International Municipal Lawyers Association



e-News: Issue 14 July 13, 2017

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Banks: Failure to Take Title to Foreclosed Properties and Allowing Them to Fall into Disrepair Does Not Constitute Requisite Causation to Support City's Nuisance Claim

*City of Cincinnati v. Deutsche Bank National Trust Company, n*o. 16-3752 (6th Cir. July 11, 2017).

Affirming the district court, the Sixth Circuit has found that Cincinnati's nuisance suit

against Wells Fargo, seeking compensation for the many properties in the City which Wells Fargo allowed to fall into disrepair after foreclosing on them, did not adequately demonstrate a nexus between the bank's actions and the costs to the City.

After the 2008 financial crisis the City of Cincinnati (City) alleged that Wells Fargo and Deutsche Bank (collectively, Banks) adopted a policy of not taking title to properties that were foreclosed when a borrower failed to pay the mortgage. In this manner, the City alleged, the Banks violated local and state property regulations - and specifically that they did it when the cost of compliance outweighed the value that could be recouped through the resale of a foreclosed property. The City initially alleged that the Banks' policy created a common law absolute and qualified public nuisance, statutory public nuisance, interference with fiduciary duty, and municipal code violations, but the parties resolved all claims except common law nuisance claims against Wells Fargo, which the district court dismissed as a matter of law. The City appealed.

The Sixth Circuit summed up the district court as holding that "(1) the economic-loss doctrine foreclosed recovery [by the City] and (2) the City's alleged damages--increased police and fire expenses, a decrease in the City's tax base, and an increase in the City's administrative costs--were too attenuated to establish proximate cause. As for the first issue, the Circuit first identified the economic-loss doctrine as barring tort plaintiffs from recovering purely economic loss that "do[es] not arise from tangible physical injury" to persons or property. As a result, the Circuit agreed that the City's arguments for recovery for the costs imposed by the Banks' behavior - less tax revenue, more police and fire service costs, etc. - were economic only and thus barred. In general the Circuit also found that the City's nuisance claim suffered from the fatal flaw that upon amending its complaint, the City failed to identify any nuisance properties *owned by Wells Fargo* - the only remaining defendant. The City countered it should obtain recovery for "additional nuisance properties that will become known to the City" through discovery, to which the court replied that that is not "how civil litigation or for that matter nuisance law works."

As the court put it the "most that can be extracted from the complaint is that some of the " [n]umerous known and unknown properties" "were so deteriorated and dilapidated that they were declared public emergencies." But which properties? And which ones were not covered by the settlement?"

As for proximate cause, the court summed it up as requiring "some reasonable connection between the act or omission of the defendant and the damage the plaintiff has suffered" and proving up "some direct relation" between the injury and the injurious conduct. The City fell short here as well, evidenced by the Court characterizing its attempt to show it suffered damage as a result of Wells Fargo behavior as a "verdict" without "factual allegations to support it." The court then characterized the City's damage theory as "attenuated" since the impacts - decreased tax revenue, increased police and fire expenditures, and increased administrative costs - tied only to a "policy" of Wells Fargo making it "difficult to connect" the two. The court closed saying the holding did not leave the City without help, it could, for example, utilize other municipal code violations and, if needed, amend its enforcement mechanisms to include adding punitive damages or attorney's fees to the damages and costs recoverable for violations.

DISSENT: A dissent was filed with regard to the nuisance claim dismissal. The dissenter, Chief Judge Cole, rehashed that an absolute nuisance claim under Ohio law is "1) the intentional creation of a public nuisance, which is an unreasonable interference with a right common to the general public or 2) an abnormally dangerous condition bound to injure property." Judge Cole would have found that the City's argument that "Wells Fargo has created an absolute public nuisance by deliberately leaving its many foreclosed properties vacant, unsound, or decrepit, which has led to numerous safety hazards, crime, and the diversion of scarce public resources" met this standard. As for the majority's position that the City failed to allege which properties were Wells Fargo's in its amended complaint, the dissent found the exhibits attached adequately did so and, perhaps more importantly, disagreed such a showing was required to survive a FRCP 12(b)(6) motion with the notice pleading requirements of federal law. Chief Judge Cole would have reversed and allowed the nuisance claim to proceed.

