IMLA

Municipal Lawyer

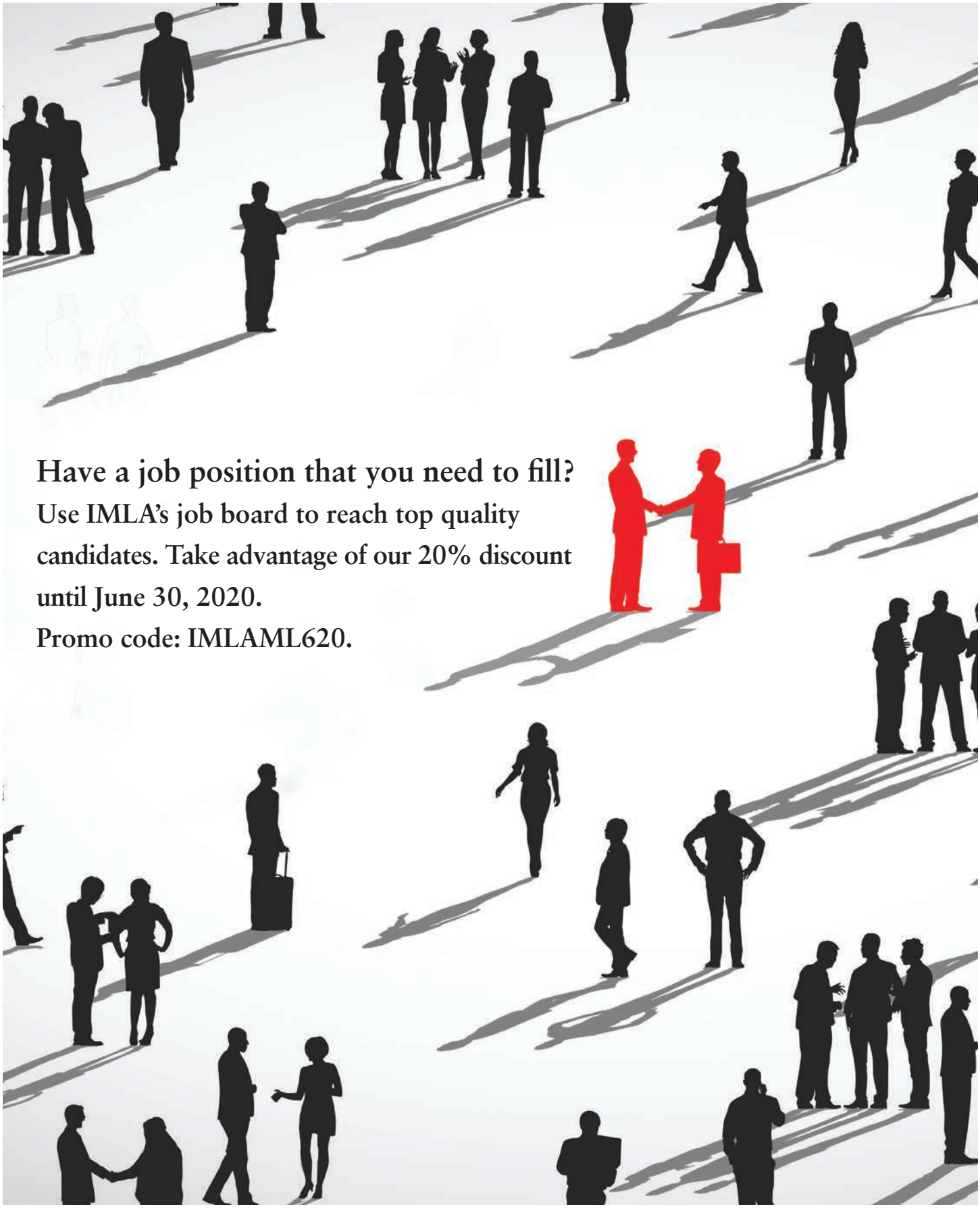
THE JOURNAL OF LOCAL GOVERNMENT LAW

MAY
JUNE
2020
VOL.61
NO.03



Municipal Emergency Powers in Maryland

Frequent Flyers: Reducing 911 Abuse


Have a job position that you need to fill?
Use IMLA's job board to reach top quality candidates. Take advantage of our 20% discount until June 30, 2020.
Promo code: IMLAML620.

OFFICERS
President
Patrick Baker
City Attorney
Charlotte, North Carolina

President-Elect
Tyrone E. Cooper
City Attorney
Beaumont, Texas

Immediate Past President
Andrew J. Whalen, III
City Attorney
Griffin, Georgia

Treasurer
Barbara Adams
Village Attorney
Kenilworth, Illinois

General Counsel And Executive Director
Charles W. Thompson, Jr.
IMLA
Rockville, Maryland

BOARD OF DIRECTORS
Christopher Balch
City Attorney
Brookhaven, Georgia

Shauna Billingsley
City Attorney
Franklin, Tennessee

Lori Grigg Bluhm
City Attorney
Troy, Michigan

Alan Bojorquez
Borjorquez Law Firm PLLC
Austin, Texas

Beth Anne Childs
Prosecutor
Owassa, Oklahoma

Jeffrey Dana
City Solicitor
Providence, Rhode Island

Arthur Gutekunst
Sr. Assistant Corporation Counsel
White Plains, New York

Douglas Haney
Corporation Counsel
Carmel, Indiana

Nina R. Hickson
City Attorney
Atlanta, Georgia

Joy Hulton
Regional Solicitor
Newmarket, Ontario

Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia

Wynetta Massey
City Attorney
Colorado Springs, Colorado

Marcel S. Pratt
City Solicitor
Philadelphia, Pennsylvania

Gregory Priamos
County Counsel
Riverside County, California

Kelly Pridgen
ACCG
Atlanta, Georgia

Tracy Reeve
City Attorney
Portland, Oregon

Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County, Florida

Nancy Thompson
City Counselor
Columbia, Missouri

Randall Van Vleck
New Mexico Municipal League
Santa Fe, New Mexico

Byron Werry
City Solicitor
Regina, Saskatchewan

Susana Alcala Wood
City Attorney
Sacramento, California

CONTENTS

MAY-JUNE 2020

MUNICIPAL EMERGENCY POWERS IN MARYLAND
By: Kevin J. Best, The Law Offices of Kevin J. Best, Annapolis, Maryland
COVID-19 necessitates rapid and extraordinary actions at all levels of government. One state's statutory framework illustrates the devolution of power needed for a comprehensive response.
PAGE 6

EASEMENTS BY ESTOPPEL
By: Kenneth R. Bennett, Assistant City Attorney, City of Arlington, Texas
A review of the equitable right to use, occupy or traverse unowned property.
PAGE 16

FREQUENT FLYERS: REDUCING 911 ABUSE
By: Leann D. Guzman, Senior Assistant City Attorney, Fort Worth, Texas
The unnecessary summoning of emergency medical services is a costly waste of resources even in the best of times. Municipalities can take steps to discourage the practice.
PAGE 12



COVER AND FEATURE ILLUSTRATIONS BY:TRUJILLO DESIGN

DEPARTMENTS

20 OPIOID UPDATE
Justice Delayed
By: Erich Eiselt, IMLA Assistant General Counsel
Progress impeded, but not stopped.

25 AMICUS CORNER
The Impact of COVID-19 on the Supreme Court
By: Amanda Kellar, IMLA Deputy General Counsel and Director of Legal Advocacy
The nation's highest court adapts to the crisis.

31 FEDERAL
The False Claims Act: Fraud Spikes when Disaster Strikes
By: Deanna Shahnami, IMLA Associate Counsel
Governmental action against abuse as stimulus funds flow.

35 LISTSERV
Emergency Trip Follows IMLA Footprint Across America
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
A cross-country journey reaffirms IMLA's reach.

38 INSIDE CANADA
Rainbow Flags, Lighted Bridges and Tow Trucks
By: Monica Ciriello, Ontario 2015
Recent cases of interest.

