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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Assistant General Counsel

The New Normal

As Fourth of July 2021 approaches, our cover celebrates the increasing post-Covid normalcy which seems within grasp for most of America. At least 29 states that previously required masks in public places have rescinded those measures; eleven states never implemented mask mandates to begin with. The most visible symbol in our individual campaigns to avoid the virus is rapidly disappearing.

Perspectives may diverge when analyzing the larger questions surrounding Covid. What are the true origins of the virus? Did the government sufficiently characterize the threat? To what extent could federal, state, and local health authorities legitimately override constitutional rights? Despite those issues, there can be little argument that our ability to respond with highly effective vaccines in less than a year's time was remarkable. In the midst of widespread death and an uncertain future, resilience prevailed.

But just as the Covid demon may be in retreat, a much more persistent and intractable foe reappears. Its most recent iteration, at least in North America, occurred only days before this issue of *Municipal Lawyer* went to press. Much of the West Coast--and in particular the reliably seasonable cities in the Pacific Northwest--saw temperatures spiking 40 degrees above normal levels. While Seattle at 107 degrees and Portland at 115 degrees were all-time records, they lagged behind the nearly unfathomable roasting visited on a village much further north: Lytton, British Columbia. Sited 195 miles east of Vancouver, on June 28, 2021 the tiny community bordering the Fraser River (population 249 as of 2016) sustained the hottest temperature ever recorded in Canadian history—121 degrees. Two days later, it succumbed to wildfires that erupted spontaneously, destroying every inhabited structure in the village.

Lytton's demise was a small subset of the havoc wreaked across Western Canada. Over the next several days, nearly 500 British Columbians would die in connection with the extreme heat.

That destructive temperature spike was only partially attributable to "climate change." But few experts doubt that greenhouse gases—critical in trapping some of the sun's reflected rays and warming the earth sufficiently to sustain life, but destructive when snaring too much sunlight—played a role. While we can, in 300 days' time, analyze and outmaneuver a deadly, rapidly evolving virus, the massive scope of actions needed to address this much more foreboding problem on a global scale are daunting. IMLA member municipalities are already beginning to pursue climate-friendly strategies while seeking to restrain harmful actors, and will have a major role to play in promoting effective answers.

Here's to a Happy Fourth—and a Happy Canada Day, just passed—and to continued progress in our mutual efforts towards responsible climate policies.

Best regards,

Erich Eiselt

EXECUTIVE DIRECTOR'S LETTER



BY: CHUCK THOMPSON
IMLA General Counsel and Executive Director

An Era Ends, but the Mission Remains Unchanged.

As we announced in the previous issue of *Municipal Lawyer*, I will be stepping down as Executive Director of IMLA at the end of 2021 and handing the reins to Amanda Karras, who I know will do an outstanding job.

Leading IMLA for the past 15 years has been a sincere honor, providing some of the most fulfilling experiences in my life. Each day I am able to interact with thoughtful, dedicated, and caring people in our profession--people committed to the Rule of Law, to their communities, and to making life better for all of us. Hopefully, IMLA adds to that commitment and brings value to their communities through our programming and our work on behalf of local governments in the courts.

In my role as Executive Director, I am excited to report that IMLA came through the pandemic bruised but not bowed. While being together at programs and conferences cannot be replicated through a virtual format, the pandemic showed us that we can expand our reach to local government attorneys and make programming more affordable, using technology. We served roughly 1000 attorneys at our virtual Annual Conference last Fall and almost as many this Spring at our virtual Seminar and Section 1983 Defense program. Many who attended asked for more virtual programming and we hope to bring a hybrid format to our upcoming Annual Conference in the Twin Cities, providing engagement and value to in-person and remote attendees alike. We are also working on IMLA's regular programming to expand our webinar offerings and give them the same feel as a Conference session. Over 150 local governments now subscribe to our "Kitchen Sink" annual webinar program, allowing multiple attorneys in one office to participate and receive CLE credit. It may be the most affordable such offering available.

Because we were able to reduce costs, last year IMLA offered a dividend to members that they could apply to purchase virtual programming. We did so as a way of saying thank you for your loyalty to IMLA. I am hoping we will be able to again offer some sort of dividend in the coming year, and we are looking at other ways of benefiting members. We recognize that the pandemic has created challenges for many local governments, and we continue to seek ways to provide excellent value for IMLA members.

One area in which we have significantly expanded our efforts and visibility on behalf of our membership is in legal advocacy. We saw success this year in several of our amicus cases, including a particularly well written and argued brief supporting Austin's petition for certiorari seeking review of its efforts to regulate digital billboards and gain clarification of the *Reed* decision. Our great team of attorneys, Amanda Karras, Erich Eiselt and Deanna Shahnami collaborated to write a very well-articulated brief and days ago, the Supreme Court granted certiorari. That brief, and many others, reflects the value IMLA membership brings to local governments: our policies limit amicus support to members only, barring exceptional circumstances.

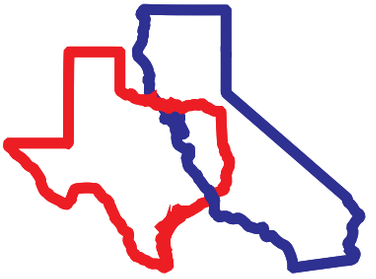
We stand with our membership as the legal landscape continues to change. Qualified immunity faces challenges both in the courts and in legislatures. The great political divide that rends our nation also burdens many local governments or pits urban centers against rural interests. Where cities once held non-partisan elections, there seem fewer instances where candidates try to appear unaligned. Contentious national issues crop up on local agendas, putting city and county attorneys at risk of appearing partisan should they issue opinions regarding otherwise unremarkable measures. Local government attorneys must now walk a minefield in advising law enforcement and city leaders on First Amendment issues associated with protest, responding to civil unrest, or the effects of "defunding" police. Divergent and evolving views on religious expression, gender equality, racial justice, homelessness, and the relationship between personal rights and communal responsibilities continue to make municipal lawyering a complex process.

Through all of these challenges, whether instigated by a virus or arising from shifting societal, political, and legal norms, IMLA programming and advocacy spotlight issues to prepare members to serve their clients and communities. Our members uniformly attend our programs not for CLE credit, but to learn and share what they know with others. That is why IMLA and its mission exist – Advancing Excellence in the Practice of Local Government Law.

I look forward to seeing many of you at our Annual Conference in the Twin Cities from September 29 to October 3, 2021. It will be yet another opportunity to spend time with people I greatly respect and who make IMLA's mission a reality. ML

Interlocal Agreements, Cooperative Contracting, and Innovative City-University Research Collaborations

BY: BRANDON W. CARR, *Assistant City Attorney, Austin, Texas and*
HOLLY HEINRICH, *Assistant City Attorney, Austin, Texas*



INTRODUCTION

What do you do if you need a quick contract in the following situations: your city council passes a resolution to work collaboratively with your neighboring county on a pandemic response; your city has been hit by a flood or winter storm and needs to immediately purchase supplies without competitive bidding or extended contract negotiations; or a local university wants to set up a long-term research relationship with your city?

Well, if you work for a local government entity and you need solutions for cooperating with other local government entities to perform government functions, you should consider whether an interlocal agreement, cooperative purchasing program, or master research agreement is permitted under your state's laws. Such an agreement can help a city not only respond to a crisis, but also establish a long-term collaboration with a fellow governmental entity. In particular, a master research agreement can be a way for a city and a public university to establish a relationship that facilitates cutting-edge policy research, which can be used to inform city decision-making and improve city operations.

1. Interlocal Agreements.

Local government contracting is governed by the laws of each individual state. These laws are generally concerned with the processes and procedures by which taxpayer money is spent to procure goods and services for the local government. In many cases, a competitive solicitation will be required as a part of the procurement process. The goals of competitive procurement laws can include ensuring that the municipality: receives the most appropriate goods on the market (for the price the municipality is willing to pay); hires a reliable contractor; and contracts with minority- and women-owned businesses, when possible.

Many state legislatures have also recognized that competitive solicitation requirements are often unnecessary when a municipality desires to enter a contract with another government entity. When both government entities are empowered to perform the same function, there becomes little practical difference between the government entity performing the function for itself and the government entity contracting with another government entity to perform the function on its behalf.

Sometimes these agreements are referred to as interlocal agreements. Interlocal agreements are intended to serve as a means of increasing cooperation among government entities for the performance of governmental functions. In Texas, the types of governmental functions that a municipality performs are listed in the context of tort claims liability.[1] This list includes police and fire protection, animal control, bridge construction and street maintenance, and water and sewer service. While this list is not exhaustive, it serves as a good basis for understanding the

nature of governmental functions.

In Texas, interlocal agreements are governed by Texas Government Code Chapter 791, also known as the Interlocal Cooperation Act. Chapter 791 includes its own list of governmental functions, which is shorter than the list found in the Texas Civil Practice and Remedies Code.[2] However, there is substantial overlap in the way that these Texas laws classify governmental functions. The stated purpose of the Interlocal Cooperation Act is "to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the state."[3]

Local government entities are broadly defined to include counties, municipalities, special districts, and political subdivisions of Texas and other states. The City of Austin has entered into interlocal agreements with the State of Texas, its surrounding counties, and even other states. Over the last few years, our city has even been asked to enter a few interlocal agreements with the State of California and educational institutions, the latter of which will be discussed in the second part of this article.

In the interlocal agreement between the City of Austin and the State of California, the California Department of General Services (DGS) entered into a cooperative purchasing agreement with a company to provide business class Telemetry and Global Positioning System (GPS) equipment for vehicles to the State of California, and participating local government agencies, at contracted pricing in accordance with the requirements of a request for proposals. After researching California's Joint Exercise of Powers Act, California Government Code Chapter 6500, as well as the Texas Interlocal Cooperation Act, it was clear that under both states' laws, a Texas city could take advantage of a California cooperative purchasing agreement through the use of an interlocal agreement. Through the use of an interlocal agreement, the City of Austin was able to "piggyback" onto this contract, and the City of Austin was able to obtain the same volume pricing discounts as the State of California received in their contract with the vendor.

The rules governing interlocal agreements require one or both entities to be a "local government entity," as defined earlier. A local government may contract with another local government, a federally recognized Indian tribe, a Texas state agency, or a similar agency of another state. In addition, the interlocal agreement must be a written contract to: "(1) study the feasibility of the performance of a governmental function or service by an interlocal contract; or (2) provide a governmental function or service that each party to the contract is authorized to perform individually."[4] The first category is especially useful when the local government entity desires to work with a local university or educational institution. The second category is often useful for smaller government entities that do not have the resources to perform the governmental function on their own, or when two government entities could realize a cost savings by having only one entity perform the function on behalf of both entities. An example of this includes agreements in which a larger city performs animal control services on behalf of smaller cities, with each smaller city reimbursing the larger city for the cost of administering such services.

Texas law also requires interlocal agreements to be approved or authorized by the governing body of each government entity, to state the purpose, terms, rights, and duties of the parties, and to specify that payment for the performance of the services under the agreement will be made from current revenues available to the paying party. State law also requires the paying party to fairly compensate the performing party under an interlocal agreement. They may also be renewed, as with any other contract or agreement.

Particularly important is the fact that interlocal agreements do not require a competitive bidding process in order to procure the services. This means that a local government entity could potentially choose the other government entity that it desires to contract with and immediately begin contract negotiations without the need for competing offers. And because government cooperation is not only encouraged by many state laws, but also by geographic circumstance, the cooperation involved in a interlocal agreement can either help form or strengthen ties for future long-range regional planning in response to disasters and emergencies, or to plan new and innovative health and transportation initiatives, among other regional goals.

Continued on page 8



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Holly Heinrich is an Assistant City Attorney for the City of Austin, Texas in the Utilities and Regulatory Division. She is a co-editor of the 2022 edition of *Essentials of Texas Water Resources,* a water law practice guide, and she authors a chapter on the water-energy nexus for the same publication. Holly holds a J.D. from the University of Texas at Austin, an M.Phil. in Public Policy from the University of Cambridge, and a B.A. in Government, with highest honors, from the University of Texas at Austin. Prior to working at the City of Austin, Holly interned at the Mechanism for International Criminal Tribunals in The Hague and in the White House Council on Environmental Quality during the administration of President Barack Obama.

Interlocal Agreements *cont'd from page 7*

The COVID-19 pandemic created many opportunities for local government entities to work together to address this national crisis. For example, the City of Austin entered into an interlocal agreement with Travis County to jointly purchase personal protective equipment for the added benefit of bulk order pricing. The City of Austin and Travis County also entered into an interlocal cooperation agreement under which the County agreed to provide a grant to City, as a subrecipient, for CARES Act funds allocated to the County. Travis County desired to provide these funds to reimburse the City for COVID-19-related City services that benefited or were made available to residents of unincorporated areas of Travis County, including expenses for personal protective equipment, the alternate care site for COVID-19 patients at the Austin Convention Center, and the isolation facilities for recuperating patients.

2. Cooperative Agreements.

We would also like to briefly discuss a unique type of interlocal agreement called a cooperative purchasing agreement. A cooperative purchasing agreement is a type of agreement whereby one entity decides to take the lead on issuing a solicitation for a particular good or service, negotiating favorable contract terms and conditions for those goods and services and then allows members of the program to take advantage of those negotiated contracts. This is similar to the interlocal agreement between the City of Austin and California DGS discussed earlier. A cooperative purchasing agreement can be entered among solely government entities, or it may be formed by a private entity that specializes in cooperative contracting.

Texas law allows government entities to participate in cooperative purchasing programs with local governments of Texas and other states.[5] By entering into a cooperative purchasing program managed by another entity from the same state, a local government can be almost certain that the other entity has followed all processes required to competitively solicit the contract under the laws of that state. However, before your government entity joins a cooperative purchasing program, especially a cooperative program that is either located out of state or contains many out-of-state members, you should check the processes and procedures that the cooperative requires for competitive solicitations to ensure that each participating entity is bound to follow practices for competition that match your own state's requirements. Otherwise, if the out-of-state entity does not comply with your state's laws for competition, your award of the contract could be challenged for not complying with your state law. Similarly, if the lead entity that negotiated a stand-alone cooperative contract is from another state, it is important to determine whether the competitive process that was used to solicit that contract is comparable to what is required under your state's laws.

Under Texas law, a cooperative program must designate the lead person or agency to act on behalf of the program, the participating local government entity using the cooperative must be responsible for vendor payments for the goods and services it orders using the cooperative contract, and the participating local government entity must pursue any contract compliance issues directly with the vendor. In exchange for negotiating and managing the cooperative program and contracts, the cooperative program managing agency is usually entitled to a fee based on a percentage of the goods and services ordered using the cooperative. The vendor is usually responsible for paying this fee, not the local government entity, and therefore the administrative cost for managing a cooperative program is generally not borne by the participating government entities but may be passed on as part of the overall price.