LINK

Education: Educator's Discretion to Review and Approve Lesson Plans is Not a Delegation of Policymaking Authority from a School District

Brinsdon v. McAllen Indep. Sch. Dist., No. 15-40160 (5th Cir. June 30, 2017).

The Fifth Circuit has found that qualified immunity was properly granted to a school district and individual teachers whose lesson plan incorporated a recitation of the Mexican Pledge of Allegiance; further, no clearly established First Amendment right was violated by requiring students to recite the Mexican pledge for a grade.

Plaintiff Brenda Brinsdon (Brisdon) was asked to memorize and recite the Mexican Pledge of Allegiance as a part of an assignment for her high school Spanish III class. Brinsdon disagreed with the assignment and refused to participate. Instead, she was provided with an alternative assignment. At her father's insistence later that week, Brinsdon brought a "spy pen" to class to record other students reciting the Mexican pledge without their knowledge. Brinsdon's father then emailed the video to a media source and placed the video on YouTube. As a result, the school received multiple calls and threatening emails. The video was ultimately picked up by Fox News and Brinsdon was interviewed as a part of their coverage. After her interview with Fox News, Brinsdon was removed from her Spanish III classroom and completed the semester by self-studying in the principal's office. Several school officials testified at trial that Brinsdon's behavior towards her Spanish teacher at the time of the incident was disrespectful and that the video's release had created increased tension among Brinsdon's classmates.

Brinsdon sought an injunction, a declaratory judgment, and nominal damages against her teacher, her principal, and the school district under Section 1983. She first claimed that her First Amendment rights were violated when she was forced to recite the pledge and that she was retaliated against when she was removed from class. She then claimed an Equal Protection violation occurred when she was removed from class. Both Brinsdon's teacher and principal were granted qualified immunity in summary judgment. Brinsdon's claim against the McAllen Independent School District (Disrtict) went to trial, where the court ruled in favor of the District and concluded that Brinsdon had not established an applicable municipal policy. Brinsdon appealed.

The Fifth Circuit first held that the case was moot, given Brinsdon had already graduated; therefore, restricting her claim for equitable relief. With regards to municipal liability and qualified immunity, the court also found for the individual defendants and the school district, agreeing that all three defendants should be given qualified immunity.

Brinsdon argued that her school principal's authority under the Texas's "Essential Knowledge and Skills" guidelines to "oversee the curriculum and approve lesson plans" was a delegation of policymaking authority from the District. The Fifth Circuit disagreed, holding that an educator's discretion to review and approve lesson plans is not a delegation. Brisdon also presented a constructive knowledge argument, claiming that the assignment had been given for 15 years and therefore could be imputed on the district. The Fifth circuit was equally unpersuaded by this argument, holding that the longevity of the assignment did not prove that the district had an official policy or custom forcing students to recite the Mexican pledge. Further, there was no evidence of anybody complaining about the assignment in the past, which would potentially point towards the district's knowledge of the assignment.

With regards to Brinsdon's compelled speech argument, the court was equally unpersuaded and

distinguished it from other similar cases of compelled student. The court turned to *Barnette v. West Virginia State Board of Education*, 319 U.S. 624 (1943) for guidance, pointing out that compelling a pledge of allegiance (in *Barnette* it was the United States Pledge), unacceptably compelled a particular belief and attitude of the mind. In Brisdon's case, however, the pledge was merely being used as a learning tool rather than a means of inculcating belief. Citing to a number of other similar circuit decisions, the Fifth Circuit noted that assignments requiring students to adopt various viewpoints or recite specific passages for legitimate pedagogical reasons are generally constitutionally permissible.

LINK

Immunity: No Summary Judgment for Officers Where Facts Unclear as to Origin of Drugs Attributed to Arrestee in Police Car

Manning v. Cotton, no. 16-3076 (8th Cir. July 5, 2017).

