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FEATURED CASE:

Takings: Relocation Fee on Landlords is not a Taking, Seizure, or Exaction

Ballinger v. City of Oakland, no. 19-16550 (9th Cir. Feb. 1, 2022).

Affirming the court below, the Ninth Circuit finds that Oakland's ordinance requiring landlords to pay tenants a relocation fee when they terminate a tenancy is neither an unconstitutional taking of private property for a public purpose nor an exaction, viewing the payment more as a wealth-transfer mechanism within the rubric of legitimate landlord-tenant regulation.

In September 2016, Lyndsey and Sharon Ballinger (Ballingers) leased their home in the City of Oakland (City) for one year while fulfilling military assignments; after one year, the lease converted to a month-to-month tenancy. Under the City Municipal Code, even after a lease has ended and converted to a month-to-month tenancy, the tenancy may only end if the landlord has good cause. Although moving back into one's home is for good cause, landlords are also required, under the Uniform Residential Tenant Relocation Ordinance (Ordinance) adopted by the City in January 2018, to pay tenants a relocation payment based on rental size, average moving costs, the duration of the tenant's occupancy, and whether the tenants earn a low income, are elderly or disabled, or have minor children. Half the payment is due upon the tenant's receipt of the notice to vacate and the other half upon actual vacation, and the tenants do not actually need to spend the money on relocation costs. Failure in bad faith to make the payments will allow a tenant to bring an action against the landlord for injunctive relief, the relocation payment, attorneys' fees, and treble damages.

When the Ballingers returned to the Bay area, they decided to move back into their home. Complying with the Ordinance, they gave their tenants 60 days' notice to vacate, and paid them a total of $6,582.40 in relocation, half up front and half after the tenants vacated. The Ballingers then sued the City, bringing facial and as-applied constitutional challenges under the Declaratory Judgment Act and 42 U.S.C. § 1983. Characterizing the relocation payment as "ransom," they claimed that the fee is an unconstitutional physical taking of their money for a private purpose and without just compensation. Alternatively, they claimed that the fee constitutes an unconstitutional exaction of their Oakland home, and an unconstitutional seizure of their money under the Fourth and Fourteenth Amendments.

The district court dismissed, holding that "no precedent supports the Ballingers' argument that legislation requiring the payment of money constitutes a physical taking." Because the Ordinance was "generally applicable legislation," it did not give rise to an actionable exaction claim.

The Ninth Circuit affirmed.

No Taking of Identifiable Interest: Although as noted below, money can be the subject of a physical/per se takings claim, the relocation fee was a regulation of the landlord-tenant relationship, not an unconstitutional taking of a specific and identifiable property interest. While the Fifth Amendment as applied to the states through the Fourteenth Amendment provides that "private property" shall not "be taken for public use, without just compensation," and a regulation which results in a physical appropriation of property can be a per se taking (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)), there nevertheless must be an actual appropriation by the government. This was not such an appropriation; it was a legitimate housing regulation. The Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." These acts include zoning enactments, rent control, or requirements that landlords accept tenants they don't like. "Here, the Ordinance imposes a transaction cost to terminate a lease agreement. We see little difference between lawful regulations, like rent control, and the Ordinance's regulation of the landlord-tenant relationship." It was significant that the Ballingers had voluntarily surrendered their property to begin with, which set in motion the relocation fee. As the court noted, a different case would be presented if they had been required to vacate their property or had no way to terminate the tenancy. (Without a taking, the court saw no need to address whether the fee was taken for a public purpose or what just compensation would be).