One of the downsides to cooperative contracts is that vendors often push back on accepting terms and conditions established by local ordinances or policies. Vendors reason that all orders should conform exactly to the terms they negotiated with the cooperative program. When a government entity publishes its own solicitation, vendors are made aware of these local terms and conditions up front. However, in a cooperative program, the vendor is not made aware of each government entity's local requirements until the government entity executes a purchase order using the cooperative program. Another potential downside to cooperative contracts is that the purchaser is limited to a certain subset of vendors who have participated in the cooperative program and they may not be able to find a local vendor on the cooperative program. Many cities have local and small and minority business preferences which may be subverted by the use of cooperative contracts if these businesses do not participate in cooperative programs.

However, the benefit of cooperative contracts is that the local government entity does not have to competitively solicit its own contracts for the goods and services provided in a cooperative contract. As an example, by using cooperative contracts, the City of Austin was able to procure disaster planning consultant contracts and purchase many items used as personal protective equipment in a matter of days rather than weeks during the COVID-19 pandemic. If the cooperative program has an already competed, already negotiated

contract for the goods or services that your entity seeks to procure, you can simply contact the vendor for a quote through the cooperative program and enter a contract directly with the vendor. While you may need to add a few references to local laws to satisfy your jurisdiction's requirements, the bulk of the negotiating should already be complete, which dramatically streamlines the procurement process. That is the beauty of cooperative agreements.

3. Using Interlocals for City-Focused University Research.

Interlocal agreements also offer a path for facilitating stronger relationships and collaboration between cities and universities. Such agreements are generally a mutually beneficial arrangement for both parties. Cities can benefit from the innovative research performed by universities under an interlocal agreement, while the university is provided with the opportunity to perform research on matters that can be used to improve performance of the city's governmental functions and opportunities for students to gain real-world research experience. A university might, for example, conduct research that helps a city make data-informed decisions about how to improve public safety, reduce traffic congestion at rush hour, promote water conservation, or reduce wildfire risks. Likewise, an interlocal agreement gives a university the opportunity to conduct externally funded research that directly benefits the public, enabling university faculty and students to build bridges with a community and perform research that will have a positive, meaningful impact on their community. Both the city and university benefit from collaboration that enables them to identify how emerging technological innovations, such as artificial intelligence, can be used to improve public life in ways that are consistent with community values and goals. (It should be noted that under the Texas Interlocal Cooperation Act, a city can form an interlocal agreement with a public institution of higher education or public university system, but not with a private institution of higher education. Other procurement and contracting solutions are needed if a city desires to form a similar research agreement with a private university.)

[B]efore your government entity joins a cooperative purchasing program, especially a cooperative program that is either located out of state or contains many out-of-state members, you should check the processes and procedures that the cooperative requires for competitive solicitations to ensure that each participating entity is bound to follow practices for competition that match your own state's requirements.

When it comes to research agreements, under Texas Government Code § 791.035, competitive procurement requirements do not apply to an agreement between a local government and a higher education institution or university system, as long as the agreement is funded on a cost-recovery basis. This compensation system is generally satisfactory to a university as well, as the university's primary mission is to contribute to knowledge advancement, and the interlocal agreement provides an avenue for funding university research on a reimbursement basis.

In 2020, the City of Austin and the University of Texas at Austin (UT Austin) entered into a five-year, $7.5 million master interlocal agreement for research. Under this agreement with UT Austin, City staff are authorized to enter into work orders for research projects valued at up to $7.5 million over five years, divided among the projects.[6] The master agreement streamlines the process of contracting for research, as the City of Austin and UT Austin have agreed upon a common set of contract terms, and the parties only need to negotiate a scope of work for each individual research project. (Previously existing interlocal agreements between the parties were not affected). Each work order receives legal review to ensure compliance with Chapter 791 of the Texas Government Code and the terms of the master agreement. Now, the parties can prepare and negotiate work orders within weeks, in contrast to the sometimes months-long process for negotiating and receiving governing body approval for individual interlocal agreements for research.

This master research agreement was inspired by a similar agreement between the City of Minneapolis and the University of Minnesota, which also enabled municipal staff and university researchers to enter into work orders for research, subject to the terms and conditions of a master agreement that governed all work orders.

In order to make use of the master agreement with UT Austin, City of Austin departments must have funding available in their budgets that can be allocated to fund research. Alternatively, your city staff could ask their council to specifically appropriate city-wide funding for a city-university research agreement. This is especially useful for smaller city departments that receive less budgetary funding and/or do not generate revenue, as smaller

Continued on page 10

departments may not otherwise have enough funding to make use of the agreement.

Recognizing that data sharing would be an important part of an agreement for research, the City of Austin and UT Austin worked together to develop comprehensive data security terms for the master research agreement. The terms govern how UT Austin handles the City of Austin's confidential and sensitive data. This ensures that the parties are in agreement about the technical standards that UT Austin will maintain in order to protect the City's data.

Under the City of Austin process, first the City department interested in the research fills out a statement of interest with the university to see if the university would be interested in the project. If UT Austin agrees to accept the project, the university will designate a professor and team to negotiate the terms of the work order. In preparing and reviewing each work order, the City Law Department works with City of Austin staff to assess whether any City information shared for a particular project falls under certain data categories that trigger the need for UT Austin to observe heightened security and confidentiality protocols established in the contract. City of Austin staff must indicate on each work order whether any City data falls into such a category; this creates a shared understanding of when UT Austin needs to observe these security and confidentiality requirements. Because much of the information that the City shares is public information, these heightened data security obligations are expected to arise only in limited circumstances.

We recommend the following practice tips to any municipal attorney advising their city on establishing and managing a master interlocal agreement for university research:

Cities can benefit from the innovative research performed by universities under an interlocal agreement, while the university is provided with the opportunity to perform research on matters that can be used to improve performance of the city's governmental functions and opportunities for students to gain real-world research experience.

- As discussed above, an agreement formed under your state's interlocal cooperation laws might require either the performance of a governmental function or research on performance of a governmental function. A municipal attorney should review each proposed research project to confirm that the project meets this requirement. A municipal attorney should also confirm that each research project has a public purpose.

- Master agreements involving a work order process are most appropriate for facilitating research projects that are in line with the direction that a city council has previously given to city staff. In approving a master agreement that authorizes staff to issue work orders for university research, a city council provides city staff with broad discretion to determine what research will be performed (within the boundaries set by the contract terms). A city council may object to this type of agreement if city staff use their authorization to pursue controversial projects without prior council approval. City staff should provide a concrete plan to their council when they seek approval of a master interlocal agreement, so that the council is aware of the parameters of the contract, and the approval of a master agreement is not simply a blanket authorization. Clearly articulated contract boundaries also help guide city staff, reducing the risk that they will overstep into areas where the city council desires to be more closely involved in setting the city's policy direction. For this reason, we also recommend that city employees prepare separate agreements and seek council approval before pursuing projects that may be politically nuanced or where there is a significant need for advance public input. By taking a thoughtful approach in determining which projects are appropriate or inappropriate for a master research agreement, you will protect and respect your city council's role, as an elected body, of setting city policy.

- If a city and university decide to establish individual research projects via a work order system, each work order should clearly state the responsibilities that will be undertaken by each party, and the deliverables that are expected. (In general, the university will produce deliverables, such as reports, source code, analysis, research findings, or monthly project updates, that are submitted to the city.) The parties should also set deadlines by which each deliverable must be provided.

- City and university staff may wish to transition research currently performed under an existing agreement to the new master research agreement. This can be done, but staff should take care to ensure that the prior agreement is completely closed out before the transition is made to the new agreement, so there is no conflict or uncertainty about which aspects of the research are funded by the old agreement and governed by its terms. This will facilitate a smooth transition of the research from the old research agreement to the new master research agreement.

- Attorneys should draft and negotiate data security and confidentiality terms to ensure that the parties' data and ownership interests in data are thoroughly protected. If a city is providing confidential or sensitive data to the university for the purpose of performing research, the city may wish to stipulate that the data cannot be used for any purpose outside the scope of the city's approved work order. The city may also want to require the university to return or destroy confidential or sensitive city data at the conclusion of the project, as another means of guaranteeing that the data will not be used for purposes other than those intended by the city.

An interlocal agreement between a city and a public university can be a valuable mechanism for facilitating innovative research and greater collaboration between two government entities that both desire to understand how a city can improve public life and address local challenges. Entering into a master research agreement, where work orders are used to establish individual research projects, can streamline the contracting process. All work orders issued under a master interlocal agreement are governed by a common set of terms, eliminating the need to negotiate a new agreement and obtain governing body approval every time the parties wish to pursue a research project together. A master research agreement can also promote consistency and predictability in how a city and a university work together on research projects, since a master agreement necessitates the development of common administrative processes. Without a master agreement, such joint research projects are often handled on an ad hoc basis.

CONCLUSION

In summary, interlocal agreements and cooperative contracts provide local governments with an alternative mechanism for compliance with procurement laws, and can have particular value when responding to emergency situations. In particular, one type of such agreements—the interlocal master research agreement—allows municipalities and academic institutions to take their collaborations to new heights by enabling research that helps solve the unique challenges that local governments face.

NOTES

1. Texas Civil Practice and Remedies Code Section 101.0215(a).
2. Texas Government Code Section 791.003(3).
3. Texas Government Code Section 791.001.
4. Texas Government Code Section 791.011(c).
5. Texas Local Government Code Chapter 271, Subchapter F.
6. Link to city council approval action: https://www.austintexas.gov/edims/document.cfm?id=345144; for additional information visit: https://research.utexas.edu/find-a-researcher/coa/



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Negotiating and Drafting Municipal IT Contracts

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INTRODUCTION

Negotiating a technology contract with a vendor can be challenging, due to the leverage some large companies may enjoy and the ever-changing nature of technology itself. In this article, practitioners from large to mid-size cities attempt to guide fellow municipal attorneys through perennial concerns, and share tips and tricks which we ourselves have found useful.

I. Types of Technology Contracts and Corresponding Concerns – Lara Mainella, Assistant City Attorney, Madison, Wisconsin

Cities require a variety of technology solutions to maintain operations and provide services to the public. This includes everything from software to run the payroll system, manage police reports, maintain public transit schedules, and provide vehicle diagnostics and telematics, to appointment scheduling and text message notifications for the public, to name just a few. It is important to recognize "what" your client is purchasing when evaluating and negotiating the contract – both the format of the technology, and the subject matter and data that the technology will manage.

The *format* of the technology determines the nature of the contract. This section will address the following formats: On-premise software, cloud computing services, and hardware.

Software: On-premise software is installed or downloaded to a local device such as your computer (the old floppy disc) or a server on the City's network. On-premise software is licensed, not sold, and your client will be presented with a click-through license agreement or EULA (end-user license agreement) that must be clicked and accepted to download or install, or a written license agreement for signature. Concerns with click-through agreements include: Does the employee installing this software have authority to bind the city to a contract? Can you negotiate the terms? Does the EULA contain legal terms that your city cannot, or should not, agree to? Do you want to negotiate every $500 software purchase? What are the risks?

"On-premise" is no longer the most common way to buy software, but it can be the most straightforward to negotiate, if the vendor is willing. If not, the above considerations might be business decisions for your client. Depending on a project's size or importance, you might advise them to select another vendor who *will* negotiate. Your client may decide the cost-benefit analysis does not favor spending legal resources on small software purchases.

When presented with a traditional on-premise software license, review it like any other contract – look out for binding arbitration, choice of law, shifts of liability. Some common but unfavorable clauses include dollar caps on the vendor's liability, city indemnification of the vendor, lack of indemnification by the vendor, one-sided termination provisions, and/or shortened statutes of limitation. Many software licenses include a concession that the vendor will suffer irreparable harm if the license is breached or their intellectual property is infringed, and the vendor is entitled to injunctive relief without having to prove it, and without posting a bond. Consider striking such concessions and changing them to say the vendor may "seek" injunctive relief. Finally, consider how to add any man-

datory legal terms required by your city, such as insurance, indemnification, social responsibility clauses such as nondiscrimination, and so on.

The next category is cloud computing, including **Software as a Service (SaaS)**, **Platform as a Service (PaaS)**, and **Infrastructure as a Service (IaaS)**. Cloud computing is provided via a public, private, or a hybrid cloud. "Public" refers to a third party that offers cloud services over the public internet to everyone – such as Amazon Web Services (AWS) and Microsoft Azure. Data can be segregated within tenant spaces and geographic limitations are possible, but not automatic, and probably not cheap. A private cloud is one that is used by a single company. PaaS and IaaS are delivered in a private cloud. **SaaS** is a software application hosted in a public, private or hybrid cloud and accessed by the user via the internet. Because these are such technical concepts, unless you're an expert, any cloud computing solution should be vetted by IT professionals long before the decision to purchase and contract, is made.

SaaS is software that would have been installed on-premises in "the old days" and SaaS subscriptions are the modern replacement of the on-premise license. A SaaS subscription provides software access, regular updates and maintenance, and technical support. Maintenance and updates are performed without your involvement and without having to touch your network - eliminating the extra fees and contract documents that come with annual maintenance of on-premise software. The subscription may also include training and other professional services. If the SaaS application generates or handles data, which most do, this data is stored (hosted) by the vendor or a third-party data center (aka public cloud). SaaS can be a low-cost way to provide functionality and save storage space. But the off-site storage of city data presents legal concerns: public records requests and retention, data ownership, data mining, security and back-up - discussed in Sections IV and V, below. Ideally, your IT staff will analyze security and back-up risks before deciding to buy SaaS; then, the SaaS agreement should address these things.

SaaS agreements are structured as service contracts, granting access to the service for a subscription period, in exchange for a fee. SaaS might be sold per user, or for an unlimited number of logins. It may or may not include a license grant, but there are restrictions on acceptable use and clauses protecting the vendor's intellectual property. The unfavorable clauses in most on-premise licenses are also present with SaaS. The customer must warrant that it will not upload harmful or malicious material, allow unauthorized access or sharing of

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IT Contracts *cont'd from page 13*

passwords, or enable similar acts.

As with on-premise software, the vendor should offer to indemnify and defend the customer from third-party infringement claims. These are reasonable things. Less reasonable are clauses where the customer warrants that content uploaded to the system complies with all possible privacy laws, everywhere. Also unreasonable is requiring the customer to indemnify and hold harmless the vendor, their affiliates, and unknown third parties against all sorts of claims. While vendors will insist they need this to stay in business, most vendors will remove such an indemnity clause. You may have a harder time removing or raising liability caps (see Section III). The most time-consuming negotiation topic after limitations of liability is data ownership. Assume that your client has a quote for SaaS that will provide amazing efficiencies for city operations for only $395/month. In exchange, the vendor gets unrestricted access to your city's valuable data, allowing the vendor to use your data for whatever they want, even sell it, as long as it is de-identified and/or in aggregate form. There are two common clauses: one that allows the vendor to crunch your data solely to provide services to you, and improve service delivery. But a second clause might grant them ownership or a very broad license to use your data for just about anything. Try to learn the nature of the data - should it be analyzed, owned, or sold by this vendor? How sensitive is the data? How valuable is it? Can you strike that clause? (See Sections IV and V.) Educate your client about these risks. Finally, after removing unfavorable language, add the clauses your city requires.