Where Omaha officers had not conducted a complete search of a female arrestee before placing her in their police vehicle where drugs were subsequently found, summary judgment based on qualified immunity was premature due to unresolved issues of fact.

Tabatha Manning (Manning) was pulled over in Omaha, Nebraska for having a broken taillight. She did not have a driver's license or registration and had outstanding warrants. Two City of Omaha (City) police officers arrested Manning, handcuffing her and placing her in a police cruiser. They looked in her purse and removed a cellphone from her back pocket at her request, but did not otherwise search her because she was cooperative and no female officers were present. When Manning exited the vehicle, the officers found a small baggy containing methamphetamine in the car. Manning agreed to have the baggy fingerprinted and to take a drug test, vehemently denying the drugs were hers.

The officers declined to do either fingerprinting or drug testing and charged Manning with drug possession, keeping her incarcerated for three days. She filed suit alleging the officers violated her Fourth, Fifth, and Fourteenth Amendment rights by planting the methamphetamine, conspiring against her, falsely implicating her in a felony, and falsely testifying against her--and that the City proximately caused the constitutional violations. The district court denied the officers' motion for summary judgment at this stage, saying that if in fact they had planted the drugs, they would not be eligible for qualified immunity. It also denied the City's motion for summary judgment, finding that, based on a prior incident and the unclear facts in this case, the issue of whether the City's policies and procedures were adequate was still subject to inquiry.

On appeal, the Eighth Circuit recited that government officials are generally immune from civil liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." It inquired "(1) whether the official's conduct violated a constitutional right; and (2) whether the violated right was clearly established." The Circuit found the district court erroneously treated the two officers as a unified group; separate analyses must be performed for each individual seeking qualified immunity. The Circuit then performed the analyses, reviewing the video footage of each officer individually. It concluded that the evidence was inconclusive as to whether Manning had removed the drugs from her pocket or whether the drugs had been planted in the vehicle. As it stated in denying the second officer's immunity, the "crux of th[e] case is how the package of methamphetamine ended up in the police cruiser, which is material to the qualified immunity issue."

The City argued that the Eighth Circuit should review its appeal under pendent jurisdiction because the appeal was "inextricably intertwined" with the officers' qualified immunity cases. The

Circuit disagreed, finding the municipal liability issue was not intertwined-the question of whether the City had adequate training standards and maintained proper policies was entirely distinct from whether the individual officers had acted improperly. The Circuit thus lacked jurisdiction to hear the appeal.

LINK

Immunity: Qualified Immunity for Private Security Company Workers Acting Under Direct Instruction of Supervising Government Official

Meadows v. Rockford Housing Authority, no. 15-3897 (7th Cir. June 30, 2017).

Private security company employees who changed the locks on a rent-stabilized apartment at the instruction of a supervising governmental officer had qualified immunity in a suit brought by the apartment's resident.

Don Meadows (Meadows) worked as a building engineer for the Rockford Housing Authority (RHA), from whom he also leased a rent-subsidized apartment. RHA received complaints that someone they did not know was living in Meadows' apartment, prompting the RHA executive director to request that the private security company contracted to serve RHA properties determine whether Meadows was improperly subleasing his apartment. The private security company, acting on commands or "orders" from RHA, entered the apartment and changed the locks. Meadows filed suit alleging the action violated his Fourth Amendment rights. The district court determined the private security company operating at the behest of the state agency was eligible for qualified immunity and granted it. Meadows appealed.

The Seventh Circuit affirmed. It noted that the Supreme Court had tackled the issue of qualified immunity for third party contractors a few times, looking to the history and purpose of immunity and highlighting that its opinion was "self-consciously narrow" and focused on the facts and circumstances of each case. Here, it was undisputed that the private individuals that actually changed the locks worked under direct supervision of RHA staff when they acted; had the RHA staff changed the locks, they would be eligible for qualified immunity. It thus held the lower court correctly granted immunity to the private actors. It noted clearly however that the "holding is a narrow one. It should, by no means, be read to guarantee qualified immunity to all employees of private security companies that provide contractual security services to governmental entities. The circumstances presented here, however, establish that the defendants were operating at the direct instruction of a supervising government official. Under these circumstances, qualified immunity is available to the defendants."