Money can be "Property" for Takings Purposes, but: The court also made it clear that merely because the "property" involved was money, that did not foreclose a takings claim. Based on the Supreme Court's "long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 616 (2013), the relocation fee's obligation to pay money rather than real or personal property "does not

mean that it cannot be an unconstitutional taking." As the Circuit saw it "*Koontz* appeared to endorse that 'the relinquishment of funds linked to a specific, identifiable property interest' invoked a per se takings analysis." But unlike the fee challenged by the Ballingers, which applies to any residential property in the City, the exaction in *Koontz* operated on "the direct link between the government's demand and a specific parcel of real property." Rather than a mere obligation to pay in relation to the use of one's property, the government in *Koontz* had demanded and specifically identified that it required Koontz's payment of money in exchange for granting a benefit. Here, the Ordinance did not identify the the Ballingers' residence or their $6,582.40 as a parcel of money it intended to take. Thus, their physical-taking claim was not "an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest."

Not an Exaction: The Ballingers also claimed that the Ordinance (a legislatively imposed condition) was an unconstitutional exaction. But as the Circuit held, they missed, under the Nollan/Dolan framework, "that whatever the government action is, it must condition the grant of a benefit on an unconstitutional taking." As Dolan established, an actionable exaction is found "where government bodies 'make some sort of individualized determination that the required dedication [or condition] is related both in nature and extent to the impact of the proposed development'". Here, the Ordinance did not conditionally grant or regulate the grant of a government benefit, such as a permit, and therefore did not fall under the unconstitutional-conditions umbrella.

No Fourth Amendment Claim: The Fourth Amendment's applications to searches and seizures, including to those in the civil context. For purposes of a Section 1983 seizure claim, the Ballingers had to allege a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" which was caused by state action. They claimed that their tenants were "willful participant[s] in joint activity with the State or its agents" and that the Ordinance authorized a "meaningful interference with [their] possessory interest in property." But a private individual's actions can only be considered state action if a "sufficiently close nexus" makes private action "treat[able] as that of the [government entity] itself," and merely "authoriz[ing]," "approv[ing,] or acquiesc[ing]" to private action—such as the "creation or modification of any legal remedy"—is not enough to show state action. Here, the City did not participate in the monetary exchange between the Ballingers and their tenants, nor did it "exercise[] coercive power" over the Ballingers' tenants or "provide[] such significant encouragement, either overt or covert, that the [tenants'] choice must in law be deemed to be that of the State." Merely enacting the Ordinance and entitling tenants to demand a relocation payment was a "kind of subtle encouragement . . . no more significant than that which inheres in [a government entity]'s creation or modification of any legal remedy."

LINK

Short Summaries:

First Circuit – Qualified Immunity – Deliberate Indifference – Parkinsons Disease – County Liability

Generally, I love reading First Circuit decisions and this case furthers the attraction. As I read the opinion, I thought that the plaintiff was pro se, but that was not the case. Nevertheless, the court's opinion mentions the various claims abandoned, the lack of argument on specifics and the general failure of presenting an effective appeal. The claims involved mistreatment of the inmate a person suffering from Parkinsons for quite some time who believed that treatment in the jail was deliberately indifferent and that the county should be held liable along with various officers. Long story short, admitting that there was no policy that actually caused harm will unlikely yield a successful claim against a county. This line from the opinion effectively captures how the court viewed almost all of the plaintiff's claims: "Plaintiff's undeveloped attack against the judge's alternative qualified immunity ruling on the inadequate-medical-care matter — an attack consisting of one sentence — is reason enough to disregard this facet of the claim."

Daggett v. York County
LINK

Second Circuit – Probable Cause – Arguable Probable Cause – Qualified Immunity

Apparently, the Second Circuit has differentiated "probable cause" (a term used in the Fourth Amendment) from "arguable probable cause" (a term whose origin I'm unfamiliar with). So, a domestic dispute brought officers to a family in the throes of hating each other and wanting the police to sort things out for them rather than deal with their interpersonal issues themselves. The father died and a son showed up and got into a fight with mother and his brother who both called the police after the event to ask the brother/son to be arrested. At a wake for father a short time later, wife of son calls police to assert that her husband had been attacked by his brother. Police arrive at home and wife is happy they're there but they claim to be there only because of the original call to arrest her husband (ouch). They seemingly ignore her statements about her husband being the real victim by "rolling their eyes" and saying they're not getting into a tic for tac dispute between them and they arrest the husband. Charges are dismissed and the litigation lottery begins. A jury finds that the officer did not have probable cause to arrest but the district court issues an order notwithstanding the verdict by finding that the officer had "arguable probable cause". Similarly, and because the officer was not liable, the county was not liable.