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Deanna Shahnami

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2020 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

EDITOR'S NOTE



BY ERICH EISELT
IMLA Assistant General Counsel

Taming the Wave: Municipalities and the Virus

The pandemic plays out daily in raw statistics, climbing relentlessly: millions afflicted around the world, hundreds of thousands dead. On global maps, expanding crimson circles seep across national boundaries, disrespecting geography, race, religion or political orientation.

Much of America's topology remains shrouded under the same vermilion, a massive overlapping Venn diagram of medical and economic duress. Behind the daily press briefings, the national body count and the ever-escalating fiscal countermeasures, 35,000 local governments persevere. In some, glimmers of optimism appear; in others, the wave has yet to crest. Local attitudes about precaution vary widely, making municipalities true "laboratories of democracy" in the scientific sense.

On main street, the role of governance is paramount, placing municipal lawyers in a pivotal role, critical to maintaining order and effecting policies that allow communities to function, however hobbled. In many ways, the practice of government law has never been more stimulating: seemingly every question balances public health against civil rights, and every park bench disagreement rapidly assumes constitutional dimensions. Not surprisingly, as this May-June 2020 *Municipal Lawyer* goes to print, the Supreme Court—now operating virtually--is being asked to opine on the fundamental collision between police powers and commercial interests.

The issues confronting IMLA members in the time of corona compress an entire career's worth of experience into a single season. As our Listserv and COVID-19 calls exemplify, municipal lawyers are dealing simultaneously with overarching questions about religious gatherings and the devolution of power among federal, state and local authorities while taking on less lofty but equally essential tasks of deciphering the CARES Act, the FFCRA, the EFMLA and a host of state and local emergency provisions.

IMLA is continuing to serve our constituency by providing various platforms for members to discuss these issues. Thanks to you, our virtual conference last week was a great success, affording colleagues web access to education, CLE accreditation and Zoom-facilitated camaraderie. This issue of *Municipal Lawyer* joins the cause, providing pandemic-related subject matter which we trust will be useful.

We are grateful for our shared mission with you and look forward to the time when safety and prosperity again return to the communities we serve.

Best regards-

Erich Eiselt

EXECUTIVE DIRECTOR'S LETTER



BY: CHUCK THOMPSON
IMLA Executive Director and General Counsel

It Takes an Association: Strength in Numbers as We Face the Pandemic

As I write this, IMLA's staff continues to work feverishly to put together a "virtual" Seminar. Cancelling an event that we've held for over thirty years seems impossible to comprehend and missing the opportunity to visit face to face with with our members from around the country in the beauty of Washington DC as spring emerges cannot be replaced "virtually." Nevertheless, with the support of so many State Leagues, County Attorney Associations and Municipal Attorneys Associations, we believe the "virtual" Seminar will succeed in offering valuable opportunities to network and learn despite the confining nature of a computer screen.

Interestingly for me, in 2005 I attended a meeting of the World Jurist Association in Beijing to deliver a paper on pandemic and the legal issues involved as governments attempted to respond. In preparing that paper, I learned a lot that I am now seeing play out, fifteen years later. Who among us thought as we took the bar exam or began working for a local government that we would need to comprehend the differences between mortality and morbidity and the rate of spread of an infectious disease? Yet, here we are trying to understand these concepts while trying to get employees back to work, keeping homeless people safe, or running mass transit systems, all the while fearing a virus we cannot see.

Some members may represent hospitals or health services, which present unique legal issues even under ordinary circumstances. One can only imagine the challenges they face today and need counsel to address. Some members represent child protective service agencies or other departments that require in-home visits to serve their clients or protect the elderly, children or those who may have a disability. Police, fire and EMS are on the frontlines of protecting our communities and each day expose themselves to greater risk than those of us fortunate enough to work from home under a shut in order. As governments face this pandemic, our members offer counsel to the agencies and employees faced with exposure to the virus while doing their jobs. Issues can include employment law nuances as well as questions regarding whether to enter a home, disclosure of health information, how to enforce limitations on gatherings, procedures for virtual city council meetings, servicing open records requests, and myriad other legal questions.

IMLA responded quickly to address what we foresaw as our members' needs. We implemented a listserv to share information addressing Covid19 on a broad spectrum of issues. We implemented a weekly call-in where we've hosted up to 500 callers seeking to share information or get questions answered. We've held webinars, created a file sharing application and have been there for members to connect with and ask questions. We also switched quickly to offer our "virtual" Seminar when we knew we needed to cancel the in-person event. We did all of this with a very small but very talented team. I am very proud of them and of their dedication to our members and fulfilling IMLA's mission.

Somebody once asked me when I said "we" if I had a mouse in my pocket – so to answer that question definitively – our coronavirus response was all the team with very little personal involvement on my part. I cannot thank Jenny, Trina, Amanda, Erich, Deanna, Caroline and Carolina enough for their hard work. I am also immensely grateful to our officers and directors who have faithfully continued to take the time to attend our Board meetings and provide their leadership even as their own schedules become ever-more compressed. Finally, I thank all of you, our members, who contribute to our collective by sharing your wisdom and experience for the benefit of all. We are all connected in a mutual desire to do the best for our communities and it is an honor to work with and for you.

We will all miss the time we would have spent this spring at the historic Omni, reconnecting with cherished friends and colleagues at a venue that has become our home over the past decade. IMLA staff who live in the area report that the hotel's gardens are particularly colorful and robust this year, even as the world around it slows to a crawl. Rest assured that we have already reserved lodging and conference space for next year's Seminar, and have every expectation of of seeing you there.

I sincerely hope that we will be able to meet in Riverside County at La Quinta and share stories of how we beat this virus. Keep your fingers crossed that we can, and stay well.

ML

Municipal Emergency Powers in Maryland

BY: KEVIN J. BEST
The Law Office of Kevin J. Best, Annapolis, Maryland



The COVID-19 pandemic requires a rapid and all-encompassing response, not only by the federal government but equally at the state and municipal level. Fundamental in taking such local action is a clear understanding of the emergency powers wielded by the various actors involved and an appreciation of how that relative authority can be reconciled. While this article analyzes those powers in one jurisdiction currently in the throes of corona devastation, it is hoped that many of the themes discussed and the legal provisions cited will be familiar to a larger audience and will enhance clarity in local decision-making.

In Maryland, along with the Governor, every local government has the potential to exercise local emergency powers. According to § 14-301 of the Public Safety Article of Md. Ann. Code, a "public emergency" means: (1) a situation in which three or more individuals are at the same time and in the same place engaged in tumultuous conduct that leads to the commission of unlawful acts that disturb the public peace or cause the unlawful destruction or damage of public or private property; (2) a crisis, disaster, riot, or catastrophe; or (3) an energy emergency meaning a situation in which the health, safety, or welfare of the public is threatened by an actual or impending acute shortage in energy resources.

Maryland has 23 counties, Baltimore City, 156 municipalities, and 167 special taxing districts. The counties are the principal unit of local government and the default public service provider in Maryland and are responsible for most basic services. Compared to the vast majority states in the union, Maryland ranks near the bottom or 45th among the states in the number of local governments. Many communities in Maryland do not have a municipality set up and are governed in an emergency and otherwise solely by the federal, state and the county governments.

A municipality is a public corporation exercising both corporate and governmental authority. The Maryland General Assembly has defined a "municipal corporation" as a city, town or village established either under general or formally under special law for "general governmental purposes" and subject to Article XI-E of the Constitution, "which possess legislative, administrative and police powers for the general exercise of municipal functions, and which carry on such functions through a set of elected and other officials."

Municipal corporations in Maryland including Baltimore City may exercise a broad grant of authority when passing police power ordinances. Despite Dillon's Rule under the Common Law of Maryland, which states that municipalities, as creatures of the State, can exercise only those powers expressly delegated and those implied powers that are necessary to carry out the express powers or those other powers that are indispensably necessary to carry out the express powers, this police power authority is so extensive that Article XI-E (Municipal Corporations) of the Constitution of Maryland probably amounts to a grant or devolution to the municipalities of almost all of the state's police powers to be exercised within the municipal geographic limits.

