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COVID: San Diego Restrictions on Adult Entertainment Enjoined as Not Supported by Medical Evidence

Midway Venture LLC vs County of San Diego, No. 37-2020-00038194 (Ca. Sup. Ct. S.D. Co., Dec. 16, 2020).

A California Superior Court enjoins San Diego County's enforcement of a closure order, since retracted, directed at two adult dancing venues that implemented 15-foot boundaries and other safety measures, finding that, despite the County's dilemma in being required to follow a statewide lockdown mandate directing such closures, the County's evidence that its cease and desist actions bear a coherent relationship to ICU bed capacity or COVID outbreaks is insufficient to justify the burden placed on the adult establishments.

Plaintiffs operate Pacers and Cheetahs, "adult entertainment establishments" in the County of San Diego (County) as defined in the County's Municipal Code and holding a Nude Entertainment Business Permit issued by City's Chief of Police. Closed for months after the pandemic arose, Plaintiffs submitted a plan to the County which included the following restrictions:

- Stages to be located on two-foot platforms, 15 feet from any tables.
- Stages to be roped off with signs strictly advising patrons not to pass within the 15-foot buffer.
- Adult entertainers to perform, one artist at a time per stage.
- All stage equipment to be sanitized after a performance.
- All performers to wear mask coverings while performing.
- The announcer and disc jockey (DJ) to be located 15 feet from any tables, roped off and designated for one person at a time.

- Audio stage to be sanitized and cleaned after every daily use.
- The announcer and DJ to wear a mask covering.
- The announcer and DJ to issue regular reminders to patrons that they are not to approach performers and they are to remain seated at their tables.

They re-opened their establishments and provided indoor entertainment for approximately five weeks before receiving the County's cease and desist letter, which they challenged. On November 6, 2020, the court issued a temporary restraining order enjoining the County from preventing plaintiffs' provision of live adult entertainment, whereupon the County changed its rules, allowing the plaintiffs to continue in business. They challenged the rescinded provisions nonetheless.

Mootness. While the County argued that, after the Court issued its prior TRO, the County "changed the State's treatment of live performances held at restaurants, by authorizing such performances under the same conditions under which restaurants may operate" and "This motion is therefore moot," the court disagreed. It referenced the Supreme Court's recent review of New York Governor Cuomo's order, which rejected the argument that a measure allowing potential religious closures was not moot:

> Like the Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court finds that Defendants' latest change does not render Plaintiffs' Application moot. To avoid any confusion, the Court is deeply empathetic to the County and Dr. Wooten's dilemma in balancing their local responsibilities, based on the data in San Diego County, while subject to the State's threat "to withhold funding from counties that do not adhere to its guidance or enforce its orders.". As Brent Panas, Chief of the County's COVID-19 Safe Reopening Compliance Team, declares "As the Governor and other State officials have made clear, local governments (including the County of San Diego) do not have authority to relax the State's COVID-19 public health restrictions and orders. While counties can adopt stricter requirements in their public health orders, they cannot affirmatively permit activities or business operations that violate the State's guidelines and orders."

First Amendment Analysis. The court focused on the parties' evidence of a link between the adult entertainment businesses activities and the risks of COVID. Plaintiffs' medical experts provided the following: "I have been asked to opine on the issue of whether a restaurant would increase the risk to its patrons or employees if a dancer performing on a stage were present if the dancer is 15 feet away from all patrons and suitably masked. There is no scientific evidence of increased risk to the patrons if dancing is allowed at a restaurant under those conditions."

In contrast, the court found that the County's proponents did not submit credible evidence to refute such testimony:

> The Court infers that . . . the County possesses contact tracing data and has the power to produce such evidence to refute Plaintiffs' assertions that Plaintiffs providing live adult entertainment and San Diego County businesses with restaurant service, such as Plaintiffs' establishments, subject to protocols, do not present any risk – much less a greater risk than before Governor Newsom issued his December 3, 2020 Regional Stay at Home Order - to the spread of COVID in San Diego County. Since the County could have produced "stronger evidence," the Court discounts the County's "weaker evidence."
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> The obvious question, from the Court's perspective, is, in the absence of evidence, why is the State's Regional Stay at Home Order limiting San Diego County restaurant businesses "to take-out, pick-up, or delivery" rational?