So enters the Second Circuit – agree no probable cause. There was arguable probable cause therefor QI prevents the officer's liability. The county however is responsible under respondeat superior for state tort claims as the state law allows vicarious liability against municipal governments. Because the officer arrested without probable cause,

the county is liable. (I'll admit to a little confusion on this one, so feel free to straighten out).

Triolo v. Nassau County
LINK

Third Circuit – State Created Danger

I guess most cases we report on are sad, but this one is exceptionally so, especially if you have had to deal with a family member who suffers from a mental health condition. A young man with serious bipolar disorder was hospitalized in a state facility and his condition deteriorated. He attacked other patients and staff and seriously injured another patient. The young man's mother asked about visitation and the doctor suggested that it would help the man. The head nurse advised that she would supervise the visit. The visit started well enough but the nurse left mid visit and the man attacked and seriously injured his mother. She sued the doctor and the nurse. The court concluded that the doctor did not create the danger as the woman had a choice to visit or not. On the other hand, the nurse created the danger that harmed the mother by agreeing to supervise the visit and leaving mid-way through it. At that point the court believed the mother did not have a choice, so the state created danger rule applied. The elements of which the court identified as: • she suffered a "foreseeable and fairly direct" harm; • the state "acted with a degree of culpability that shocks the conscience"; • she "was a foreseeable victim … or a member of a discrete class of persons" potentially harmed "by the state's actions"; and • the state "affirmatively used [its] authority" to "create[] a danger" or make her "more vulnerable to danger than had [it] not acted at all.".

Mears v. Connolly
LINK

Fourth Circuit – Qualified Immunity – Missing Witness – Excessive Force

In one of those cases where the police probably wish they never responded to a 9-1-1 call, an officer was denied qualified immunity in a case where the officer shot and killed a very hostile and seemingly deranged man. The man seemed to have some mental issues and these exhibited when his family visited. Apparently, for years he had tried to keep his children close and would threaten to kill them if they left the property. One child had left and returned with her family only to find the father still a bit possessive. She awoke one day to find the tires flattened on her car and the father threatening various family members. Not having cell service there, she texted her mom who called 9-1-1 as did a family friend. The woman's brother who lived with the father got away from the property and also got in touch with 9-1-1 reporting his father armed and dangerous, but seemingly having good sense, the son stayed gone for the rest of the day. The police arrived and put the daughter and her family in safety but the father was enraged. He took a shovel threatening the police and then ran for it. One officer

slipped and fell the other lost sight of the man only to spot him again as he turned the corner of the house, where the man was leaning over a sofa. The officer told him (as the officers had quite a few times) to raise his hands, but the man turned quickly and the officer shot him.

Both the lower court and the panel found the officers were confronted with a basis to use excessive force, but the panel concluded that the facts not in dispute raised a factual question as to whether the officer's story was true and since the man was dead, the court accorded the plaintiff's side a reason to deny summary judgment. The issue was whether the man was shot in the back – the officer said he fired and the man continued to turn accounting for the shot in the back whereas, the court found it unlikely. BTW, the court also noted that the son in deposition said that he never mentioned that his dad was armed and dangerous but the 9-1-1 call was recorded and proved otherwise.

Stanton v. Elliott
LINK

Eighth Circuit – ADA – No Mask Requirement Mandates

A disability rights group filed suit against Iowa's mandate that prohibited mask mandates. Their suit was on behalf of school children at risk who believed that the prohibition affected their rights under the ADA. A panel in a 2-1 decision of the court concluded that a mandate against mandates violated the plaintiffs' rights. The majority concluded that mask requirements are reasonable accommodations under the ADA and the Section 504 of the Rehabilitation Act required to protect the rights of plaintiffs' children, thus prohibiting reasonable accommodations violated the federal laws.