Privacy Policies and Online Terms of Use (TOU): A thorough SaaS agreement may incorporate the vendor's Privacy Policy and Terms of Use for their website. How much attention should you pay to these? It depends, again, on the nature of the data. Often the privacy policy only impacts personal information of the employee who sets up the account. Or, privacy may overlap with the Confidentiality clause – read both. Online TOU might only apply when visiting the website. Ideally your negotiated SaaS agreement should integrate with or *supersede* conflicting privacy policies or TOU on the website or while logging in. After all that hard work negotiating your SaaS agreement, you don't want employees clicking on the TOU and setting up a conflict.

Service Level Agreements (SLA): This is a set of minimum requirements for "uptime" for the service - reflected in "nines" such as 99.99% availability. The SLA is often non-negotiable-but you should be aware of it. An SLA should not include legal terms but might limit your client's remedies for downtime or other performance lapses, such as deadlines for reporting downtime and being compensated for it. The client should review and approve any SLA.

What kind of Software?: A special situation arises when the vendor *doesn't know* if their product is on-premise or SaaS. You're pretty sure your client is buying SaaS, but the vendor gives you an on-premise license. Send it back and ask "are you sure this is the right agreement for this product?"

No Software: Maybe there is no software involved? Online training or other web-based content may not involve a license for any software-one less document to review! This raises the question of how involved you want to be in these purchases (or how much money the client wants to spend). Have a mutual understanding with your client, train them to spot issues and bring agreements to you sooner than later.

Hardware: Staff should be able to purchase *equipment* without legal help, right? But what about equipment that comes with software? Surprise–your client must sign a license agreement that comes with a printer / card reader / fingerprint machine / and so on. This is sometimes called "firmware." Firmware may not prevent security risks or data concerns, but you still must agree to a license agreement or the hardware won't work. Treat this like an on-premise license agreement.

Some equipment comes with "back-office" software (on-premise or SaaS) to operate the equipment or read data generated by it. (Parking access and surveillance systems come to mind). The agreement for the software that operates these systems should be negotiated like any other software agreement, and staff should be trained to ask for these agreements *before* buying equipment.

This is just a taste of some technology contracts and the legal issues presented. Even the most technologically challenged municipal attorney can become familiar with technology contracts, and develop your own strategy for negotiating them.

II. Statement of Work and Agile Procurement Process – Concerns and Risks – Patrick Bryant, Associate General Counsel, New York City Department of Information Technology & Telecommunications

Statement of Work vs. Scope of Work: Many technology contracts will require professional services to implement the solution. The acronym SOW is often used for Statement of Work and Scope of Work, often interchangeably, for the document that describes the work to be performed. For my purposes, I will be talking about the "statement" as the SOW. The *statement* of work is the larger document with more information than the *scope*. For most of our agreements, the

SOW will be an attachment to the agreement (the body of the contract that includes the boilerplate). The scope of work is a portion within the SOW. In addition to describing what the work actually is, the SOW could include a timeline, performance criteria, schedule of deliverables, travel requirements, location, special skills, and so on..

If the agreement is the brains of the contract, spelling out the legal arrangements between the parties, the SOW is the heart of the agreement. It's where the rubber meets the road. The SOW should be drafted jointly by the vendor performing the work and your city's business team who know their business needs, what the solution does technically and what proper performance looks like. They can evaluate deliverables. Business teams are often in a rush to buy something and may want to worry about the details later. I have reviewed SOWs, and I've literally seen some that are comprised of only five to ten bullet points with general descriptions of deliverables, and sometimes no real acceptance criteria. This is unacceptable. The SOW needs to be very, very specific. This is important both up front and on the back end. This is where you spell out exactly what you are buying, and exactly how you know if you got what you paid for when you were supposed to get it.

You may find yourself in the situation where you have to ask very basic questions of your business teams to help them draft a document that protects them. The most common question I find myself asking is "where does it say that?" For example, the draft SOW might say "Vendor will provide licenses so users can perform tasks." And I'll ask how many licenses? Which tasks? The business team then might tell me they are supposed to get 1,000 licenses where all users can perform task X, Y, and Z. And I'll ask where does it say that? If the vendor provided 500 license that allowed users to perform tasks X and Y, then the vendor may have a claim that it has performed under this ambiguous language. At this point your business team may be shorthanded; at best they have a dispute on their hands, and at worst they have wasted money for a partial solution.

You want to also focus on any assumptions the vendor writes into the SOW. For example, you can go to your team and say, "here is a list of ten things the vendor is saying are not in the scope; do you agree?"

Acceptance Procedures: Your SOW should provide clear procedures for when and how you will receive, evaluate, and accept deliverables. You have may have procedures that apply to all deliverables, documents deliverables, and/or releases and systems. Those will be project-specific. In a Systems Integration procurement for example, we have Preliminary Acceptance: this is when we agree that the system is ready to go into a production environment. Preliminary Acceptance is followed by Final Acceptance, which occurs when the system performs for 30 consecutive days in the production environment with no Severity Level 1 or Severity Level 2 errors (or an accumulation of enough Severity Level 3 errors to be deemed Level 2). Acceptance procedures will, of course, be project-specific.

A type of acceptance you should never have, however, is "deemed acceptance." This is when the vendor wants the mere passage of a certain amount of time to constitute acceptance. All of us who work for municipalities understand that in normal times, and especially given recent times, budgets and staff are thin. Deliverables should only ever be accepted if someone has time to review and accept them by checking against specified criteria. Two weeks going by does not mean the vendor submitted an approved deliverable. This is also something to look out for in the assumptions. Vendors tend to write language around review and acceptance of deliverables, but there is always the possibility that deliverables will need to be rejected.

What happens if a deliverable is rejected? This is important to note as vendors often draft SOWs with language similar to "Customer will have X business days to review and accept a deliverable." I always insert "Customer will have X business days to review and accept ***or reject*** a deliverable." The deliverable may be horrible. If there is a dispute on the back end regarding performance, the SOW is where you look. The remedies will be in the Agreement, but if properly written, then the answer should be in the SOW.

Use of Resellers: When we use a reseller, and we do it often, we have the reseller execute the SOW on the reseller's letterhead. This effectively creates a relationship in which the reseller is the prime contractor and the OEM is the subcontractor. The reseller is then responsible directly for delivering the services regardless of the entity who is actually performing the services. This makes sense because the reseller is the entity to whom we make payments.

It is often the case that software or cloud is part of the purchase, and if so, we separately execute the corresponding EULA or cloud services agreement directly with the OEM in order to have privity of contract with the OEM for the licensing terms. In this situation, we often have a pre-negotiated SOW template in place with the reseller. Obviously most purchases will differ on the details, so there should be some flexibility baked into the template. The flexibility should be specifically for things like business, technical and operational terms, but not legal terms. The SOW should not include things like indemnification,

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Avoiding A Collision When Code Enforcement and Fair Housing Intersect, Part 2

BY: PATRICIA (TRISH) LINK, *Assistant City Attorney, Austin, Texas*



INTRODUCTION

Welcome back to the intersection of code enforcement and the Fair Housing Act. Part 1 of this article addressed the Act and two types of discrimination: failure to grant a reasonable accommodation and different treatment. This part will address two additional types of discrimination and strategies to reduce the likelihood that a collision will result in liability.

Types Of Discrimination (Continued)

3. Disparate Impact.

A facially neutral policy or practice[1] may violate the Act if it causes an adverse impact on a group of individuals in a protected class. Disparate impact claims "challenge[] practices that have a disproportionately adverse effect on" members of a protected class and "are otherwise unjustified by a legitimate rationale."[2] It is intended to remove artificial, arbitrary, and unnecessary policies that are barriers to fair housing choice.[3] In *Texas Dept. Housing & Community Affairs v. Inclusive Communities Project, Inc*, ("*ICP*"), the Supreme Court first recognized disparate impact claims as actionable under the Act.[4,5] In the code enforcement context, this means the Act prohibits enforcement policies or practices that create an adverse impact on a group of individuals in a protected class, are barriers to fair housing choice and are artificial, arbitrary, and unnecessary.

Disparate impact claims are decided using a three-step burden-shifting framework.[6] The initial burden is on the plaintiff. To establish a *prima facie* case, a plaintiff needs to "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the policy and the disparity.[7] In *ICP*, the Supreme Court required that the casual connection be "robust" so that defendants are not "held liable for racial disparities they did not create."[8]

Unfortunately, the Court's opinion in *ICP* did not define "robust casual connection" and, as a result, the courts are split as to whether the Court adopted HUD's disparate impact rule or a stricter test.[9] For example, the Fifth Circuit found that the Supreme Court adopted a test that is stricter than HUD's rule.[10] In contrast, the Second Circuit determined that *ICP* implicitly adopted HUD's approach.[11] The Fourth, Eighth, and Eleventh Circuits have also considered how to apply *ICP*'s robust causality requirement.[12]

If a plaintiff establishes the causal connection, the burden shifts to the local government to demonstrate that the policy is necessary to achieve one or more of its substantial, legitimate, non-discriminatory interests. If the local government meets its burden, the burden shifts back to the plaintiff to prove that there are less discriminatory alternatives to achieve the government's legitimate objective. This means that the challenged enforcement policy will be compared to one or more policies that achieve the same objective. If the plaintiff puts forward a policy that is feasible and has less of a disparate impact, the challenged policy constitutes discrimination based on disparate impact.[15]

Over the years, landlords have tried to use the disparate impact cause of action to resist enforcement of minimum property standards and rental registration requirements. In *Gallagher v. Magner*, a pre-*ICP* decision, landlords sued the City of St. Paul and claimed that the city's code enforcement practices had a disparate impact on their tenants who were members of a protected class.[16] Specifically, the landlords alleged that the city "issued false Housing Code violations and punished property owners without prior notification…or adequate time to remedy Housing Code violations."[17]

Additionally, the landlords alleged that the City had a viable alternative to its then-current practices.[18] In its decision, the Eighth Circuit ruled that the landlords offered sufficient evidence to show a *prima facie* case and that the City had a legitimate non-discriminatory objective, but that a genuine issue of material fact existed as to whether the landlord's proposed policy was a viable alternative to the City's current policy.[19]

Post-*ICP*, landlords continue to raise similar claims. In *Ellis v. City of Minneapolis*, low-income rental housing landlords challenged how the City enforced its Housing Code.[20] Specifically, plaintiffs alleged that the City wanted to discourage for-profit rental housing because the City required for-profit rental property landlords to make repairs "without delay" and to maintain their properties while not requiring government-owned housing to meet the same minimum standards.[21] The Court read the landlords' complaint to allege that the "policy" at issue was the City's "deliberate or negligent" misapplication of the Housing Code.[22] Additionally, the Eighth Circuit determined that the landlords' allegations were an "attempt to bootstrap" single decisions into a policy.[23] Lastly, the court concluded that the plaintiffs failed: (1) to plead sufficient facts to show that the alleged policy existed and (2) to show that the Housing Code provisions were arbitrary or unnecessary to protect health and safety.[24]

Two years later, the Eighth Circuit again considered a disparate impact claim involving Minneapolis' code enforcement practices. In *Kahn v. City of Minneapolis*, the landlord alleged that the City's "heightened enforcement of housing and rental standards" had a disparate impact on the availability of low-income rental housing for individuals protected under the Act.[25] In many ways, Khan's allegations mirrored those in *Ellis*. Consistent with its decision in *Ellis*, the Court ruled that Khan's allegations and arguments failed to identify a policy that caused a disparate impact.[26]

As the discussion in *ICP* and the decisions in *Ellis* and *Khan* cases show, enforcement of municipal housing / minimum property standard codes can withstand disparate impact claims. Even though the courts have recognized enforcement of minimum property/housing standards as a legitimate objective, the possibility of a successful disparate impact claim remains real. Not all enforcement policies will qualify as an enforcement policy with the least discriminatory impact. For example, a local government may adopt an enforcement policy that equates to zero-tolerance for non-compliance with minimum property standards. If that policy causes a disparate impact on members of a protected class and the plaintiff can identify a feasible policy with less a of disparate impact, then the policy is discriminatory.

4. Retaliation.

The Act prohibits retaliation against a person who exercised or enjoyed their rights under the Act or aided or encouraged another to do so.. Retaliation includes coercion, intimidation, threats, or interference.[27] Activities covered by this provision include filing a complaint with HUD, requesting a reasonable accommodation, or assisting another individual with exercising their rights.[28]

A retaliation claim can survive even if the underlying discrimination claim lacks merit.[29] For example, a tenant files a complaint with HUD against their landlord and, subsequently, the landlord engages in intimidation tactics against the tenant. Because the intimidation is retaliation, the tenant will have a viable retaliation claim against the landlord even if HUD determines that the discrimination allegation in the initial complaint is not substantiated.

A retaliation claim under the Act is analyzed using the burden-shifting framework found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[30] To establish a *prima facie* case, the plaintiff must show they were engaged in a protected activity, that subsequent action was causally linked with the plaintiff's exercise of protected activity, and that the plaintiff suffered some resulting damage. It is important to note that the causal connection can be "established indirectly by showing that the protected activity was closely followed in time by the adverse action."[31] If the plaintiff makes a prima facie case of retaliation, the burden shifts to the local government to "articulate a legitimate, nondiscriminatory reason for the challenged … action."[32] If the local government cannot articulate such a reason or the plaintiff can show that the reason was merely pretext, the local government will be held liable for violating the Act.[33]

The trial court's decision in *Oxford House, Inc. v. City of Baton Rouge* aptly demonstrates how easily code enforcement activities can be considered retaliation.[34] The controversy started with a notice of violation stating that the single-family home was over-occupied. The occupants, represented by an attorney, responded with a request for a reasonable accommodation. Shortly after plaintiffs filed their complaint with HUD, the City issued its first notice, identifying a certificate of occupancy violation and directing the plaintiffs to remedy the violation within a specific time frame.[35] The second notice, sent shortly after the plaintiffs filed their lawsuit, reiterated the notice of violation, provided ten days to remedy it, and advised plaintiffs that the City would take legal action if the violation was not resolved.[36]

The City argued that the plaintiffs failed to show retaliation because the notices were an attempt to get the site into compliance with applicable regulations.[37] However, the trial court disagreed and found that the plaintiffs made a *prima facie* case for retaliation, albeit indirectly, because the notices were sent within a few weeks after the plaintiffs engaged in protected activities – filing a complaint with HUD and filing a lawsuit.[38] The trial court ruled in the plaintiffs' favor

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on the retaliation claim even though the plaintiffs simply established a *prima facie* case because the City did not argue that it had a legitimate and non-discriminatory reason for its actions. The trial court's decision noted that if the City had argued its legitimate and non-discriminatory reason for sending the letter was that all residential occupancies need a certificate of occupancy, the Court would have been skeptical of that reason. The Court's skepticism seems to be based on the City's knowledge that the certificate of occupancy violation existed a few months before the plaintiffs filed their complaint.[39]

Due to the formal nature of code enforcement activities, such as investigations, written notices of violations, penalties (civil, administrative, or criminal), and court proceedings, it is easy to see how enforcement activities can be easily considered retaliation. Additionally, the resources of local government, such as peace officers and building officials, make its activities particularly vulnerable to retaliation claims. Lastly, when code enforcement occurs at the behest of persons with ulterior motives including discrimination, the prospect increases that enforcement could be considered retaliation. To say it more bluntly, courts can find retaliation when the government acts "for the sole purpose of effectuating the desires of its private citizens, that racial or other improper considerations were a motivating factor behind those desires, and that [government] decision makers were aware of the motivations of the private citizens."[40]

Reduce the Likelihood of a Collision and Liability.