The California court cited inconsistencies recently detected by the Supreme Court in New York's lockdown order:

> [Governor Cuomo] has chosen to impose no capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

Here, the activity being regulated was not a church, but "the nature of [plaintiffs'] entertainment is entitled to First Amendment protection ('if only within the outer ambit of the First Amendment's protection.')". Because the State and County's purpose in enacting the restrictions was unrelated to suppressing Plaintiffs' expression, the restrictions only needed to satisfy intermediate scrutiny, leading the court to vacate its application of the "more stringent" test it had applied in granting the prior TRO.

But that change in standard of review made no difference. While the State had relied on *Jacobson v. Massachusetts,* 197 U. S. 11 (1905) to assert that the "Challenged Orders Are a Permissible Exercise of the State's Emergency Powers," the court again reverted to the Gorsuch concurring opinion in *Archdiocese,* "But Jacobson hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." The court also rejected the argument that "Restrictions on Live Entertainment Are Content-Neutral Time, Place, Manner Regulations that Survive Intermediate Scrutiny," with the observation that "shuttering Plaintiffs' establishments except "to take-out, pick-up, or delivery," in the absence of evidence to support the restrictions, is neither 'neutral' nor 'narrow.'. . . . The Court also questions whether 'take-

out, pick-up, or delivery' is consistent with the patrons' primary purpose in frequenting Pacers and Cheetahs, and therefore whether such restriction 'leaves open ample alternative channels for communication' . . . ."

The County objected vigorously to the implication that plaintiffs' business had been singled out for enforcement activities. "The 125 cease-and-desist letters, and seven Immediate Closure Orders, that County Defendants have issued through November 30, 2020, involved a wide array of business and other activities, including gyms, fitness centers, yoga studios, bars, restaurants, spas, fraternities and sororities, religious entities, and entertainment centers. And with respect to live entertainment, Plaintiffs' businesses were not the only establishments that received a cease-and-desist letter from the County concerning live entertainment taking place in violation of the then-applicable State COVID-19 restrictions and the Public Health Order."

The lack of selective enforcement did not solve the problem: "[T]he County's issuance of cease-and-desist letters, and Immediate Closure Orders, to 'a wide array of business and other activities, including gyms, fitness centers, yoga studios, bars, restaurants, spas, fraternities and sororities, religious entities, and entertainment centers' does little, if anything, to demonstrate any nexus between businesses with restaurant service, such as Plaintiffs' establishments, who've implemented protocols as directed by the County, and the spread of COVID."

The court also challenged the California Regional Stay Home Order, which creates a series of Regions, each consisting of several counties. The County is one of eleven (Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Ventura) in the Southern California Region; the State measures the "ICU bed capacity" in each Region and imposes restrictions to "gatherings of any size, closes operations except for critical infrastructure and retail, and requires 100% masking and physical distancing."

The court questioned "whether there is a rational nexus between the percentage of ICU bed capacity throughout the Southern California Region and . . . live adult entertainment and businesses with restaurant service. . . ." While the defendants presented no evidence that businesses with restaurant service such as plaintiffs' establishments—who implemented protocols as directed by the County-- impacted ICU bed capacity throughout the Southern California Region, the court found that "plaintiffs have made an adequate showing that they have exhausted their capital trying to comply with Defendants' 'endless and bewildering' orders, have sustained significant, if not draconian, losses, and are fearful that their businesses may be closed permanently if Defendants' latest orders are not enjoined."

On this record, the court held that the harm to plaintiffs if the preliminary injunction was denied outweighed the prejudice to the County if the injunction was granted. Furthermore, it was likely that plaintiffs would prevail on the merits. The court emphasized that the reach of the preliminary injunction is limited to 1) Plaintiffs

providing live adult entertainment; and 2) San Diego County businesses with restaurant service . . . "

LINK

Opioids: Tennessee Supreme Court Holds that Pharma Companies can be Liable under Drug Dealer Law

Effler v. Purdue Pharma L.P. , No. E2018-01994-SC-R11-CV (TN Dec. 17, 2020).

