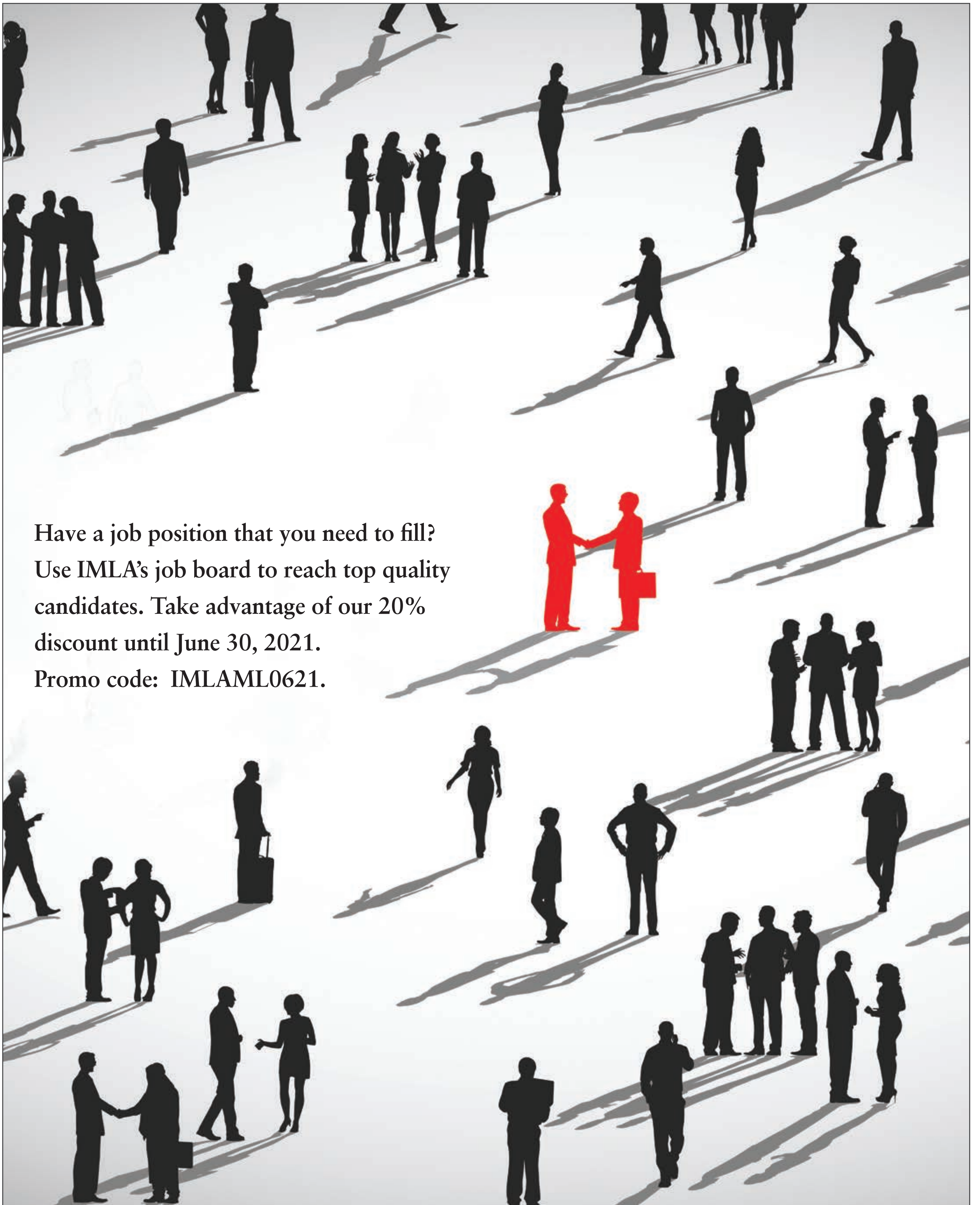
Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2021 VOL.62 NO.02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EDITOR'S NOTE

BY: ERICH EISELT
IMLA Assistant General Counsel

Many Rivers to Cross

> I've known rivers:
> I've known rivers ancient as the world and older than the flow of human blood in human veins.
>
> My soul has grown deep like the rivers.
>
> I bathed in the Euphrates when dawns were young.
> I built my hut near the Congo and it lulled me to sleep.
> I looked upon the Nile and raised the pyramids above it.
> I heard the singing of the Mississippi when Abe Lincoln went down to New Orleans, and I've seen its muddy bosom turn all golden in the sunset.
>
> I've known rivers:
> Ancient, dusky rivers.
> My soul has grown deep like the rivers.
> *The Negro Speaks of Rivers*, Langston Hughes, 1920

Near the setting for IMLA's annual spring Seminar in Washington D.C. is a bridge that carries Calvert Street NW over Rock Creek, a modest but much-cherished waterway wending to the slow-moving Potomac. Most who travel that roadway will not notice the bronze plaques honoring the structure's namesake—Edward Kennedy "Duke" Ellington. Born in the District in 1899, Duke Ellington would call New York City home for most of his 75 years. That timespan would encompass some of the most shameful periods of segregation and prejudice in American history. At Duke's birth, *Plessy* had just been declared the law of the land, and would sanctify Whites Only norms for another half-century. Nearly 2,000 Black Americans would succumb to the barbarism of lynching during Ellington's life, according to statistics from the Tuskegee Institute. Black troops returning from the trauma of World War II would find their sacrifices forgotten when they sought equal access to jobs and housing. For decades, voting rights would be systematically denied to people of color.

Duke was himself subject to multiple injustices. When he initially played Harlem's Cotton Club, Black audiences were not admitted. He was no doubt denied numerous venues, lodging, and much more. But through that darkness, his musical alchemy produced irrepressible treasures. In May 1938, he joined Count Basie and other bands for the nation's first outdoor jazz festival, energizing a Randall's Island crowd of nearly 24,000 enthusiasts of all races, mixing easily under the spell of "America's music."

By the time Duke died, much progress had been made in civil rights, and prospects for better days must have been greatly encouraging. There would be would be continuing challenges, with much work yet to do. But the allusion to Duke's bridge seems appropriate as we acknowledge Black History Month: a symbol of crossing one small river, with many more to go. The lyrics of Jimmy Cliff, adopted for the PBS/Henry Louis Gates' epochal 2013 documentary of the same name, and the foundational phrasings of Langston Hughes, are still relevant as ever.

In our own way, IMLA endeavors to pay homage to that theme in this March-April 2021 *ML* with several topical pieces. We lead with Tyrone Cooper's note on the fragility of democratic freedoms. We announce IMLA's new Diversity and Inclusion initiative and discuss mechanisms to force more equitable behavior by America's largest companies. And we explore a case examining anti-Black racism in Canada's sentencing practices.

IMLA commemorates Black History Month and marks the beginning of Woman's History Month--and we express appreciation for the great diversity of our membership that makes IMLA a successful mosaic.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER

BY: TYRONE COOPER
IMLA President and City Attorney, Beaumont, Texas

An Attack on Democracy

January 6, 2021, brought shock and amazement as the nation watched the bastion of American democracy under siege.

I was sitting in my office at 1:33 p.m. CDST with CNN on in the background, volume down, when I received a text message from a colleague: "Hey bro." My reply, "Wassup." Apparently, without knowing what was happening he responded, "It's a good day in America…democracy has been restored. Now on to the next agenda."

No longer buried in my work, I looked up to the TV screen in disbelief as a mob appeared to be storming the Nation's Capital. My next text was "Protestors have stormed the Capitol Building in DC." After a reply of "What?" the texts stopped, and the phone rang. It was like a scene from a third-world country, a coup seeking to replace the legitimately elected government, but this was an actual attack on the democracy of the United States of America. An attack on what we, as Americans, hold up to the rest of the world as the model of a free representative government of the people. Conversely, what was on display to the world was a mockery, fueled by a lie that our 2020 presidential election was not free and fair.

By definition:

> "democracy is a government by the people; rule of the majority; a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections." *Merriam-Webster English Dictionary 2021 (Democracy | Definition of (merriam-webster.com)*

On November 3, 2020, by all accounts and after considerable judicial review, our nation conducted a free and fair presidential election, as has been accomplished for centuries. January 6, 2021, was to be the day that Congress would carry out its ministerial duty imposed on it by the Electoral Count Act of 1887, a ceremonial counting of the ballots of the Electoral College. That proccess was interrupted by an insurrection assaulting the freedoms we enjoy (and take for granted at times) to change what had already been decided by an overwhelming majority of American voters.

After thirty-three presidential elections since 1887, each with a peaceful transition of power, the question we should now all ask ourselves is, "How did we allow this to happen in 2021?" This was not an organized action of a militarized foreign invader to our shores, but an incursion by our fellow citizens.

It is time for a national conversation as to how this internal threat to our national security is to be addressed. Many of these "rioters" are using the very document that protects our rights and freedoms in their defense to charges related to domestic terrorism in their attempt to overthrow the American government. As lawyers, particularly government lawyers, we stand at the gates of American democracy to protect and defend the Constitution, (as the oath continues) against all threats, foreign and domestic. Who is to say that the mob storming the Capitol was not infiltrated by foreign insurgents partnered with domestic extremists seeking to capitalize on the exposed vulnerabilities? This heinous attack on American democracy on American soil is unacceptable and is not to be tolerated. Freedom is fragile and it must be nurtured and protected if it is to endure.

In the month of February when we celebrate Black History, we look back to the historic plight of African Americans and their contributions, and to the recent Black Lives Matter movement as a constant reminder of how fragile freedom can truly be to a people.

The Honorable John Lewis who died on July 17, 2020, wrote an essay to be published on the day of his funeral. In the essay he writes:

> Like so many young people today, I was searching for a way out, or some might say a way in; then I heard the voice of Dr. Martin Luther King, Jr. on an old radio. He was talking about the philosophy and discipline of non-violence. He said we are all complicit when we tolerate injustice. He said it is not enough to say it will get better by-and-by. He said each of us has a moral obligation to stand up, speak up and speak out. When you see something that is not right, you must say something. You must do something. Democracy is not a state. It is an act, and each generation must do its part to help build what we called the Beloved Community, a nation and world society at peace with itself.

The preservation of democracy is the responsibility of us all. ML

Robocall Me Maybe[1]

Examining Federal Law Restrictions on Automated Calls and Texts Made by Local Governments

BY: DAVID S. JOHNSON,
Assistant City Attorney, City of Arlington, Texas

As local governments seek to streamline processes and efficiently utilize funds in continually decreasing budgets, automated phone calls and text messages may appear to be an attractive option to communicate with citizens. These methods of communication are commonly referred to as "robocalls" and "robotexts." The federal Telephone Consumer Protection Act of 1991 ("TCPA") and associated Federal Communications Commission ("FCC") rules[2] place restrictions on how automated calls and texts are made. Additionally, the FCC recently released a ruling that formally applies those restrictions to local governments and their contractors.[3] This article describes the relevant federal law as well as some practical considerations for municipal lawyers when advising local government clients that desire to contact citizens using automated calls and texts.

I. Telephone Consumer Protection Act Basics

In general, the TCPA and associated FCC rules prohibit a person from making phone calls or sending text messages using an automatic telephone dialing system or an artificial or prerecorded voice ("automated calls and texts") without the called party's prior express consent.[4] In addition to the TCPA and rules noted above, the FCC has issued many rulings and orders interpreting these laws. For example, although these provisions in the TCPA and FCC rules only refer to phone calls, the FCC has found that they equally apply to text messages.[5]

There are similar, but slightly different standards for automated calls and texts made to a cell phone as opposed to a residential landline. Since fewer and fewer people maintain a residential landline, the bulk of this article focuses on the federal law as it relates to automated calls and texts made to cell phones.

- **Cell Phone Calls –** a person may not make a call using an automatic telephone dialing system or an artificial or prerecorded voice to a cell phone number without the called party's prior express consent.[7] There is an exception when a call is made for emergency purposes.[8]

- **Residential Landline Calls –** a person may not make a call using an artificial or prerecorded voice to a residential line to deliver a message without the called party's prior express written consent.[9] There are exceptions when a call is made for emergency purposes or for non-commercial purposes.[10]

A call is made for "emergency purposes" if it is "made necessary in any situation affecting the health and safety of consumers."[11]

Consequences for violating the TCPA include legal action to enjoin the violation, legal action for actual monetary loss or $500 in damages for each violation, whichever is greater, or both.[12] Also, a court may increase damages up to three times the amount available upon a finding that the caller acted willfully or knowingly.[13]

If a local government engages a contractor to handle any aspect of making automated calls or texts to citizens, the local government or its contractor could be liable for TCPA violations, depending on who is considered the "maker of the call."[14] A caller makes or initiates a call

"by 'tak[ing] the steps necessary to physically place a telephone call'" or "by being 'so involved in the placing of a specific telephone call as to be directly liable for making it.'"[15] The "maker of the call" is determined under a totality of the circumstances by considering several factors: "who determines the content of the message, who determines the recipients of the message, who determines the timing of when the message is sent, the extent to which a person willfully enables fraudulent spoofing, and whether a calling platform knowingly allows clients to use the platform for unlawful purposes."[16]

II. TCPA and Local Government Automated Calls and Texts

Recently, the FCC ruled that local governments and their contractors are considered "persons" subject to the TCPA restrictions above.[17] Local governments may desire to make automated calls and texts for many purposes, including: inviting citizens to join telephone town hall events, notifying defendants of municipal court dockets and due dates, notifying water utility customers about past due accounts and utility service matters, and, more recently, providing information to citizens about preventing the spread of COVID-19. This section examines how the TCPA applies to these types of automated calls and texts.

A. Telephone Town Halls

To reach a large group of citizens, local governments may desire to make non-emergency automated calls or texts about upcoming telephone town hall events (also known as "tele-town halls"), or may use a contractor to do so. Shortly before a telephone town hall event is set to begin, a local government or its contractor may plan to make an automated call or text to a group of citizens with instructions on joining the event. Under the general rule, the local government needs prior express consent to make this non-emergency automated call or text to a citizen's cell phone about a telephone town hall event.[18]

In December 2020, the FCC released the *Broadnet Order on Reconsideration* ("*Broadnet Order*"), which examined whether a local government and its contractors were considered "persons" subject to the TCPA in the context of a contractor that facilitated non-emergency automated calls for government clients about telephone town halls.[19] Ultimately, the FCC determined that local governments and their contractors were indeed "persons" under the TCPA and may only make non-emergency automated calls and texts to cell phone numbers with the called party's prior express consent.[20]

If a local government already has the prior express consent of the citizens it plans to contact by automated call or text, there is likely no issue under the TCPA. If, however, the local government is making automated calls or texts to citizens "blindly" without any record of consent, a potential TCPA violation could result. To address these issues, there are ways for local governments to obtain prior express consent from citizens before making non-emergency automated calls and texts about telephone town hall events. For example, local governments could create posts on their websites or social media pages inviting citizens to sign up online for automated calls and texts about future telephone town hall events. Then, local governments could make non-emergency automated calls and texts about those events to those citizens who "opt in" and give consent for such communications. These actions could potentially resolve issues raised in the *Broadnet Order* and allow local governments to make non-emergency automated calls and texts about telephone town hall events in compliance with the TCPA

B. Municipal Court Dockets and Due Dates

Municipal courts may desire to make automated calls and texts for various reasons, including to notify defendants about upcoming court dockets and due dates, missed due dates, as well as the issuance of orders compelling attendance and other court orders. Under the general rule, a municipal court, as a local government department, needs prior express consent to make a non-emergency automated call or text to a defendant's cell phone.[21] To address consent issues, these automated calls and texts should be made to phone numbers provided by defendants for contact purposes at some point during the judicial process. There may also be instances when a municipal court may desire to make an automated call or text for an emergency purpose, such as the court being closed for inclement weather or "incidents of threats and/or imminent danger" to the court based on fire, dangerous persons, or health risks.[22] In these instances, prior express consent would not be needed.