LINK

Liquor: Indiana Law Prohibiting Interlocking Ownership between Beer and Liquor Wholesalers is Rationally Related to State's Interest in Promoting Temperance

Monarch Beverage Company, Inc. v. Cook, no. 15-3440 (7th Cir. June 30, 2017).

Indiana's alcoholic beverage licensing scheme, which prohibits beer and liquor wholesalers from owning interlocking interests, does not violate the Equal Protection rights of a beverage company interested in participating in both sectors because the law is rationally related to the government's legitimate interest in promoting temperance through higher prices for alcohol.

Monarch Beverage Company (Monarch) operates in Indiana and is bound by Indiana's liquor laws, one of which, titled the "prohibited interest" law, separates beer and liquor wholesalers by preventing beer wholesalers from holding an interest in a liquor-distribution permit. Monarch challenged the law facially as lacking a rational basis and thus violative of the Equal Protection Clause. The lower court denied Monarch's argument and it appealed.

The Seventh Circuit began by noting that Indiana, like many states, regulates alcohol highly in general and divides the market two ways - by alcohol type and by distributor type (e.g. wholesaler, retailer, etc.). It then briefly discussed that permitting in the overall scheme is a component and that while a beer or liquor wholesaler can each have an interest in wine wholesaling, the law mandates separation of beer and liquor wholesalers. As for a standard, since no protected class was at issue, Monarch labored to make its case under the least-favorable of judicial review, rational basis, meaning the government only had to show that the law had some rational basis to survive while Monarch was tasked with "negat[ing] every conceivable basis that might support the challenged law, and it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature."

Indiana's first argument that the Court need not reach any substantive equal protection analysis since Monarch failed to identify a similarly- situated party fell flat since, in the court's words, "[i]n that kind of equal-protection litigation, the plaintiff doesn't challenge a statute or ordinance but argues instead that a public official (or group of officials) has treated him differently than other persons similarly situated for an illegitimate or irrational reason." Here, Monarch clearly was not making such a claim, but rather was "challeng[ing] a statute that by its terms imposes regulatory burdens on a specific class of persons (in this case, beer distributors), [and thus there is] no need to identify a comparator; the classification appears in the text of the statute itself."

The court then moved to the merits and Indiana's three proposed bases for the law: 1) that by separating the wholesalers Indiana makes beer and liquor more expensive and thus discourages alcohol consumption - a legitimate interest; 2) that Indiana has an interest in tax revenue and that separating beer and liquor wholesaling, again, increases costs and thus has a rational basis; and 3) that Indiana has an interest in market stability and that eliminating the separation would cause market disruption. The Court identified the first argument as the strongest (and noted pointedly that Indiana barely briefed or put effort into defending the others). It found that reducing alcohol consumption is doubtless a legitimate government interest and though Indiana could likely choose a more direct way to raise costs of alcohol to achieve that interest (e.g. a tax), the system that separates wholesaling of liquor and beer also increases costs and furthers the governmental interest. The prohibited interest law thus passed rational review. The court found ample support for its conclusion, noting "[t]he Supreme Court has never invalidated an economic regulation on rational-basis review because a more direct or effective policy alternative was available. Neither have we, and Monarch has given us no reason to change course."

LINK

Remedies: Prejudgment Interest Not Warranted Where Compensation Payable by City Official Was for Noneconomic Damages

White v. Chafin, No. 16-1319 (10th Cir. July 10, 2017).

Where a Denver city official was required to pay a plaintiff $100,000 in compensatory damages, prejudgment interest was not appropriate because the award was for noneconomic damages.

Philip White (White) obtained a judgment for $100,000 in compensatory damages against Kyllion Chafin (Chafin), an official in the City of Denver, in both his official and personal capacity. White moved for an award of prejudgment interest. The district court rejected the motion, holding the bulk of $100,000 award was compensation for noneconomic damages, and that therefore prejudgment interest was not warranted. White argued the Tenth Circuit should overrule its precedent denying prejudgment interest for §1983 cases and he argued, if not, the district court abused its discretion in denying the award in his case.