Affirming in part and reversing in part, the Tennessee Supreme Court holds that the state's Drug Dealer Liability Act can apply to opioid manufacturers; while state District Attorneys do not have standing to bring the action, neonatal abstinence babies do.

In 2017, seven Tennessee District Attorneys (DAs) and two Baby Doe plaintiffs brought an action in Campbell County, Tennessee, alleging that opioid producers Purdue Pharma, Endo and Teva were liable under the Tennessee Drug Dealer Liability Act (Act) which, as with analogous provisions in 18 states, provides a cause of action against a knowing participant in the illegal drug market for injuries caused by illegal drug use.

The DAs and the Baby Doe plaintiffs alleged that the drug companies knowingly participated in the illegal drug market by intentionally flooding East Tennessee communities with prescription opioid medications, leading to widespread addiction and diversion of the opioids into the black market. The DAs claimed that the opioid epidemic had damaged the communities in their districts, and the Baby Doe plaintiffs alleged that they were harmed by exposure to opioids in utero.

The drug companies moved to dismiss, arguing that the Act did not authorize the DAs to sue for damages and did not apply to the drug companies' conduct. The trial court ruled that the Act did not apply and dismissed the case. The Court of Appeals reversed, resulting in the drug companies' appeal to the Tennessee Supreme Court on the issue of the DAs' standing and the applicability of the Act to their conduct.

The Act. The Act is adopted from the Model Drug Dealer Liability Act, which has been described as "essentially a products liability act for illegal drugs." The intent of the Model Act was to overcome evidentiary difficulties inherent in actions against drug dealers by creating a form of "market liability" to hold them liable for the injuries caused by their involvement in the illegal drug market. Under the Model Act, a plaintiff may either prove that the defendant sold illegal drugs to the user or that the defendant was a dealer of

the same drugs in the community when the user consumed the drugs. Tennessee's Act expressly creates market liability "for those who intentionally join the illegal drug market. Thus, the Tennessee Legislature created a statutory cause of action for family members of drug users, including babies exposed to illegal drugs in utero; employers, insurers, medical facilities, governmental entities, and others that have expended resources on behalf of an illegal drug user; and anyone injured by the actions of an illegal drug user against those "who knowingly participate in the illegal drug market in Tennessee."

A plaintiff must prove the defendant's participation in the illegal drug market by clear and convincing evidence. Tenn. Code Ann. § 29-38-113(a) (2012). Successful plaintiffs may recover economic and non-economic damages, punitive damages, attorney fees, and the costs of the litigation, including expert witness fees. Id. § 29-38-106(c).

Standing. The Act lists the parties who may file suit:

1. A parent, legal guardian, child, spouse, or sibling of the individual drug user;
2. An individual who was exposed to an illegal drug in utero;
3. An employer of the individual drug user;
4. A medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for the individual drug user, or that otherwise expended money on behalf of the individual drug user; or
5. A person injured as a result of the willful, reckless, or negligent actions of an individual drug user.

The court found that DAs did not have standing: "Section 106(a) lists governmental entities, but not District Attorneys, as parties with standing to sue. Presuming that the Legislature means what it says—and does not mean what it does not say—we follow the principle of *expressio unius est exclusio alterius*. . . . "Relying on this premise, we infer that if the Legislature had intended to enact a certain provision missing from the statute, then the Legislature would have included the provision."

The DAs claimed that they "stand in the shoes" of the political subdivisions in their districts and act as "governmental entities" under the Act, and wield considerable independence and power as constitutional officers. The court responded "All true. Yet the District Attorneys' broad discretion in administering criminal justice does not translate into an entitlement to bring a civil suit not authorized by the Act. . . .we determine that the Legislature meant that a prosecuting attorney could serve as legal counsel for a party who has statutory standing to sue. If the Legislature had intended to authorize District Attorneys to sue in their own names or represent a class of plaintiffs, the Legislature could have expressly done so."