Municipalities are chartered to provide municipal services including law enforcement for the convenience and accountability of the city's or town's residents and typically provide

The federal government, although supreme in its sphere, is a government of limited powers. The State governments, although beholden to their own constitutions and the federal government under the Supremacy Clause of the U.S. Constitution, as the original sovereigns possess almost unlimited powers to pass laws for the health, safety and welfare of their citizens including certain emergency police powers delegated by statute to the Governors.

a limited array of public services that in many instances complement county government services. Some of the larger municipalities are full-service providers that rival or surpass the county governments. Municipalities in rural counties on the Eastern Shore and in Western Maryland provide services that may not be offered at all by the respective county government.

The municipal charter serves as the equivalent of a constitution for the municipal government and the municipal code of ordinances serves as the equivalent of a code of statutes. The primary purpose of a municipal charter is to delineate the powers and structure of the municipal government and the duties of its officers.

The federal government, although supreme in its sphere, is a government of limited powers. The State governments, although beholden to their own constitutions and the federal government under the Supremacy Clause of the U.S. Constitution, as the original sovereigns possess almost unlimited powers to pass laws for the health, safety and welfare of their citizens including certain emergency police powers delegated by statute to the Governors.

An incorporated community has the independent power to determine for itself which potholes are filled, where to deploy police forces, how to regulate land use or invest taxes, how to handle emergencies, which recreation programs to implement, whether to ban certain offensive behavior or other detrimental conditions impacting urban living. A municipality can focus its finite resources on solving as many or as few problems as it desires. Unless a suspect classification (i.e., race, national origin, or ancestry) or fundamental right (i.e., the right to vote, travel, access to criminal appeal, or procreation) is involved in a particular case or statute, a municipality, using its police power, may criminalize certain behavior which happens to be legally acceptable in a neighboring town without violating either state or federal equal protection guaranties.

The structure of municipal government in Maryland is similar to the various structures found in the rest of the nation's municipal corporations. A municipality consists of a governing body known as a council, commission or board. Each city or town government has a senior elected official usually designated to serve as the chief executive officer or mayor. The power of the mayor varies greatly amongst the municipalities.

In some cities or towns, the mayor possesses powers similar to those of our governor or president. However, in many cities or towns the mayor may simply preside over council meetings and votes only in case of a tie, which may be more or less akin to the role of the chairman of the board of a business corporation.

In approximately fifteen of the 157 municipalities, the chief executive officer is an appointed city manager or administrator, who performs most of the duties of a traditional mayor. The manager or administrator is a professional, normally possessing a specialized degree and training. In the council-manager form of government, the mayor presides over meetings and acts as the ceremonial representative of the city, but the city manager executes the day-to-day operations of the municipal government.

The General Assembly recognizes the Governor's broad authority in the exercise of the police power of the State to provide adequate control over persons and conditions during impending or actual public emergencies. The Governor's emergency powers are primarily found in Subtitle 3 of Title 14 of the Md. Ann. Code. Many of the powers delegated to the Governor of Maryland to declare state emergencies are similarly delegated to the local chief executives.

In general, at the State level, the Governor has significant authority to respond to a declared emergency. See PS Art. § 14-107(d). For example, if "necessary in order to protect the public health, welfare, or safety," the Governor may "suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision" or order the "evacuation of all or part of the population from a stricken or threatened area" of the State. PS Art § 14-107(d)(1)(i), (ii). This general power applies to a wide range of different types of emergencies, including "a public health

Continued on page 8



Kevin J. Best is the Town Attorney for five Prince George's County, Maryland municipalities and a former staff member of the Maryland Municipal League. With offices in Annapolis, Kevin has been practicing municipal law for 16 years. He is a graduate of the U.S. Naval Academy with a B.S. in Political Science, The George Washington University (MPA with Local Government Concentration), and the University of Baltimore School of Law. A former active duty, U.S. Marine infantry officer, and originally a native of Northeast Indiana, his law practice in Maryland also includes administrative, land use and zoning, and landlord-tenant law and general litigation matters.

catastrophe." PS Art. § 14-101(c)(2).

The Governor also has broad authority to respond to certain health emergencies under Maryland's Catastrophic Health Emergencies Act (MCHEA). This statute applies when the Governor declares a "catastrophic health emergency," as he did on March 5, 2020, defined as "a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent." PS Art. § 14-3A-01(b). "[D]eadly agent," in turn, means "anthrax, ebola, plague, smallpox, tularemia, or other bacterial, fungal, rickettsial, or viral agent, biological toxin, or other biological agent capable of causing extensive loss of life or serious disability." PS Art., § 14-3A-01(c)(1). The MCHEA was passed in 2002 and is based in part of the Model State Emergency Powers Act, which was drafted by the Center for Law and the Public's Health as a template for States considering legislation on the topic. *See* 100 Opinions of the Md. Attorney General 160 (2015).

The mayor or chief executive/administrator are usually authorized by charter or ordinance to declare an emergency. Who exactly is responsible to exercise local emergency powers depends on the structure of municipal government described in the local charter, and the municipal code of ordinances; however, state law requires it to be "the principal executive officer of a political subdivision." Declaration of a local state of emergency activates the response and recovery aspects of any applicable local state of emergency plan; and authorizes the provision of aid and assistance under the applicable plan.

A mayor, town manager or president of the commission should not assume that simply because he or she is the chief elected or appointed official of the city or town that he or she automatically has emergency powers or the ability to declare an emergency and marshal the municipality's employees and equipment to face the crisis. Typically, there will be in place a civil emergencies ordinance that spells out how to declare an emergency and what emergency powers are available.

Local civil emergency ordinances often include an enumerated list of emergency powers that a local mayor or manager can select to supplement existing law and to provide certain authority and establish guidelines for a municipality to react to and operate under during periods of civil emergencies, and to prevent or mitigate conditions that threaten to destroy property and harm the public health, safety or welfare of residents of, or visitors to, the city or town.

The authority to enact such provisions or regulations is provided in Title 14 (Emergency Management) of Public Safety Article of Md. Ann. Code, the local charter and other Maryland Statutes. A municipal civil emergencies ordinance may include sections entitled as follows: purpose and authority, applicability, proclamations (executive orders) of civil emergency, authority of the principal officer to issue such orders, the required contents of an emergency order, use of certain services and equipment, disaster readiness and response plans, emergency operations committees or team, emergency purchases of supplies, emergency notifications, and penalties for violating an emergency order.

Subject to § 14-1002 of the Public Safety Article of Md. Ann. Code, a local government has a duty to prevent civil disturbances, and if a structure or personal property is stolen, damaged, or destroyed in a riot, the injured party may recover actual damages sustained in a civil action against the county or municipal corporation of the State in which the riot occurred. Furthermore, pursuant to § 14-305 of the Public Safety Article of Md. Ann. Code, a law enforcement agency of a county or municipal corporation shall notify the Secretary of State Police if the local law enforcement agency receives notice of a threatened or actual disturbance that indicates the possibility of serious domestic violence.

Pursuant to most municipal charters and § 5-209 of the Local Government Art. of the Md. Ann. Code, the municipal governing body has the power to pass ordinances to protect and preserve the health of the municipality and its inhabitants. The governing body also may enable the appointment of a public health officer, and define and regulate his or her powers or duties; to inspect, regulate, and abate any buildings, structures or places which cause or may cause unsanitary conditions or conditions detrimental to health provided that none of these powers and duties impair the Md. Secretary of Health and Mental Hygiene, the county board of health, or any public, general or local law relating to the subject of health.

According to § 14-111 of the Public Safety Article of Md. Ann. Code as found in the Maryland Emergency Management Agency Act, only the principal executive officer of a political subdivision, which means a county or municipal corporation of the State, may declare a local state of emergency, and except with the consent of the governing body of the political subdivision, a local state of emergency may not continue or be renewed for longer than 30 days. Typically, the chief executive officer is deemed to be the senior official who oversees the day-to-day administration. A *de facto* or acting mayor ordinarily will be permitted to exercise the mayor's emergency powers.