In the *Blackboard / Edison TCPA Declaratory Ruling* ("*Blackboard / Edison Ruling*"), the FCC examined "prior

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express consent" in the context of a school district that made non-emergency automated calls and texts to cell phone numbers of students and parents.[2] The FCC found that when a parent, guardian or student provides their cell phone number as a contact to a school, they give prior express consent for the school to contact them (using automated calls and texts) about matters closely related to the educational mission of the school or official school activities, unless there is an instruction to the contrary.[2] The FCC concluded that the TCPA authorized the school district
to make non-emergency automated calls and texts involving notices of parent-teacher conferences and surveys for input on school-related issues.[2]

Although the school district's non-emergency automated calls and texts in the *Blackboard / Edison Ruling* do not present an identical scenario to these notice-type calls and texts from municipal courts, there is a good argument that they are analogous and the same reasoning from that ruling could apply in the context of municipal courts. In both situations, automated calls or texts are made to a cell phone number provided by the called party and involve non-emergency matters closely related to the mission of the group or its official activities. These types of non-emergency automated calls and texts from a municipal court relate to the court's purpose, such as managing dockets, processing cases, and issuing orders; and, municipal courts would be calling numbers provided by the defendants regarding their court cases, which would address consent issues as noted above.

Thus, a municipal court could likely make non-emergency automated calls and texts to defendants' cell phone numbers as long as the court used the numbers provided by defendants, and the calls were closely related to the court's mission or official court activities. Additionally, a municipal court could make automated calls or texts for emergency purposes without prior express consent.

C. Water Utility Service and Past Due Accounts

A local government's water utility department may desire to make automated calls for various reasons, including to notify customers about past due account balances as well as other matters related to utility service. Under the general rule, water utility departments need prior express consent to make non-emergency automated calls and texts to a customer's cell phone.[2] On the other hand, when a water utility department makes automated calls and texts for "emergency purposes," prior express consent is not required.

In the *Blackboard / Edison Ruling*, the FCC also examined "prior express consent" in the context of an electric utility company that made non-emergency automated calls and texts to its customers' cell phone numbers about their utility service, including calls and texts about the failure to make payment on current utility service.[27] As with the school district, the FCC found that when customers provide their cell phone numbers as a contact to a utility company such as a water utility service, the customers give prior express consent for the utility company to contact them (using automated calls and texts) about matters closely related to the service, including calls to warn that service may be curtailed due to failure to make payment, unless there is an instruction to the contrary.[28] The FCC found that the TCPA allowed the following types of non-emergency automated calls and texts, which are closely related to the utility service: "those that warn about planned or unplanned service outages; provide updates about service outages or service restoration; ask for confirmation of service restoration or information about lack of service; provide notification of meter work, tree trimming, or other field work that directly affects the customer's utility service; notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as, e.g., age, low income or disability; and calls that provide information about potential brownouts due to heavy energy usage."[29]

Notably, the FCC reiterated its prior findings that some utility-related automated calls and texts qualify under the TCPA's emergency exception and thus would not require a customer's prior express consent at all: "'[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.'"[30]

Thus, water utility departments can make non-emergency automated calls or texts to customers' cell phone numbers as long as they use numbers provided by the customers and the calls are closely related to the utility service. Additionally, water utility departments can make automated calls or texts for emergency purposes without prior express consent.

D. COVID-19 Information

With the COVID-19 pandemic still impacting many communities across the world, local governments may desire to make automated calls and texts to citizens with information about the associated health and safety risks and efforts to prevent the spread of the disease.

In March 2020, the FCC released the *COVID-19 TCPA Declaratory Ruling* addressing automated calls and texts related to the dissemination of COVID-19 information.[31]

[I}f a local government plans to make such calls and texts to cell phone numbers provided by citizens, the FCC recommends disclosing the full range of calls that citizens should expect to receive and informing them that by providing their phone number, they are consenting to receiving such calls and texts.

The FCC found that the COVID-19 pandemic constitutes an "imminent health risk to the public" and that governments may lawfully make automated calls to citizens' cell phone numbers under the TCPA's emergency exception *without prior express consent* as long as: (1) the caller is a local health official, other government official, or a person under their express direction and acting on their behalf; and (2) the content of the call is solely informational, made necessary because of COVID-19, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.[32]

The FCC provided this example of a permissible COVID-19 emergency automated call from a local government: "a call made by a county official to inform citizens of shelter-in-place requirements, quarantines, medically administered testing information, or school closures necessitated by the national emergency would be made for an emergency purpose as such measures are designed to inhibit the spread of the disease."[33] In presenting a list of permissible COVID-19 emergency automated calls by hospitals, health care providers, and governments, the FCC noted that its list was not exhaustive,[34] allowing for other types of emergency automated calls and texts that would be lawful under the TCPA. Thus, as long as a local government meets the standard above, it can make automated calls and texts about COVID-19 to citizens under the TCPA's emergency exception without prior express consent.

III. Best Practices for TCPA Compliance

The TCPA as well as the associated FCC rules and rulings interpreting the TCPA can be complicated to navigate. Accordingly, the following is a non-exclusive list of best practices and tips for complying with these laws.

A. Disclose the Full Range of Calls

The caller has the burden to prove that they have the called party's prior express consent when making a non-emergency automated call or text.[35] Thus, if a local government plans to make such calls and texts to cell phone numbers provided by citizens, the FCC recommends disclosing the full range of calls that citizens should expect to receive and informing them that by providing their phone number, they are consenting to receiving such calls and texts.[36] It can also be helpful for local governments to document how such disclosures were made in the event that citizens claim to have not given consent.

B. Called Party's Consent and Reassigned Numbers

When making a non-emergency automated call or text, callers must obtain the prior express consent of the called party, i.e. the actual subscriber of the cell phone number or the non-subscriber who is the customary user of the phone—this *does not* include the person whom the caller intended to call if they are not one of these individuals.[37] Additionally, callers are liable for automated calls or texts to a reassigned cell phone number "when the current subscriber or customary user has not consented, subject to a limited one-call opportunity for cases in which the caller does not have actual or constructive knowledge of the assignment."[38] Even though a local government may have a citizen's prior express consent to make non-emergency automated calls or texts to a certain cell phone number, that consent does not count if the number is reassigned. Local governments could do the following to avoid making automated calls and texts to the wrong person: keep up-to-date records of citizens' current contact information, remove reassigned numbers from records for future automated calls, and request that citizens update their contact information regularly.

C. Revocation of Consent

People may revoke their prior express consent to receive non-emergency automated calls and texts by using any reasonable method (orally or in writing) that clearly expresses their desire not to receive further messages.[39] Establishing a process to honor consent revocation requests may help local governments to ensure that automated calls and texts are not made to cell phone numbers of citizens who revoked their prior consent.[40]

D. Skip-Tracing

Some debt collection firms and other entities utilize the process of "skip-tracing" to identify other numbers for contacting people. The FCC described skip-tracing as "the process of locating a person, using as much information as possible,

Continued on page 10

Robocall *cont'd from page 9*

including from sources such as phone number databases, credit reports, job applications, criminal background checks, utility bills, and public tax information."[41] Skip-tracing seeks to identify a person's current phone number, but is not guaranteed to find the person.[42] Although skip-tracing may yield new contact information for a citizen whom a local government desires to reach, TCPA violations may result if the local government uses a new phone number obtained through that process to make non-emergency automated calls or texts. This is primarily because it is unlikely that the local government could establish that the called party at the new number gave prior express consent to receive automated calls and texts, especially if they are not the person the local government intended to call. Local governments should seek the advice of counsel before using skip-tracing to identify new phone numbers for future non-emergency automated calls or texts.

E. Manual Phone Calls and Texts

It is important to note that the TCPA *does not* affect the ability of a local government, its contractor, or another person to make traditional *manual* phone calls and text messages on behalf of the local government without the involvement of an automatic telephone dialing system or an artificial or prerecorded voice.[43] The TCPA only establishes legal restrictions on *automated* calls and texts. If there is any concern about whether a local government may lawfully make a non-emergency automated call or text, especially if there is doubt as to whether the called party gave prior express consent, the local government could first make a manual phone call or text message to remove any doubt.[44]

Local governments may make automated calls and texts to citizens about COVID-19 without prior express consent under the TCPA's emergency exception if the calls and texts are informational, made necessary because of COVID-19, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.

Conclusion

The federal laws governing automated calls and texts can be a complex subject. In light of this, the following summary may be of assistance when advising local government clients on making automated calls and texts:

- In general, local governments must have the called party's prior express consent to use an automatic telephone dialing system or an artificial or prerecorded voice to make non-emergency phone calls or send text messages to the party's cell phone number.
- Local governments are not required to have the called party's prior express consent if the automated call or text is made for emergency purposes, i.e. made necessary in any situation affecting the health and safety of consumers.
- When citizens provide their cell phone numbers to a local government department, they are generally deemed to have given prior express consent for non-emergency automated calls and texts about matters closely related to the department's mission or its official activities. Likewise, when customers provide their cell phone numbers to a local government utility service, they are deemed to have given prior express consent for non-emergency automated calls and texts about matters closely related to the service.
- Local governments may make automated calls and texts to citizens about COVID-19 without prior express consent under the TCPA's emergency exception if the calls and texts are informational, made necessary because of COVID-19, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak. **ML**

Notes

1. Title inspired by Carley Rae Jepsen, "Call Me Maybe," on Kiss (Interscope Records 2012).
2. Codified at 47 U.S.C. § 227 (2019) & 47 C.F.R. § 64.1200 (2020), respectively.
3. Broadnet Teleservices LLC Petition for Declaratory Ruling, CG Docket No. 02-278, Order on Reconsideration, 2020 WL 7383274 (Dec. 14, 2020) ("Broadnet Order on Reconsideration"). 3. 47 U.S.C. § 227(b)(1)(A)(iii) & (b)(1)(B), & 4. 47 C.F.R. § 64.1200(a)(1)(iii) & (a)(3).
5. Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 9054, 9055, ¶ 3 & n. 10 (2016) ("Blackboard / Edison TCPA Declaratory Ruling").
6. Defined as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1).
7. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
8. *Id.*
9. 47 U.S.C. § 227(b)(1)(B) & 47 C.F.R. § 64.1200(a)(3).
10. 47 U.S.C. § 227(b)(1)(B) & (b)(2)(B), & 47 C.F.R. § 64.1200(a)(3)(i)–(ii).
11. 47 C.F.R. § 64.1200(f)(4).
12. 47 U.S.C. § 227(b)(3).
13. *Id.*

14. Broadnet Order on Reconsideration, 2020 WL 7383274, ¶ 18.
15. *Id.* at ¶ 19, *quoting* Joint Petition filed by DISH Network, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6583, ¶ 26 (2013).
16. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7980 & 7982, ¶¶ 30 & 33 (2015) ("2015 TCPA Omnibus Declaratory Ruling and Order").
17. Broadnet Order on Reconsideration, 2020 WL 7383274, at ¶¶ 3, 13, 29-34, & 37-38.
18. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
19. Broadnet Order on Reconsideration, 2020 WL 7383274, ¶¶ 3, 8, 13, 18, 29-34, & 37-38.
20. *Id.* at ¶¶ 3, 13, 29-30, & 37-38.
21. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
22. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9062-9063, ¶ 21 (identifying analogous emergency calls made by a school district).
23. *Id.* at 9063-65, ¶¶ 22-24.
24. *Id.* at 9064, ¶ 23.
25. *Id.* at 9064-65, ¶ 24.
26. 47 U.S.C. § 227(b)(1)(A)(iii) & 47 C.F.R. § 64.1200(a)(1)(iii).
27. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9065-9068, ¶¶ 27-34.
28. *Id.* at 9066-68, ¶ 29 & 32.
29. *Id.* at 9066-67, ¶ 30.
30. *Id.* at 9066, ¶ 28, *quoting* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8778, ¶ 51 (1992).
31. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840, 2020 WL 1491502 (Mar. 20, 2020) ("COVID-19 TCPA Declaratory Ruling").
32. *Id.* at ¶¶ 2 & 7 (referenced and affirmed by Broadnet Order on Reconsideration, 2020 WL 7383274, ¶ 17, n. 44 & ¶ 39, n. 96).
33. *Id.* at ¶ 8.
34. *Id.* at n. 14.
35. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9067, ¶ 31.
36. *Id.* at 9065 & 9067, ¶¶ 25 & 31.
37. 2015 TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd at 8000-01, ¶ 73.
38. Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9065, ¶ 26 & n. 95.
39. 2015 TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd at 7996, ¶¶ 63-64.
40. *See e.g.* Blackboard / Edison TCPA Declaratory Ruling, 31 FCC Rcd at 9065 & 9068, ¶¶ 25 & 33.
41. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Notice of Proposed Rulemaking, 31 FCC Rcd 5134, 5139, n. 40 (2016).
42. *Id.* at 5139, ¶ 14.
43. 2015 TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd at 8006, ¶ 84.
44. *Id.*

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The Municipality as Shareholder: Secutities Litigation in the Age of Fiscal and Social Responsibility

BY: JOSHUA GRABAR, *Principal, Grabar Law Office, Philadelphia, Pennsylvania*

Securities litigation is often viewed as benefiting individual shareholders who have been harmed due to misstatements, omissions, negligence, or intentional acts of public companies. But the reality is that millions of others participate in the capital markets as employees of municipalities and local government subdivisions—counties, cities, townships, school districts, fire and police departments and more—who act on behalf of these workers as shareholders in publicly traded entities through pension plans, risk management pools and similar vehicles. As indicated in this article, these entities can add their influence to obtain recourse for corporate wrongdoing and to effect socially responsible change in corporate policies.

Overview:

Securities class action plaintiffs amassed $2 billion in settlements in 2019. An average of 224 new federal securities class actions were filed each year between 1997 and 2019, with 428 filed in 2019 alone.[1] In fact, the total financial recovery from settled securities class actions in roughly that same time frame, 1996 to present, is $104,371,151,287 – yes, over $104 billion.[2] In securities class actions, plaintiffs bring a suit as a class seeking compensation from defendants for damages resulting from a loss in a stock's value. Often, the same core underlying facts that support a securities class action can give rise to a shareholder derivative lawsuit in which shareholders sue corporate executives and board members on behalf of the company itself, seeking damages to be returned to the corporate entity as well as corporate governance reforms. In each instance, municipal entities often take the role of lead litigant. Recently, shareholder derivative cases have brought about meaningful governance reforms in the wake of social, environmental and public health wrongs. Institutional investors, including state and municipal entities that collectively hold more than $4 trillion in public company securities,[3] have played a significant role in bringing these settlements to fruition.