The Arc of Iowa v. Kimberly Reynolds
LINK

Eighth Circuit – Protests – Excessive Force – Qualified Immunity – Social Media is not anonymous

In his long career Tom Brady apparently has often advised referees and opponents of his displeasure with certain aspects of their failure to adhere to their roles and responsibilities and in a podcast mentioned this and how he has never been flagged for his conduct. Well – in his very next game, with the season on the line, he spoke up about a missed call and got flagged hurting the team's chances of winning. Word to the wise – don't tempt fate and don't publicly tout how you get away with things. So, during a mass protest in St. Louis a number of people were ordered to disburse and didn't and were subsequently herded into a "kettle" and allegedly beaten and sprayed with chemical agents among other alleged atrocities both before and after being arrested. The next day an officer posted a picture of several officers holding a sign that said something like "Welcome to the Entertainment District" which seemed to mock those arrested during the evening melee. When sued by an individual who claimed not to

have been a protestor, but a resident interested in finding out what all the commotion was about who had not heard the dispersal order and one who claimed to be badly treated, the officers and the supervisor sought Qualified Immunity only to be denied. A panel of the Eighth Circuit upheld the denial citing among other really bad facts the sign that was posted on social media. As to supervisor liability the court recounted some of the allegations that suggested that the supervisor was intimately involved with both the force used and the tactics thereby deny the supervisor qualified immunity as well.

Apparently, the actions of the police in this case led to some indictments and some really bad PR. As a lesson to be learned, we all need to act professionally in dealing with our residents and social media doesn't offer anonymity. Bear in mind as I do that these are allegations only, so the facts may be quite different.

Baude v. Leyshock
LINK

Ninth Circuit – Attorney Client Privilege – Primary Purpose Test – Because of Test

In an amended opinion the Ninth Circuit has adopted the primary purpose test for attorney client privilege when there are dual purposes in seeking advice from an attorney. In situations involving both legal advice and non-legal advice if the primary purpose of the advice is to seek legal advice then attorney client privilege prevails. The primary purpose test is more narrow than the "because of test" which essentially applies attorney client privilege to communications that arise because of potential litigation. This case involved advice involving a tax deduction.

In Re Grand Jury
LINK

Ninth Circuit – Resisting Arrest – Excessive Force – Protests – Council Meetings – Bane Act – Qualified Immunity

Maybe the Ninth Circuit is turning a corner. In this case a group of protestors showed up at a council meeting to protest the death of a man. They wanted to stage a "die-In" and in doing so disrupted the meeting. The mayor adjourned the meeting and officers told the protestors to leave or be arrested. The protestors agreed to engage in passive resistance by going limp and refusing. The officers then dragged them out and arrested them. One of the protestors filed this action for excessive force. She had a sprained wrist, mild swelling and a torn rotator cuff. By way of footnote the court mentioned that it was difficult to tell if the rotator cuff injury occurred during this arrest or another arrest the Plaintiff was suing over where a similar injury seemed to be a part of the claim. The court concluded that the force the officers used; i.e., lifting the limp Williamson and carrying/dragging her from the room was not more than required for the purpose. The

court also concluded that the governmental interest was minimal but existed. The court recognized the right to protest but noted that protestors:

> ". . . do not have a right to prevent duly installed government from performing its lawful functions. See Felarca, 891 F.3d at 818. To conclude otherwise would undermine the very idea of ordered society."

Bottom line: no constitutional violation, so therefore district court should have granted Defendants' motion for SJ. Also, reversed denial of SJ to Defendants under California Bane Act which requires a constitutional violation for liability to attach.

Williamson v. City of National City
LINK

Tenth Circuit – Qualified Immunity

In an order upon remand from the Supreme Court, the Tenth Circuit remanded a case against two officers to the District Court to enter judgment based on the Supreme Court's decision in Bond v. Tahlequah. The officers had been called to a home because the former husband of the resident was in the garage drunk and refusing to leave. When the officers arrived they engaged the man in conversation and he eventually moved to the rear of the garage despite being told to stop. He picked up a hammer and based upon the officers' fear that he was going to use it against them, they shot him and he died.