Typically, an executive order of a civil emergency by the mayor or other executive officer shall, within

Ordinarily, if the mayor's declaration is challenged, the local trial court will scrutinize the facts underlying the mayor's determination that an emergency existed in the context of the circumstances that existed when the declaration was made. The party who seeks to attack the mayor's declaration has the burden of establishing its invalidity by proving that no emergency existed.

some period of time from issuance of the proclamation or at the earliest practicable time be filed with the appropriate clerk for presentation to the governing body for possible ratification and confirmation, modification, or rejection. The governing body typically may, by resolution, modify or reject the proclamation, and if rejected, it will be void.

If the governing body modifies or rejects the proclamation, said modification or rejection will typically be prospective only, and shall not affect any actions taken prior to the modification or rejection of the proclamation. Under state law, except with the consent of the governing body of the political subdivision, a local state of emergency may not continue or be renewed for longer than 30 days.

The mayor's or chief executive's emergency powers are extraordinary, but their constitutionality has generally been upheld. The mayor's exercise of these powers must be reasonable and may be invoked only for the purposes specified by the legislature [governing body], and only when an emergency exists. Any exercise of these powers during a non-emergency period will be invalid.

Notwithstanding the above, the determination of whether an emergency exists lies with the mayor or chief administrator. However, in order to ensure that the mayor does not assume unfettered control over governmental operations, that determination is subject to judicial review. Ordinarily, if the mayor's declaration is challenged, the local trial court will scrutinize the facts underlying the mayor's determination that an emergency existed in the context of the circumstances when when the declaration was made. The party who seeks to attack the mayor's declaration has the burden of establishing its invalidity by proving that no emergency existed.

The court's task in reviewing the mayor's determination is not an easy one. The applicable provisions of law rarely define the circumstances constituting an emergency except in general terms. Rather, the mayor is vested with a great deal of discretion in formulating his or her decision to declare an emergency. It has been held that where a charter provision described an emergency as being a situation in which public property, or the lives, property or welfare of the city's residents was threatened, it did not have to be limited to situations including a public disaster such as an earthquake, fire, flood or bombing, but also included that where the municipal police and fire departments were on strike.

Once an emergency is deemed to exist and has been declared by the mayor or chief administrator, he or she is given a wide range of powers to cope with it. These may include assuming control over the city's police and fire departments, or summoning, organizing and directing the members of any other appropriate city agency, marshaling, deputizing or otherwise employing private citizens, issuing directives which may derogate express charter provisions, modifying employee salaries or exercising other legislative powers, or doing whatever else he may deem necessary for the purpose of meeting the emergency.

Pursuant to § 14-306 of the Public Safety Article of Md. Ann. Code, the chief executive officer or governing body of a county or municipal corporation may request the Governor to provide the militia to help bring under control conditions existing within the county or municipal corporation that, in the requestor's judgment, the local law enforcement agencies cannot control without additional personnel. (Furthermore, the Governor by proclamation may require that each able- bodied individual in the State between 18 and 50 years old, inclusive, who is not regularly or continuously employed or engaged in a lawful and useful business, occupation, trade, or profession immediately register for work under Subtitle 9 of Title 14 of the Public Safety Article). Where the mayor or chief executive/administrator has made a valid emergency proclamation, subsequently adopted ordinances approved by the mayor will not impliedly repeal or otherwise modify those emergency powers where the emergency continued to exist at the time of their passage, and where the ordinances were not intended to have any influence on the exercise of those powers.

Pursuant to § 14-8A-02 of the Public Safety Article of Md. Ann. Code, the state, the governing body of a county or municipal corporation, or any other governmental agency within the National Capital Region, as defined under § 2674(f)(2) of Title 10 of the United States Code, may enter into a reciprocal agreement for the period that it considers advisable with a federal agency, the Commonwealth of Virginia, the District of Columbia, or a county or municipal corporation, within or outside the state, and establish, train, and implement plans to request or provide mutual aid through the use of its officers, employees, and agents, together with

Continued on page 10

Municipal Emergency *cont'd from page 9*

all necessary equipment, in accordance with § 7302 of the Intelligence Reform and Terrorism Prevention Act of 2004 (108 P.L. 458, 118 Stat. 3638). Of course, many municipalities in Maryland already have in place mutual aid agreements (MAAs) such as police MAAs to allow assistance during times of emergency or when there is no emergency and certain jurisdictions simply wish to work together to provide aid and assistance.

Occasionally, the Governor will directly delegate certain powers to local chief executives or administrators through his emergency orders. Under Maryland's relevant conflicts-of-law statutes, a local mayor's emergency orders will typically supersede conflicting orders of a county executive, but will be preempted along with any similar order of an appointed city or town health officer in cases where a county health officer's order is promulgated pursuant to the Governor's emergency order. An interesting situation recently arose under the current COVID-19 health emergency that necessitated the postponement of several municipal elections, which occur around the State in every month of the year. Several cities and towns expressly amended their charters in accordance with the Constitution of Maryland to move the election dates but did so using the Governor's emergency order suspending the timelines and procedural requirements for amending municipal charters found in State statutes.

As an exercise of the broadly delegated police power, Maryland's incorporated cities and towns potentially possess a full array of emergency and enumerated powers. Although all municipalities in Maryland may potentially declare and exercise certain emergency powers to combat a calamity or health emergency, the mayor, manager, or administrator must typically do so in accordance with a duly enacted civil emergencies ordinance, brought to life by a city council or similarly elected representative body and scrutinized when necessary in a court of law.

While the specific statutory provisions referenced in this article are derived from Maryland law, they should depict a structure of interdependent authority familiar to American local government practitioners generally.

It is this tripartite equilibrium between legislative, executive and judicial powers, writ large in the Constitution and equally evidenced in the smallest of American local governments, that undergirds public confidence even in the most menacing of crises. ML

A substantial part of this article is credited to or derived from a treatise by IMLA's founder, Charles S. Rhyne, Mayor: Chief Municipal, Executive Law, §11.16 (1985).




IMLA
85
ANNUAL
CONFERENCE
LA QUINTA, CA
SEPTEMBER 23-27, 2020
IMLA

Frequent Flyers: Reducing 911 Abuse

BY: LEANN D. GUZMAN
Senior Assistant City Attorney, Fort Worth, Texas



Many municipalities who provide their own ambulance service are faced with the "frequent flyer"- someone who calls 911 repeatedly and inappropriately for a claimed medical emergency, but who does not actually need emergency medical intervention. This problem is particularly serious as first responders, at the heart of the Covid-19 crisis, answer unprecedented numbers of pandemic-related calls.

These frequent flyers are a small number of people who are responsible for a high volume of ambulance transports. For example, the ambulance authority in Fort Worth, Texas, found in 2009 that 21 patients had been transported to local emergency rooms a total of 800 times over a 12-month period, which created almost $1 million in ambulance charges.[1] The Tucscon Fire Department similarly found that 50 patients were responsible for more than 300 nonemergency 911 calls over a 12-month period.[2] One woman in Washington, DC made 226 calls to 911 in one year and went to the hospital 117 times.[3] The San Francisco Fire Department has over 200 frequent fliers, which they define as using the ambulance service more than four times per year, and about 10% of these frequent fliers have been transported between 30 and 120 times.[4]

When the frequent flyer calls come in, important and finite resources are tied up, from the ambulances to the emergency rooms. However, although the callers may not have an emergency, they are sick or suffering in some way and need help. Their issues are deeper than those presented, often stemming from chronic pain, addiction, mental health issues, lack of insurance, or homelessness.[5] As a result, many communities have explored and are still exploring ways to help the frequent flyer while conserving valuable public resources.

One answer may be through expanding the role of the paramedics at the ambulance service to perform more than emergency response. This increased role is being put into practice through a nationwide movement to provide Mobile Integrated Healthcare-Community Paramedicine (MIH-CP). MIH-CP is "the provision of healthcare using patient-centered, mobile resources in the out-of-hospital environment."[6] MIH-CP is an umbrella term that can refer to any number of out-of-hospital services, including 911 nurse triage, chronic disease management, post-hospital discharge follow-up, and case management for frequent 911 users.