What Is a Securities Fraud Class Action?

A securities class action is a case brought pursuant to Federal Rule of Civil Procedure 23 on behalf of a group of persons and entities who purchased the securities of a particular company during a specified period of wrongdoing (the class period). The complaint generally contains allegations that the company and/or certain of its officers and directors violated one or more federal or state securities laws. A suit is filed as a class action because the members of the class of impacted investors are so numerous that joinder of all members is impracticable. For a case to proceed as a class action, there should be a well-defined commonality of interest in the questions of law and fact involved in the case. Further, the plaintiffs must establish that a class action is superior to other available methods for the fair and efficient adjudication of the controversy and that the prosecution of separate actions by individual class members would create a risk of inconsistent and varying adjudications.

Securities fraud deprives individual investors, retirement plans, pension funds, and institutional investors out

of millions of dollars every year. Manipulation of the market for a given stock is actionable under the federal securities laws. The past paradigms for these cases are steeped in allegations of accounting fraud and earnings restatements as in *Enron* and *WorldCom*.

What Is A Shareholder Derivative Action? Corporate Governance Goals

Unlike a securities fraud class action, which is brought on behalf of investors to recoup monetary loss, a shareholder derivative action is a lawsuit brought by a shareholder of a publicly traded company on behalf of and for the benefit of the company itself against the directors and/or officers of that company. In a derivative action, shareholders "step into the shoes" of the directors and officers of a company and bring litigation that the corporate board would be unwilling to pursue on its own. Such unwillingness typically relates to the fact that the board members themselves are alleged to have participated in the misconduct and thus would be unlikely to "sue themselves."

Shareholder derivative litigation can recover money damages back to the company for financial or reputational harm caused by the conduct of its insiders, and also can be used to improve the governance of public companies in order to guard against such harms in the future.

Any shareholder of a company can be a nominal plaintiff in a shareholder derivative action provided that the shareholder has held stock in the company continuously from at least the period in which the alleged wrongful conduct began through the present.

What Laws Provide Shareholder Derivative Standing?

Shareholder derivative actions generally arise out of violations of state corporation laws and as such, are traditionally brought in state courts. However, shareholder derivative actions can be brought in federal court under certain circumstances. Under Delaware state law, which governs a majority of U.S. companies that are incorporated there and also serves as a model for other state laws, directors and officers of publicly traded companies owe fiduciary duties to the companies that they serve. These duties include the duties of:

- **Loyalty**, which requires directors and officers not to use their positions of trust and confidence to further their private interests;
- **Care**, which requires that directors use that amount of care which ordinarily careful and prudent people would use in similar circumstances; and
- **Good Faith**, which requires corporate fiduciaries to act with a genuine attempt to advance corporate welfare — not to act in a manner unrelated to a pursuit of the corporation's best interests.

Breaches of these three duties form the foundation of the claims underlying shareholder derivative actions.

What Harm Is Required to Bring A Shareholder Derivative Action?

The harm alleged by the nominal plaintiff *must be to the company itself*, and not to the shareholder personally. Moreover, because company officers and directors are traditionally charged with preserving the interests of the company, a shareholder in a derivative action must be able to demonstrate that a litigation demand on the board to pursue the action was either wrongfully refused, or that making a litigation demand prior to filing suit would have been futile due to the self-interest of the members of the board.

While accounting fraud-based allegations often come to mind when thinking of securities class action litigation, in the last several years there has been a trend toward filing event- or social justice-based securities litigation in the class and derivative context. Some of the more newsworthy are detailed below.

Newsworthy Examples Related to Gender and Race Discrimination:

In re Alphabet Shareholder Derivative Litigation, 19-CV-341522 (Cal. Super. 2020) – A shareholder derivative lawsuit against Alphabet and top current and former executives alleged that the company misled investors by covering up sexual harassment and abuse by executives, along with a Google+ data breach. Among the nominal plaintiffs in this matter was the City of Irving (Texas) Firemen's Relief & Retirement Fund.

The lawsuits generally alleged that Alphabet's board engaged in a "pattern of concealment" to protect company interests at investors' expense, including the concealment of sexual misconduct and lax customer data safeguards. The investors pointed to $135 million in combined severance payouts to former executives Andy

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Social Responsibility *cont'd from page 13*

Rubin and Amit Singhal, who left the company following credible sexual harassment allegations.

In response to the litigation, Alphabet agreed to create a special litigation committee to investigate the claims. After its investigation, the committee presented its results to the parties before they entered into a settlement. Under the settlement, Alphabet agreed to allocate $310 million over up to 10 years to fund various initiatives meant to diversify its workforce from top to bottom, including investing in computer science programs and hiring underrepresented talent. The settlement also creates an anti-sexual harassment program that includes a commitment to transparency and to fostering a respectful working environment. Alphabet is required to incorporate these principles into formal policies and to create a panel — named the Diversity, Equity and Inclusion Advisory Council — to oversee its efforts for at least five years.

Additionally, Alphabet has agreed to more closely monitor data breaches and to make "sweeping policy reforms" that include ending the use of forced arbitration of harassment, discrimination and retaliation-related employment disputes, narrowing confidentiality agreements so that workers can discuss the facts of their case, and ensuring that workers company-wide are punished equally for the same misconduct.

Similarly, in *City of Monroe Employees' Retirement System v. Rupert Murdoch et al.*, 2017-0833-AGB, (Del. Chanc. 2017), 21st Century Fox agreed to a $90 million settlement (to be funded by insurance) to resolve allegations by the City of Monroe (a shareholder) that the company's management permitted a culture of sexual and racial harassment to permeate the company, ultimately resulting in financial and reputational harm to the company. The settlement included not only a financial component, but also provisions for corporate governance and compliance enhancements, including the creation of a Workplace Professionalism and Inclusion Council.

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The shareholder derivative lawsuit related to underlying allegations that numerous women who worked for the company had been sexually or racially harassed or retaliated against. In July 2016, former Fox News reporter Gretchen Carlson had filed a sexual harassment and wrongful termination suit, alleging that Fox News CEO Roger Ailes had harassed and retaliated against her. Her allegations led to an internal investigation of Ailes, which in turn led to his departure from the company pursuant to a separation agreement under which Ailes was paid substantial sums. Shortly thereafter, the City of Monroe Employees' Retirement System filed a books and records request with the company seeking documents relating to Carlson's allegations and Ailes's separation from the company.

The complaint contained six separate claims for relief, alleging breach of fiduciary duty against the individual defendants and unjust enrichment against the estate of Roger Ailes. (The unjust enrichment count related to the separation payments the company agreed to pay Ailes at the time of his departure from the company). The complaint alleged the existence of a "systemic, decades-long culture of sexual harassment, racial discrimination, and retaliation that led to a hostile work environment at Fox News Channel." The hostile environment was "created and facilitated by senior executives at Fox News." The company's board, the complaint alleged, "did not take steps to address workplace issues such as sexual harassment and racial discrimination" and "failed to implement controls sufficient to prevent the creation and maintenance of this hostile work environment."

The complaint further alleged that the company's senior officials "failed to implement sufficient oversight over the workplace" at Fox News to "prevent massive damage to the Company." The company's top executives allegedly failed to meet their "fiduciary duty to monitor developments at its most important business unit, investigate when red flags appeared, or put in place protocols that would have ensured greater visibility into the hostile work environment at Fox News."

Public revelations of a "toxic work culture" led to "numerous sexual harassment settlements and racial discrimination lawsuits" and to the "departures of talent and damage to good will." Among other things, the complaint alleged that the Company paid over $55 million in sexual harassment and racial discrimination settlements. The complaint also alleged that the toxic work culture the senior management permitted also caused the company other harm, including the severance or termination payments the company agreed to pay to Ailes and O'Reilly as well as approximately $20 million in related litigation defense costs and over $200 million in related financial harm.

The settlement provided both a payment to the Company of $90 million and the implementation of governance and compliance reforms which included the creation of the Fox News Workplace Professionalism and Inclusion Council comprised of "experts in workplace and inclusion matters" to advise Fox News and its management "in its ongoing efforts to ensure a proper workplace environment for all employees and guests," as well as to improve reporting, workplace behavior, and recruitment of women and minorities.

New York State Common Retirement Fund Amazon Audit. On December 18, 2020, the New York State Common Retirement Fund (NYSCRF) announced that it had filed a shareholder proposal calling for an independent audit to assess Amazon.com Inc.'s policies and practices on civil rights, equity, diversity, and inclusion. The proposal requests that Amazon's "Board of Directors commission a racial equity audit analyzing Amazon's impacts on civil rights, equity, diversity and inclusion, and the impacts of those issues on Amazon's business. The audit may, in the board's discretion, be conducted by an independent third party with input from civil rights organizations, employees, communities in which Amazon operates and other stakeholders."[4] NYSCRF's proposal cites a host of concerns that appear inconsistent with Amazon's pledge to fight systemic racism including reports of payment of low wages to disproportionately Black and Latino warehouse employees, who have contended with dangerous conditions such as exposure to COVID-19, racial discrimination against a former employee who led a walkout over concerns of workplace safety, discrimination against employees for wearing Black Lives Matter masks on the job, inconsistent enforcement of Amazon's policy banning the sale of products that promote hatred, and the use of AWS facial surveillance technology disproportionately against people of color, immigrants, and civil society groups.[5]

Additional shareholder derivative actions alleging race and /or gender discrimination have been brought against the boards of Oracle, Pinterest, Qualcomm, CBS, Papa John's, Wynn Resorts, Lululemon, and Nike.

Newsworthy Examples Related to the Opioid Epidemic:

In re McKesson Corporation Derivative Litigation, 4:17-cv-01850 (N.D. Cal. 2017) McKesson Corp. directors agreed to pay $175 million to resolve a shareholder derivative action accusing the pharmaceutical distributor's board of failing to enforce a compliance program to catch suspicious orders of opioids, leading to a $150 million fine from the U.S. Department of Justice.

The shareholder derivative action accused current and former McKesson directors of breaching their fiduciary duties to the company by allowing it to violate the Controlled Substances Act even after paying a $13.25 million penalty in 2008 related to similar violations in which the DOJ alleged that the distributor had failed to design or implement an effective system to find and catch suspicious orders for controlled substances from its independent and small-chain pharmacy customers. McKesson assured the DEA that it would enforce a compliance program to catch suspicious orders, but the DOJ later discovered that McKesson never implemented the compliance program it had designed after the 2008 settlement.

Shareholders filed a shareholder derivative suit against the retired McKesson CEO and board Chairman along with several other current and former directors who served on the board around the time of either the 2008 agreement, the 2017 fine, or both.

"McKesson's board and senior executives knew that continued illegal and improper conduct could subject the company and its stockholders to grave consequences, including large fines and penalties and suspension of sales in lucrative markets," the complaint stated. "Despite these risks and red flags, the board and senior management threw the dice to see if the rewards from the improper conduct outweighed the negative consequences of being caught ignoring the mandate of the [controlled substance monitoring program] and the CSA."

In addition to the $175 million cash payment, the settlement included governance reforms that required a separation of the CEO and chairman roles, which were previously held jointly by the same person, term limits for directors, the addition of two new indepen-

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dent directors and an overhaul of McKesson's compliance committee.

Additional shareholder derivative actions stemming from alleged corporate wrongdoing and the opioid crisis have been brought against AmerisourceBergen and others.

Newsworthy Examples Related to Data Breaches:

In re Equifax, Inc. Derivative Litigation, 1:18-CV-00317-TWT (N.D. Ga. 2018). Nominal plaintiffs included the Boston Retirement System.

The consolidated shareholder derivative complaint alleged claims derivatively on behalf of Equifax against the individual defendants for breach of fiduciary duties, unjust enrichment, waste, insider trading, and violations of the federal securities laws. Lead plaintiffs sought, among other things, monetary damages and the implementation of corporate governance and internal control reforms to prevent or at least to mitigate the risk of recurrence of the data breach.

Here, the class and derivative actions settled in tandem yielding a $149 million deal to end the securities fraud suit on behalf of a putative class of Equifax investors related to the credit reporting agency's massive 2017 data breach and a $32.5 million deal in a derivative shareholder suit stemming from the same incident and underlying facts.

Shareholder derivative litigation in the wake of a significant data breach has now become commonplace. In recent years, shareholders have filed derivative lawsuits in the aftermath of data breaches at Yahoo, Target, Home Depot, Wyndham, Wendy's, and others.

Newsworthy Examples Related to Covid:

In re Inovio Pharmaceuticals, Inc. Derivative Litigation, 2:20-cv-01962 (E.D. Pa. 2020). Here, Inovio shareholders filed complaints against the company's CEO, the company's board chair, five other company directors and listed the company itself as a nominal defendant. The allegations are that defendants represented to the investing public, in statements by the CEO and in company SEC filings, that the company had developed a COVID-19 vaccine that could be ready for human trials as early as April 2020. These false statements caused the company's share price to rise, and later fall as the truth was revealed.

The shareholder derivative complaints allege that the defendants breached their fiduciary duties by making or causing the company to make the allegedly misleading statements, and by failing to correct or failing to cause the company to correct those allegedly false and misleading statements. The complaint also alleges that the defendants breached their fiduciary duties by failing to maintain internal controls. These failures subjected the company to a securities class action lawsuit as well as the need to conduct internal investigations, the need to implement adequate internal controls, and recoup losses from alleged waste of corporate assets as well as losses from the unjust enrichment of individual defendants who allegedly were over-compensated or benefited from the alleged wrongdoing. The complaints assert claims for breach of fiduciary duty, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and for contribution.

To date, at least 25 securities cases have been filed for (1) misrepresentation or failure to disclose risks associated with COVID-19, (2) statements about how COVID-19 is impacting the business operations of the company, or (3) false statements about COVID-19.[6] These cases have been filed against a variety of travel, health care, technology and financial services companies and are all still in their preliminary stages. The boards of publicly traded companies will continue to face both shareholder class action and derivative suits, and municipal involvement will play a significant role. *See, e.g. City of Riviera Beach General Employees Retirement System. v. Royal Caribbean Cruises LTD,* 20-CV-24111 (S.D. Fla. 2020) (alleging defendants failed to disclose material facts about the Company's decrease in bookings outside China, instead maintaining that it was only experiencing a slowdown in bookings from China. The complaint further alleges that defendants failed to disclose material facts about the Company's inadequate policies and procedures to prevent the spread of COVID-19 on its ships).

Additional shareholder derivative suits have been brought recently against corporate boards for failures in proper governance with respect to environmental abuses and money laundering.

Conclusion:

Shareholder litigation of the nature mentioned above is becoming increasingly more common. 2020 saw a large number of securities matters being filed, and even new legislation based on the social mores and issues of our day. In fact, on September 30, 2020, driven in part by renewed focus on equality and diversity issues, California enacted Assembly Bill 979, requiring public companies headquartered in California to elect at least one director from an underrepresented community by the end of 2021 and to have a minimum of two directors from underrepresented communities in companies with more than four but fewer than nine directors. A company with nine or more directors must have a minimum of three directors from underrepresented communities by the end of 2022.[7]

These shareholder cases and their results thus far represent a significant example of the influence that municipal

and individual shareholders can have in demanding remedial measures to address toxic corporate culture concerns and the bad acts of corporate executives.