The inability of the DAs to proceed did not end the case, however, because the Baby Doe plaintiffs-neonatal abstinence syndrome babies--clearly had standing to bring an action under the Act.

Applicability to Drug Companies. The court found that that the Act can be construed to apply to Purdue and the other drug companies, parsing the statute's language. The Act provides that "a person who knowingly participates in the illegal drug market within this state is liable for civil damages," and "person" includes corporate entities. Participation in the illegal drug market "means to distribute, possess with an intent to distribute, commit an act intended to facilitate the marketing or distribution of, or agree to distribute, possess with an intent to distribute, or commit an act intended to facilitate the marketing or distribution of an illegal drug." An "illegal drug market" as "the support system of illegal drug related operations, from production to retail sales, through which an illegal drug reaches the user," and an illegal drug is any drug "the distribution of which is a violation of state law." And under Tennessee law, distribution of opioids--a Schedule II controlled substance--to a person without a valid prescription violates state law.

This answered the question about applicability: "The plain meaning of the language of the Act suggests that it applies to a corporation that knowingly distributes or commits an act intended to facilitate the production, marketing, distribution or sale of opioids to a person who does not have a valid prescription."

The allegations of the Baby Doe plaintiffs provided the necessary evidentiary ingredients: The drug companies manufactured and distributed highly addictive opioids in quantities too large to be medically justified. For example, in 2015, Tennessee filled 1.18 opioid prescriptions—fifty-one hydrocodone pills and twenty-one oxycodone pills—for every man, woman, and child in the state. Their complaint alleges that the drug companies observed signs of illegal diversion, and they knew that some of the opioids were being distributed without a prescription and thus were illegal drugs. Even though they knew of the "substantial risks of addiction, abuse, and illegal diversion associated with prescribing opioids for chronic pain," the drug companies "each played a key role in creating, perpetuating, and/or expanding the opioid crisis, including the creation of a legion of addicts who would seek pills on the black market or through 'pill mills.'"

The court found that the Baby Doe plaintiffs' allegations, taken as true, could prove that the Drug Companies knowingly flooded communities in East Tennessee with highly addictive opioids they knew would be sold in the illegal drug market. The high court agreed with the Court of Appeals that the drug makers could not "knowingly seek out suspect doctors and pharmacies, oversupply them with opioids for the purpose of diversion, benefit from the process, and then cynically invoke their status as otherwise lawful companies to avoid civil liability."

The Tennessee Supreme Court cited to the proceedings at the national opioid MDL: "We find persuasive the rationale of the United States District Court for the Southern District of Ohio that when a community is flooded with highly-addictive drugs, a black market for those drugs will follow. . . In refusing to dismiss negligence claims against distributors and manufacturers of opioid medications, the court said: 'Here, taking Plaintiffs' allegations as true, by failing to administer responsible distribution practices . .

., Defendants not only failed to prevent diversion, but affirmatively created an illegal, secondary opioid market. Opioids are Schedule II drugs.' "

The drug companies insisted that they only participated in the legal drug market, but the fact that the "distribution system for prescription opioid medications is legal and . . . extensively regulated is immaterial if the Drug Companies' marketing and distribution practices as alleged in the complaint amounted to participation in the illegal drug market as defined in the Act." The International Association of Defense Counsel asserted that drug companies' sales to licensed distributors do not become "illegal" "even if criminal third parties might later distribute opioids in violation of state law. "We disagree. The Drug Companies admit that if they "knowingly distribute[d] medications to a person not registered to receive them . . . that could constitute the distribution of 'illegal drugs' under the [Act]."

The defendants also urged the Tennessee Supreme Court to rule that the Act did not apply, so as to "avoid the serious constitutional question whether the Act's 'market liability' scheme violates due process"—but they did not ask the court to rule on the constitutionality of the Act.

In sum, the DAs no longer have standing to pursue the action but the Baby Doe plaintiffs do, and have the burden of proving to a jury by clear and convincing evidence that the drug companies participated in the illegal drug market in Tennessee.