MIH-CP has been used for decades in rural areas where the only access to medical care was from EMTs or paramedics. And now urban areas are looking to MIH-CP as a solution for their frequent flyers, who also have resource gaps and challenges to access to the kind of medical care they need, albeit for very different reasons.[7]

Today, over 200 EMS agencies in 33 states plus Washington, DC are operating MIH-CP, with more providing MIH-CP-style services but who do not want to use that label, and still more planning to begin those services soon.[8]

And, MIH-CP is working. In Fort Worth, the MIH-CP program was shown to reduce frequency of transports, reduce hospital admissions, and save millions.[9] In Ontario, Canada, seniors in low-income housing were treated through an MIH-CP program, resulting in reduced emer-

gency calls, lowered blood pressure, and lowered diabetes risk after one year.[10] In Milwaukee, after instituting community paramedicine by the Milwaukee Fire Department, 911 calls across all demographics dropped by more than half.[1]

With the success of these programs, municipal lawyers whose cities provide ambulance services and who do not yet provide MIH-CP may very well encounter questions from their clients about starting the provision of these services soon. This article is intended to provide municipal law practitioners with a broad overview of legal issues of which to be aware as a starting point for vetting the legalities of the provision of MIH-CP services by their client.

1. Legality of MIH-CP Services by City Paramedics

Emergency medical services are regulated by state law, and these laws vary across the country. Traditionally, EMS action has been provided in the context of an emergency, and the trigger for deployment is a call for help. Some states still follow this very narrow definition of what EMS personnel may do. But in order to provide MIH-CP services, the traditional definition of the services that EMS personnel may provide must be expanded in some way, generally by the state legislatures.

Some states have delegated the authority of the scope of EMS to medical directors for the EMS organization, which will not require a change in state law, but will require a change in protocols by the medical director, as the established protocols related to services and dispatch of EMS personnel are usually based on the traditional model of provision of emergency services. Most protocols may remain the same, but others will need to be included, such as, for example, specific procedures for 911 triage and home visits.

In other states, changes to allow for the legality of MIH-CP services will require modifications at the legislature, and collaboration and agreement among multiple entities, including state or local health departments, boards of emergency health services, hospitals, ambulance providers, and supervising physicians.[1]

With the rise in popularity and the proven efficacy of MIH-CP programs, other states are working to change their laws to allow for these services. A list of states' laws related to MIH-CP from March 2018 was put together by the National Association of State EMS Officials, and is a good starting point to find out your state's or US territory's laws, although verification and updates will be needed.[13]

2. Anti-Kickback Statute

If your city wishes to provide MIH-CP services without implicating the federal Anti-Kickback Statute, the city must have a cost analysis and retain that documentation in its files, and then price the services so that the services are not provided below cost.

The Anti-kickback statute ("AKS")[14] is a federal law that prohibits knowing and willful solicitation or receipt of any remuneration, either directly or indirectly, in cash or in kind, to induce referrals of items or services reimbursable by the Federal health care programs, including Medicaid and Medicare. Violations of the AKS subject the violator to The Civil Monetary Penalties Law[15] which authorizes the Office of Inspector General to seek penalties for offenders.

The purpose of the AKS is to protect federal dollars from people and organizations gaming the federal system to get more business and more federal money. Both sides of a transaction are subject to the AKS, so that in the situation of an ambulance service and a facility to which the ambulance takes the patient, the law would be applicable to both the service and the facility.

In the context of MIH-CP, the program must be carefully crafted with AKS compliance in mind, especially if the MIH-CP services are provided through a facility that also refers patients to the ambulance service.

The Office of Inspector General issued a groundbreaking opinion regarding a form of MIH-CP services, stating that the arrangement was allowed to stand even though it could be construed as a technical violation of the AKS.[15] In the situation opined on in OIG Advisory Opinion 13-10 (OIG Opinion), a hospital provided a program with certain post-discharge services, including community paramedic services, free to patients who had congestive heart failure in order to prevent hospital readmissions and improve the patient health. This -type of arrangement may trigger concerns under the AKS if a patient is provided free or discounted services that could potentially incentivize a patient to go to the provider of those services for Medicare or Medicaid-covered care.

The OIG Opinion found that the benefits of the program outweighed the risk of influencing the patient to select that hospital for future services. The opinion rested on several program-specific factors, including that the patient had to have already selected the hospital for follow-up care, no employees would be compensated based on the number of patients in the program, the services were narrowly tailored in time and services, the hospital did not advertise the program, and neither Medicaid nor Medicare would pay directly for the program services.

The OIG Opinion is obviously a case-specific opinion, and should be read as such, but it is also an indication that the federal government is seeing the benefits of MIH-CP services and is willing to work with programs that meet the spirit of the law.[17]

Continued on page 14

Frequent Flyer *cont'd from page 13*

3. Liability Issues
With the City embarking on a new program, particularly one involving the medical care of patients, the possibility for additional liability should be thoroughly vetted and addressed. Patients or potential patients may bring a variety of claims.

Constitutional claims might include a violation of due process through a deprivation of life or liberty interests if a patient is not provided services.[18] However, the U.S. Supreme Court decided in *DeShaney v. Winnebago County Department of Social Services* that a government's failure to assist or respond to someone in need is not a constitutional violation in and of itself, and the government is not generally required to provide people with assistance.[19]

The level, if any, of duty of care for the paramedics that would arise in your state for a program dedicated to providing care for individuals and whether a claim for breach of that duty would survive the immunity statutes in your state is something that should be considered.

4. Other Legalities to Consider
Although not an exhaustive list, here are some additional things to consider in order to perform MIH-CP with city employees:

a. Compliance with state home health licensing and regulation, if applicable
b. Job descriptions of employees providing MIH-CP
c. Credential checks for applicants and existing employees
d. Proper pay and overtime issues
e. Forms for evaluations and assessments necessary to fulfill the services with the clients
f. Consents, waivers, and forms for patients to sign
g. HIPAA-compliant records and record-keeping
h. Training for employees, including skills for the services and for HIPAA compliance
i. Contract with funding or cost-sharing organization(s) or entity, if available, to help assure financial viability of the MIH-CP program
j. Contract with MIH-CP services provider, if different from city
k. Supply contracts
l. Necessary council approvals

5. Implementation
It is important to know Best practices for implementation of an MIH-CP program as you guide your decision-makers.

(1) Identify the need. Rural and urban programs have very different needs, and not every rural area or urban area has the same gap in existing medical services. If the city needs to reduce 911 callers, what is the need by the patient that drives the calls to 911? Stakeholder groups should use reliable and available data to explore the needs in a patient-centered way. The stakeholder groups should be as inclusive as possible (e.g., include people working in homeless services, pre-hospital care, hospital systems, geriatrics, pediatrics, psychiatric and mental health, hospice, and chronic disease management.) If needed data isn't available, conduct community surveys and assessments, or begin to collect necessary data.
(2) Identify the model. How will the MIH-CP program be run using City resources? Some options:

a. Medical Provider-controlled and City-operated. A hospital or other medical services provider is the "owner" of the project and then contracts with the city to provide the service. (Beware of the AKS issues mentioned above.)
b. City-controlled and Operated. The city owns the program and the EMTs in the Fire Department perform the services.
c. City-controlled and Contractor-operated. The city owns the program and outsources the work by contracting with a provider of the services.

No matter the model used, collaboration with other medical providers in the area is critical and will strengthen the program, and the program will need medical oversight by physicians and other community practitioners.
(3) Identify the metrics. How will staff determine that the program has been successful? What data will they want and need to track to ensure the metrics have been met? How often should metrics be evaluated? The answers will depend on the services provided. A list of resources with sample metrics can be found in the MIH-CP Program Toolkit provided by National Association of Emergency Medical Technicians.[20]
(4) Identify the money. Establishing a budget is a relatively easy part of starting a new program, provided staff can identify all overhead and expenses. The difficulty is in finding sustainable funding for the program.