Municipal entities are increasingly recognizing their ability to influence social change through demanding better corporate governance from the companies in which invest. They may not only seek recovery of losses due to securities fraud, but can also propel social objectives via shareholder derivative matters in which a municipal entity who holds relevant securities can investigate a company and its board, and even bring litigation, for potential wrongdoing, mismanagement, and breaches of fiduciary duties for activities ranging from environmental wrongdoing, money laundering, to systemic racial and gender inequality and more.

Notes

1. *See* http://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-YIR.pdf
2. http://securities.stanford.edu/stats.html
3. https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-government-pensions#question1
4. https://www.osc.state.ny.us/files/press/pdf/ny-state-common-racial-equity-audit.pdf. *See also*, https://www.osc.state.ny.us/press/releases/2020/12/nys-comptroller-dinapoli-amazon-must-ensure-its-business-not-adding-racial-inequality
5. *See* https://www.osc.state.ny.us/press/releases/2020/12/nys-comptroller-dinapoli-amazon-must-ensure-its-business-not-adding-racial-inequality
6. *See* http://securities.stanford.edu/current-topics.html
7. AB-979 defines a "director from an underrepresented community" as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self identifies as gay, lesbian, bisexual, or transgender." Companies may increase the size of their boards in order to comply with the law. AB-979 builds on California's AB-826, signed into law in 2018, which requires at least one woman to sit on any corporate board with its principal offices located in California. As a penalty for noncompliance, AB-979 allows California's secretary of state to impose fines in the amount of $100,000 for a first violation or failure to timely file board member information pursuant to AB-979, and $300,000 for any subsequent violation. ML

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Public Sector Entities and Litigation Finance

Public sector entity (PSE) affirmative litigation of all shapes and sizes across the country is increasing, as PSEs with different demographics and economic circumstances want to ensure their right of access to the courts.

Introduction

This article discusses state and local governments' assumption of their leading role in shaping policy and litigation priorities in the United States. When this context is viewed through the prism of post-Covid imposed budget stress, legal financing may be uniquely positioned to provide a creative budget and policy solution for PSEs. Concerns expressed relative to PSE legal finance resemble similar objections to private sector legal finance. These objections merit consideration, but a full treatment of these points exceeds the scope of this discussion. Lastly, impact investing mandates may generate significant new investment opportunities for PSE legal finance.

PSE Market Size and State of Play

There are approximately 90,000 units of local government. This number is broken out in approximate numbers as follows:

- 35,000 cities, towns, villages, and townships;
- 3,000 counties;
- over 52,000 special districts (such as airport, harbor, water and/or sanitary districts); and
- the remainder are school districts and other miscellaneous units.

Combined government spending for PSEs is $3.7 trillion, which is 9% of US Gross Domestic Product, and double the spend of the US federal government. Given the size and differing compositions of PSEs, it is hard to pinpoint with exactitude PSE legal spend. According to the *US Census Bureau 2017 Census of Governments* (released in summer 2019), PSE legal spend in 2017 approximated over $10 billion for the 90,000 units of local government. Another data point is found in a dedicated survey of city legal department spend, the *Governing Magazine 2016 Study of the Top 20 Largest Municipal Legal Budgets,* which indicated the total annual median expense was $12 million. Median annual litigation expense was $3.5 million, but it is important to note that this sum excluded staff costs. To be sure, surveys of this enormous market with differing budget data points and nomenclature cannot capture the many millions of dollars in litigation expenditures by public client law firms retained by PSEs. These litigation expenditures may either conform to traditional fee arrangements, or increasingly common alternative fee structures such as modified contingencies or hybrid hourly rate/recovery models.

Given the sizable differences among PSEs, and the varying affirmative litigation strategies across the US, no comprehensive data set or analytics currently exists to definitively measure case duration, settlement amount or damages profiles of cases. However, certain data points confirm the upswing in scope and return on PSE affirmative litigation. For example, the following settlements in the last two years provide context:

2018 – State of Minnesota settlement of PFAS environmental cases for $850 million. Note, litigation by local governments regarding PFAS in that state is recently underway, and not impacted by this settlement.

2018 – City of Chicago settlement with Uber and Lyft for over $10 million.

2019 – Cuyahoga and Summit County, Ohio settlement of opioid claims for $260 million.

2019 – Several California counties settlement of lead paint abatement litigation for $305 million.

2020 – United Kingdom Revenue and Customs Department obtaining a very large share of a £22.5 million recovery on an insolvency claim, such claim which was financed by a litigation funder.

Covid-19 economic dislocation and cost burdens associated with the public health response imposed severe budget impacts and revenue loss on PSE in 2020, and this impact will continue to unfold over the years to come. Economic dislocation and related revenue decreases erode ability and capacity to pursue and sustain affirma-

tive litigation. Several policy organizations recently provided the following statistics to capture the amount of reduced PSE revenues, with such shortfalls constituting the biggest cash flow crunch since the Great Depression. The National Association of Counties identified current budget shortfalls of $434 billion for states, $360 billion for municipalities, and $202 billion for counties. The Brookings Institution estimates state and local revenues will be reduced 5% in 2020, 7.5% in 2021, and 8% in 2022. With the prospect of divided federal government in 2021 and beyond, federal relief of this budget stress is unlikely.

Aside from the economic reality of PSEs during and subsequent to the current pandemic, there are a lot of good practical reasons for PSEs to align themselves with litigation finance managers.

Significant benefits exist for PSEs to partner with commercial litigation funders due to their perspective on the commercial aspects of a given case, which will be important for PSEs to ensure they are delivering value to their constituencies. Funders also represent a 'second set of eyes' to determine the commercial prospects of a case (merits, collection, counsel insight, judiciary insight, counsel recommendations, case strategy, etc.), the probability of winning a case and the likely costs and timing associated with its pursuit.

The other perspective for PSEs to consider is using litigation finance as a financial hedge against other actions where they may be listed as the defendant. If the PSE does not actively consider plaintiff side claims, they are missing an opportunity and exposing their constituents to downside risk associated with defense side litigation without benefiting from the upside inherent in plaintiff side litigation. However, the PSE doesn't have to assume this risk alone. Instead, PSEs should consider partnering with litigation financiers to share the risk associated with plaintiff side litigation.

Implementing Legal Finance for PSEs

With budget and resource scarcity juxtaposed alongside policy consensus in many PSE jurisdictions supporting affirmative litigation strategies, PSEs could benefit from an infusion of investment capital to ensure public access to the courts and a level litigation playing field. The complex cases being maintained by PSEs, such as opioid claims, public nuisance claims regarding alleged environmental harms, or whistleblower actions, often require a sustained and intensive budget and legal resource commitment. This commitment is required regardless of whether these cases utilize outside counsel, staffing a case(s) with additional government lawyers, or some combination of the two. Given shrinking state and local budgets and the growing list of potential big-ticket claims, legal finance in the public sector could offer budget flexibility to public servants, just as it offers flexibility to private sector businesses. Financing could permit governments to exercise a newfound ability to fund strong, effective legal counsel. In the alternative, governments could fund operations if they have the capacity to prosecute litigation with internal legal staff. By law, PSE budgets must be balanced every year, during a time where revenue shortfalls typically reflect 10-30% downturns. Thus, PSEs have a statutory mandate to address budget and policy allocations in a very tight time frame. This creative new optionality could address and overcome budget and operational pressures resulting from these severe revenue shortfalls.

Legal finance could address the asymmetrical funding gap between PSEs and corporate defendants. Irrespective of the merits of their defenses, many corporate entities in high stakes PSE affirmative litigation have the means, the money, and the motivation to hire the best legal talent money can buy to wear down their opponents. Returning to the inherent optionality of legal finance, a PSE is in a new position to get exactly the law firm it wants, not just the law firm that can take a matter on contingency. With a financing option in place, a specialist law firm that may have a long-standing relationship with a PSE could in fact offer better value, dedication and results than a volume dependent, contingent fee practicing law firm. However, as is the case in the private sector legal market, this does not necessarily present a downside risk for law firms. The law firms with a public client practice, with possibly a burgeoning desire to expand their contingent fee practices, can benefit from financing which supports firm liquidity and client retention goals. Instances of avoided or deferred litigation would be reduced if a PSE felt it had access to new financial tools to undertake litigation. While this discussion focuses only upon legal finance as applied to the affirmative litigation environment, the authors believe there is a significant potential for legal finance in a defense context as well.

So how might legal finance work in the new PSE market? The competitive landscape in the litigation financing market is siloed, and concentrated in the plaintiff/consumer or private sector commercial litigation worlds. PSEs can benefit from funders that are conversant with the public sector, informed by subject matter expertise and a national network. Tapping into this niche requires relational and subject matter expertise to understand, approach, negotiate, and close deals in the public sector entity market.

While the existence of a funder's direct contract with an entity is likely disclosable under relevant government Freedom of Information Act

Continued on page 20

Affirmative Litigation *cont'd from page 19*

laws, this may not necessarily constitute a market negative outcome for the legal funder that already understands such an outcome going into prospective deals. First, the contents of the litigation funding agreement should be exempt from full disclosure pursuant to applicable statutory exceptions exempting production of confidential, proprietary, or trade secret information. Second, an agreement between a funder and a law firm representing a PSE (not the PSE itself) should be exempt from production as it is privileged, and also not a public record. Third, it may actually be a net positive outcome, because if a defendant knows a public entity cannot be outspent, or that it will succumb to financial pressure exerted by a free-spending defendant, a more open and positive case settlement dialogue may occur sooner rather than later. The authors understands from first-hand experience over numerous seven-and eight-figure litigations in his career, that defendants bank on "outspending" and "burying" public sector entities with litigation costs. Quicker, fairer settlement outcomes can relate back to what the Federal Rule of Civil Procedure 1 states, that there is a goal of the "just, speedy and inexpensive resolution of every proceeding." Fed. R. Civ. P. 1.

Legal financing will interject a new component into media coverage of PSE litigation. Newly conferred budget and operational flexibility is an attractive counterpoint to the standard narrative of reciting how public entity funds are being depleted during litigation. This type of budget flexibility promotes organizational stability for elected officials, chief financial officers, and the legal team. There could also be more dollars potentially available in a recovery that could be directed to the public good. Depending on deal terms and the waterfall, there may be more flexibility in litigation resolution returns, meaning, more dollars returned to taxpayers, as opposed to the recoveries obtained under the traditional contingent fee model. On any deal involving legal financing, there may be concern over the amount of returns recovered by a funder on a successful outcome. Funders should be mindful and respectful of the intrinsic nature of operating in this space, and simply put, not seek too much. Also, some jurisdictions, like the state of Ohio, have statutorily mandated fee schedules with a hard cap on recoveries paid to non-governmental entities. Of course, the PSE needs to be mindful that this is an investment that requires a return that cannot be measured off of the outcome of a single investment, but rather must be viewed in the context of the funder's portfolio (including write-offs included therein).

PSE Legal Finance and the Public Interest

Several concerns and arguments against legal finance for PSEs exist, which closely resemble arguments interposed against contingent fee lawyers and law firms maintaining public sector affirmative litigation. Many of these arguments are discussed at great length in law review articles and legal symposia. As such, thoughtful consideration of those points far exceeds this forum.

At top of mind, however, is the contention that legal finance may deprive elected officials of their constitutional and statutory power to control public expenditure, or that legal finance processes may be non-transparent. However, as local democratic citizen participation on budget matters makes clear, and which is repeatedly expressed in "Zoom" or in-person Council/Board meetings, those objections may run into trouble in the public forum. The vast majority of law firm retentions must and do comply with applicable public sector procurement regulations, which typically implicate public bidding or a lengthy Request for Proposal ("RFP") process. In the end, this review and approval process regarding expenditure of public funds is usually publicly approved by the governing body, and requires the passage of some time. In some states and localities, legal financing arrangements between a funder, and a PSE as a counterparty, will likely be subject to an RFP or bidding process. However, in cases where a funder and the law firm are the counterparty, public bidding and review may not occur, as the transaction remains by and between those two entities. RFP and bid responses typically remain confidential as proprietary business information, with the caveat that some public entities may publish a proposer's winning bid/response as a policy custom or statutory practice. And, in some states and localities, legal finance may never be utilized as it might be disallowed under the same laws that prohibit contingent fee law firm public client work. All told, the opportunity costs implicated by the different characteristics of the PSE marketplace can be fairly weighed against the market size and opportunity.

It is asserted that legal finance could promote the de-evolution and ceding of prosecutorial authority to funders. Yet it is hard to imagine an ethically rigorous funder who assumes the obligations of operating in the public environment, with documents maintaining any say in legal strategy or case control. PSE contracts with affirmative litigation firms and applicable procurement statutes typically state in black letter law that PSE maintain strategic primacy, and retain full and final settlement authority in litigation. Legal finance is complementary to, not a driver of, PSE affirmative litigation. Other objections stating that legal finance is a clumsy way to resolve questions that should be the sole province of legislatures or city councils, do not necessarily focus an objection upon PSE legal finance, but rather a more comprehensive objection to affirmative litigation itself.

ESG / Impact Investing Opportunities in PSE Legal Finance

A corollary consideration relevant to the possible upswing in PSE legal finance is the intersection it may have with impact investing, or Environmental, Social, or Corporate Governance ("ESG") investing. The uncorrelated nature of legal finance coupled with the ongoing emphasis for certain institutional investors to make sustainable investments, will likely open up the market for PSE legal finance. Investors can broaden their portfolios and their allocation strategies into this "niche of a niche." PSE financing advances a central thesis of all litigation, the aspiration to see the rule of law upheld. This aspiration is a shared goal of all citizens, regardless of partisan or political persuasion.

One specific litigation area that will continue to fall into the impact investing orbit is the PFAS/PFOS water contamination cases filed across the US and the world. This subject matter garnered new attention following the fall 2019 release of the motion picture, "Dark Waters." The existence and toxicity of PFAS "forever chemicals" in drinking water in the state of Minnesota triggered the settlement of state claims against 3M Corporation for $850 million in 2018. In the months since, other states such as New Jersey, New Hampshire, North Carolina, Michigan, and Ohio, have filed suits which may potentially result in recoveries running into the billions of dollars. Litigation funders and their investors are bound to take a close look at these cases, and those to be filed in the years to come, through the prism of ESG allocations and their potentially attractive return profiles.

Conclusion

PSEs are in the forefront of addressing and resolving policy and litigation issues in the US. Legal funders, prospective litigants, and law firms will likely work together to unlock this previously unrealized PSE legal market. Investors looking for a compelling new alternative investing strategy can expect to pay attention to this niche in the years to come.

Investor Insights

The PSE sector is a vast segment of every country's economy and litigation funders should be aware that significant opportunities may exist in the public sector given the sheer size of these organizations and the claims they may attract. While PSE motivations may be different than those of commercial entities, PSEs should understand that commerce lies at the core of litigation finance and that investors need returns commensurate with the risk they assume to ensure the long-term viability of the asset class. Disclosure and RFP processes may be problematic in the context of litigation finance given the nature of the financing, and so this issue needs to be dealt with early on in the process. PSEs should think about litigation funders not just as sources of capital, but trusted advisors that can add value above and beyond the capital they may provide. For litigation funders, PSE claims would likely qualify as ESG investing activities, given the social benefits that are derived from these activities.