The Tenth Circuit quickly rejected overruling its precedent, noting the panel cannot overrule published opinions by other Tenth Circuit panels. White's principal argument was that under §1988 (fees) the court should incorporate Colorado law (which mandates prejudgment interest). The Court tackled this by pointing out that Colorado law would only be employed under §1988 if federal law were "deficient" and the Circuit refused to make the finding that *not allowing prejudgment interest as a matter of right* made §1983 cases deficient for fee purposes.

Moving on to whether the district judge abused its discretion in denying prejudgment interest in the case, the Circuit held it did not. White acknowledged the Tenth Circuit grants district courts "great leeway" in awarding prejudgment interest when a jury returns a verdict of compensatory damages, thus recognizing the unfavorable standard he faced. The Circuit set out the rules within which district courts determine whether prejudgment interest is to be awarded, noting "the first step is to determine whether such an award would compensate the injured party . . . . [and that i]f prejudgment interest would be compensatory, the court must determine whether the equities would preclude an award." On the merits, the Circuit agreed with the lower court that prejudgment interest for the noneconomic injury White suffered would be compensatory. As for the second factor - equity - the Circuit found the lower court's opinion adequately took into account that egregiousness of defendant Chafin and the public interest in deciding that prejudgment interest need not be added to the punitive damages award the jury handed White. It affirmed the lower court.

LINK

Speech: Joining Five Other Circuits, Third Circuit Holds that Public Has First Amendment Right to Record Police Activity; However, Right Was Not Clearly Established in Circuit in 2013

Fields v. City of Philadelphia, no. 16-1651 (3d Cir. July 7, 2017).

Reversing the lower court which had found that recording police arrests was not, without more, an adequately expressive activity to garner First Amendment protection, the Third Circuit has explicitly found such activity to be protected; however, that right was not clearly established in the Circuit in 2013, requiring qualified immunity for the police officers who interfered with photographers.

In 2012, Amanda Geraci was forcibly prevented by Philadelphia police from photographing an arrest at an anti-fracking demonstration. In 2013, Richard Fields was arrested and his iPhone confiscated after he photographed police breaking up a house party at Temple University. They brought §1983 actions against the City of Philadelphia (City) and various officers, claiming

retaliation for exercising their First Amendment rights and improper search and seizure in violation of the Fourth Amendment.

The district court granted summary judgment to the City and officers, finding that the mere recording of police activity was conduct lacking a sufficiently expressive character. It did not constitute "expression of a belief or criticism of police activity."

The Third Circuit reversed. It joined the First, Fifth, Seventh, Ninth and Eleventh Circuits in confirming a definitive First Amendment right to record police activity in public, which is integral to the public's right to access to information -- and found that the actions of plaintiffs Geraci and Fields constituted such protected expression. However, the court found that despite a 2011 City police department internal memorandum advising officers that the public had a First Amendment right "to observe and record police officers in the public discharge of their duties," that advisory was not well understood by officers in 2012 and 2013. Therefore, such a right was not yet "clearly established" in the Circuit when the retaliatory police actions occurred, and the officers were entitled to qualified immunity. Although the court strongly implied that the City had no municipal liability, it remanded the case to the district court to assess *Monell* considerations.

Craig Gottlieb of the City of Philadelphia Law Department argued the case for the City.

LINK

State Action: Private Entity Obtaining Event Permit Is Not Acting "in Lieu" of Government; Rules in Permit Indicate City Did Not Cede Authority

Amistad Christiana Church v. Life is Beautiful, LLC, no. 15-17080 (9th Cir. July 3, 2017).

Rebuffing a §1983 complaint by a Las Vegas church claiming that a music festival operating under a special event permit issued by the city was in essence an instrumentality of the city, the Ninth Circuit has found that such a permit, containing explicit rules about noise and other externalities, does not transform private activity into governmental action.

Life is Beautiful, LLC (LIB) put on a music festival near Amistad Christiana Church (Church) in Las Vegas, Nevada (City). The Church complained under §1983 that the festival violated its First Amendment religious freedom and constituted a nuisance under Nevada law. The district court dismissed, holding the Church failed to state a claim for which relief could be granted. The Church appealed.