The most important way to reduce risk across all types of discrimination is education and awareness. However, there are some additional discrimination-specific strategies that should reduce risk.

1. Requests for Reasonable Accommodations.
Adopting a reasonable accommodations process is an important strategy to reduce risk. The process should identify decision-makers; grant the necessary authority to approve or deny the requests; provide timeframes for your client to follow; and establish how your client will document decisions, requests for additional information, and the interactive process. Second, it is important to cease enforcement efforts while the accommodation process is ongoing. Pausing enforcement efforts is crucial, even if your client does not adopt an accommodations process. This pause will help your client avoid liability for a failure to grant a reasonable accommodation or for a claim based on retaliation.

2. Disparate Treatment.
There are a few ways to reduce risk of liability for disparate treatment claims. First, encourage your client to identify and articulate a non-discriminatory reason(s) for treating a particular investigation (or type of investigation) differently from other investigations (or types of investigations) before the investigation begins. This also applies when your client deviates from existing department practices or policies.

Second, identify ordinances and regulations that impose different treatment, facially and as applied; and determine whether the different treatment is because of an individual's status as a member of a protected class. If the ordinances or regulations discriminate in a manner that will violate the Act, your client may want to consider non-enforcement strategies or amendments to the regulations and ordinances to reduce its risk for liability.

A third way to reduce risk is to plan for and identify enforcement requests that are the product of community fears, prejudices, stereotypes, or assumptions about individuals. Planning prepares staff and elected officials to respond to these risk-laden requests in a manner that does not violate the Act. Identifying these enforcement requests requires learning about and listening for "code words." In some circumstances, it also includes understanding a regulation's or an ordinance's political, legislative, and operational background.

3. Disparate Impact.
One strategy to reduce legal risk with disparate impact claims is to assume that a new policy/practice will adversely impact members of a protected class. With that assumption in mind and before adopting the policy or practice, your client should identify its substantial, legitimate, non-discriminatory interests for adopting the new policy or practice; and explore whether there are other practices that serve its interests with a less discriminatory effect.

4. Retaliation.
Even with the best intentions, your client's actions may qualify as retaliation. Because the timing of your client's actions is critical, one strategy is to pause enforcement once your client learns that someone needs an accommodation or when a complaint is filed at HUD. However, if there is no pause, your client needs to have a legitimate, nondiscriminatory reason for enforcement that is identified before enforcement occurs. Additionally, in light of the Court's skepticism in the *City of Baton Rouge* case, the reason may also need to reflect a serious or urgent violation.

Conclusion

It is inevitable that the Act and code enforcement will intersect. Only in an ideal world will they not collide. However, the collision and resulting liability does not have to be inevitable. If your client recognizes the intersection and responds appropriately, the likelihood of a collision and liability can be reduced. ML

NOTES

1. In this part of the article, policies and practices are interchangeable.
2. Ellis v. City of Minneapolis, 860 F.3d 1106, 1110 (8th Cir. 2017). Alternatively, this claim may be used to challenge a policy that perpetuates segregation. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619–20 (2d Cir. 2016).
3. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 540-41 (2015) ("*ICP*").
4. Prior to the *ICP* decision, nine courts of appeal agreed that disparate impact claims were cognizable under the Act. *Mhany Mgmt., Inc.*, 819 F.3d at 616-617.
5. *ICP*, 576 U.S. 519 (2015).
6. Reyes v. Waples Mobile Home Park Limited Partnership, 903 F.3d 415, 424 (4th Cir. 2018).
7. *ICP*, 576 U.S. at 542-543.
8. *ICP*, 576 U.S. at 542.
9. Inclusive Communities Project, Inc. v. Lincoln Property Company, 920 F.3d. 890, 902 (5th Cir. 2018); *Reyes*, 903 F.3d at footnote 4.
10. *Lincoln Property Company*, 920 F.3d. at 902.
11. *Mhany Mgmt., Inc.*, 819 F.3d at 618.
12. *Reyes*, 903 F.3d at 415; *Ellis*, 860 F.3d at 1106; Oviedo Town Center II, L.L.L.P. v. City of Oviedo, 759 Fed. Appx. 828 (11th Cir. 2018).
13. *Reyes*, 903 F.3d at 424.
14. *Lincoln Property Company*, 920 F.3d. at 906; *Reyes*, 903 F.3d at 424.
15. City of Ft. Lauderdale v. Scott, 551 Fed. Appx. 972, 976-977 (11th Cir. 2014).
16. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).
17. *Id*. at 834.
18. *Id.* at 838.
19. *Id.*
20. *Ellis*, 860 F.3d. at 1106.
21. *Id*. at 1109.
22. *Id*. at 1112.
23. *Id*. at 1113.
24. *Id.* at 1112-1113.
25. Khan v. City of Minneapolis, 922 F.3d 872 (8th Cir. 2019).
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IT Contracts *cont'd from page 15*

limitations of liability, or termination rights. These terms are in the primary agreement with the reseller who serves as the primary contractor. Some basics in the SOW may be: points of contact for the project, payment terms (depending on how the main agreement is structured) with milestones, the scope of work baseline, change order process, acceptance, service levels, and miscellaneous non-legal terms.

In a direct-seller arrangement, the concepts are largely the same but at the very least (1) there is a layer removed, (2) the procurement method will be different, and will likely vary based on the dollar amount of the purchase, and (3) the procurement will take much longer in most cases. These concepts also carry over whether or not your development is a traditional "waterfall" development or an "agile" development.

"Agile" versus "Waterfall" Development: Some municipalities will have large units of inhouse developers, and some will exclusively rely on vendors to develop their software. The main concepts of agile development remain the same either way. Agile development is a response to traditional waterfall development. In traditional waterfall development, the entire process is essentially finished before the bulk of testing happens. Agile takes an incremental approach to processes that don't progress in a sequential, stepwise manner. Teams work across silos in a collaborative approach. The point is to have much shorter and more frequent feedback loops with the goal of addressing and fixing issues along the way. Agile works through a framework called "Scrums" which is comprised of "Sprints." For the purposes of an SOW, the concepts you want to focus on are pretty much the same, but the milestones and deliverables will typically need to be written in on a more frequent timelines, and the cross-functional teams, along with the developers will need to be more collaborative.

III. Limitation of Liability and Indemnification – Chris Malcarney, Divisional Deputy Solicitor, City of Philadelphia Law Department

Limitation of liability: Limiting liability is among the most important concepts in a commercial contract because it goes a long way in allowing both parties to gauge the extent of their risk when entering into an agreement. That said, since a customer's main duty in these types of agreements is often limited to its payment obligation, government contractors for goods and services may be able to avoid limitation of liability clauses completely. Vendors can be persuaded to forego a limitation of liability because of the predictable nature of the attendant risks in those types of contracts. For instance, if the contract is for a hundred desks, it's fairly easy to foresee the types of damages that could accrue from that contract. Additionally, when dealing with fungible goods such as desks, the customer has significant leverage because they can presumably procure such goods from another source without too much effort.

However, technology contracts are a different animal altogether. Damages are not necessarily proportionate to the dollar value of the contract. Even a small dollar contract or some freeware can contain viruses or bugs that allow data to leak out or hackers to gain access to a system. Stories of ransomware attacks routinely appear in the news, and one has only to scan their own personal email accounts to see notifications of data breaches. By the industry's very nature, it would be an unsustainable business model if technology companies had to pay for all of the damages that they caused. Technology contracting is also unique in that products and services are seldom considered fungible by the end user. Take mobile phones as an example: Androids, iPhones, Google Pixel phones, and others , are all capable of performing similar functions, yet many people, myself included, have strong opinions about which is the superior product. When clients become convinced that one technology solution is superior to other similar options, it can undermine the lawyer's leverage during negotiations. This tension between protecting your organization and participating in an industry that has increasingly grown both risk-averse and aware of its increasing leverage is one of the biggest challenges in negotiating technology contracts.

Obviously, the higher the limitation of liability the better for the buyer, whose real obligations are likely to be mostly the aforementioned obligation to pay the contract price, but whose risk is disproportionately higher due to the usual issues which may crop up during implementation or go-live, as well as the increasing specter of security issues such as data breaches and ransomware attacks. A formula that works well is to have the limit be the greater of a certain threshold amount or a multiplier of the total contract amount. The benefit under this method is that a multiplier of the contract amount will allow the level of damages to be proportionate to a contract that is amended beyond the initial value, while having a threshold amount guarantees that even if it is a small dollar contract, the aggrieved buyer can regain some of their losses.

Even when agreeing to limitation of liability, certain causes of action should be exempted. These include injury or death (likely excluded by public policy anyway but best to cite them out of an abundance of caution), property damage, and infringement of third-party's proprietary rights. It should be noted that this last category of proprietary rights in-

fringement has long been an industry standard carveout from the limitation of liability cap. There are vendors who will try to nibble away at the margins to reduce the risk, but as discussed below, this is a responsibility that should fall squarely on the shoulders of the vendor. Finally, if applicable, you should reserve the rights available under any sort of tort claims act that is relevant to your organization.

Indemnification: While breach of contract and/or warranty will provide a cause of action for aggrieved buyers, it is helpful to have an indemnification clause in the contract as well, so that a vendor will have to "step into the shoes" of your organization in the event that there is an action for which they are responsible. For government entities, these indemnity clauses are often one-sided as it is not considered good public policy to use taxpayer funds to indemnify vendors. Obviously, the broader the clause the better from the perspective of the government buyer, but it is frequently a challenge to get vendors to agree to an open-ended indemnity, so for most damages, an indemnity based on negligence is a reasonable fallback. Once again, however, indemnification for infringement of a third party's proprietary rights is distinct from the general indemnity case and should therefore be set forth in its own section or otherwise distinguished for the sake of clarity.

While there is often significant pushback about a general indemnity, the technology industry as a whole still generally recognizes that it is the vendor's responsibility to provide an indemnity for infringement of a third-party proprietary rights. This is likely because the customer has no way of determining what was used to create that software solution. Only the vendor can properly vet the components that make up the solution. So, for instance, if a vendor decides that it is financially advantageous for them to use open-source software as a building block when developing their solution, that is their prerogative, but they should not be allowed to pass the risk on to the customer of not having properly secured the rights to use that building block. Remember, one of the things that the customer is paying for is the peace of mind that the vendor has secured all necessary rights to sell what they are purporting to have the rights to sell.

These clauses usually require the vendor to provide comprehensive indemnification for infringement claims, but there are often several key qualifications. One is that the vendor has the rights to control the litigation and/or settlement of the matter. Two, the customer needs to provide reasonable assistance in the defense of the claim. And three, there is usually a series of solutions that the vendor may pursue prior to the contract being terminated in the event of the vendor not being able to secure the rights. Most frequently, the vendor will have the ability to attempt to cure the infringement at its own expense by: procuring the rights for the customer to continue to use the software; replacing the software with non-infringing equivalent; modifying the software to make it non-infringing; or in the event that there is no other option, requiring the customer to remove the software and refunding any amounts paid back to the customer. This last point can be contentious, with vendors taking the position that the customer will be unjustly enriched if it has been able to use a system for a time and then have receive a complete refund. The counter argument is that the vendor is being unjustly enriched because it benefited from the sale of a license to which it did not own the rights.

Several contingencies can let a provider off the hook for infringement. For instance, if the customer failed to install updates or enhancements for the software, if the customer modified the software or used it in a manner not intended by the parties, or if the software somehow became infringing when combined with unauthorized third-party software, then the vendor may have a credible justification to be relieved of its indemnification obligations because the customer neglected to take obvious steps that would have mitigated the infringement.

There is no one size fits all solution when it comes to limitation of liability and indemnity issues in technology contracts. A number of factors can impact negotiations, such as if the solution is "sole source," or if the client has very strong feelings about one solution being far superior to the others on the market. In all instances, it's best to consider the entire risk profile of a given deal (sensitivity of the data, complexity of the project, past relationship with a longstanding vendor, etc.) when advising the client if the terms are acceptable.

IV. Cyberliability Insurance, Cybersecurity Standards and Audits – Phil Lam, Assistant City Attorney, City of Los Angeles

Ransomware: Cyber-ransom[1] is a serious topic for both the private and public sectors, which the federal government supports with excellent resources[2] along with private information-sharing organizations.[3] Although this article is not focused on that thorny problem, effective cybersecurity provisions in vendor contracts could lower such business-freezing risks in addition to curbing clients' liabilities from garden variety cybersecurity breaches.

Cybersecurity is fundamentally an IT client's responsibility.

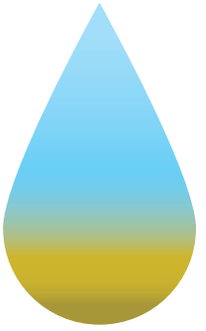
Cybersecurity contractual provisions: That said, comprehensive contractual provisions could reduce the chance of cybersecurity breach by making explicit a client's chosen standards,

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AFFIRMATIVE LITIGATION

The Persistent Cost of Forever Chemicals: Municipal PFAS Litigation

BY: ERICH EISELT, *IMLA Assistant General Counsel and Director of Affirmative Litigation*



INTRODUCTION

On September 4, 1995, a twin-engine Piper Aztec overshot runway 10-28 at East Hampton airport. The plane's nose gear buckled, grinding its propellers into the soil and bringing the craft to a violent stop. The Village of East Hampton Fire Department (EHFD) sped to the wreck, assisting the occupants and dousing the smoke in a thick lather to snuff incipient flames.

No lives were lost in the incident, which might have passed into oblivion but for the first responders' choice of firefighting remedy—aqueous film-forming foam, otherwise known as AFFF. The EHFD had been using the substance for years, quelling liquid fuel and aircraft fires, spraying large quantities during mass-casualty training sessions, and washing it off their vehicles at days' end. Hundreds of gallons of AFFF were stockpiled in drums on EHFD premises in anticipation of future needs.

Forever Chemicals: Likely unknown to EHFD firefighters at the time was the considerable hazard spawned by their highly effective flame suppressant: AFFF is one member of a large family of manmade chemicals known as per- and polyfluoralkyl substances (PFAS). Invented in the 1940's by Dupont and 3M, PFAS combine varying ratios of carbon and fluorine to produce compounds that stubbornly repel water, grease, and stains. Dupont would develop one variant-PFOA-which became better known for its use in Teflon. And one 3M subspecies-PFOS-would be a primary component of Scotchgard. In the 1960's, PFAS were adapted in AFFF to fight petroleum fires, of particular interest to the military after a horrific jet fuel conflagration aboard the USS Forrestal claimed the lives of 134 pilots and sailors.

