color of state law" within the meaning of 42 U.S.C. § 1983. *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658, 690 (1978). The crux of the language in section 1983 that *Monell* construed was the term "person," defining potential defendants in section 1983 ("Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or *other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or

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containers and wrappers; and where the customer paid before eating. The plaintiff company bought property in the Village that was subject to the ban. One of its potential tenants was a national chain sandwich shop. The company sought to invalidate the ban on the basis that the prohibition of FFFRs was based solely upon ownership and was unlawful, unconstitutional and void, premised on the fundamental rule that zoning dealt with land use and not with the person who owned or occupied the land. The ban, it alleged, was based on the nature or identity of the owner or operator, and not upon the land use itself. The court disagreed: the FFFR ban was not based "simply upon who owns or operates the restaurant. The challenged Code is not 'plainly personal' and does not seek to regulate a specific entity," but was a neutral rule that applied to the entire business district, and addressed conduct that affected the character of the community. *Mead Sq. Commons, LLC v. Village of Victor*, 930 N.Y.S.2d 431, 2011 N.Y. Misc. LEXIS 4630 (N.Y. Sup. Ct. 2011). ML

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immunities secured by the Constitution and laws...") (emphasis added). What I, among others, have been awaiting is the right set of facts to determine if a city also can be an injured "other person within the jurisdiction" of the United States for the purpose of being a civil rights plaintiff. In *South Macomb Disposal Authority v. Washington Tp.*, 790 F.2d 500, 503 (6th Cir. 1986), the Sixth Circuit confronted this situation and opined:

> We are of the opinion that in light of *Monell*, it would be a strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a "person" within one clause of section 1983, but not a "person" within another clause of the same statute. Rather, we believe the outcome in this case is dictated by a different body of law, which analyzes whether the appellant, as a municipal corporation, may assert constitutional claims against its creating state, or political subdivisions thereof, and, if so, in what context may it assert such claims. *See, e.g.*, Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1308 (5th Cir.) (per curiam), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).

In a footnote, the court added that, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Supreme Court stated that section 1983 was enacted to provide a new remedy to "private parties," although the Fifth Circuit had concluded that a municipal corporation was not such a "private party" entitled to section 1983 relief. However, after *Monell*, the Sixth Circuit concluded that whether a municipal corporation was or was not a "private party" did not necessarily pose the correct question, and declined to focus on that inquiry. The court resolved the *South Macomb* case on the constitutional grounds that one political subdivision of a state lacked standing to challenge the constitutionality of the acts of another political subdivision of the same state. 790 F.2d at 505. But what if a city sued a business corporation or individual acting under color of state law for a violation of the city's federal constitutional or statutory rights? An aside: What is a "private party" in the sense used by the *South Macomb* court? Is a publicly-traded business corporation a "private party"? What about a city official or employee?

5. *See, e.g.*, Fed. R. Civ. P. 1 (rules "should be construed and administered to secure the just, speedy, and inexpensive determination").

6. Of course, business corporations, unlike municipal corporations, are often considered "persons" for Bill of Rights purposes. The way that corporations sidled their way into constitutional personhood is a pretty frightening tale, but not my subject today. *See* Katie J. Thoennes, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203 (2005), particularly the discussion of *Santa Clara Cnty. v. Southern Pac. RR Co.*, 118 U.S. 394 (1886), in *Frankenstein* at 209 *et seq.* No discussion on this general topic would be complete without mention of *Citizens United v. Fed. Election Com'n*, 130 S. Ct. 876 (2010). Consider it mentioned.

7. *See, e.g.*, Texas Workers' Comp. Com'n v. City of Bridge City, 900 S.W.2d 411, 414 (Tex. App.-Austin 1995, writ denied).

8. The U.S. Supreme Court articulated the doctrine as follows:

> [T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933) (quoting John Norton Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (4TH ED. 1918)).

9. *See* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L. J. 63, 65 (2010-2011). ML

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Because human nature is what it is, you may run into situations where you first believe the individual is a particular type, only to find out later he is completely different. In light of that, I believe one of the most beneficial ordinance provisions is one that allows a city to correct violations and charge the costs to the responsible person if he can't (or won't) correct them. Although it's a difficult proposition to spend tax dollars to clean up or otherwise correct violations on private property, the alternative—letting the problem continue or get worse—is not very appealing, and you'll likely have elected officials and neighbors pounding down your door to get the problem corrected.

Good luck in your battles. ML