LINK

Due Process: Approval of Preliminary Plan after Developer Made Accommodations Did Not Create Constitutionally-Protected Property Interest

Ogle v. Sevier County Regional Planning Commission, no. 19-6327 (6th Cir. Dec. 9, 2020).

The High Bridge Development Partnership (Partnership) wanted to build a large subdivision in Sevier County, Tennessee (County), and submitted a concept plan to the County Regional Planning Commission that included a 40-foot right-of-way, though the subdivision regulations required a 50-foot right-of-way. The Commission denied the plan, citing the right-of-way problem. The Partnership presented information putatively solving the problem and the High Bridge subdivision plan was initially approved. Then, following further investigation, the plan was denied.

The Partnership ultimately sued, alleging violations of its due process and equal protection rights. After a bench trial, the district court found in favor of the Defendants. The Sixth Circuit affirmed. The County was properly granted judgment on the due

process claim because initial approval by the Commission did not confer a cognizable property interest, given that the Commission still had discretion to reject the design plan at a later stage. The Partnership's equal protection claim also failed, because it did not identify an actual similarly-situated comparator which had been treated differently by the Commission.

LINK

Qualified Immunity: Hospital Workers are Immune from Suit for Failing to Expedite Mentally Unstable Inmate's Admission to Specialized Care

Luong v. Napa State Hospital, no. 19-16846 / 16875 (9th Cir. Dec. 22, 2020).

Dat Thanh Luong (Luong) was murdered by his Alameda County (County) jail cell mate. Luong had been found incompetent to stand trial and was on a waitlist for admission to Napa State Hospital at the time of his death. His family's various claims against the County and its officials were settled, and most claims against California state entities and employees were dismissed. But the family's due process claims against four supervisory-level Department of State Hospitals employees, on the grounds that they employees should have notified interested parties about the availability of an informal psychiatric acuity review process by which jail inmates with acute needs could bypass the hospital waitlist and be admitted directly, survived dismissal.

On interlocutory appeal, the Ninth Circuit reversed the denial of qualified immunity for the four State workers. "It is difficult to justify the imposition of monetary damages against these hospital employees on the theory that they were additionally required to give individualized notifications to relevant actors in Luong's case. At the very least, the hospital employees are entitled to qualified immunity."

LINK

Zoning: No Equitable Tolling Where City Mistakenly Required Supermajority Vote for Variance

3799 Mill Run Partners, LLC v. City of Hilliard, no. 20-3700 (6th Cir. Dec. 14, 2020).

Three years after the City of Hilliard (City) denied the applicant's zoning modification request to develop an indoor shooting range, the City admitted that it had mistakenly required a supermajority vote to allow the variance, when in fact the city council's 4-3 vote in favor would have sufficed. The applicant's § 1983 due process suit was nevertheless dismissed as untimely under the applicable two-year statute of limitations. The City's error in properly applying its own law did warrant equitable tolling; moreover, the applicant could have reviewed the City code and discovered the error immediately. There was no indication of intentional oversight or withholding of information by the City.

LINK

THIS JUST IN:

Fourth Circuit en banc Review of Baltimore Police Aerial Surveillance Program

Yesterday the Fourth Circuit announced that all 15 judges will review *en banc* its November 5, 2020 ruling (2-1) upholding the constitutionality of the Baltimore Police Department's use of drones for aerial surveillance. Yesterday's order is located HERE.

The Fourth Circuit's original decision in ***Leaders of a Beautiful Struggle v. Baltimore Police Department*, no. 20-1495 (4th Cir. Nov. 5, 2020)** is located HERE.

Win for Ohio Municipalities; IMLA Filed Amicus Brief

***City of Athens v. McLain*, no. 20-Ohio-5146 (OH. Nov. 5, 2020).** Athens and nearly 100 other Ohio municipalities sued the State's Commissioner of Revenue, challenging the State's right to retain .5% of net-profits taxes collected as compensation for the State's acting as a centralized collection facility. While two lower courts had ruled against the municipalities, the Ohio Supreme Court reversed, finding that the unpermitted extraction of fees violated the localities' Home Rule authority. IMLA participated as an amicus in the case, with a brief authored by Erin Scharff.

LINK