The Ninth Circuit held that the district court appropriately dismissed the First Amendment case because LIB is a private entity and was not acting under color of state law for purposes of §1983. The Church did advance a novel argument - that LIB acted "in lieu of a traditional state actor" by taking over from the City the public function of the regulation of sound and decibel levels on public streets during the festival - but it failed. The Circuit framed the sound issue as the City *delegating* to LIB since the City issued it a special event permit wherein it set the rules for sound and allowed LIB to control decibel levels within that framework; meaning the City *exercised its authority* and did *not cede* it.

LINK

Takings: No Taking Where County Declined to Extend Sewer Service to Plaintiff's Vacant Lots and Required that Smaller Lots be Aggregated

Quinn v. Board of County Commissioners, no. 16-1890 (4th Cir. July 7, 2017).

Citing *Murr*, the Fourth Circuit has upheld a Maryland County's decision not to extend sewer service to roads having only vacant lots and its requirement that smaller lots be aggregated in order to qualify for sewer service.

Between 1984 and 2000, several thousand vacant lots in St. Mary's County, Maryland (County) were purchased by real estate speculators, including Kevin Quinn (Quinn), who bought hundreds of small lots on South Kent Island. The lots were not serviced by a central sewer system, requiring each residence to have its own septic field. Over time, the County began to restrict the number of septic permits issued, out of environmental and safety concerns. Notwithstanding this step, many of the existing fields failed, causing pollution to the Chesapeake Bay watershed and increasing risk of disease to residents.

The County determined that it would provide central sewerage service, but only down roads where some residences were already located-including service to the vacant lots on those roads as required under Maryland law, which directs that any vacant lot abutting a road having a sewer line be allowed to connect to that line.

The County was concerned that the newly-available sewer service would spur runaway development on the vacant lots. In 2014, it adopted a "Grandfather/Merger Provision" which required that contiguous smaller lots would have to be aggregated to satisfy zoning minimums and qualify for sewerage connections.

When Quinn found that 12 of his small lots would have to be aggregated to create four qualifying lots, and that more than 200 of his lots would simply not be eligible for sewerage, he sued the County and the State of Maryland, claiming that the sewerage program and the Grandfather/Merger Provision constituted a taking of his property without compensation and violated his Due Process and Equal Protection rights.

The district court dismissed as to Maryland and granted the County summary judgment. On appeal, the Fourth Circuit affirmed. It found that Quinn had not been deprived of a property interest, because he had purchased the lots with no anticipation of sewer service-meaning he had no demonstrable investment-backed expectation in terms of sewerage. While government is prohibited from taking private property without compensation, it has no affirmative obligation to enhance the value of property-which is essentially what Quinn was arguing.

The Fourth Circuit also found that the County's Grandfather/Merger Provision was not a Fifth Amendment taking-it cited the recent Supreme Court *Murr* opinion which had upheld a similar provision which prevented development of two smaller lots unless they were aggregated, finding that such governmental policies are " 'a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners by limiting building on lots that do not meet the current minimum lot size while ensuring that all property owners can still build on their land." The Grandfather/Merger Provision did not deprive Quinn of *all* economic value in his properties taken as a whole; several could still be combined to create buildable lots. To restate the obvious, any lack of value in the non-buildable lots was due to the fact that they could not accommodate a septic system, and had nothing to do with the Grandfather/Merger Provision.

LINK

Trials: No Violation Where Prosecutor Fails to Disclose Exculpatory Evidence to Accused Who Pleads Guilty.

Alvarez v. City of Brownsville, No. 16-40772 (5th Cir. June 26, 2017).

Reversing a jury award of $2 million to plaintiff who had not been provided exculpatory evidence before he pleaded guilty to assaulting a prison worker, the Fifth Circuit has found the *Brady* rule does not require providing such evidence to a party pleading guilty; it is relevant only where a judge or jury would be assessing guilt.