Despite PFAS' many benefits, over time it became increasingly clear that they were freighted with an undeniable downside: PFAS move with ease through substrates, rapidly infiltrating aquifers. Once there, these "Forever Chemicals" become a permanent odorless and colorless additive to drinking water, easily absorbed into human tissues and highly toxic at low concentrations. Today, it is known that PFAS cause a variety of cancers and harm fetal development, and may produce other deleterious effects not yet fully understood.

Federal authorities had become concerned about the threat long ago. In May 2000, the EPA exerted its authority, forcing the following joint announcement from 3M:

> Following negotiations between EPA and 3M, the company today announced that it will voluntarily phase out and find substitutes for perfluorooctanyl sulfonate (PFOS) chemistry used to produce a range of products, including some of their Scotchgard lines. 3M data supplied to EPA indicated that these chemicals are very persistent in the environment, have a strong tendency to accumulate in human and animal tissues and could potentially pose a risk to human health and the environment over the long term. EPA supports the company's plans to phase out and develop substitutes by year's end for the production of their involved products.[1]

Warfare in the Hamptons: Despite growing publicity about PFAS' dangers after the 3M announcement, nearly 20 years would pass before EHFD's use of AFFF generated controversy. It

arose in Wainscott, a hamlet extending inward from the dunes of the Atlantic in a thin rectangle directly south of the East Hampton airport, the EHFD and its training facility. Inhabiting 520 dwellings, most valued in the millions, Wainscott's residents had drawn water from their own wells for more than a century.

In October 2017, the Suffolk County Department of Health Services began sampling Wainscott's private water supplies. It determined that more than 230 wells contained PFOA and/or PFOS; of these, 75 contained the substances in excess of New York State's recommended maximum contamination levels (MCLs) for drinking water. Concentrations in a dozen wells exceeded the EPA's 70 parts per trillion health advisory level. Wainscott denizens had been drinking and bathing in contaminated water for decades.

The Town of East Hampton, a separate municipality of 21,000 residents encompassing the Village and owning the property which the airport and EHFD occupy, immediately advised Wainscott homeowners not to drink, cook, or shower from their private wells, and began distributing bottled water. One month later, the Town received a letter from New York State environmental authorities stating in part:

> We have received information that certain perfluorinated compounds (PFCs) have been detected in nearby water supply wells, which may be attributable to current or past operations on your property. These compounds are known components of firefighting foams, and are listed as hazardous substances in New York State (6 NYCRR Part 597). This information leads us to suspect that hazardous waste may have been disposed of at [the Airport]. Therefore, this letter constitutes DEC's notification to you as the identified property owner that this property is considered a potential inactive hazardous waste disposal site.[2]

In October 2017, the Suffolk County Department of Health Services began sampling Wainscott's private water supplies. It determined that more than 230 wells contained PFOA and/or PFOS; of these, 75 contained the substances in excess of New York State's recommended maximum contamination levels (MCLs) for drinking water. Concentrations in a dozen wells exceeded the EPA's 70 parts per trillion health advisory level. Wainscott denizens had been drinking and bathing in contaminated water for decades.

The only viable solution was to connect all Wainscott homes to the Suffolk County Water Authority (SCWA), whose public water system was free from PFAS. It would not be inexpensive. The Town rapidly authorized raising the $24.3 million cost via a 20-year municipal bond, assuaged in part by Governor Cuomo's $9.7 million grant for the project.[3] SCWA and the Town worked in record time. By early 2019, nearly 8.5 miles of water main had been laid beneath the roads of Wainscott, bringing PFAS-free water to all 520 homes.

That accomplishment cleared one hurdle, but more ominous challenges lay ahead. In mid-2019, New York State notified the Town that portions of the airport and the EHFD grounds were a Superfund Site,[4] setting in motion an inevitable and far more costly trajectory: the Town was ultimately ordered to remediate the contaminated acreage.[5]

The massive responsibility would not be assumed without a fight. In April 2020, the Town sued the Village (*East Hampton v. Incorporated Village of East Hampton, d/b/a East Hampton Fire Department*, No. 20-cv-01787 (E.D.N.Y. Apr. 14, 2020), under the citizen suit provisions of the Resource Conservation Recovery Act (RCRA). It also sought injunctive relief and damages under sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), naming Alternative American Insurance Corporation as an Interested Party in its capacity as insurer of EHFD. The Town demanded that EHFD immediately disclose "all locations where EHFD used AFFF, stored AFFF and washed AFFF equipment at the Airport and/or within the boundaries of the Superfund Site," and remediate or pay for remediation of "all PFOA/PFOS contamination at and emanating from the Superfund Site caused, in whole or in part, by EHFD's storage of AFFF, use of AFFF and washing of AFFF equipment." It also demanded compensation for "all past and future costs incurred or to be incurred by Plaintiff responding to the PFOA/PFOS contamination at and emanating from the Superfund Site."[6]

Among other evidentiary matters cited in the Town's complaint was EHFD's use of AFFF to smother the smoking Piper Aztec 25 years earlier at East Hampton airport.[7]

The AFFF MDL: While the architecture of that case, pitting one municipal entity against the other, may have been somewhat unusual, the basic ingredient in the dispute—PFAS groundwater contamination—was hardly unique. By 2020, PFAS cases numbered in the thousands, filed around the country by state attorneys general, individuals and homeowners, water utilities, and local governments. Redress was being demanded for a wide spectrum of harms:

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personal injury, reduced property values, and remediation expense; shareholders have sued for failure to disclose material information about PFAS liability;[8] rural water providers have formed a class action seeking injunctive relief for testing and data collection;[9] and a nationwide class action was proposed to establish a panel of experts studying PFAS.[10]

In December 2018, the Joint Panel on Multidistrict Litigation (JPML) transferred 75 AFFF actions from Colorado, Delaware, Florida, Massachusetts, New York, Pennsylvania, and Washington to a newly-formed AFFF Multi-district Litigation (AFFF MDL) before Judge Richard Gergel in the District of South Carolina. The JPML identified material elements common to the cases:

> In each of these actions, plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOA or PFOS into local groundwater and contaminated drinking water supplies. With some minor variations, the same group of AFFF manufacturer defendants is named in each action. *These actions thus share factual questions concerning the toxicity of PFOA and PFOS and their effects on human health; the chemical properties of these substances and their propensity to migrate in groundwater supplies; the knowledge of the AFFF manufacturers regarding the dangers of PFOA and PFOS; their warnings, if any, regarding proper use and storage of AFFFs; and to what extent, if any, defendants conspired or cooperated to conceal the dangers of PFOA and PFOS in their products.* (italics in original).

The East Hampton lawsuit fit those parameters. On April 28, 2020, less than two weeks after it sued EHFD, the Town learned that its case had also been transferred to the South Carolina court, joining more than 500 other AFFF actions. That number now exceeds 1160 cases. The vast majority are brought by individuals, but nearly four dozen, including the Town's, involve municipal plaintiffs. Some of these, such as Dayton's $300 million claim against 3M, Tyco, and Buckeye Fire Equipment, brought in the Southern District of Ohio on diversity jurisdiction[11] were rapidly transferred. State court actions with a federal nexus were also subsumed: Tucson and Marana, Arizona initially filed in Pima County Superior Court, seeking to hold 3M, Tyco Fire Products, Chemguard, National Fire Equipment, and Fire Foam accountable for their manufacture, marketing, and sale of AFFF which had infiltrated the localities' aquifers.[12] That action was summarily removed to federal court on the basis of diversity and federal officer jurisdiction;[13] weeks later it too joined the AFFF MDL docket. In California, six municipalities and five water districts joined to file a multi-hundred million dollar AFFF suit before Orange County Superior Court in late 2020; in June 2021 that action was also removed under 28 U.S.C. § 1442 federal officer grounds.[14]

Early Wins for PFAS Plaintiffs: While the cases transferred to Judge Gergel's South Carolina federal courtroom are stayed as the complex multi-district machinery slowly progresses, others have moved ahead, achieving settlement. These include a trio of personal injury-based actions brought by Robert Billot, the unyielding Cincinnati litigator of "Black Water" movie fame: In 2017, Dupont and Chemours agreed to contribute equally to a $671 million settlement to 3,550 West Virginia plaintiffs suffering the effects of PFOS released into their groundwater by a Parkersburg Teflon facility.[15] Those same companies announced a massive settlement in January 2021, establishing a $4 billion fund to be utilized over the next 20 years on PFAS-related expenses, while also settling 95 personal injury claims docketed in an Ohio MDL for another $84 million.[16] And a May 2021 personal injury settlement brought a new tortfeasor to the table, as Georgia Pacific joined 3M in paying $11.9 million in a class action brought by residents of Parchment, Michigan whose health and property values have been damaged by PFAS dumped in local landfills.[17]

Governmental plaintiffs have also succeeded in obtaining PFAS compensation. In April 2021, diminuitive Bemidji, Minnesota (population 15,678 as of 2020) announced a $12.5 settlement with 3M, whereby the company will build and pay for the operation of a water treatment facility to remove AFFF-borne PFAS.[18] That result was modest in comparison to a much larger victory by Minnesota, where Attorney General Lori Swanson obtained an $850 million settlement from 3M in 2018, resolving a $5 billion *parens patriae* PFAS case brought in state court under the Minnesota Environmental Resource Liability Act.[19]

(As with many large statewide settlements, the devil may be in the details once Minnesota's deployment of PFAS recoveries begins. Its suit had asserted that 3M's discharges polluted more than 100 square miles around the Twin Cities metro area, including numerous lakes and nearly 140 miles of the Mississippi River. The state's plans to allocate $700 million of the 3M

recovery to remediation ($125 million went to outside counsel) have now hit considerable headwinds.[20] The way forward is further complicated by revelations that Minnesota's PFAS problem is far more widespread than previously known, with recent detections of unacceptable levels at 98 of the State's 101 closed landfills.)[21]

Other States Follow Suit: Minnesota's massive settlement inspired similar actions by other state AGs. Most have seen their cases slowed by transfer to the AFFF MDL. New York's Letitia James sued PFAS defendants in Albany County in November 2019. That suit was soon removed on federal officer grounds[22] and then transferred to South Carolina. Vermont AG T.J. Donovan filed an AFFF action in State Superior Court in July 2019;[23] that case too was removed and swept into the AFFF MDL. And in January 2020, Michigan Attorney Dana Nessel filed against 17 defendants in Washtenaw County Circuit Court, alleging that they "deliberately concealed the dangers of PFAS and withheld scientific evidence, and intentionally, knowingly and recklessly sold, distributed, released, transported, supplied, arranged for disposal or treatment, and handled and used PFAS and PFAS-containing materials in Michigan in a way that they knew would contaminate natural resources and expose Michigan residents to harm."[24] Although Nessel had not referenced AFFF specifically, 3M successfully argued that the suit involved federal government contracting and removed it to the Western District of Michigan. Inevitably, it was then named in a Conditional Transfer Order and moved to the AFFF MDL.[25]

In July 2020, Michigan doubled down, upgrading its water quality standards and imposing more restrictive MCL thresholds for PFAS. The new limits impact more than 2700 water treatment utilities, schools, hospitals and large businesses that supply water to the public. That move drew resistance from 3M. In May 2021, it sued the State in Michigan's Court of Claims, arguing that the new water standards were promulgated through a "rushed and invalid regulatory process" without properly assessing the cost of compliance for water suppliers.[26] The company has similarly challenged new water standards adopted in New Jersey and New Hampshire. In the latter, 3M found an unlikely ally in tiny Plymouth Village Water and Sewer District, whose legal fees 3M paid as the utility joined in an effort to challenge the process which led to more stringent MCL limits on PFAS.[26]

Alabama took an alternate path in pursuing 3M to redress PFAS[27] contamination in Decatur and other sites in the northwest part of the State. In July 2020, the Alabama Department of Environmental Management (ADEM) announced a consent order with 3M, describing the result as "the most far-reaching and significant enforcement action to date taken in regard to PFAS in the country. . . . In short, this is the quickest and surest route to accomplish the goals of reducing public exposure to PFAS now and preventing exposure in the future, while holding 3M accountable."[28] Under the order, 3M will assume all costs of environmental assessment, water treatment plant upgrades, remediation, ongoing research of PFAS contamination, and more, without a dollar limit.[29]

The Federal Government's Role: While states, localities, water districts, homeowners and others battle to recover costs for PFAS remediation, federal inaction—and even complicity—is revealed. As noted earlier, the EPA has been aware of PFAS' dangers for three decades or more, yet the Agency has never promulgated actual MCL standards for America's drinking water, and PFAS have never been included as "hazardous substances" under CERCLA or RCRA. That is now changing. In March, the House passed H.R. 2467, designated the PFAS Action Act of 2021, "To require the Administrator of the Environmental Protection Agency to designate per- and polyfluoroalkyl substances as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980."[30] That same month, the EPA reissued its final regulatory determinations for PFAS under the Safe Water Drinking Act, beginning a process where the Agency will propose national MCL standards for PFOA and PFOS.[31]

These steps may illustrate Washington's redoubled commitment to limit PFAS, but one notable federal outlier remains. The Department of Defense relies on the superior firefighting qualities in AFFF, and despite DoD's highly promoted efforts to reduce usage and protect water sources, it has not located a suitable substitute. Maureen Sullivan, Deputy Secretary of Defense for Environment was quoted last September: "Unfortunately, none of the commercially available PFAS-free foams meets DoD's strict safety standards for putting out fires quickly . . . besides putting out aircraft fires quickly, foams with PFAS are particularly effective at putting out large industrial or structural fires and overturned vehicles that are on fire."[32] This posture is reiterated on 3M's website discussing the history of PFAS, which recounts, "To this day, the military specification governing AFFF can only be met by the use of PFAS-based surfactants, given their

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unique and life-saving properties."[33]

It is not surprising, then, that DoD airports are an increasing target of PFAS litigation. In May, Dayton filed a $300 million suit against Wright-Patterson Air Force Base and the DoD, accusing them of failing, after more than four years of requests, to take steps preventing PFAS from infiltrating wellfields that provide water to more than 400,000 residents. New Jersey sued the United States in January 2021 for PFAS emanating from Joint Base McGuire-Dix-Lakehurst, Naval Weapons Station Earle, and the Naval Air Warfare Center in Trenton, following New Mexico's lead two years earlier.[34]

CONCLUSION

As the race to develop an AFFF substitute is being run, all evidence suggests that America's PFAS problem is far greater than initially suspected, with new trouble spots being discovered almost daily. Municipalities will be under continuing pressure to provide clean water to their constituents and to prevent further contamination, requiring massive amounts of money and effort. While consent decrees such as that obtained by Alabama may provide recourse, litigation will remain a critical mechanism for local governments seeking to fund their battle against forever chemicals. ML

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AMICUS

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

Clarifying Law Enforcement Parameters at the Supreme Court

As the current Supreme Court term ends, most news coverage has understandably been on *Texas v. California*[1] and *Fulton v. City of Philadelphia*.[1] Additionally, the Court has already stacked headline-grabbing arguments on its docket for next term, including those involving the Second Amendment and abortion. But other recent decisions highly relevant to local government may end up flying under the radar. This article will summarize two such cases recently decided by the Court, each construing the Fourth Amendment, and review a qualified immunity case in which IMLA recently filed an amicus brief in support of a petition for Supreme Court certiorari.[2]

Caniglia v. Strom

Kim Caniglia and her husband got in a fight during which got a gun, threw it on their dining room table and said: "shoot me and get it over with." She left the home and stayed at a hotel. The next morning, when she could not reach her husband on the phone, Kim called the non-emergency line and asked the police to accompany her home, recounting the fight from the evening before and her concern about "what she would find" when she arrived.