Medicaid and Medicare traditionally have not been funding sources. Medicare, for example, has primarily paid only for an ambulance transport when the patient is taken to a hospital emergency department, which actually creates an incentive to transport people who do not need it. (This problem is not limited to Medicare patients; under most fee-based payment structures historically used in ambulance services, there is no fee charged or paid unless there is a transport somewhere.)

However, this status of the federal government as a non-payer is changing. On February 14, 2019, the United States Department of Health and Human Services (HHS), Center for Medicare and Medicaid Innovation (Innovation Center), announced a new payment model that allows ambulance service providers to partner with qualified health care practitioners to deliver treatment in place (such as through

telemedicine or on-site care) and to provide transportation to alternative destination sites other than emergency rooms (such as urgent-care clinics or primary care physician offices). The model "will encourage development of medical triage lines for low-acuity 911 calls in regions where participating ambulance suppliers and providers operate."[21]

In some states, specifically Nevada, Arizona, New Mexico and Minnesota, Medicaid is paying for parts of the program.[22] Funding could also be obtained through federal grants, cooperative agreements, and contracts.[23]

In conclusion, MIH-CP, if legally allowed in your state, is an important tool in the toolbox when exploring ways to reduce frequent flyers and conserve valuable and finite taxpayer resources from being monopolized by a few people whose true needs could be met in other ways. ML

Notes

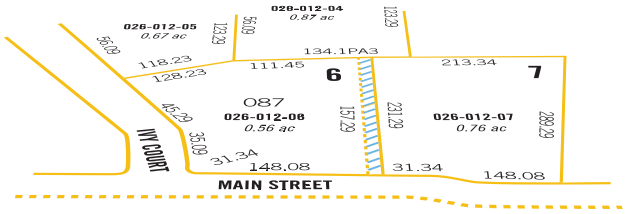
1. The Agency for Healthcare Research and Quality, *Case study: How an EMS agency tackled "frequent fliers"*, EMS1.COM (February 7, 2012) https://www.ems1.com/research-reviews/articles/1233831-Case-study-How-an-EMS-agency-tackled-frequent-fliers/.
2. *Id.*
3. Amy Brittain, *D.C. woman's number of 911 calls prompt city to request that she be given a guardian*, WASH. POST (November 8, 2013), https://www.washingtonpost.com/local/dc-womans-number-of-911-calls-prompt-city-to-request-that-she-be-given-a-guardian/2013/11/08/85f9d428-4897-11e3-bf0c-cebf37c6f484_story.html?utm_term=.22622e900f57
4. ABC7, *Ambulance frequent fliers costing cities millions* (May 18, 2012), https://abc7news.com/archive/8666579/.
5. National Association of Emergency Medical Technicians, *Mobile Integrated Healthcare and Community Paramedicine (MIH-CP) 2nd National Survey*, http://www.naemt.org/docs/default-source/2017-publication-docs/mih-cp-survey-2018-04-12-2018-web-links-1.pdf?Status=Temp&sfvrsn=a741cb92_2.
6. National Association of Emergency Medical Technicians, *Mobile Integrated Healthcare-Community Paramedicine*, https://www.naemt.org/initiatives/mih-cp (Last Visited June 25, 2019).
7. National Association of Emergency Medical Technicians, *Mobile Integrated Healthcare and Community Paramedicine (MIH-CP) 2nd National Survey*, http://www.naemt.org/docs/default-source/2017-publication-docs/mih-cp-survey-2018-04-12-2018-web-links-1.pdf?Status=Temp&sfvrsn=a741cb92_2
8. *Id.*
9. National Center for Biotechnology Information, *A pilot mobile integrated healthcare program for frequent utilizers of emergency department services,* https://www.ncbi.nlm.nih.gov/pubmed/28495031 (Last visited June 25, 2019).
10. MedStar Mobile Healthcare, *Mobile Healthcare Programs* – Overview, National Association of Emergency Medical Technicians, http://www.medstar911.org/mobile-healthcare-programs (Last visited June 26, 2019).
11. Laura Otto, *Paramedic training helps improve health, reduce 911 calls*, UMW Report (April 24, 2018) https://uwm.edu/news/uwm-helps-improve-health-reduce-911-calls/
12. www.astho.org/Preparedness/ASTHO-EMS-and-Law-Report.
13. National Association of State EMS Officials, *State by State Community Paramedicine – Mobile Integrated Healthcare (CP-MIH) Status Board,* (March 2018) https://nasemso.org/wp-content/uploads/CP_State_Status_Board_CURRENT.pdf.
14. 42 U.S.C. Section 1320a-7b.
15. 42 U.S.C. Section 1320a-7a.
16. Office of Inspector General, U.S. Department of Health and Human Services, *OIG Advisory Opinion 13-10*, (August 9, 2013) https://www.oig.hhs.gov/fraud/docs/advisoryopinions/2013/AdvOpn13-10.pdf.
17. James G. Hodge, Jr., Daniel G. Orenstein, Kim Weidenaar, *Expanding the Role of Emergency Medical Services Providers: A Legal Analysis*, Association of State and Territorial Health Officials (2014).
18. 489 U.S. 189 (1989).
National Association of Emergency Medical Technicians, *MIH-CP Program Toolkit*, http://naemt.org/initiatives/mih-cp/mih-cp-program-toolkit (Last visited June 25, 2019).
19. U.S. Department of Health & Human Services, *HHC launches innovative payment model with new treatment and transport options to more appropriately and effectively meet beneficiaries' emergency needs* (February 14, 2019), https://www.hhs.gov/about/news/2019/02/14/hhs-launches-innovative-payment-model-new-treatment-transport-options.html.
20. National Association of Emergency Medical Technicians, *New Money Makeover: What new EMS payment models mean to Medical Directors and their agencies* (January 3, 2019), www.naemt.org/docs/default-source/community-paramedicine/toolkit/new-money-makeover-what-new-ems-payment-models-mean-to-medical-directors-and-their-agencies.pdf.
21. International Roundtable on Community Paramedicine, *Potential Funding for Community Paramedicine Projects in the United States*, http://ircp.info/Portals/11/Downloads/Funding/Funding_Streams_in_US.pdf?ver=2013-10-24-113402-000 (Last visited June 25, 2019).

Leann Guzman was licensed to practice law in Texas in 2001, joined the City of Fort Worth City Attorney's Office in 2004, and is currently the Section Chief of the Real Estate and City Facilities practice group in the Transactional Division of the City Attorney's Office. She received her law degree from University of Texas School of Law and her bachelor's degree in political science from the University of Texas at Arlington.

LAND USE

Easements by Estoppel

KENNETH R. BENNETT
Assistant City Attorney, City of Arlington, Texas



If you are a municipal attorney involved in the practice of real estate law, you are likely to spend time drafting and approving easement documents. If you do, that probably means you are assisting in the acquisition of right-of-way needed for new public infrastructure, or the replacement or reconstruction of the old. Either way, your goal is to secure the right-of-way with a well drafted legal document. But there are times you must sift through the detritus of history and try to fix mistakes, oversights, and poor planning from the good old days. There are times when you don't have the luxury of a written document. Sooner or later you will have to argue that there is, nevertheless, a public right-of-way.

That can be a tall order inasmuch as the Statute of Conveyances says that a conveyance of "…an estate for more than one year, in land and tenements, must be in writing…"[1] One way to get around the requirement of a writing, of course, is by a prescriptive easement. However, the focus of this article will be on easements by estoppel, which are generally of three types: implied dedication, implied easement appurtenant, or an easement by equitable estoppel (or, "in pais").[2] My emphasis will be on Texas law, but with a sampling from other states.