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Grant Farrar is the founder and managing director of Arran Capital Inc, which is currently raising capital to create the first fund specifically dedicated to investing in the PSE sector.
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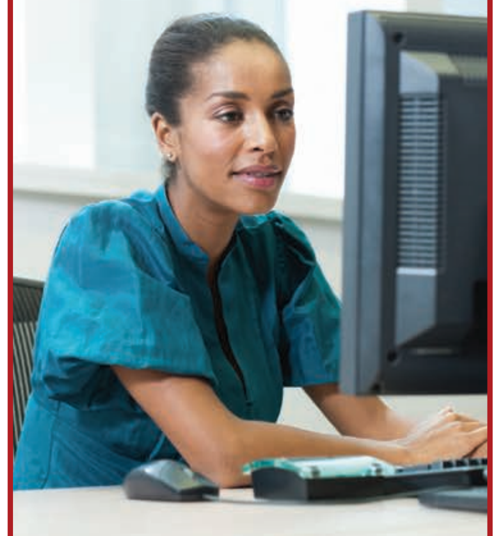

PRACTICE TIPS

BY: KAREN DAY WHITE,
Executive Counsel, Louisiana Municipal Association

Mandatory Employee Vaccinations: Complexities Abound

As someone who receives thousands of questions seeking technical assistance each year, I am keenly aware of how frustrating it can be when the response to a seemingly simple inquiry turns out to be a complicated flowchart of possible resolutions. Ancient philosopher and mathematician Pythagoras (yes, he of theorem fame) noted, "The oldest, shortest words – 'yes' and 'no' – are those which require the most thought." Attempting to answer questions about employer-mandated vaccines is perfect proof that our Greek friend knew what he was talking about.

Because the protection of fundamental employee rights - as articulated by a complex network of federal legislation - falls under their purview, the Equal Employment Opportunity Commission (EEOC) is generally the authority on the matter. On December 16, 2020, the EEOC issued revised pandemic guidance in which they conclude that employers generally can mandate that employees receive an FDA-approved vaccine. But that conclusion, as you will see, has a laundry list of caveats attached.

The most significant limitation on mandated vaccinations is the employer's obligation to properly consider the requests of employees who seek exemption from vaccination requirements due to medical conditions under the ADA or sincerely held religious beliefs under Title VII of the Civil Rights Act. In both cases, there are multiple tiers of analysis that must be performed on a case-by-case basis.

For example, after determining that an employee has a qualifying disability under the ADA, the employer must then embark on a series of inquiries, each of which requires careful examination of several factors. Would the unvaccinated employee pose a direct threat due to a significant risk of substantial harm to the health or safety of others? If so, is there a way to provide a reasonable accommodation that would eliminate or reduce that risk to an acceptable level? If not and the employer chooses to exclude the employee from the workplace, are there other federal protections that prevent termination or would require that they be allowed to work remotely?

Similarly, if an employee asserts that a sincerely held religious belief, practice, or observance prevents them from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. While "religious belief" is broadly interpreted, the employer may request information to support the claim if they have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance.

Another concern is whether the pre-vaccination screening questions would trigger the provisions of the ADA or the Genetic Information Nondiscrimination Act (GINA). Depending on how those questions are constructed, they may constitute "disability-related inquiries" regulated by the ADA or may elicit genetic information (such as family medical history) protected by GINA. The good news is that these concerns are irrelevant when the screening and vaccine administration are conducted by a third party not controlled by the employer, such as a pharmacy or healthcare provider. If you plan on administering the vaccine directly or through a contracted healthcare provider, be very careful about those screening questions.

An employer may ask an employee if they have already been

vaccinated and if the response is affirmative, the employer may also ask for proof of vaccination. If the response is "no," however, the employer generally cannot ask the employee why they have not received the vaccine without triggering ADA protections.

Given the complicated nature of a mandatory vaccine program, is it really worth it? With recent polls indicating that a significant percentage of Americans prefer not to receive the COVID-19 vaccine, employers who want to require employee vaccinations should be prepared to deal with substantial resistance. Many employers are choosing instead to dedicate their time and legal resources toward developing a vaccination incentive program to encourage voluntary participation. Similar programs have been developed to incentivize healthy eating habits, smoking cessation, and frequent exercise, and those programs have been largely successful.

Though the supply of vaccines is currently limited, and distribution is in the beginning stages, now is the time to consider your approach and carefully develop the necessary rules and processes, regardless of which strategy that your municipality intends to adopt.

Editor's Note: the information provided in this column is not a replacement for consultation with your own municipal attorney, and it should not be considered legal advice for any particular case or situation. This note was originally published in Volume 86, Issue 2 (February 2021) of the Louisiana Municipal Journal, and is reprinted with permission.

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SUPREME COURT

BY: LISA SORONEN,
Executive Director, State and Local Legal Center, Washington D.C.

Legislators Rein In Qualified Immunity: High Court Review Ahead?

Lawyers who defend police officers and other government employees in civil rights cases held their breath every Monday during most of May and June 2020. Over a series of conferences, the U.S. Supreme Court was considering whether to take nine petitions[1] involving qualified immunity. That wouldn't have been unusual or alarming except for the fact that in a number of the petitions a party and/or an *amici* asked the Court to modify or overrule the doctrine. When multiple petitions piled up over months, speculation grew that the Court would agree to hear a number of the cases at the same time and somehow alter if not abolish the doctrine.

On June 15, 2020, government lawyers could rest a little easier. The Court refused to hear any of the petitions. Only Justice Thomas filed a dissenting opinion in one of the cases.[2] He reiterated his observation that qualified immunity is not mentioned in the text of 42 U.S.C. § 1983.

It is impossible to know whether qualified immunity is safe from the Supreme Court tinkering with it in the near future. We don't know why the Court didn't grant any of these petitions. At least two theories are plausible. First, the Justices may have known/suspected that Justice Ginsburg's death was imminent. If so, they may have wanted to spare the new Justice the challenge of immediately having to decide a question as big as what to do with qualified immunity. Second, while some of the Court's more liberal Justices may be open to eliminating or modifying the doctrine, they may have doubted that enough conservative colleagues would join them, making a grant pointless. Adding to the uncertainty, the Court now may want to wait and see what Congress does with legislation modifying qualified immunity proposed after George Floyd's death.

Since at least 2017 there has been a significant, ongoing, and (somewhat) organized attack on qualified immunity. The attack has happened on three fronts: at the U.S. Supreme Court and the lower courts, before Congress, and before state legislatures. The attack on the latter two fronts has been primarily due to George Floyd's death. This article explains how the Supreme Court ended up with nine petitions asking it to do something dramatic with the doctrine and summarizes what is going on in Congress and state legislatures related to qualified immunity.

Lower Courts and the Supreme Court

It all started with an academic article asking a simple yet bold question: is qualified immunity unlawful.[3] According to William Baude, the Supreme Court has articulated three legal justifications for qualified immunity; but all are flawed.[4] The most well-known is that qualified immunity "derives from a putative common-law rule that existed when Section 1983 was adopted" in 1871.[5] But Baude claims "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted."[6]

In *Ziglar v. Abbasi*, 582 U.S. ___ (2017), Justices Kennedy, Roberts, Thomas, and Alito granted qualified immunity to a number of high level federal executive agency officials related to a claim they conspired to violate the equal protection rights of persons held on suspicion of a connection to terrorism after September 11, 2001. In a concurring opinion, Justice Thomas cited to Baude's article stating that the Court needs to focus in qualified immunity cases on whether the immunity existed at common law in 1871.[7]

Baude's moment in the sun wasn't over yet. In *Kisela v. Hughes*, 584 U.S. ___, *6 (2018) (per curiam), a majority of the Supreme Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer in an excessive force case. Justices Sotomayor and Ginsburg criticized the majority opinion citing to Baude's article for the proposition that the Supreme Court "routinely display[ing] an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'"[8]

So now Justices on the right and on the left had criticized qualified immunity in a short span of time—albeit for different reasons. But that isn't a movement—it might just be bad luck.

The attack on qualified immunity became clearer and more organized in March of 2018 when the Cato Institute held a forum on qualified immunity (featuring Baude as one of the speakers). Cato announced that it was beginning an "*amicus* campaign" in lower courts

to alert them to the "variety of problems" with the doctrine.[9]

Since then, Cato has attacked qualified immunity on a number of fronts. As promised, it regularly files a prepackaged *amicus* brief in the lower courts criticizing the doctrine. The brief, relying heavily on Baude, argues qualified immunity is "untethered from any statutory or historical justification" and is "amorphous" and "unworkable."[10] Cato asks the lower court to deny qualified immunity and "take note of the legal infirmities with qualified immunity generally."[11] Cato has also filed numerous *certiorari* petitions asking the Supreme Court to modify or overrule the doctrine.[12]

Cato also maintains a website called Unlawful Shield[13] where it, among other things, criticizes the work of others who defend qualified immunity, reports on lawsuits that illustrate the problems it perceives with the doctrine, and summarizes legal and academic developments related to qualified immunity. In September 2020 Cato issued a lengthy report describing qualified immunity as a "legal, practical, and moral failure."[14]

At least before the Supreme Court, Cato isn't the only game in town. "Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law" has filed a number of *certiorari* stage *amicus* briefs asking the Court to "revisit" the doctrine.[15] Signatories on the cross-ideological brief, true to its names, include left and right leaning organizations most of which don't focus exclusively on law enforcement or criminal justice issues. The cross-ideological brief argues that qualified immunity "regularly denies justice to those deprived of federally guaranteed rights," "imposes prohibitive and unjustified costs on civil-rights litigants," and "harms public officials by eroding public trust and undermining the rule of law."[16]

Finally, in 2018 the *Notre Dame Law Review* published a series of articles mostly explaining how and why to get rid of qualified immunity.[17] Perhaps unsurprisingly, these articles have become the basis of a "Scholars of the Law of Qualified Immunity" *certiorari* stage *amicus* brief. In this brief, a number of professors, mostly citing themselves, argue qualified immunity "lacks a sound legal basis," "fails to achieve its own goals," and may be plausibly improved.[18]

So, the real question is whether all of these briefs and articles have made any difference or are likely to make a difference in the near future. On one hand, less than a year ago, the Supreme Court decided to not revisit the doctrine. On the other hand, critics haven't walked away totally empty handed. In November 2020, in a very brief, unauthored opinion the Supreme Court denied qualified immunity in *Taylor v. Riojas,* 592 U. S. __ (2020), to a number of correctional officers who confined Trent Taylor to a "pair of shockingly unsanitary cells" for six days. Cato joined a cross-ideological groups' brief asking the Court to "revisit" qualified immunity.[19] Likewise, Cato points to Justices and judges who have criticized the doctrine.[20]

Proposed Federal Legislation

While none of the officers involved in the tragic and horrific death of George Floyd would likely be entitled to qualified immunity, following his death three bills were swiftly introduced into Congress to "reform" the doctrine.

The Amash-Pressely Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020), is the most sweeping. It would eliminate qualified immunity for all state and local government employees and any defense of good faith. According to one commentator, the language of this bill "seems broad enough to allow for monetary damages even when an officer follows binding circuit-court or Supreme Court precedent that is later overturned as well as for officers who follow state law that is later deemed unlawful under federal law."[21]

The Braun Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020), also would eliminate qualified immunity for all state and local government employees and any defense of good faith. Jay Schweikert,[22] ardent Cato critic of qualified immunity, summarizes instances where qualified immunity would still be available:

If the defendant could show that, at the time they were alleged to have violated someone's rights, (1) their challenged conduct was specifically authorized by a federal or state statute, or federal regulation, (2) no court had held that this statute or regulation was unconstitutional, and (3) they had a reasonable, good-faith belief that their actions were lawful.

The George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (2020), would have eliminated qualified immunity and any good faith defenses for state and local government police officers, but not all state and local government employees.

As of this writing, none of the three Congressional measures has become law. Senator Braun ceased promoting his legislation under police union pressure and the George Floyd law failed to advance in the Senate after being passed in the House.

State Legislation

Since George Floyd's death three state legislatures have passed laws addressing police officer immunity. At the time this article was written Georgia, Maryland, New Jersey, New York, South Carolina, Texas, and Virginia were considering laws limiting qualified immunity.

Colorado's Enhanced Law Enforcement Integrity Act, SB 20-217 (Colo. 2020) (enacted), created a state law version of 42 U.S.C. § 1983 applicable to local (notice not state) government "peace officers" who violate the state constitution. Colorado's new law eliminates qualified immunity as a defense. Interestingly, if the local government determines the peace officer "did not act upon a good faith and reasonable belief that the action was lawful," he or she may not be indemnified for the lesser of $25,000 or five percent of the judgment,

Continued on page 26

Supreme Court *cont'd from page 25*

unless the peace officer's portion of the judgment is "uncollectible." If the peace officer is convicted of a crime the local government doesn't have to indemnify him or her at all.

Connecticut H.B. 6004 (Ct. 2020), creates a cause of action against police officers who, among other things, deprive persons of the "the protections, privileges and immunities guaranteed under article first of the Constitution of the state." The new law disallows governmental immunity as a defense unless "the police officer had an objectively good faith belief that such officer's conduct did not violate the law."

New Mexico's S.B. 8 (N.M. 2020), eliminated statutory immunity for police officers who commit a variety of torts including "failure to comply with duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties."