The police accompanied Kim to her residence and spoke to her husband on their porch. The ranking officer determined that Mr. Caniglia was "imminently dangerous to himself and others" and convinced him to go to the hospital for a psychiatric evaluation. Mr. Caniglia claims he only agreed to go because the officers told him his firearms would not be confiscated. After Caniglia went to the hospital, police seized his firearms on the belief that he was imminently dangerous to himself and/or others.

Caniglia sued, claiming that he and his guns were unconstitutionally seized without a warrant. The First Circuit found no Fourth Amendment violation, relying on the community caretaking exception from *Cady v. Dombrowski,* 413, U.S. 433 (1973). In *Cady,* the Supreme Court upheld a warrantless search of an automobile that the police believed contained a firearm because the search was divorced from their criminal investigatory activities and was based solely on the police officers' community caretaking functions in preventing vandals from accessing the car and obtaining the gun.

The Court had never extended the community caretaking function to warrantless searches and seizures in the home and in a unanimous opinion authored by Justice Thomas, closed that door, concluding the exception does not extend into the home.[3] The Court explained that there is an important constitutional difference between searching a vehicle (*Cady*) and searching a home: "[w]hat is reasonable for vehicles is different from what is reasonable for homes."[4]

Perhaps limiting the reach of its decision, the Court noted that its previous rulings have allowed for intrusions into the home when police have a warrant, when consent is provided, or when exigent circumstances exist, "including the need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[5] (internal quotations omitted). The Court noted that the respondent in this case had not argued that exigent circumstances justified the warrantless intrusion.[6] In other words, while exigent circumstances might have justified the warrantless seizure under these circumstances, we will have to wait for further development of the law in this area for a more definitive answer.

Three separate concurrences authored by Justices Roberts, Alito, and Kavanaugh underscored the Court's recognition of the important function officers engage in when they seek to render emergency assistance as well as the open questions that remain after the Court's decision. Both Justices Alito and Kavanaugh noted the frequency with which the elderly fall in their homes, and agreed

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Amicus *cont'd from page 27*

that police need to respond to calls related to these types of exigencies that fall outside the criminal context, including for falls and suicide.[7] And Justice Alito pointed out that even if the "community caretaking" doctrine did not apply to the home, that did not necessarily mean that the Fourth Amendment rules applicable in the criminal context would apply to searches and seizures conducted for non-law-enforcement purposes.

For example, Justice Alito highlighted a scenario that arose at oral argument where hypothetical neighbors call the police because their elderly neighbor, who is never late, did not come to dinner.[8] The question was whether it would violate the Fourth Amendment for police officers to enter the home to check on her without a warrant; the petitioner indicated it would, even if 24 hours had gone by.[9] To that, in his concurring opinion Justice Alito quipped that "[t]his imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony."[10] He noted the Court's current precedents would not cover this situation and suggested that States could seek to institute procedures for warrants in these non-criminal cases.[11]

Chief Justice Roberts, joined by Justice Breyer, wrote a short concurrence to explain that the question of whether a warrant is required to enter a home "when there is a 'need to assist persons who are seriously injured or threatened with such injury'" was decided in *Brigham City v. Stuart,* 547 U.S. 398 (2006) and that the Court's decision here did not deviate from that principle.[12] Presumably, the Chief Justice would have concluded that police could enter the home without a warrant under *Brigham City* to render aid to the imaginary woman in Justice Alito's hypothetical.

Justice Kavanaugh disagreed more directly with Justice Alito on the question of whether the Court's existing precedent would cover such a scenario. While indicating there should not be a community caretaking exception to the warrant requirement, he believed the Court's current exigent circumstances doctrine would "of course" allow police to enter the home of the elderly person who falls and needs assistance but does not answer the door, or the suicidal individual in his or her home who does not let the officers inside voluntarily.[13] This is because under *Brigham City,* according to Justice Kavanaugh, the police would have an "objectively reasonable basis for believing that an occupant is seriously injured or threatened with injury."[14] (internal quotations omitted).

IMLA joined a brief filed by the State and Local Legal Center (SLLC) highlighting the importance of avoiding an absolutist rule which would bar police and other first responders from performing non-criminal, emergency duties, like wellness checks, helping to prevent suicide, and assisting the elderly and mentally ill.[15] In our brief, we highlighted that these actions do not involve criminal investigations and thus warrants are often not available. While the case is not a win for local governments, given the narrow scope of the majority decision and the concurrences that all highlight the belief that police would be able to enter homes in these scenarios under the exigent circumstances doctrine, perhaps Justice Kavanaugh is right where he says the issue is "more labeling than substance."[16]

That said, as Justice Alito notes, there are still many open questions that lower courts will need to grapple with under the Fourth Amendment until the issue of exigent circumstances in these scenarios is properly before the Court. The Justices' seeming disagreement that precedent would cover some of the examples provided in the decision underscores that these issues will be litigated further in the lower courts.

Torres v. Madrid

In this case, two police officers sought to arrest a woman at her apartment in Albuquerque, New Mexico. They noticed two women standing in front of the apartment next to a Toyota FJ Cruiser and decided to talk to them. The officers were wearing tactical vests with police markings. Roxanne Torres was in the car and experiencing methamphetamine withdrawal. One of the officers told Torres several times to show her hands.

Torres claims she thought she was being carjacked. The facts are in dispute, but Torres drove away: she asserts neither officer was in her path, but the officers claim she drove at one of them. What is not in dispute is that officers fired at her 13 times and two bullets struck her. (Whether she was driving at the officers will ultimately be resolved below and that question will go toward the reasonableness of the seizure). Despite being shot, Torres drove 75 miles where checked herself into a hospital. She was airlifted back to Albuquerque to another hospital for treatment and arrested the next day.

She sued, claiming the officers used excessive force in violation of the Fourth Amendment. The Tenth Circuit rejected her claim, holding that, to be cognizable, the use of force "must terminate the suspect's movement" or result in physical control of the suspect.

In a 5-3 decision authored by Chief Justice Roberts, the Court reversed, providing a new rule for determining if a seizure occurs under the Fourth Amendment where force is used, but a suspect gets away.[17] The Court concluded that "[t]he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."[18] Relying on common law at the time of the Fourth Amendment's adoption and before, as well as its own precedent, the Court held that "the officers' shooting applied physical force to her body and

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INSIDE CANADA

BY: MONICA CIRIELLO,
Ontario 2015

Municipal Law Enforcement Pre- and Post-COVID

There was a time not too long ago where the scope of work for the Municipal Law Enforcement (MLE) Department centered around traditional regulatory activities. These included but were not limited to enforcing property standards to ensure one's interior and exterior property was maintained, ensuring that grass was kept short, making sure excess noise was not likely to disturb neighbours, overseeing that taxis were operating legally, and taking steps to ensure businesses were licensed to operate above board.

While regulatory changes do occur, they typically happen incrementally or at the margins; by and large, the work of MLE Departments continues with limited changes year-over-year. Some of the largest shifts in operating activities over the past five years were concentrated on how rideshare operators (Uber) would fit within or complement existing regulations and how short-term rentals (Airbnb) fit within the existing community of property standards and zoning regulations. However, since March 2020, as a result of the COVID-19 pandemic, municipalities have been inundated with new provincial regulations that have required the MLE Department to significantly shift both the breadth and depth of their work in record time.

Shifting Regulations: Over the last 16 months municipalities across Ontario have shifted priorities to respond proactively and reactively to the COVID-19 concerns. It began March 17, 2020 when the Office of the Premier of Ontario announced an order declaring an emergency across the Province under section 7.0.1(1) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (*EMCPA*). Section 7.0.1(1) provides:

> the Lieutenant Governor in Council or the Premier, if in the Premier's opinion the urgency of the situation requires that an order be made immediately, may by order declare that an emergency exists throughout Ontario or in any part of Ontario.

On July 21, 2020, the Ontario government passed Bill 195, now known as the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (*ROA*). The *ROA* came into force on July 24, 2020 and has been consistently amended since that date, loosening regulations when COVID-19 cases are low and tightening the regulations when the COVID-19 cases are high. On May 21, 2021 as COVID-19 cases continued to decrease, the Ontario government announced a three-step reopening plan. The reopening plan required the entire Province of Ontario to stay in each step for 21 days, moving to the next step will depend on the number of people vaccinated, and public health and health care measures.

What this Shift Means for Municipal Law Enforcement in Hamilton: Since the onset of the COVID-19 pandemic, MLE Departments have played a critical role in the interpretation and enforcement of provincial regulations made under *EMCPA* and the *ROA*. Traditionally, MLE Officers do not have the authority to enforce the orders of the *EMCPA*; however, the provincial government extended their authority and signed a ministerial designation under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 to designate MLE Officers as provincial officers for the purpose of enforcing all *ROA* and *EMCPA* orders, including exercising powers to ticket individuals for not complying with the recently-expired stay at home order. For businesses, the regulations enforced by MLE Officers include interpreting what is an essential and non-essential business, as well as distance requirements between restaurant tables, capacity limits, maintenance of customer logs at food establishments, screening protocols for staff and prohibition of indoor dining (at present, only outdoor dining is permitted in

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Inside Canada *cont'd from page 29*

Ontario). Occasionally, non-essential businesses that were not permitted to be open have refused to close or comply with the *ROA*. Under traditional regulatory protocols, MLE Officers would issue fines, suspend a licence and require the business to appear before the licensing tribunal. Now, non-compliance requires engagement with the Ministry of the Attorney General to explore next steps in issuing an injunction that will prevent the business from operating, and the filing of an application in the Ontario Superior Court of Justice for a Court order restraining the business and anyone acting on its behalf from continued contravention of the regulations.[1]

For residents, the regulations enforced by MLE Officers include prohibitions against indoor gatherings, mandatory face coverings in all indoor establishments (as well as in outdoor lines), and ensuring a mandatory physical distance of two metres from those not within the same household. MLE Officers now find themselves assisting police services at protests, often being filmed by those that are receiving a ticket.

MLE Officers can issue tickets with fines up to $1000 for non-compliance, and they also now have the power to temporarily close premises and disperse individuals who are in contravention of a provincial order. (*O.Reg. 8/21*). This has been a dramatic shift from the traditional regulatory activities of late 2019.

The COVID-19 pandemic has meant turning the MLE Department into a seven day a week operation, constantly balancing and re-assessing priorities. To deal with the influx of COVID enforcement, the City of Hamilton[2] was the first in the Province to establish a COVID-19 enforcement team. This team act as ambassadors in educating the community on the ever-evolving rules and issuing tickets for non-compliance. To date the COVID-19 enforcement team has issued 326 *EMCPA* charges, 504 *ROA* charges, 34 face covering charges, and 202 physical distancing charges.

Municipal Expectations: Despite adapting to the new evolving rules, there is still an expectation by constituents that Hamilton will maintain existing service levels. With more people working from home within the community, there has been an increase in calls to action from residents. In 2021 MLE has received over 23,000 calls, which works out to be approximately 155 calls a day, nearly double the amount pre-pandemic. The MLE Department continues to ensure compliances with other municipal priority initiatives including, animal rabies concerns, cannabis, property standards and firearms. This is a prime example of a municipal department working smarter, leveraging internal capabilities and strategically adjusting to do more with less.

CONCLUSION

The MLE Department is an unsung hero throughout the COVID-19 pandemic, meeting the expectations placed on them by the province and the municipality to enforce ever-changing regulations while still maintaining existing service levels. To succeed over the last 16 months, the MLE Department had to broaden and evolve its capabilities to balance competing priorities between City's goals of being open for business while enforcing health directives during a pandemic. The MLE Department has done more with less, exhibiting an ability to manage, pivot and adapt despite monumental shifts in roles and responsibilities-and thrive while doing it.

Notes

1. On June 4, 2021 the Crown filed an application and sought an order restraining a local tattoo shop Kryptonian Ink, its owner and anyone acting with their authority or direction from continuing to provide tattoo services. Justice James Ramsey granted the application.
2. With a population of approximately 600,000, Hamilton is the third largest city in Ontario and is located just 70 km (43 miles) southwest of Toronto. ML



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LISTSERV

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

What is Really Behind the Mask?

Please allow me to say right off the bat that I am not picking sides in the great mask debate. I am simply amazed at the amount of division the issue has caused in our society. It seems that each and every day brings a new story about arguments or incidents over the issue. Some of these have become quite severe and violent.

A *Washington Post* article relates a story where a passenger reportedly knocked out a flight attendant's teeth following a dispute over wearing a mask. While not every airline incident resulted from mask issues, the Federal Aviation Administration reports that the vast majority of cases involve refusal to follow the federal mask mandate.

The *Post* goes on to say that the FAA reported about 2,900 instances of unruly passenger behavior in the five months since January 1, 2021 and roughly 2,200 of those involved passengers who would not wear a mask. Potential violations were identified in 446 cases, and the FAA has started action in several. This represents an astounding increase. As the *Post* recounts, the FAA investigated a total of only 1,548 unruly passenger cases in the decade between 2010 and 2020.

One such incident reported by the FAA involved a passenger on a flight from Montana to Alaska who refused to wear a mask, became unruly and caused the crew and passengers to return to Montana before proceeding. Three passengers who disrupted flights in January face civil penalties of between $14,500 and $31,750, according to the FAA.

As a result, the FAA reports, airline "no fly" lists have grown dramatically. One airline reports a list containing 1,200 names, and three others list 830, 750, and 542 names respectively.

This problem is far from isolated to air travel, however. WESH-TV in Orlando, Florida reports that a man spit on a security guard at Disney World after being asked to wear a mask. He reportedly told the guard to "leave him alone" while taking a step forward and spitting on her. He then proceeded to walk calmly into the park. This hasn't been the only such incident at Disney World. The *Orlando Sentinel* reports that a "mostly maskless family" allegedly attacked an older man at Disney World in October after the two groups got into a fight. In another incident, Disney World personnel asked a family to change masks because they weren't wearing the right kind; they switched but returned with one of them maskless, who started an argument with park officials.

The AP reports that when a patron in a suburban Houston fast-food restaurant was asked to wear a mask, he became angry, confronted the manager and ended up stabbing him. In another Texas case, a woman was arrested following disputes over wearing a mask inside a bank and an Office Depot location on the same day. ABC News reports a patron at a "dollar store" allegedly wiped his nose and mouth on an employee's shirt after being asked to wear a mask, and a Michigan father of eight was killed at a retail store following a dispute over mask wearing.

Such confrontations, according to ABC, seem to be on the increase since official mask regulations and ordinances have been relaxed or disappeared but where stores or other businesses continued to request mask wearing.