Plaintiff-Appellee George Alvarez (Alvarez) pleaded guilty in Texas state court to assaulting a prison employee. Based on video of the altercation which subsequently surfaced, the Texas Court of Criminal Appeals held that he was "actually innocent" of the assault and set aside his conviction. Alvarez subsequently filed suit in federal court against the City of Brownsville (City) and several law enforcement officers under 42 U.S.C. § 1983, asserting a *Brady* claim against the City for wrongful failure to disclose exculpatory evidence. The district court granted summary judgment for Alvarez, concluding as a matter of law that the City violated his constitutional rights under *Brady*.

After a damages-only trial, a jury awarded Alvarez $2 million and $300,000 in attorney's fees. The City appealed. The Fifth Circuit reversed, instead ruling in favor of the City. *Brady* violations are defined in terms of potential effects of undisclosed information on a judge's or jury's assessment of guilt; therefore, the prosecutor's failure to disclose exculpatory information to an individual waiving right to trial by pleading guilty was not constitutional violation.

LINK

THIS JUST IN: IMLA Colleague Joe van Eaton of BB&K Wins Significant Cable Decision Benefitting Local Governments

Congratulations to Best Best & Krieger's Joe van Eaton, a recurring speaker on telecommunications issues at IMLA's conferences, on his win yesterday in the Sixth Circuit. He succeeded in expanding the scope of authority exercisable by localities over cable operators and restoring the provision of free services by cable operators to local communities.

In Joe's words:

Good news for local governments, schools and the public: the Sixth Circuit today reversed an FCC Order our clients have been opposing for almost a decade.

The case is Montgomery County v. FCC , and it had its genesis in an FCC Order issued in 2007, which some cable operators read to mean that (a) localities could only regulate them in their provision of cable services, and could not enforce customer service requirements in connection with their provision of non-cable, non-common carrier services (Internet service is an example of a non-cable service); (b) the value of any "in-kind" benefits that they provided to localities could be deducted from rent paid for use of the rights of way; and (c) localities could no longer require the operator to provide "institutional networks" - a portion of the cable system that is used to link community institutions, and that many localities use today to provide advanced public safety and

educational services.

The FCC was asked to reconsider its order, and sat on that request for eight years, finally issuing a decision in late 2015 A coalition of communities from across the nation then pursued review in the Sixth Circuit - I had the privilege of serving as lead counsel.

The Court found on Non-Cable Services:

"In sum, the FCC's orders offer no valid basis-statutory or otherwise-for its application of the mixed-use rule to bar local franchising authorities from regulating the provision of non-telecommunications services by incumbent cable providers. Thus, on the record now before us, the FCC's extension of the mixed-use rule to incumbent cable providers that are not common carriers is arbitrary and capricious."

What that may mean: particularly should the FCC reclassify Internet - now a common carrier service - and eliminate net neutrality, localities and states may have a clearer path to protecting consumers. It also means that privacy issues surrounding the provision of non-cable services can be addressed.

On Deduction of the Value of Benefits:

"The FCC's Second Order and Reconsideration Order do not reflect any consideration of this concern, which leads to the Local Regulators' second contention: that those orders contain scarcely any explanation at all for the FCC's decision to expand its interpretation of 'franchise fee' to include so-called 'in-kind' cable-related exactions....And apart from a fleeting reference in the Reconsideration Order, the FCC has not even defined what 'in-kind' means."

What that may mean: it restores the long-standing status quo, under which localities, as part of the grant of a cable franchise, required operators provide benefits in the form of free services to community institutions; enforce requirements for discounts to elderly or disabled populations; and ensure that operators provide good customer service. Claims by operators that these cannot be required should be rejected.

On institutional networks, the FCC conceded on brief that those could be required, and the Court noted that concession, and confirmed it.

Unless the FCC asks the Sixth Circuit for rehearing en banc, or seeks Supreme Court review, the matter goes back to the FCC, which could begin a franchising proceeding anew or decide that - aside from noting the impact of the court order on its decision - there is no need for further federal intervention into what are and should be local determinations.

***Montgomery County v. Federal Communications Commission*, no. 08-3023/15-3578 (6th Cir. July 12, 2017).**

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