Conclusion

As long as Congress doesn't modify or eliminate qualified immunity the attack is likely to continue in the lower courts and the Supreme Court. States and local governments have responded. The State and Local Legal Center and the International Municipal Lawyers Association have put together an *amicus* brief defending qualified immunity. Scott Keller has written an article "confirm[ing] that the common law around 1871 did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today," responded to Baude's article.[23] Finally, and perhaps most importantly, a law professor has explained in a widely read publication why abolishing qualified immunity won't fix the problem everyone wants solved: eliminating or at least reducing police officer use of unreasonable force.[24] ML

Notes

1. John Elwood, *Relist Watch: Looking for the Living among the Dead*, SCOTUSBLOG (May. 27, 2020, 11:29 AM), https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead.
2. *Baxter v. Bracey*, No. 18-5102, 751 Fed.Appx. 86 (6th Cir. Nov. 8, 2018), *petition for cert. denied,* 140 S. Ct. 1862 (U.S. June 15, 2020) (No. 18–1287) (Thomas, J., dissenting from cert. denial).
3. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018).
4. According to Baude a second justification for a broad interpretation of qualified immunity is that Section 1983 has been read too broadly. In particular the "under color" of any statute, ordinance, regulation, etc. has been interpreted to cover constitutional violations without statutory, ordinance, regulatory, etc. authority. Baude thinks Section 1983's broad interpretation is correct and that even if it isn't two wrongs don't make a right. The Court's oldest justification for qualified immunity is lenity—the idea that government officials should be given fair warning before being liable for a violation of the law. Baude rejects lenity because it comes come from another Reconstruction-era statute that enforces constitutional rights against state officials. But that statute prohibits *criminal* conduct while Section 1983 prohibits *civil* conduct. And the Supreme Court currently rarely applies lenity in criminal cases. Baude, *supra* note 3, at 117-32.
5. *Id.* at 106.
6. *Id.* at 110.
7. *Ziglar*, 582 U.S. at *5 (Thomas, J., concurring).
8. *Kisela*, 582 U.S. at *14 (Sotomayor, J., dissenting).
9. Transcript of Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability, CATO Institute, Mar. 1, 2018, *available at* https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability.
10. *See, e.g., See* Brief for CATO as Amici Curiae Supporting Petitioner, Williams v. Cline, 902 F.3d 643 (2018) (No. 17-2603).
11. *Id.*
12. *See, e.g.,* Brief for CATO as Amici Curiae Supporting Petitioner, Allah v. Milling, 139 S.Ct. 49 (2018) (No. 17-8654).
13. Unlawful Shield, https://www.unlawfulshield.com (last visited Jan. 13, 2021).
14. JAY SCHWEIKERT, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE (2020).
15. *See, e.g.,* Brief of Cross-Ideological Groups as Amici Curiae Supporting Petitioner, Baxter v. Bracey, 140 S.Ct. 1862 (2020) (No. 18-1287).
16. *Id.*
17. Notre Dame Law Review, Symposium, Federal Courts, Practice & Procedure: The Future of Qualified Immunity, ndlawreview.org/publications/archives/volume-93-issue-5/ (last visited Jan. 13, 2021).
18. *See, e.g.,* Brief of Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner, Baxter v. Bracey, 140 S.Ct. 1862 (2020) (No. 18-1287).
19. Brief of Cross-Ideological Groups as Amici Curiae Supporting Petitioner, Taylor v. Roijas, 592 U. S. __ (2020) (No. 19-1261).
20. Schweikert, *supra* n.14.
21. Christopher J. Walker, Legislating Away Qualified Immunity in Section 1983, Yale Journal on Regulation Blog (June 24, 2020), https://www.yalejreg.com/nc/legislating-away-qualified-immunity-in-section-1983/
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23. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021), *available at* https://ssrn.com/abstract=3680714.
24. Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, NEW YORK TIMES, June 16, 2020.

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BY: AMANDA KARRAS,
IMLA Deputy General Counsel and Director of Legal Advocacy

About Face? Revisiting a Prior Administration's Pending Cases

President Biden's policy agenda will have impacts on local governments ranging from transportation and infrastructure projects, to addressing climate change and racial equity, to changes on stances regarding immigration from the prior administration. In the more immediate future, President Biden has proposed a $1.9 trillion coronavirus relief package titled the American Rescue Plan, which includes (as of this writing) a proposal for $350 billion in critical aid to state, local, and territorial governments.[1] And while there can be no doubt that President Biden's agenda will impact local governments (hopefully including a large infusion of badly needed economic aid), a less certain outcome of the transition is what happens to the litigation the Department of Justice is involved in when a new President with a drastically different political agenda comes into power?

According to experts, including two former Acting Solicitors General, the federal government typically does not change legal positions in pending cases, even when a new President has a dramatically different policy preference from a previous President.[2] Both Paul Clement, who led the Solicitor General's office during the transition from President Clinton to President Bush, and Neal Katyal, who led the office during the transition from President Bush to President Obama, agreed that it was highly unusual for the Solicitor General to take a different position in a case litigated by a prior administration, particularly those pending before the Supreme Court. And in a recently published law review article, Michael Dreeben, who was an attorney in the Solicitor General's office for more than 30 years, agrees:

> … during my time at the Solicitor General's Office—spanning fourteen Solicitors General and Acting Solicitors General— this was an unspoken way of doing business. If our Office had staked out a legal position in the Court, with rare exceptions that was the position of the United States, full stop.[3]

Mr. Katyal indicated the office under his charge did not change any positions during the transition period. In fact, during that transition, there was a controversial criminal procedure case involving the question of whether the Constitution requires a state to provide DNA evidence to a convicted felon.[4] Many criminal defense advocates, including the Innocence Project, were sorely disappointed when the federal government did not change its position under Mr. Katyal, particularly because President Obama had been an advocate for DNA evidence when he was a state senator in Illinois.[5]

Mr. Clement similarly recalled that there was not a single case in which the new Bush administration had changed a position taken in a Supreme Court brief by the prior administration. He recalled only one or two cases where the new administration changed its position from what had been the Department of Justice's position in a lower court brief once that case got to the Supreme Court. One such instance, according to Mr. Clement, was the University of Michigan affirmative action cases.[6]

While maintaining the prior administration's legal position before the High Court is the norm, that was not the case under Noel Francisco, President Trump's Solicitor General. In fact, Mr. Francisco changed positions so many times during his first

Supreme Court term, that Justice Sotomayor quipped during oral argument for *Janus v. American Federation of State, County, and Municipal Employees, Council 31*: "I don't understand what you're arguing. This is such a radical new position on your part… Mr. -- Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?"[7] The answer in Mr. Francisco's first term was that the federal government changed positions four times in that year alone.[8]

The prior flip flopping, as Justice Sotomayor put it, may have an impact on how the Solicitor General's office will handle cases under the new Biden administration. Will the new administration insist on flipping back to the position the prior administrations had taken before President Trump? Or will the office instead try to recalibrate the Solicitor General's presence before the Court and maintain consistency from the Trump administration to the Biden administration. Because the Solicitor General's office is often referred to as the "tenth Justice," the office's credibility is on the line and changes in position under the new administration will not be made lightly. Then again, Mr. Dreeben argues that the Solicitor General's office should feel less pressure to maintain the "stare decisis" of the office if, after rigorous consideration, it believes the prior position is legally incorrect.[9]

Along those lines, there are a number of pending cases pending before the Supreme Court at both the merits and petition stages that may result in a change in position, either from the Solicitor General's office, or as a result of a change in policy.[10] For example, Acting Solicitor General Elizabeth Prelogar has asked the Court to hold two immigration cases in abeyance that were previously set to be argued in late February and early March. *Biden v. Sierra Club* (formerly *Trump v. Sierra Club*), involves a dispute over former President Trump's border wall construction. And *Pekoske v. Innovation Law Lab* involves the question of the legality of the prior administration's Migrant Protection Protocol (MPP) - aka the "Remain in Mexico" policy. President Biden signed executive orders asking agency heads to review the issues involved in both cases, to undertake actions undoing the previous policies, and to assess the legality of the programs.[11] In light of those executive orders, the Solicitor General's office asked the Court to take these cases off its calendar. In a brief order, the Court agreed to do so, but technically, the cases are not yet moot, and the Biden administration has not fully undone the MPP.[12] That said, it seems likely that they will become moot after agency review of the new directives. A change in policy for these issues saves the Solicitor General's office from having to reverse a legal position as it will instead be able to simply argue to the Court that the cases are moot given the new policy directives.

The issue of so-called sanctuary jurisdictions is another immigration area that could be impacted by the new administration. There have been a number of lawsuits filed by local governments against the Department of Justice regarding the imposition of immigration related conditions on the Byrne Jag grant, a formula grant providing federal criminal justice funding to state and local governments. The vast majority of courts to review the issue have concluded that the Attorney General exceeded his statutory authority under the Administrative Procedure Act in imposing the conditions on a formula grant and that the conditions were therefore ultra vires.[13] However, the Second Circuit is the lone court to rule in favor of the Department of Justice, concluding the conditions were lawfully imposed.[14]

In November 2020, the Department of Justice filed a petition for Supreme Court certiorari from the Ninth Circuit's decision in favor of San Francisco on the Byrne Jag issue. Meanwhile, a coalition of states and New York City have filed a petition for Supreme Court certiorari from the Second Circuit's decision. In its response to the New York City petition, the Department of Justice, under former President Trump, agreed that the Supreme Court should grant certiorari in both cases.

Ordinarily, a clear circuit split involving a Department of Justice petition would be ripe for the Court to grant certiorari. However, on January 20, 2021, President Biden issued an Executive Order "on the Revision of Civil Immigration Enforcement Policies and Priorities," which rescinded President Trump's executive order regarding sanctuary jurisdictions.[15] Thereafter, the Solicitor General's office issued a letter to the Supreme Court, asking the Court to hold the petitions in both the San Francisco and New York cases in abeyance "pending a determination by the current Administration of its position concerning the issues presented in the petition."[16] Unlike the border wall or MPP programs, which would seem easier to deal with at a policy level at least in the abstract, the issues in the Byrne Jag lawsuits involve previously imposed conditions on formula grants since 2017.

Certainly, going forward, the Department of Justice could choose not to impose the immigration related conditions (and it would seem a likely bet that it will choose that course both because of the policy directive and because of a current forward looking nationwide injunction).[17] But the cases pending before the Supreme Court involved the imposition of conditions on grants from 2017 and 2018 and conflicting rulings from the lower courts. Perhaps there is a way to handle the issue at the agency level retroactively, but that is far from certain.[18]

The Solicitor General could reverse course, and ask the Court to decline to accept certiorari, but the Court could simply ignore such a request and grant

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Amicus *cont'd from page 29*

certiorari anyway, given the circuit split on the issue. Furthermore, even if the Court declines certiorari, the Second Circuit's unfavorable ruling would remain in effect for several states and local governments. If the Court does grant certiorari, the question for the new Solicitor General will be whether to reverse course on the merits and argue that the conditions were imposed unlawfully.[19] As noted above, Mr. Dreeben argues it would be appropriate for the Solicitor General's office to do such an about face if it believes the prior position is legally incorrect.[20] And in this case, where every court to review the issue, save one, has sided with the local governments, there would seem to be strong evidence that the law is on their side.

That said, most commentators agree that if the Solicitor General is to change course, she should cash in those chips sparingly. And indeed, it comes as no great surprise that she has already reversed positions of the United States in the Affordable Care Act (ACA) case: *California v. Texas*. In this case, Texas and a group of states filed suit claiming that when Congress enacted the Tax Cuts and Jobs Act and zeroed out the tax penalty for failing to obtain health insurance, the individual mandate could no longer be considered a tax (which was the rationale the prior ACA case for upholding the law). The Texas coalition argues that the individual mandate is not severable from the entire ACA, meaning the entire law would be unconstitutional. The Trump administration originally took the position in district court that the individual mandate was unconstitutional, but would be severable from the rest of the law. That same administration then changed position at the Supreme Court, arguing that the entire law is unconstitutional. It is worth noting that this position was unusual for the Solicitor General's office to take because typically, the office would defend Congressional Acts where it can (it is the lawyer for the federal government, after all), and here there is a strong likelihood that the individual mandate is severable (all signs point to that being the outcome of this case).

It would seem obvious that President Biden, who ran on the idea of expanding the ACA and providing greater health care coverage for Americans, would want to change positions in this particular Supreme Court case from the posture under the Trump administration. The thorny problem for the new Acting Solicitor General was that the case has already been briefed and argued. So even if President Biden wants to change course in this case, procedurally, it is not that simple. Nevertheless, on February 10, 2021, Edwin Kneedler, the Deputy Solicitor General, sent a letter to the Supreme Court stating: "Following the change in Administration, the Department of Justice has reconsidered the government's position in these cases. The purpose of this letter is to notify the Court that the United States no longer adheres to the conclusions in the previously filed brief of the federal respondents."[21] Specifically, in the two page letter, Mr. Kneedler explains that it is now the position of the United States that the individual mandate is constitutional and that even if it is not, that provision is severable from the remainder of the Act.[22] Finally, Mr. Kneedler notes that the United States is not requesting supplemental briefing in the case, given that it was briefed and argued months ago.[23] This two page letter is unlikely to change the outcome of the case, but is an example of where the importance of optics and politics for the President may have outweighed the Solicitor General's interest in a consistent legal position for the United States.

In sum, Ms. Prelogar will be engaged in a bit of a highwire act for the next several months, balancing institutional concerns of the integrity and credibility of the Solicitor General's office while also working for a President with sharply contrasting policy preferences from those of his predecessor. ML

Notes

1. *See* Press Release from National Association of Counties Regarding Coronavirus Aid Package, available at: https://www.naco.org/resources/press/counties-house-and-senate-leadership-pass-president-bidens-coronavirus-relief-package (last visited on 2/4/21).
2. *See* Constitutional Priorities in the First 100 Days, Georgetown Law School Event, Recorded on 1/27/21 and available at: https://www.facebook.com/events/3896656360366223/ (hereinafter "Constitutional Priorities"). While both Mr. Clement and Mr. Katyal served as Acting Solicitor General, Mr. Clement was later confirmed by the Senate to serve as the 43rd Solicitor General of the United States.
3. Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General,* The Yale Law Journal Forum, Jan. 15, 2021, available at: https://www.yalelawjournal.org/pdf/DreebenEssay_kdn1z8ge.pdf
4. The case was District Attorney's Office for the Third Judicial District, et al. v. Osborne, 557 U.S. 52 (2009).
5. *See* Tony Mauro, *SG Won't Disavow Bush Position in Controversial DNA Case,* The BLT: The Blog of LegalTimes, Feb. 20, 2009, available at: https://legaltimes.typepad.com/blt/2009/02/sg-wont-change-position-in-controversial-dna-case.html
6. *See* Constitutional Priorities, *supra* note 2.
7. *See* Transcript of Oral Argument for *Janus v. AFSCME,* available at: https://www.oyez.org/cases/2017/16-1466. To be fair, Solicitor General Donald Verrilli, Jr. was taken to task by Chief Justice Roberts in 2012 for a change in position from the Bush administration to the Obama administration in *Kiobel v. Royal Dutch Petroleum,* when during oral argument, the Chief quipped: "Whatever deference you are entitled to is compromised by the fact that your predecessors took a different position." Transcript of Oral Argument for *Kiobel,* available at: https://www.oyez.org/cases/2011/10-1491.