Despite all these stories, folks, is it really about mask wearing? Or is the country (or world) becoming increasingly intolerant in general? I tend to think it is the latter. Masks aren't the only subject over which we seem to be having issues. It just seems in many sectors of society people are becoming argumentative and even incorrigible.

I belong to an alumni group for my high school alma mater, a school my entire family has graduated from. Recently, a member posted an interesting article about a fellow alum running for Congress. The post started: "This is not intended as a political post, and I am neither supporting nor opposing the candidacy. I simply thought you (the

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group) might find it interesting to hear what a fellow grad is up to." It took no less than ONE post for the issue to become political. The very first response was "I'm not voting for him," followed by "How dare you bring up politics in this forum. That's what we are trying to stay away from." A couple of authors then tried to support the post explaining that it was simply an announcement about something "positive" a fellow grad was doing. "I don't see it as positive," growled one responder. Finally, the well-intentioned author removed the post after he began getting personal insults directed at him. The writer was simply attempting to pass on an informative, positive piece about one of our old friends. "I apologize for believing we could discuss this in a civil and cordial matter," he said explaining why it was removed.

I find this just a plain shame. It was a wonderful piece about a man from a disadvantaged background earning a football scholarship to the University of North Carolina, and then going into education when his pro football career did not work out. A great story turned into a ridiculous argument. Do people simply refuse to be happy for someone they perceive as having different views from their own? It certainly seems that way.

I believe the "anger problem" stems from a couple of areas, perhaps first of all in what we see in our leadership. When was the last "uncontested" presidential election? By that, I mean when did the election loser graciously admit defeat and congratulate and pledge help to the winner? Ha! Instead we are shelled with a bevy of unfair accusations.

Daily news reports about squabbling and failure by our leaders to work together have become so commonplace that people don't even pay attention any longer. Citizens see this and tend to back the leader of their "choice," carrying those arguments into the street, stores and schools. Bickering and backstabbing has become common place nearly everywhere.

"I like that idea, but I can't support it because "the other side" came up with it." "I am not supporting it because of who brought it up." "I'd vote for it if somebody else introduced it." I have heard all of these statements on several occasions. It seems it has all become about "winning" and getting your own way. "Progress? Oh yeah, I'm for that. We'll only achieve it if so and so is kicked out."

Another area contributing to the frustration seems to be the "instant gratification" and selfishness contained in our desires. Too many people, if they don't get what they want when they want it, aren't willing to wait their turn. I saw a woman cut to the front of a grocery line recently because she only had three items. It wasn't even the express lane. When folks addressed her, she obnoxiously retorted "I only have three items. You can wait that long." She was a young able-bodied woman who apparently felt she was entitled to go to the front of the line because she didn't feel like waiting like everybody else. "I'm in a hurry," she grumbled.

Gunplay has erupted in arguments over a parking space, or a position in a ticket line. People are going to jail for contempt of court because they mouth off to the judge in disrespect. Where are these attitudes coming from and what can we do to get rid of them? Aren't we all in this together? A wise old adage of "We will have to agree to disagree on that issue" seems to have become laughable. Compromise is considered week, and too often things seem to be "My Way or the Highway."

Finally, it is unfortunately quite likely that frustration has built up over lockdowns, pandemic restrictions and business closings. More people have been out of work, out of a job and forced to stay home. Frustration is boiling over, and people seem to be at a tipping point. "I've been locked up over a year and you can't tell me what to do! Leave me alone!!!"

It appears to me the "great mask debate" is an example of the way our society is leaning as a whole. It seems all of the perceived selfishness, self-centered "me-first" type of thinking might be the underlying cause of the mask debate. And, because of that something so important upon which we should all be working together has become an even more divisive focal point.

All of this finally brings me to the point and closing of this article. We should be thankful that we have a forum here in our online listserve where we can discuss issues, exchange ideas and have civil discussions. We are all on the listserve and the Water Cooler to help each other, and we have done so in many areas with a collegial and congenial spirit. In my humble opinion, this is what the world needs more of today. We need more forums where people simply want to help each other get by, help each other get better and in turn make our little corners of the world better. In doing so, don't we help make the world a better place?

I know it has worked that way for me. I have had a difficult time of it for about the past two years, but much personal and legal help has come from my colleagues on the listserve and Water Cooler. You folks are my friends and always seem willing to help. Why can't it be that way more often?

I would encourage anyone to join or participate in a group such as our listserve where one can find support, healthy and sometimes vigorous (but respectful) discussion where we end up shaking hands at the end of the day. Joining such a group helps one enjoy the positive mental health aspects of happiness and each other's company.

The Prosecution rests, your honor…



A DAY IN THE LIFE: LOURDES MORATE MARTÍN, COUNCILOR TO THE TOWN COUNCIL, OVIEDO, SPAIN

ML: *Can you tell us a little about your city?*
Oviedo is a city of nearly 240,000 people, and is the capital of the Principality of Asturias. It is located about 25 kilometers inland from Spain's northern coast, and together with the nearby coastal cities of Gijón and Avilés, forms a metropolitan area of more than 800,000.

ML: *What is the local government structure of Oviedo?*
The local government of the Oviedo City Council is represented by the mayor, the councilors, and the local government board, which make decisions that affect the residents of the municipality.

ML: *I see that you are an attorney for the Oviedo Town Council. What are your job duties, and who is your client or who do you represent?*
As an Attorney at Law, I have to handle different cases in defense of the municipality. One of my main duties right now is defending the Town Hall in all jurisdictions at the different Courts (Administrative Court, Labor and Civil Court). My daily work basically consist of dealing with a range of legal proceedings in various areas, provide legal assistance, and drafting legal reports about different issues, when required. My main client is Oviedo´s Town Hall.

ML: *What do you like the most about your job?*
Defending the Town Council at the different courts. In fact, I love to litigate at the court and to represent the public interest.

ML: *And how long have you been practicing law?*
I have been practicing law for twenty years.

ML: *Why did you become an attorney?*
Because I always loved defending my interests and my ideas, and that is basically what I do as an attorney, although they are no longer my interests or my ideas, but those of the City Council.

ML: *Please tell IMLA members something about Oviedo that most people don't know.*
Oviedo is part of the ancient route of the 800-kilometre long "Camino de Santiago," and is actually called "Oviedo Origin of the Camino." In fact, many pilgrims who go to Santiago de Compostela through Northern Spain, travel through Asturias, whose capital is Oviedo, where one of the most beautiful roads that reach Santiago de Compostela passes.

ML: *What is your favorite Spanish tradition?*
Popular festivals of all kinds. It's said that in Spain, there is a festival every day.

ML: *If I had 24 hours in Oviedo, where would you recommend I visit?*
The old part of the City, and I would not miss drinking cider (our most popular drink) on a terrace of our traditionals bars called "Sidrerías."

ML: *The most important question of all--what is your favorite Spanish dish?*
As a good Spaniard, I was going to say the "Paella." After some thought, I think my favorite food is the "Spanish Omelette," something really simple—but if it is well done—is really unique.

ML: *And finally, if you could vacation anywhere in the United States, where would you go and why?*
I would definitely go to Miami. I love the weather there, the beach and mixture of cultures--North American and Latin cultures.

OVERVIEW OF THE SPANISH JUDICIAL SYSTEM

FROM **LOURDES MORATE MARTÍN**, ATTORNEY TO THE CITY COUNCIL, OVIEDO, SPAIN

It is generally said that in the American system of impartial justice—which we Spaniards know (I admit) basically through cinema, films, and television—the weight of judicial precedent is fundamental when it comes to judgments issued by the courts. This, in principle, might seem very different from the Spanish civil law system, which is based on comprehensive legal codes and the premise that judges and courts are subject "to the rule of law."

However, there are more things that unite us than separate us. We start from an identical point of view in both legal systems, that justice originates from, and with the support of, the people. The United States Constitution says, "We the People of the United States, in Order to form a more perfect Union, establish Justice (...)". Well, the same origin is also the foundation of the judiciary in Spain, because our Constitution, as in the United States, indicates as a fundamental principle that justice "comes from the people" although it is administrated in the name of the King, by Judges and Courts....

This brings us to the role of the Judge in Spain when it comes to imparting such justice. Thomas Wilson wrote: A Judge "is not the master, but the minister of the law." This sentence summarizes the position of a Judge in Spanish law in his capacity as an interpreter who applies the law. The separation of powers in the Spanish legal system guarantees that the function of legislating is strictly attributed to Parliament and that of judging, as our Constitution says, to the Courts or Tribunals, "independent, immovable, responsible, and subject exclusively to the rule of law," which clearly proclaims judicial independence from the executive power.

However, the preponderance of judicial decisions under Spanish law has recently changed as a result of globalization and a greater influence of the Anglo-Saxon legal system on our vision of law and on our very way of administering justice. European law now has a larger influence as a consequence of Spain's membership in the European Union, resulting in greater relevance of judicial precedents when it comes to resolving a specific case—in many cases greater than the legal norms that are applied or interpreted. We also have a judicial system that is structured similarly to the French or German systems, divided into different jurisdictions for a greater specialization of judges. We have Civil Courts (relating to issues between individuals and private law), Social (which solves problems that affect the rights of workers), Criminal (for the prosecution of crimes), and Contentious-Administrative (which prosecutes all issues of public law that affect public administrations in their relationship with citizens).

As in the Anglo-Saxon legal system, we are seeing how case law and judicial review are becoming increasingly important when Spanish judges are rendering a decision; these include the decisions of national judicial bodies (the Supreme Court, Constitutional Court and other courts), and supranationals (primarily the Court of Justice of the European Union, and the Court of Human Rights in Strasbourg, which modulate the application of the law and are no longer limited to filling voids in regulation but also have the latitude to avoid applying the provisions of a legal norm).

In addition to our statutory legal system—in principle—judges are bound by the doctrine established by our Supreme Court (Spanish Supreme Court's Case Law); and the relevance of decisions of other courts is becoming increasingly evident (because of the influence of common law on judicial review). The so-called "minor jurisprudence," composed of the doctrine established by the Superior Courts of Justice of the different autonomous communities and Provincial Courts (Spanish Courts of Appeals' Case-Law) in matters within their competence, and even that of minor courts, is fundamental to resolving certain legal disputes.

Therefore, we can see that the role of legal precedent is increasing in Spain, making the differences between American and Spanish administration of justice smaller and smaller, gradually shrinking the ocean that separates our two countries.

IT Contracts *cont'd from page 21*

vendor's compliance responsibilities and their liabilities in the contract. However, there are no "standard" or one-size-for-all cybersecurity provisions, because the IT service business models, technology, cybersecurity standards and hackers' *modus operandi*, among other parameters, are constantly and rapidly changing by the months.

May I recommend the following major steps at the outset of any transactions involving data of any kind: (1) involve the most knowledgeable clients (MKCs) in cybersecurity and in the business needs of that particular transaction; (2) identify the data involved; (3) determine the desired cybersecurity standards to impose; (4) apply state, federal and foreign data privacy laws; (5) draft cybersecurity and data privacy provisions with priority consideration against other provisions of the agreement; and (6) add any applicable non-data privacy laws, if desired, to restrict unauthorized disclosure, use and sharing of data.

Involve the MKCs.: Involve in the working group, the client(s) most knowledgeable on current cybersecurity practice and standards (typically the Chief Privacy Office, Chief Data Office or Chief Cybersecurity Office) and the client(s) most knowledgeable about the business needs to be fulfilled by the transaction.

Identify the Data and Use: Through in-depth discussions with clients, identify the data (pre-existing and newly collected or created) involved in the transaction, and ask who may access, how and when. Nature of the data triggers different data privacy laws--state, U.S., and foreign. For examples, Protected Health Information,[4] Personally Identifiable Information[5] and Payment Card data are among the most sensitive and more regulated than anonymized inventory data. In addition, it is highly recommended that clients go through a checklist of data rights as in the "who, how and when?" questions for vendor and any third parties, including sublicensing right. Such data rights should be clearly included in the vendor contract. In separate provisions, typical intellectual property rights, including that in data, should be delineated in terms of who owns what IP and who holds a license (or even sublicense) and the scope of the license(s).

Desired Cybersecurity Standard(s): The MKCs should be dictating the technical and cybersecurity standards for the transaction based on their particular business needs and prevailing cybersecurity standards. The most popular international and U.S. cybersecurity standards, as of June, 2021, include ISO 27001 and SOC 2.[6] Though both are similar, SOC 2 requires auditing only by a licensed CPA. Because of the rapidly changing IT environment and threats, it is prudent not to stipulate in the agreement to a particular standard exclusively. A non-exclusive drafting could be useful, if a standard is to be specified by name. Alternatively, the agreement could use general term in describing "prevailing," "leading," or "industry cybersecurity standards" or words to that effect, with written approval by client of the vendor-suggested standards at a later time.

Privacy Laws: Various state, federal and foreign privacy laws have a wide continuum of harsh to non-existing laws for violators. The 2016 European Union's General Data Privacy Regulation (GDPR)[7] is comprehensive and arguably the most onerous in compliance and penalties in the world, though it is unclear on its extraterritorial application in the U.S. However, should you conduct any international transfer[8] of personal data of an EU natural person, be sure to check the European Commission's newly published standard contractual clauses governing such transfer. In comparison, Canada's privacy laws are less stringent than the GDPR but still more protective than the U.S.'s. Foreign jurisdiction may arise from the physical foreign location of the data. Thus, to avoid triggering onerous foreign privacy laws, if practicable, a contract often prohibits storage, use or processing of such data outside the U.S. In 2018, California led the nation in passing a comprehensive privacy law modeled after the GDPR. Other states[9] have passed or have in the pipeline personal privacy legislation.

Cybersecurity Provisions. The agreement should address key issues such as (a) physical security of the structures in which IT equipment is held, (b) network and internet security protocols, (c) data breach protocols, (d) breach response protocols, (e) disaster recovery, and (f) periodic audit of protocols and updates. Irrespective, cybersecurity standards that your clients have chosen should be clearly agreed to by the vendor along with corresponding remedies. In addition, it could be worth checking to piggyback on a state cloud master agreement. The NASPO ValuePoint, which is the cooperative purchasing arm of the National Association of State Procurement Officials (NASPO),[10] could have new master agreement templates for participating states to use or for your clients to reference. Similarly, the National Chief Information Officers of the States could be a good source of best practices.

Additional Non-Cybersecurity Provisions. Other legal grounds may also restrict unauthorized use, distribution or disclosure of data; including copyright, trade secrets, and Protected Critical Infrastructure Information (PCII) designation.[11] For IT agreements involving utilities (electrical grids, water supply, airports, etc.),

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it could pay to have client determine the benefits from pre-designating the information as PCII versus the administrative burden.[12]

Therefore, an expansive set of cybersecurity provisions should not only lower the chance of data breach, system hack or even ransomware, but also increase remedies for clients. As fully discussed in Section III above, indemnification is a great tool to recoup damages from vendors.

As a back up to the indemnity obligations, it is common nowadays to require vendors to provide cybersecurity and/or data breach insurance, because cybersecurity insurance policy choices are abundant and costs tolerable. Given the nature of the data in each transaction, risk manager could assist in assigning an appropriate coverage amount so as not to over insure. As in other insurance policies, clients shall be the named insured to capture 100% of the policy benefits.