Bond v. City of Tahlequah
LINK

Eleventh Circuit – Prisoner Suits – Sheriffs –Jails- Three Strikes – Exhaustion

A panel reversed dismissal of two suits by two inmates of the Baker County Detention Center. Apparently one of the plaintiffs since being incarcerated has found litigation to be a form of recreation and brings many actions against the terms of his incarceration. In this matter both plaintiffs filed in state court and were accorded in pauperis status. The defendants removed the cases to federal court and sought dismissal as to one plaintiff, the recreational litigator, under the three strikes law and against the other for failure to exhaust administrative remedies. The court reversed on three strike by reading the law to apply to suits brought in federal court by the plaintiff where as here it was brought in state court and removed by the defendants. As to the exhaustion claim, the panel felt the lower court had not fairly considered the plaintiff's allegations before ruling against him on the basis of the defendants' defense.

Maldonado v. Baker County Sheriff's Office
LINK

Colorado Federal District Court – Obscenity – Social Media – Public Forum

In a blog post I read last evening Eugene Volokh reported on a Magistrate judge opinion finding that posts critical of police officers were obscene and therefore not protected by the First Amendment. Professor Volokh questioned the decision. For our purposes, the case reflects the danger in using social media for governments and dealing with residents who want to express their views on the government's social media. In this case, someone who did not hold the police in high esteem said some very rude things about police officers. The department removed those passages and the person, now doubly offended, sued. The Magistrate concluded that the messages were obscene. Professor Volokh suggested a better argument for redaction might be that the forum was a limited public forum. IMLA has a model social media policy available to members that might help in these contexts.

LINK

Maryland Court of Special Appeals – Tax Exemptions

The Maryland Code provides certain tax exemptions as does the Prince George's County code. Those exemptions run to the benefit of transfers to the State or entities of the State. Does that mean any state or just the home state of Maryland. Los Angeles County's pension fund owns an LLC that sought an exemption on the belief that a section of the Code that defined State to include any of the United States or its Territories meant that it was entitled to the exemption as an instrumentality of the State of California. Not so, said the home state's court. The intent of the statute was to apply the exemption to the State of Maryland only.

Gateway Terry, LLC v. Prince George's County
LINK

Arguable Probable Cause

I had some really helpful responses to my question about "arguable probable cause". Apparently, the term is used in some circuits but not others. One great response was from a lawyer who I really admire in Vancouver, Washington, Dan Lloyd who wrote: "Arguable probable cause" is germane only in the qualified immunity context. Essentially what it means (if properly applied) is that unless every reasonable officer would agree probable cause was lacking, probable cause is "arguable" and therefore the constitutional question is not "beyond debate," which means the individual gets qualified immunity. So in other words, it's another way of stating the constitutional question is not "beyond debate"." Terrific explanation.

I guess I'm just too old (maybe I'm arguably middle aged), but I learned the Constitution protected against searches and seizures that were not based upon probable cause. If it helps provide qualified immunity to say that an officer thought there was probable cause and a lot of other folks would have thought so too, but now in the resplendent courtroom after hearing a bunch of arguments the court doesn't think so, but can forgive the mistake – well, maybe that makes some sense. From my perspective however I think it would be better for courts to frame the question as to whether there was or was not probable cause and if not, did the officers nevertheless act in good faith. I guess one can ask if there is *per se* arguable probable cause if a magistrate issues a warrant based on the stated probable cause? I always used to believe that when I prosecuted, I could prosecute someone if there was sufficient evidence to believe a crime had been committed and the defendant had committed it. Sometimes, I lost, but the result didn't change the how the case was viewed in advance of the trial.

Anyway, thanks to Dan and others who responded and let's hope the courts continue to find ways to recognize that officers don't have to be correct, they just need probable cause – arguable or actual – to search or arrest.