8. By way of comparison, in President Obama's eight years, the Solicitor General flipped positions a total of four times. *See* Dreeben, *supra* note 3, at 549-51.
9. *See Id.* at 556-62
10. As of this writing, the author was able to ascertain two cases in which the Solicitor General has already notified the Court of its change in position. One was in California v. Texas, the Affordable Care Act case, which is discussed more fully below. The other was in Cedar Point Nursery v. Hassid, a case involving the question of whether a California regulation that allows union organizers access to an employer's property for limited amounts of time is a per se physical taking. In a letter submitted on February 12, 2021, Ms. Prelogar informed the Court of the United States' change in position. Ltr. From Acting Solicitor General Elizabeth Prelogar to Hon. Scott Harris, Clerk of the Supreme Court of the United States, Feb. 12, 2021, available at: https://www.supremecourt.gov/Docket PDF/20/20-107/68955/202 10 212160515182_20-107%20letter.pdf
11. *See* Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction, Jan. 20, 2021, available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/; *see also* FACT SHEET: President Biden Outlines Steps to Reform Our Immigration System by Keeping Families Together, Addressing the Root Causes of Irregular Migration, and Streamlining the Legal Immigration System, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/
12. On February 16, 2021, the White House issued a press release regarding the MPP, indicating that beginning on February 19th, the United States would begin to process eligible individuals in the MPP program to pursue their asylum cases in the United States. *See* The MPP Program and Border Security Joint Statement by Assistant to the President and National Security Advisor Jake Sullivan and Assistant to the President and Homeland Security Advisor Elizabeth Sherwood-Randall, Feb. 16, 2021, available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/the-mpp-program-and-border-security-joint-statement-by-assistant-to-the-president-and-national-security-advisor-jake-sullivan-and-assistant-to-the-president-and-homeland-security-advisor-and-deputy-na/
13. City of Chicago v. Barr, 961 F.3d 882, 891-909 (7th Cir. 2020); City & Cty. of San Francisco v. Barr, 965 F.3d 753 (9th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 30-45 (1st Cir. 2020); City of Philadelphia v. Att'y Gen. of the United States, 916 F.3d 276, 284-291 (3d Cir. 2019); cf. Colorado v. U.S. Dep't of Justice, 455 F. Supp. 3d 1034, 1047-1054 (D. Colo. 2020), appeal docketed, No. 20-1256 (10th Cir. July 13, 2020); ; City of Evanston & United States Conference of Mayors v. Sessions, No. 18 C 4853, 2018 U.S. Dist. LEXIS 204500 (N.D. Ill. Aug. 9, 2018). In addition to APA claims, local governments also claimed the imposition of the conditions was unconstitutional either under the Spending Clause, the separation of powers doctrine, and/or the Tenth Amendment. While several courts did conclude the imposition of the immigration conditions violated the Constitution, most did not reach the question, resting instead on the fact that they are ultra vires under the APA.
14. New York v. United States Dep't of Justice, 951 F.3d 84 (2d Cir. 2020).
15. *See* Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities, available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/
16. Ltr. From Acting Solicitor General Elizabeth Prelogar to Hon. Scott Harris, Clerk of the Supreme Court of the United States, Jan. 27, 2021, available at: https://www.supremecourt.gov/DocketPDF/20/20-666/167414/20210127163042025_LETTER%20for%2020-666%20San%20Francisco.pdf
17. City of Chicago, *supra* note 11 at 931-32 (7th Cir. 2020); *see also* Chicago v. Wilkinson, No. 17-CV 05720, Amended Final Judgment and Order, (Feb. 8, 2021, Docket No. 240); Chicago v. Wilkinson, No. 18-CV-06859, Amended Final Judgment and Order, (Feb. 5, 2021, Docket No. 128).
18. For example, presumably the DOJ could decide to stop litigating the cases in the lower courts and simply abide by the Chicago program-wide injunction, which would mean that it would be enjoined from imposing the conditions on all grant recipients for 2017 forward. But it is less clear how to square the conflicting rulings involving a nationwide injunction from the Seventh Circuit and a contrary ruling in the Second Circuit. Would the nationwide injunction apply to local governments within the Second Circuit?
19. If the Solicitor General's office did reverse course in this way, the Supreme Court could appoint someone to argue the prior position as amicus curiae.
20. *See* Dreeben *supra* note 3, p. 556-562
21. Ltr. From Deputy Solicitor General Edwin Kneedler to Hon. Scott Harris, Clerk of the Supreme Court of the United States, Feb. 10, 2021, available at https://www.supremecourt.gov/DocketPDF/19/19-840/168649/20210210151147983_19-840%2019-1019%20CA%20v%20TX.pdf. Ms. Prelogar is recused from the case, in all likelihood because she filed an amicus brief in the case when she was in private practice.
22. *Id.*
23. *Id.*

PREEMPTION

BY: MONICA CIRIELLO
Ontario 2015

Pandemic-Proof? Cannabis Retailers Thrive in Ontario

COVID-19 has seemingly spared few businesses in its path. While local restaurants, travel and tourism industry giants and thousands of small businesses have suffered, one unlikely player has thrived; the retail cannabis industry. Over the last year, the City of Hamilton, a metropolis of 600,000, has received over 100 applications from the Alcohol and Gaming Commission of Ontario (AGCO), the provincial licensing regime, to open cannabis retail stores. Many of these applicants have applied to operate their shops in vacant commercial spaces where once-vibrant local businesses once stood.

This has raised several important questions. Many are a matter of policy, such as, which businesses are best suited to occupy valuable downtown commercial real estate? The answer to these questions tends to rely on complex evaluations of costs and benefits. Other questions are a matter of jurisdiction, such as what authority does the City have to regulate cannabis retail stores in their community? To this question the answer is much simpler: none!

Federal Jurisdiction: Legalizing Recreational Cannabis

The Federal government proposed two bills to legalize and regulate the use of non-medical cannabis across Canada: Bill C-45 and Bill C-46. Bill C-45 *An Act respecting cannabis and to amend the Controlled Drug and Substances Act, the Criminal Code and other Acts (Cannabis Act,* S.C. 2018, c. 16) created a regulatory framework for the production, distribution, sale, cultivation and possession of cannabis across Canada. Bill C-46, *An Act to amend the Criminal Code and to make consequential amendments to other Acts* addressed the offences relating to cannabis. The recreational use of cannabis became legal on October 17, 2018.

Under the *Cannabis Act* the federal government is specifically responsible for:

- Individual adult possession of cannabis;
- Promotions and advertising, including regulating how cannabis or cannabis accessories can be promoted;
- Packaging and labelling;
- Licensing commercial cannabis production;
- Criminal penalties.

The Ever-Changing Provincial Process

In Ontario, the provincial government was originally the only legal vendor of recreational cannabis, selling it online from the Ontario Cannabis Store. With a change of government in 2018, the Province amended its approach, providing municipalities the authority to contemplate bricks and mortar cannabis retail stores within their jurisdiction. In accordance with the *Cannabis Licence Act, 2018, S.O. 2018,* c. 12 Sched. 2, the Province, not the municipality, would ultimately license the cannabis retail stores through the AGCO.

Municipalities had the option to debate whether to opt-in or opt-out of the provincial government's offer. The City of Hamilton opted-in, permitting cannabis retail stores to open and operate within the municipality.

At the time Council opted-in it was concerned of its limitations under the *Cannabis Licence Act, 2018* and sought further authority. The City wanted the authority to determine:

i. separation distances from sensitive land uses such as parks, schools, day care and health care facilities;
ii. over-concentration of dispensaries in one area of the City;
iii. the total number of dispensaries City-wide and within particular areas of the City;
iv. general issues of urban design such as location of entrances and transparency of facades;
v. advertising and signage;
vi. hours of operation;
vii. property standards compliance;
viii. the ability to restrict or prohibit operations that routinely violate municipal standards such as noise, nuisance or property standards.

In 2019, the Province announced that the AGCO would conduct a lottery to permit 25 private cannabis retail stores into communities that opted in. Two of these lottery locations were in Hamilton. A second lottery was held in August 2019 for 50 cannabis retail stores and of the 50 authorizations, the Province allocated eight stores to retailers to operate on a First Nations Reserve, with the remaining 42 stores being allocated throughout the Province; five authorizations through this lottery went to Hamilton.

The process changed again for municipalities when the Province announced that the AGCO had been given regulatory authority to open the market for retail cannabis stores beginning in January 2020, without the need for a lottery. This meant that the temporary cap on the number of private cannabis retail stores throughout the Province and the pre-qualification requirements for prospective retailers were removed. Other amendments included:

- Increasing the ability of licensed producers to open a store at one of their facilities;
- Phasing in limits on the number of authorized stores a licence holder can hold; and
- Allowing retailers to sell other cannabis related items, such as cannabis magazines and cookbooks.

The changes occurred without municipal consultation.

Municipalities are only Commenting Bodies

The AGCO only advises municipalities of an application for a proposed cannabis retail store in its jurisdiction. Within 15 days, municipalities are responsible for reviewing the applications and providing comments to the AGCO. As a result of the influx of applications, the City of Hamilton has established a designated Cannabis Team responsible for reviewing each proposed location utilizing Council's *Cannabis Policy Statement*. This includes reviewing and reporting on the City's desired 150-metre radial separation setback from schools, parks, day cares, libraries, community centres, addiction and health centres and other cannabis stores. The team also solicits input from the area Councillor, internal stakeholders such as police, building and public health officials, as well as canvases residential addresses and businesses within a 300-metre radial area. All comments or concerns are compiled and provided to the AGCO for consideration.

The AGCO issues a cannabis retail licence to all applicants as long as it does not contravene the "public interest" as defined in section 10 of Ontario Regulation 468/18 of the *Cannabis Licence Act, 2018*:

10. For the purposes of paragraph 5 of subsection 4 (6) of the *Act*, only the following matters are matters of public interest:
    1. Protecting public health and safety
    2. Protecting youth and restricting their access to cannabis.
    3. Preventing illicit activities in relation to cannabis.

Over the past year the City of Hamilton has received 101 applications for cannabis retail stores from the AGCO. Upon review, the City had no objection to 58 of the applications, objected to 30 applications for a contravention of the City's *Cannabis Policy Statement*, and the remaining 13 applications are still pending. The AGCO has granted all applications including the 30 opposed by the City. Presently 88 cannabis retail stores are open or set to be opening their doors in Hamilton, with 13 more expected in short order despite objection. In summary, whatever authority the City appears to have been given, is in fact, inconsequential.

Municipal Authorities

One of the most common business regulations is the requirement that people obtain a business licence from the City in order to operate. The *Municipal Act, 2001*, S.O. 2001, c. 25 provides municipalities broad authority to pass by-laws respecting business licensing, establishing in the bylaw terms and conditions that must be met for obtaining, continuing to hold or renewing a business licence. The bylaw may suspend or cancel a business licence for failing to comply with the terms and conditions. However, section 42(1) of the *Cannabis Licence Act, 2018* explicitly restricts a municipality's by-law making authority for cannabis retail stores:

> 42(1) the authority to pass a business licensing by-law within the meaning of the *Municipal Act, 2001* […] does not include the authority to pass a by-law providing for a system of licenses respecting the sale of cannabis, holders of a licence or authorization issued under this Act or cannabis retail stores.

The same limitation applies for *Planning Act,* RSO 1990, c. P. 13 by-laws:

> *42(2) the authority to pass a by-law under section 34, 38, or 41 of the Planning Act does not include the authority to pass a by-law that has the fact of distinguishing between a use of land, a building or a structure that includes the sale of cannabis and a use of land, a building or a structure that does not include the sale of cannabis.*

With cannabis retail stores on the rise with no indication of slowing, it may be time for the Province to increase municipal authority to regulate cannabis retail stores through municipal licensing so as to differentiate dispensaries from other commercial forms of retail use, and/or to have broader separation distances from other establishments such as schools, parks or residential neighborhoods. ML

DIVERSITY

BY: DEANNA SHAHNAMI,
IMLA Associate Council

Diversity, Equity, and Inclusion, Oh Yes!

When you begin your portfolio of investments, the number one rule is: Do not put all your eggs in one basket. In other words, you must diversify your investments in order to reduce the risk of losing all your money in one product, company, project, and so on. Imagine yourself being just as enthusiastic about diversifying your work environments as you are about diversifying your portfolio. It begins with recognizing that employees are investments.

Lawyers from different races, ethnic backgrounds, socioeconomic backgrounds, cultures, and regions provide different perspectives, expertise, and knowledge. Inclusion turns diversity—what can be seen—into what can be felt. Inclusion is creating an environment to allow all employees to be heard and acknowledged. Equity is seeing that even though there is equal opportunity, it does not mean people historically marginalized are given equal knowledge of that opportunity, equal consideration of that opportunity, or equal access to that opportunity. Equity is the necessary action to invest and prioritize historically marginalized groups. Diversity, equity, and inclusion increase employee engagement and productivity. Who can resist that kind of profit?

IMLA's Diversity and Inclusion Working Group was recently formed to serve IMLA members with a particular interest in or responsibility for advocating for diversity and inclusion in legal education and legal employment. The Group focuses on developing ways to provide more inclusive services to underrepresented and underserved members of the community and find ways to expand an understanding of the unique perspective of these constituencies. The Group focuses on areas that include, but are not limited to, issues related to hiring/retention, diversity-related CLE programming, municipal programs related to diversity and inclusion (implicit bias training, racial and gender equity initiatives, disparity studies, selection criteria for bids and RFPs, etc.), and strategic planning.

Co-chaired by Baltimore's Chief Equity Officer Dana Moore and IMLA Associate Counsel Deanna Shahnami, the Group's mission is to provide valuable resources for IMLA members on matters of diversity, equity, and inclusion ("DEI"). The Group has re-introduced its listserv to IMLA members interested in conducting an open dialogue about what municipalities need to instill greater DEI qualities and in sharing their resources (e.g., sample ordinances and outreach programs) that promote DEI. The Group also advocates for members to submit articles on DEI matters to IMLA's blog and *Municipal Lawyer.*

IMLA is scheduling is scheduling more diversity-related webinars in our regular webinar schedule. In January, IMLA hosted a webinar on "Elimination of Bias and Implicit Bias for Government Lawyers," presented by Tara Kelly, Associate City Attorney, Kansas City, Missouri. And in honor of Women's History Month, on March 31st IMLA will host a webinar on "Women in Law" featuring IMLA award-winning local government attorneys discussing how the law, office practices, and local policies treated women in the past and how things have--and have not-- changed for women on a structural, policy, and individual level. This presentation will address diversity, equity, and inclusion. The presenters are Deanne Durfee, Director for the Municipal Operations Section in the Denver City Attorney's Office; Patricia Miller, Chief of the Special Federal Litigation Division of the New York City Law Department; Josette Flores, Senior Assistant City Attorney, City of El Paso; and Deanna Shahnami. Information on the webinar can be found on IMLA's website under "webinar schedule."

Change starts from where you work (office or home). In February, the co-chairs introduced an initiative to create a toolkit for our members to serve as a guide on DEI for yourself and your office on hiring practices, policies, the contracting process, provisional language, and outreach resources and methods. Local government is the closest the law gets to the community, so this toolkit will benefit small and large municipalities on how to develop DEI-friendly policies and practices as they affect attorneys and the municipalities they work for. The toolkit is expected to be available to IMLA members this Fall.

The Group and Listserv's mission mission is to provide resources and tools to aid members' use and understanding of the value that diversity, equity, and inclusion provide. The first step toward that goal is to look at your portfolio and start diversifying.

If you would like to be added to the IMLA Diversity and Inclusion Listserv, please e-mail IMLA Marketing and Administration Coordinator Caroline Storer at cstorer@imla.org. ML

IMLA Member Support Project

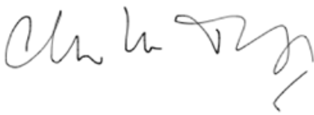
IMLA Members,

We recognize that our members (cities, counties, and special districts) have been facing difficult times. We value your membership, and we hope you value IMLA. To support you, we are offering a dividend of sorts to our continuing members, in the form of a credit towards IMLA virtual programming:

- Most members will receive a credit equal to 6% of their dues payment for IMLA's last fiscal year (which ended June 30, 2020), which can be applied to IMLA's virtual programming this fiscal year.
- The credit may be applied by the office for the use of its lawyers or paralegals.
- The credit can be used for a webinar or the Kitchen Sink* subscription or for IMLA's upcoming virtual Seminar in late April.
- Membership with IMLA must be current or brought current before using the credit, which expires on June 30, 2021.
- To use the credit, a member will need to contact IMLA directly when registering for a virtual program so that we can apply the credit and account for its use. Please email info@Imla.org.