Finally, cybersecurity or data breach could bring not only financial losses but also bad press to government clients. But appropriate standards and effective provisions could lower the risks significantly.

V. Confidentiality, Public Records Compliance, and Municipal Data Retention/Destruction – Eugene Hsue, Assistant City Attorney, City of Philadelphia Law Department

General Overview: A practitioner must balance a city's liability-free compliance of public records law with a vendor's legitimate business interest in its proprietary information and business secrets. On one hand, the requirements of any applicable public records law constrain any potential obligation of confidentiality that a city may owe a vendor for information flowing from vendor to city. With respect to municipal information flowing to the vendor through its cloud-based service or other means, the municipal attorney should obligate the vendor to a duty of confidentiality, as well as ensure that any requirements mandated by applicable privacy statutes apply. Making a vendor agree to an express acknowledgement of the city's requirements under an applicable public records statute is the practitioner's safest bet. In the language of that acknowledgement or elsewhere, the municipal attorney should disclaim any liability on the city's part that stems from disclosure of public records containing the vendor's documents.

Starting Positions in Negotiation – Pro-City Positions: A city may receive a multitude of the vendor's documents as either part of a RFP response or the city's cybersecurity audit of the vendor's product. With respect to this vendor information, the strongest (and arguably unreasonable) position that a city can take in the first instance is to not owe the vendor any duty of confidentiality. The practitioner should become competent with the category of documents which, under a jurisdiction's public records law, unambiguously fall into the category of being "public records." This category could include large portions of the vendor's RFP response or the resulting contract. If not yet competent, the practitioner should consult with colleagues who specialize in public records litigation. For vendor information that clearly constitutes a "public record," the practitioner should avoid contractual language that obligates the city to keep these documents confidential. Neither should the practitioner countenance any liability attaching to the city for their disclosure.

If the vendor pushes for a duty of confidentiality to attach to the city, then the practitioner should ask the vendor to explain how certain documents constitute business secrets or proprietary information. Reasonable vendor requests may include a vendor's references, which divulge business clientele, or a vendor's cybersecurity audit, which divulge the technical measure by which a vendor keeps its product secure. If a practitioner agrees to such a duty, the practitioner should be sensitive to the administrative implementation of confidentiality: One suggestion would be to require the vendor to emphatically mark in writing those documents as "confidential" or "proprietary."

Municipal information Flowing to Vendors: First, the practitioner should consult with privacy law colleagues or treatises on whether the content of that municipal information triggers legal requirements under privacy statutes. For example, health records of city residents may trigger HIPAA requirements that any recipient of that data become a "Business Associate" of the city's. Transactional attorneys should work closely with privacy law experts to draft boilerplate language that satisfies all of the city's privacy law mandates. In addition to privacy law requirements, the practitioner should consider obligating the vendor to confidentiality of this municipal information. The scope of this duty could include a prohibition against the monetization of this data and against its storage on any third-party's servers (like Amazon Web Services or Sales Force). There does exist the opportunity for the city to collect royalties, either continual or one-time, on the vendor's use of that data. However, in the case of continuous royalties, the city may need to rely on the vendor's platform for these statistics, and there would be no way to independently verify those numbers apart from the vendor. Ultimately, whether or not to collect royalties based on the vendor's use of municipal data is a business decision left up to the client.

Commonly Encountered Vendor Positions: In addition to documents containing proprietary information and legitimate business interests, vendors may aim to enlarge the scope of documents which they seek to obligate the city in keeping confidential. Vendors may propose and argue the RFP response, the overall monetary value of the contract, and the contract itself some-

how constitute "business secrets" or are "proprietary" to them.

The city practitioner should counter the vendor's assertions with a firm understanding of what constitutes a public record under applicable public records law. In negotiations, the city practitioner should inform the vendor that the city's contractual obligation of confidentiality cannot encompass materials which at law are public. Otherwise, that contractual term itself may be void as illegal.

Very often, the vendor may push for the duration of the city's confidentiality obligation to be in perpetuity. Ultimately, this is the client's business decision which implicates the client's technical ability to keep the vendor's information confidential. One suggestion to counter this vendor proposal would be to obligate the client to destroy the vendor's data, to certify that destruction to the vendor by writing, and then for the client's duty to extinguish upon destruction. The city itself may seek for the vendor's confidentiality obligation to be in perpetuity, particularly where health records of residents flow to the vendor. In that case, the city may not want to curtail the duration of the vendor's duty with the vendor's destruction of that data, nor the certification of that destruction. Ultimately, this is a client's business decision.

Vendors often may want to place the administrative burden of identifying which of its documents contain proprietary information or business secrets upon the city. The city should push back, because it simply is not in the best position to understand the vendor's own documents; the vendor knows its business and documents best. The city should require the vendor to identify which documents contain a business secret or are proprietary, by expressly and prominently marking those documents The contract could include a clause obligating the City to notify the vendor if there is a request for disclosure of the vendor's records, but placing the burden of proving those records as exempt from disclosure upon the vendor in the context of public records litigation. The city should not have the burden or expense of protecting the vendor's proprietary information. This is a reasonable cost of doing business with government.

Reasonable Middle Ground: Where city and vendor information flow to one another, well-drafted language should include bilateral confidentiality obligations that balance the vendor's legitimate business interest in its proprietary information with the city's legal obligation to make certain records public. The city should expressly disclaim any potential liability to the vendor resulting from compliance with public records disclosure, and the vendor should acknowledge that the city's public records obligations govern the city's treatment of the vendor's records. On the other hand, to the extent that the city receives the vendor's business secrets and proprietary information prominently marked by the vendor as such, the city should keep that vendor information confidential until the city destroys it, consistent with applicable public records laws.

CONCLUSION

We hope you find this article helpful. If you have any questions, do not hesitate to contact any co-author at the email addresses below. Happy negotiating! ML

NOTES

1. "Ransomware is an ever-evolving form of malware designed to encrypt files on a device, rendering any files and the systems that rely on them unusable. Malicious actors then demand ransom in exchange for decryption." <https://www.cisa.gov/>
2. https://www.cisa.gov/ransomware-fact-sheets-and-infographics
3. Global Resilience Federation, InfraGard, ISACs/ISAOs, and NCFTA.
4. Protected Health Information ("PHI") may be defined per 45 C.F.R. §160.103.
5. Personally Identifiable Information ("PII") is generally defined as information that can be used to identify, contact, or locate a natural person, including without limitation, natural person's name, IP address, email address, postal address, telephone number, account numbers, date of birth, driver's license or other government-issued identification card numbers and social security numbers, or any other information that is linked or linkable to an individual.
6. International Organization for Standardization ISO 27001; National Institute of Standards and Technology NIST SP 1800 Series Practical Guide; International Electrotechnical Commission (IEC); British Standards Institution;. Center for Internet Security CIS; Internet Engineering Task Force; System and Organization Controls (SOC 1 & 2); and Payment Card Industry Security Standards Council.
7. REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("General Data Protection Regulation," repealing Directive 95/46/EC) (27 April 2016, *effec*. May 25, 2018). *See also,* REGULATION (EU) 2018/1725 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC). (23 October 2018).
8. < https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc/standard-contractual-clauses-international-transfers_en>
9. Virginia, Colorado, Illinois, Massachusetts, New York, North Carolina, Pennsylvania and Texas (as of June 11, 2021 per the IAPP State Privacy Legislation Tracker <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/>.
10. https://www.naspovaluepoint.org/portfolio/cloud-solutions-2016-2026/#participants
11.Cybersecurity & Infrastructure Security Agency <https://www.cisa.gov/pcii-program>
12. <https://www.cisa.gov/>

Amicus *cont'd from page 28*

objectively manifested an intent to restrain her from driving away" and concluded she was seized "the instant that the bullets struck her."[19]

The Court came to its conclusion relying, in part, on *California v. Hodari D.*, 499 U.S. 621 (1991) for the proposition that "the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee."[20] The Court explained that this common law rule, which *Hodari D.* relied on, "achieved recognition to such an extent that English lawyers could confidently (and accurately) proclaim that '[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.'"[21] Although the common law did not deal with weapons, the Court extrapolated the rule to all seizures, including the application of force with weapons, and saw no reason to draw "artificial line[s] between grasping with a hand and other means of applying physical force to effect arrest."[22]

The Court noted, however, that not every application of force would constitute a seizure. There must also be an intent to restrain, so accidental force or force applied for some other reason (though what reason was not specified) would not satisfy the rule. Although the decision indicated there must be an intent to restrain, the Court explained the test is "whether the challenged conduct objectively manifests an intent to restrain" and that the Court "rarely probe[s] the subjective motivations of police officers in the Fourth Amendment context."[23]

Finally, the majority remanded the case to determine if the seizure was reasonable and/or if the officers were entitled to qualified immunity.

The dissent, authored by Justice Gorsuch and joined by Justices Thomas and Alito, complains:

The majority holds that a criminal suspect can be simultaneously seized and roaming at large. On the majority's account, a Fourth Amendment "seizure" takes place whenever an officer "merely touches" a suspect. It's a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again. That view is as mistaken as it is novel.[24]

While this case is a disappointing loss for local governments, the SLLC / IMLA amicus brief was notable enough that the majority quoted it, though it did so to reject our arguments that *Hodari D.* should not apply.

Rivas-Villegas v. Cortesluna

IMLA also recently participated as an amicus at the Supreme Court petition stage. In *Rivas-Villegas v. Cortesluna,* a 911 dispatch received a call from a 12-year-old girl that her mother's boyfriend was threatening her, her sister, and her mother with a chainsaw. The child reported they had locked themselves in a bedroom. She described the boyfriend and noted he was drinking.

When officers were dispatched to the scene, they saw Ramon Cortesluna through a window but did not see or hear a chainsaw. They formulated a plan, which included using less than lethal force, and knocked on the door, announcing themselves and asking Cortesluna to come outside and speak with them. When Cortesluna came to the door, he was holding a large metal object that appeared to be a crowbar. The officers ordered him to drop the weapon and come outside.

Cortesluna dropped the metal object, put his hands up and exited the home. The officers ordered him to his knees, at which point they noticed a knife in his pocket. They ordered him not to put his hands down (toward the knife) but to raise them. Cortesluna nevertheless lowered his head and hands (toward the knife), whereupon Officer Leon, immediately shot him with two rounds from a bean bag shotgun. Cortesluna then put his hands up and the officers ordered him to get down on the ground, and he complied. Officer Rivas-Villegas then put his knee on Cortesluna's back for approximately eight seconds (there is a video of the incident), deploying a common tactic used to prevent officer injury where a suspect is known to be armed.

Cortesluna sued the officers, claiming excessive force for both the use of the bean bag shotgun and for the knee on his back. The Ninth Circuit concluded that the officer who fired the beanbag rounds did not violate the Fourth Amendment, given the rapidly unfolding events and the threat when Cortesluna was reaching toward the knife in his pocket.[25] As to officer Rivas-Villegas, however, the Ninth Circuit concluded that he violated the Fourth Amendment right to be free from excessive force "by leaning too hard" on Cortesluna's back, allegedly causing injury because by the time he did so, the threat had passed.[26] The Circuit also denied qualified immunity, concluding it was clearly established that "police may not kneel on a prone and nonresisting person's back so hard as to cause injury."[27]

The dissenting judge chastised the majority for downplaying "the dangers officers face in making arrests" "from the comfort of [their] chambers," noting that the "suggestion that Cortesluna suddenly no longer posed a risk at the moment the beanbag shots were fired … is factually unreasonable."[28] The dissent also pointed out that the reasonableness of the officer's actions in placing his knee on the suspect's back given that Cortesluna was still armed at that time.[29]

The petition for certiorari argues, among other things, that the Ninth Circuit failed to properly apply *Graham v. Connor* to a widely accept-

ed police practice and also in the alternative that qualified immunity should be granted given the law was not clearly established at the time of the handcuffing. IMLA's amicus brief agrees with the legal analysis in the petition, but separately underscores the serious public safety ramifications of the Court's decision for officers.[30] The case has not yet been distributed for conference and as of this writing, IMLA awaits the outcome of the petition. ML

Notes

1. In a 7-2 opinion, the Court declined to find standing by individuals and states who had challenged the constitutionality of the Affordable Care Act.
2.In a unanimous opinion that masked deeper divisions, the Court ruled in favor of Catholic Social Services (CSS) in its free exercise challenge to the City of Philadelphia's contract requirement that CSS agree to certify same-sex couples as potential foster parents in order to comply with the City's antidiscrimination laws and policies. While the decision was technically a loss for the City, it was very narrow and applied because of particular contract language giving the Commissioner discretion to allow exceptions to the antidiscrimination language. The Court declined to overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990).
3. IMLA's amicus activity in *Caniglia v. Strom* and *Torres v. Madrid* was previously summarized in prior *Municipal Lawyer* articles, but those articles were written before the Court's decisions.
4. Caniglia v. Strom, 593 U.S. __, p. 4 (2021)
5. *Id.*
6. *Id.* at 3.
7. *Id.*
8. Caniglia v. Strom, 593 U.S. __, p. 3-4 (2021) (Alito J., concurring); Caniglia v. Strom, 593 U.S. __, p. 4-5 (2021) (Kavanaugh J., concurring).
9. *Id.* at 3 (Alito J., concurring)
10. *Id.*
11. *Id.* at 4.
12. *Id.* at 4-5.
13. Caniglia v. Strom, 593 U.S. __ (2021) (Roberts C.J., concurring)
14. *Id.* at 4-5. (Kavanaugh J., concurring).
15. *Id.* at 5.
16. To review a copy of IMLA's amicus brief, please visit: https://www.supremecourt.gov/DocketPDF/20/20- 157/169238/20210217174516662_20-157%20Korzen%20Amicus%20Brief%20ALL%20FINAL%20pdfapdf.pdf
17. Caniglia v. Strom, 593 U.S. __, p. 2 (2021) (Kavanaugh J., concurring).
18. Justice Barrett did not take part in the decision as it was argued before she was on the bench.
19. *Torres v. Madrid,* 592 U.S. __, p. 1 (2021).
20. *Id.* at 10-11. The Court's opinion discusses numerous historical decisions, including a discussion about a 1605 English common law case involving the Countess of Rutland who was deemed arrested by a "serjeant-at-mace" when he touched her with a mace.
21. *Id.* at 5.
22. *Id.*
23. *Id.* at 8.
24. *Id.* at 10.
25. Torres v. Madrid, 592 U.S. __, p. 1 (2021) (Gorsuch J., dissenting).
26. Cortesluna v. Leon, 979 F.3d 645, 653 (9th Cir. 2020)
27. *Id.* at 653-54.
28. *Id.* at 655.
29. *Id.* at 661 (9th Cir. 2020) (Collins J., dissenting).
30. *Id.*
31. https://www.supremecourt.gov/DocketPDF/20/20-1539/180902/20210603185141261_20-1539%20Amicus%20CA%20State%20Sheriffs.pdf



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