Prescriptive easements

First a brief word about prescriptive easements. To have one, you "…must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for the requisite period of time."[3] In Texas the required period of use is ten years, by analogy to the adverse possession statutes.[4] The requirements are similar in other states. New York requires a showing "…by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years."[5] In Florida the time period is longer, requiring a claimant to "…prove, by clear and positive proof, 1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; 2) that the use was related to a certain, limited and defined area of land; 3) that the use has been either with the actual knowledge of the owner, or so open, notorious, and visible that knowledge of the use must be imputed to the owner; and 4) that the use has been adverse to the owner -- that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner, and such that, for the entire period, the owner could have sued to prevent further use."[6] The elements can be rigorous and difficult to prove. Consider, for example, how "open and notorious" an underground pipe may be.

Implied dedication

In general, a dedication occurs when an owner sets land apart for public use, and the public actually or impliedly accepts that use.[7] A dedication can be accomplished by an express grant or by implication.[8] An express dedication is by words in a deed or other written document.[9]

The requirements of a dedication are: (1) the dedicator must have fee simple

As a general rule, the intention to dedicate must be shown by something more than an omission or failure to act or acquiesce on the part of the owner. There must be evidence of some additional factor that implies a donative intention when considered in light of the owner's acquiescence in the public's use of the facility.

title, (2) the dedicator must make either an express or implied offer, (3) it must serve a public purpose, and (4) the offer must be accepted.[10] An express dedication must contain dedicatory language and it must be accepted by the public authorities.[11]

An implied dedication relies on estoppel, the elements being: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the facility to public use; (2) he was competent to make the dedication; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.[12, 13]

As a general rule, the intention to dedicate must be shown by something more than an omission or failure to act or acquiesce on the part of the owner.[14] There must be evidence of some additional factor that implies a donative intention when considered in light of the owner's acquiescence in the public's use of the facility.[15] Direct evidence of an overt act or a specific declaration on the part of the landowner indicating an intention to dedicate land to public use is not required.[16] It is sufficient if the intent is properly inferable from the circumstances in evidence.[17]

In addition, evidence of long and continued use by the public can raise a presumption of dedication by the owner when the origin of the public use and the ownership of the land at the time it originated cannot be shown, one way or the other, due to the lapse of time.[18] For this rule to apply, the origin of the public use and the ownership at that time must be "shrouded in obscurity, and no proof can be adduced showing the intention of the owner in allowing the use."[19]

In Kansas, implied dedication requires a clear and unequivocal intention on the part of the landowner to provide the land for public use, as well as some action by the public body indicating acceptance beyond mere use. by the public.[20] Acceptance can be implied by (1) actual use by the unorganized public, (2) that the use has continued over a significant period of time, (3) that the use is not merely with the consent of the abutting owners, but by a claimed right of public travel, and (4) that the use justifies the conclusion that the way is of common convenience and necessity.[21]

In California, a common law dedication, whether express or implied, requires both an offer of dedication and an acceptance of that offer by the public. The offer may be "implied in fact" if there is proof of the owner's actual consent to the dedication.[22] The owner's intent is the crucial factor. The circumstances must negate the idea that the use is under a license.[23]

At common law, California allowed a sort of prescriptive-lite approach, in which a claimant could prove a dedication by adverse use. An offer of dedication could be "implied by law" if the public openly and continuously made adverse use of the property for more than the prescriptive period.[24] Thus, an implied dedication could occur if the public used the land for a period of more than five years under circumstances raising a presumption of knowledge and acquiescence by the owner, while also negating the idea of a mere license.[25] In reaction, the California Legislature passed a law in 1971 providing that no use of property "…by the public after the effective date of this section shall ever ripen to confer upon the public … a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, … accepted by the county, city, or other public body to which the offer of dedication was made…"[26]

Implied easement appurtenant

An implied easement appurtenant involves the concepts of a dominant and a servient estate. The holder of an easement over another tract has the dominant estate. The servient estate is the land or estate upon which the easement is imposed, making the servient estate subject to the use of the easement. An easement appurtenant is one attached to, and needed to enjoy, a tract of land. This is in contrast to an easement in gross, which is merely a personal right of use.[27]

An implied easement appurtenant may be found where a right or privilege over a servient tract is necessary or essential to the proper enjoyment of another tract or estate. Mere convenience is not enough. The servient estate is subject to the use of the dominant estate to the extent of the easement granted or reserved. It is essentially a negative easement, in which the servient estate may not be used in a way that interferes with the right of the owner of the dominant estate to use the servient estate for the purpose of the easement.[28]

The concept of an implied easement appurtenant developed from situations where a landowner conveyed a part of his land, the proper use of which required the use of another part; for example, where use of the conveyed tract depended upon another tract for drainage, access, or water. From such beginnings, the concept developed three basic requirements: the use (1) must be apparent and in existence at the time of the grant, (2) must have been continuous, and (3) must be necessary to the use of the dominant estate.[29] In *Drye v. Eagle Rock Ranch, Inc.,* the Texas Supreme Court gave as an example the case of two adjacent buildings with a common wall and where the stairway for both was in one of the buildings. The single owner of both conveyed each to different persons. The one with the stairs tried to deny the stairway use by the other. This was found sufficient to establish an implied easement

Continued on page 18

Easements *cont'd from page 17*

in the stairs for the benefit of the building without stairs.[30] *Drye* involved a claim of a recreational easement over a large tract to the benefit of residential lots. The court found none of the elements of an implied easement, commenting that the claimed right to "wander about the land" was too vague to be necessary to the use of the residences.[31]

In Massachussetts, cases have examined claims for implied appurtenant easements for access routes to waterfront and the right to use beaches. Courts typically look to granting documents and plats for evidence of a right of access, and to evidence of actual usage of the beach for an easement on the waterfront.[32]

In California it is said that the purpose of the doctrine of implied easements is to "give effect to the intentions of the parties, as shown by all of the facts and circumstances of the case."[33] The cases typically construe a conveyance. An easement by implied grant requires "(1) A separation of the title; (2) before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and (3) the easement shall be reasonably necessary to the beneficial enjoyment of the land granted."[34] An implied appurtenant easement can also attach to a lease: As a general rule everything which belongs to the demised premises or is used with, and appurtenant to, them and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved. This rule, for example, applies to a lease of a part of a building.[35]

Easement by estoppel in pais[36]

An estoppel in pais is also known as an easement by equitable estoppel. It concerns a situation where a landowner is estopped to deny the existence of an easement by reason of having made representations which have been acted upon by another to his detriment.[37]

Proof of an easement by estoppel must show that (1) a representation was communicated to the promisee; (2) the communication was believed; and (3) there has been reliance upon such communication.[38] The court in *Drye* commented that "The doctrine of estoppel in pais has been applied when the seller allows the purchaser to expend money on the "servient" tract, as for example a drainage ditch across the grantor's land, or a house or other structure which encroaches on the land of the "servient" estate … While estoppel cases are not limited to situations involving this type of expenditure, this group does form a large part of the cases affixing easements appurtenant by estoppel."[39] In that case, the claimant of the easement made noimprovements of any kind on the land upon which an easement was claimed. The *Drye* court pointed to the "…rather narrow band of cases in which the doctrine has been applied…" and found "…no Texas authority for an extension of the doctrine to the broad facts (i.e., a claimed right to unspecified recreational use of the land) here shown.[40] The *Lake Meredith Dev. Co. v. Fritch* case illustrates a successful claim of an equitable easement by a municipality. At the request and expense of the owners of a 59-acre tract adjacent to the City of Fritch, Texas, the City installed underground water and sewer pipelines across the tract to serve a residential subdivision. When the pipelines were installed, the subdivision and the 59 acres were under common ownership. No written easements were filed or recorded in the county deed records. Later, Lake Meredith Development Company acquired the 59 acre tract and sued the City seeking removal of the lines or damages.[41] The City claimed an easement by estoppel.[42] Lake Meredith conceded that a representation was communicated to the City and that the communication was believed. They asserted, however, that no evidence showed that the City expended any money in reliance on the representation because the prior owners paid for the installation of the pipelines.[43] Their position was that reliance by the City can be shown only by an expenditure. The Court disagreed, concluding that reliance includes "…detriment which may be determined from the surrounding circumstances, such as the effect on the user if the easement is revoked or removed."[44] Finding that the lines served residential areas inside and outside the City and that it would be extremely costly to move the lines, the Court found equitable easements for the lines because "…the reliance and resulting possible detriment to the [City] if the easement is revoked is well established…"[45]