The IMLA Board of Directors and our staff are committed to finding value for our members and making membership important to every local government. We hope this program recognizes the value of your support for IMLA and will help with the financial hurdles you are facing due to the coronavirus. We pledge to continue supporting local governments with all of IMLA's resources.

Best Wishes,



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INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

Evaluating Racism, Bias, and Procedural Fairness

Ontario Considers Role of Anti-Black Bias in Sentencing
R. v. Morris, 2018 ONSC 5186 https://canlii.ca/t/hv19g
The 2018 decision saw Justice Nakatsuru rely on pre-sentencing reports on anti-black racism and the social history of the defendant, Kevin Morris (Morris) to account for his criminal offence sentencing. By considering anti-black racism, Justice Nakatsuru sentenced Morris to one year in jail. This was a substantial shift from the Crown's request of from four years to four and six months of jail time. The Crown appealed the decision, arguing that the sentence was too lenient and that anti-black racism should not have been considered in the sentencing because there was no link between systemic racism and Morris' crime. The timely question before the Ontario Court of Appeal is whether judges can consider the effects of anti-black racism in sentencing.

Case Facts:
R v. Morris, 2018 ONSC 5186

Morris was arrested by police in the City of Scarborough who were responding to a call for a nearby home invasion. Morris was not involved in the invasion, but ran from the police. When apprehended, he was found to be carrying a loaded pistol. A jury found him guilty of numerous offences, including possession of an unauthorized firearm, possession of a prohibited firearm with ammunition, and carrying a concealed weapon.

On sentencing, the Crown presented the traditional principles of sentencing under Part XXIII of the *Criminal Code*, RSC 1985, c. C-46 (*Criminal Code*). The Defence, aware of Justice Nakatsuru's earlier decision of *R v. Jackson,* 2018 ONSC 2527 requested that consideration be given to anti-black racism and the inequities in a justice system which disproportionately jails black offenders. In *Jackson,* Justice Nakatsuru had held that sentencing was an individual process and gave consideration to the social context of the black defendant, relying on 718.2(e) of the *Criminal Code*. Section 718.2(e) states:

Other sentencing principles
718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Section 718.2(e) allows for consideration of sanctions other than imprisonment, especially for Aboriginal people. In *R v. Gladue,* [1999] 1 SCR 688 the Court interpreted section 718.2(e) to establish a sentencing structure that allowed for systemic factors of Aboriginal people to be considered in sentencing. The Supreme Court of Canada in *R v. Ipeelee*, 2012 SCC 13 further held that "the failure to apply the *Gladue* principles in any case would also result in a sentence that is not fit and is not consistent with the fundamental principle of proportionality." In *Jackson*, Justice Nakatsuru had utilized the *Gladue* factors, and considered disproportionate jail sentencing of black offenders, links to colonialism, slavery and systemic racism. He took the same approach in *Morris* when admitting two reports: one general report of systemic racism and a second report of Morris' specific social history, adding a lens as to why Morris was carrying a loaded gun and the road that led him to that point. The Crown has appealed this decision and arguing that the reports should not have been admitted.

On February 11, 2021 the appeal started before the Ontario Court of Appeal.

No Bias Where Judge was Formerly City Solicitor
Smuk v Regina (City), 2021 SKQB 37
https://canlii.ca/t/jd63f

The Appellant appealed a decision by the City of Regina (City) to refuse access to records pursuant to s. 46 of the *Local Authority Freedom of Information and Protection of Privacy Act,* SS 1990-91, c L-27.1 (*Act*). The appeal was before Justice Robertson, a former solicitor at the City. The Appellant expressed concern about Justice Robertson's independence, triggering a review of the rules and principles governing conflict to determine whether he should be permitted to preside.

HELD: No conflict.

DISCUSSION: Judicial independence is of upmost importance to preserve public confidence in the justice system. A judge must step aside when the applicant has demonstrated bias or a reasonable apprehension of

bias, *Ayers v. Miller*, 2019 SKCA 2. The threshold is high: "a real likelihood or probability of bias must be demonstrated; a mere suspicion is not enough" *Aalbers v. Aalbers,* 2013 SKCA 64. To ensure no reasonable apprehension of bias, Justice Robertson reviewed the Canadian judicial council federal judges guide, *Ethical Principles for Judges, [Ethical Principles]* viewing the matter from the perspective of a reasonable, fair minded and informed person: "the test is whether an informed person, viewing the matter realistically and practically would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly." *Committee for Justice and Liberty* [1978] 1 SCR 369. *Ethical Principles,* E. 12 states that "a judge should disclose on the record anything which might support a plausible argument in favour of disqualification." Justice Robertson complied with E.12 and disclosed that he was a former solicitor at the City, something that might support a reasonable apprehension of bias. *Ethical Principles*, E.19 contemplates how judges may deal with matters in cases involving former clients, or in Justice Robertson's situation, government departments. E.19(A) assesses whether the judge had direct involvement in the file while at the previous place of employment. The Province of Saskatchewan requires a 2-year cooling-off period; Justice Robertson confirmed that the appeal before him arose more than 10 years after he left employment with the City, therefore he had no knowledge or exposure to the matter in his previous capacity. This timeline also satisfied the required cooling off period. *Ethical Principles* provides that even if a judge is not required to step aside, the judge still maintains discretion to recuse. Justice Robertson found no reason to step aside, and no reasonable apprehension of bias as a former solicitor at the City.

Relatively Low Level of Procedural Fairness Suffices
Scott v. Toronto (City), 2021 ONSC 858
https://canlii.ca/t/jd2p7

The Applicant purchased a home in the City of Toronto (City) that had an unauthorized front yard parking pad, resulting in a Bylaw order. The Applicant then unsuccessfully applied for a licence for a front yard parking pad, a process regulated under the *Toronto Municipal Code,* Chapter 918, *Parking on Residential Front Yards and Boulevards,* which authorizes the City to issue or refuse a licence. The Applicant appealed the City's decision to the Community Council, which has delegated authority under City Council to deal with front yard parking appeals pursuant to sections 20(1) and 24(1) of the *City of Toronto Act, 2006,* S.O. 2006, c. 11. Sched A. Relying on a report presented by City staff, the Community Council denied the Applicant's request for two reasons: first, the parking pad is on the same side as street permit parking, and second, the parking pad is too close to a protected tree. The Applicant sought judicial review.

HELD: Application dismissed.

DISCUSSION: It is established case law that judicial review is limited to the information before the original decision maker with minimal exceptions, *Bernard v. Canada Revenue Agency,* 2015 FCA 263. The Court found a relevant exception in this case and proceeded to review affidavits by both parties to determine what fell within the exception pursuant to Rule 68 of the *Rules of Civil Procedure,* RRO 1990, Reg. 194 The Applicant argued that there was procedural unfairness, particularly that the City staff report did not contemplate the Applicant's argument that the front yard parking pad on his property was grandfathered, as the previous homeowner had received preliminary approval from the City. The Court noted that the City report had no obligation to summarize all arguments raised by the Applicant. Further, the Court outlined the extensive process of obtaining a front yard parking pad licence and found that the previous homeowners were only in the early stages. The Court held that since no licence was issued and no licensing fees were paid, the application of the original homeowners was rightly deemed abandoned by the City.

In addressing the Applicant's procedural unfairness argument, the Court evaluated the five factors set out *in Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817. These included (1) the nature of the decision being made, and the process followed (the decision was discretionary, taking into account the public interest, and the process did not resemble judicial decision-making; (2) the nature of the statutory scheme and the terms of the applicable statute (the decision was final, with no further appeals); (3) the importance of the decision to the individuals affected (this was a decision of relatively low importance, compared, for example, to threats to life, liberty, or fundamental dignity); (4) the legitimate expectations of the persons challenging the decision (The applicants had not established that they had a legitimate expectation of higher participatory rights); and (5) the choices of procedure made by the agency and its institutional constraints (deference was owed to the City's processes designed to balance fairness, public participation, and efficiency, and there were significant constraints on the time of elected councillors--at the June 2017 meeting, there had been 142 agenda items).

On this basis, the Applicant was entitled to a relatively low level of procedural fairness, being entitled to receiving notice, a copy of the City staff report, and an opportunity to be heard by the Community Council, all of which had been provided. The Community Council's failure to provide written reasons for its decision was not a breach of its duty of procedural fairness, as written reasons for decisions are not mandatory for all administrative proceedings. ML

LISTSERV

BY: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

Virtual Realities-Avoiding Mishaps While the Camera is On

We are living in unusual times and relying even more on technology than we ever did before. Virtual meetings are increasingly taking the place of meetings we were accustomed to having in person. Most of the time this can be quite convenient, economical, and productive: A college education can be obtained at an out of state institution without leaving home, and us lawyers can attend hearings all over the state without leaving our office. Executive Board Meetings can take place with members around the country and nobody has to travel. These are a great substitute for face-to-face encounters – certainly more convenient than cancellation altogether.

But folks, please remember where you are and what you are doing during these virtual meetings. Since it is still relatively new to many of us, here are a few tips for helping to assure a successful and productive video call or conference.

If you are not home alone, make sure everyone knows you are on the call. Close the door to the room to prevent inadvertent sounds and pictures from reaching the video. Make sure your worksite is inaccessible by pets as well.

Make sure you have finished "getting ready for work," have done your business, have eaten breakfast and for goodness sake, make sure you are familiar with your mute button.

Act as though you are ***always*** on camera and always being heard on speaker during such meetings.

Make sure you are familiar with all functions of the group format you are using. On some formats, everyone can see your chat messages. Don't type or say anything you wouldn't want in the minutes. Be sure to have conducted a "test run" if possible before your meeting begins.

Dress like you would if you were physically attending the type of meeting which is the subject of the call or conference. Don't let your attire become distracting or a subject of conversation.

Use a neutral background without too many shelves or fixtures behind you. These often gather items you do not need to have appear on a video. In addition, make sure the lighting is good so everyone can clearly tell who you are.

Turn off notifications on your computer that may ring or make other noises during the meeting.

Make sure your video is appropriately positioned at eye level so other viewers do not see you from an awkward or even embarrassing position and look at the camera and not the screen when you are talking.

Avoid answering emails, sending texts, or playing games during the calls. These can be distracting and can make noises which interrupt the call.

Overall, just use common sense and act like everything you are doing and everything in your environment can be seen and heard by everyone participating in the call or conference.

While the convenience of these meetings is fascinating, they are also the source of "interesting" moments. By now, we have probably seen the viral video of the attorney whose daughter had installed the "cat face" on her dad's computer. He "showed up" for a court hearing with the cat face on, and well, everyone is likely familiar with the rest of the story. "I'm Not a Cat!" has become a household joke across the country. A recent local virtual meeting opened with the moderator's question of "Everyone got your cat filters off?"

Through all the convenience we really need to remember that whoever is on that computer chat with you can hear and see whatever you are doing. Just like when you hear that person talking on the cell phone very loudly in the grocery store. They seem to think nobody can hear them except for the person on the phone. Please remember this isn't so!

Humor can be important in times of stress like these. I have polled my colleagues and read a few articles to come up with a series of light-hearted moments that brought a few laughs during this time of uncertainty and virtual communication.

Our series starts locally with the lawyer who was "working" from home and received a notice of a virtual court hearing in Circuit Court. Apparently, the Counselor wasn't in the practice of "dressing for work' as she worked from home. As the court

session began, she appeared in a bathrobe and curlers, much to the dismay of the Judge. Apparently, it just didn't register that everyone on the call could see her current status. Opposing counsel found it humorous, but the Judge did not. Contempt of court was threatened but did not occur.

Another colleague reports a video hearing where the lawyer indeed dressed the part but forgot to remove a bottle of Jack Daniels from the shelf behind him. The booze was clearly visible throughout the hearing.

Yet another colleague reports an associate attending a City Council meeting virtually from home. During the meeting, on several occasions, the associate could be seen lifting a Bud Light can for a periodic taste of suds.

Then there was the colleague with the persistent pre-teen in the house who wondered into the background several times to waive at the camera while wearing his Spiderman pajamas. The same meeting had a Council member sporting an "I'm With Stupid" T-shirt.

There was the lady in a western state who had set up her computer for a pending video conference call with her boss. Her two-year-old entered the room and apparently triggered the call prematurely while wearing only a diaper.

A man reports his daughter walking into the room during a conference call singing "I like bananas" at the top of her lungs.

Several folks report detecting a conference call participant using the bathroom during a teleconference.

A business executive reports her husband, unaware of the video conference taking place as his wife worked from home, prepares to take a shower and walks through the background of the video call naked in an effort to retrieve a towel from the linen closet.

A lawyer with a spouse and three children at home provided for a very noisy background in a video settlement conference. A colleague quipped "Now I know why you prefer to work from the office."

A video-recorded Municipal Zoning Board meeting was "adjourned" but the video had not yet ceased recording. A Board member could clearly be seen and heard calling the applicant an "***hole" after the meeting had adjourned and the applicant had left.

An executive reports that, during a meeting another conference participant asked him a question, and his automated Google assistant tried to answer it before he could say anything.

A conference call member participates while driving an automobile. Another driver pulls out in front of the person, and the entire 35 person call gets to hear him exclaim "SOB" at the top of his lungs.

A video participant's cat walks onto the desk, and proceeds to "moon" the rest of the video conference for about 30 seconds while the video conference continues.

A colleague reports a virtual meeting where a participant fell asleep and began to snore with his microphone on. The facilitator was unable to communicate to the gentleman and the meeting ended prematurely. The sleeper did not know the meeting had even ended and maintained a connection for several more minutes as the facilitator tried to communicate to him so the meeting could resume.

So much for levity. Changing tracks, now is the time to use the IMLA Listserve even more than ever before. If you can't be in that CLE or can't attend that conference, place questions and learn from the Listserve. It's been said before that being an IMLA member and participating in the Listserve is like having a one thousand member law firm at your fingertips.

Also, please don't forget the Water Cooler. Our need for relief from mental stress and our need for down time is at an all-time high. The Water Cooler emphasizes the "human" side of our profession, and often is a go-to place for stimulating discussions that cannot take place on the main listserve. It is all done in a civil and congenial atmosphere and is the virtual water cooler where we can discuss things like Covid shots, the weather, our kid's soccer match and our favorite quiche recipe. It can be quite popular at times, and provides a short but much needed virtual "coffee break" during our stressful day. Please be sure to take advantage of this useful resource. To join, please email me at bcunningham@lexsc.com or Don Knight at don.knight86@gmail.com.

Kudos to the IMLA Staff and Board for being able to shift the 2021 Mid-Year Seminar into a virtual format. Their job isn't easy, and they deserve our support in this effort. Remember that attendees are from many different states at various levels of travel warning, and very many of us haven't been able to obtain a Covid shot at this point. Additionally, most of the IMLA staff members have been unable to obtain the vaccination. This may not be what many of us wanted to happen, but the IMLA Staff deserves our support for being able to continue to bring us the top-notch programming to which we have become accustomed. Well done ladies and gentlemen!

Closing with a little bit of humor and a true story. A man walked into a gun shop and attempted to commit armed robbery. He pulled a gun on a clerk and demanded money. But before the clerk could even move, the man dropped his gun because four other customers had pulled a gun on him.

The prosecution rests, your honor… ML

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