Similarly, the courts in Connecticut find an easement by estoppel when a grantor "…voluntarily imposes an apparent servitude on his property and another person, acting reasonably, believes that such servitude is permanent and in reliance upon that belief either does something he would not otherwise have done or refrains from doing something that he would otherwise have done."[46]

In Massachusetts a grantor, and those claiming under him, are estopped to deny the existence of a street when (1) the grantor conveys land bounded by a street, and (2) the grantor conveys land with reference to a recorded plan that shows the street. Beyond that, the State does not recognize the creation of easements on general estoppel principles because they would encumber the unfettered right of an owner to use his land and detract from the integrity and reliability of land records.[47]

Conclusion

Older cities in America, and even relatively young areas like the DFW Metroplex in Texas, are full of subdivisions, neighborhoods and commercial areas from an earlier time when development standards may not have been as mature as in the present day. The filing of easement documents in the deed records may have been haphazard. Records may have been lost or destroyed. Plats may have been accepted without properly identified easements, at least by today's standards. We are now in a time when many of those older areas are being redeveloped and those buried

issues are resurfacing to become today's problems. When they do, fairly or not, the city government will be blamed. However, with careful investigation, it may sometimes be possible to salvage a bad situation by proving up an easement by estoppel. ML

Notes

1. Tex. Prop. Code § 5.021.
2. Drye v. Eagle Rock Ranch, Inc., 364 S.W. 2d 196, 203 (Tex. 1962).
3. Brooks v. Jones, 578 S.W.2d 669, 673 (Tex. 1979).
4. Barstow v. State, 742 S.W. 2d 495, 499 (Tex. App. —Austin 1987, writ denied).
5. Auswin Realty Corp. v. Klondike Ventures, Inc., 2018 NY Slip Op 04997, ¶ 2, 163 A.D.3d 1107, 1108, 81 N.Y.S.3d 278, 280 (App. Div.)
6. Stackman v. Pope, 28 So. 3d 131, 133 (Fla. App. 2010)
7. Ford v. Moren, 592 S.W.2d 385, 390 (Tex. Civ. App. —Texarkana 1979, writ ref'd, n.r.e.).
8. Viscardi v. Pajestka, 576 S.W.2d 16, 19 (Tex. 1978).
9. Broussard v. Jablecki, 792 S.W.2d 535, 537 (Tex. App.—Houston [1st Dist.] 1990, no writ); Copeland v. City of Dallas, 454 S.W.2d 279, 281-82 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.); Priolo v. City of Dallas, 257 S.W.2d 947, 952 (Tex. Civ. App. —Dallas 1953, writ ref'd n.r.e.).
10. Moody v. White, 593 S.W.2d 372, 378 (Tex. Civ. App. —Corpus Christi 1979, no writ).
11. Aransas County v. Reif, 532 S.W.2d 131, 134 (Tex. Civ. App. —Corpus Christi 1975, writ ref'd n.r.e.); *Broussard, supra* note 9. Copeland v. City of Dallas, 454 S.W.2d 279, 281-82 (Tex. Civ. App. —Dallas 1970, writ ref'd n.r.e.); *Priolo, supra* note 9.
12. Lindner v. Hill, 691 S.W.2d 590, 592 (Tex. 1985); Las Vegas Pecan & Cattle Co., Inc., 682 S.W.2d 254, 256 (Tex. 1984); Baker v. Peace, 172 S.W.3d 82, 87 (Tex. App. —El Paso 2005, pet. denied).
13. The author once tried to defeat a taking claim by asserting the lack of a property interest by reason of an implied dedication of the property. Drainage and sewer lines under a lot were installed by the developer of a subdivision in 1924 and were accepted and used by the public for over 80 years. There were plans of the lines in the city archives, but no easement was reserved on the plat or filed in the county records. Unfortunately, it did not work. The appellate court relied on the developer's unlawful attempt to reserve the lines to himself (which the author argued should be no evidence of anything), to find a negation of the intent to dedicate. City of Dallas v. Jones, No. 05-07-00831-CV, 2008 Tex. App. LEXIS 1619, at *10 n.1 (Tex. App.—Dallas Mar. 5, 2008, pet.denied). Three out of four ain't bad.
14. Greenway Parks Home Owners Ass'n v. City of Dallas, 312 S.W.2d 235, 241 (Tex. 1958).
15. Long Island Owner's Ass'n v. Davidson, 965 S.W.2d 674, 681 (Tex. App.—Corpus Christi 1998, pet. denied).
16. Gutierrez v. County of Zapata, 951 S.W.2d 831, 838 (Tex. App.—San Antonio 1997, no writ).
17. Owens v. Hockett, 151 Tex. 503, 505, 251 S.W.2d 957, 958 (1952); Baker v. Peace, 172 S.W. 3d 82, 88 (Tex. App. —El Paso 2005, pet. denied).
18. Graff v. Whittle, 947 S.W.2d 629, 637 (Tex. App.—Texarkana 1997, writ denied); Fazzino v. Guido, 836 S.W.2d 271, 274 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
19. *Baker*, 172 S.W. 3d at 88-89; *Fazzino*, 836 S.W.2d at 274.
20. Carlson v. Burkhart 27 P.3d 27, 32 (Kan. 2001).
21. *Carlson*, 27 P.3d at 33.
22. Scher v. Burke, 395 P.3d 680, 683 (Cal. 2017).
23. *Scher*, 395 P.3d at 683.
24. *Id.*
25. Gion v. Santa Cruz, 465 P.2d 50, 55-56 (Cal. 1970).
26. Cal. Civ. Code § *1009(b)*.
27. Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 207 (Tex. 1962).
28. *Drye*, 364 S.W.2d at 207.
29. *Id.*
30. *Id.*
31. *Id.* at 208.
32. See Hickey v. Pathways Ass'n, Inc., 37 N.E.3d 1003, 1019 (Mass. 2015); Labounty v. Vickers, 225 N.E.2d 333, 337 (Mass. 1967); Kane v. Stimson, 2016 Mass. LCR LEXIS 125, at *7 (Land Ct. 2016).
33. Piazza v. Schaefer, 255 Cal. App. 2d 328, 332-33, 63 Cal. Rptr. 246, 250 (1967).
34. *Piazza*, 255 Cal. App. 2d at 332-33, 63 Cal. Rptr. at 250.
35. Owsley v. Hamner, 227 P.2d 263, 267 (Cal. 1951).
36. The term "in pais," seeming to imply something done informally, originates from the Law French "in the country," and is defined as "Outside court or legal proceedings." Black's Law Dictionary 806 (8th ed. 2004).
37. *Drye, supra* at 209; Martin v. Cockrell, 335 S.W.3d 229, 237 (Tex. App.—Amarillo 2010, no pet.).
38. Lake Meredith Dev. Co. v. Fritch, 564 S.W.2d 427, 428 (Tex. Civ. App.—Amarillo 1978, no writ).
39. *Drye, supra* note *27* at 209
40. *Id.* at 210.
41. Lake Meredith also claimed to be an innocent purchaser for value without actual or constructive notice of the pipeline easements. Since the lines were shown on City maps, and manholes were evident on the surface, that claim was denied. *Lake Meredith*, 564 S.W.2d at 431.
42. *Id.* at *428*.
43. *Id.* at 429.
44. *Id.* at 428-29.
45. *Id.*
46. Foldeak v. Incerto, 274 A.2d 724, 727 (Ct. 1970).
47. Patel v. Planning Bd. of N. Andover, 539 N.E.2d 544, 547 (Mass. App. Ct. 1989); Blue View Constr., Inc. v. Town of Franklin, 874 N.E.2d 425, 433 (Mass. App. Ct. 2007).

OPIOID UPDATE

BY: ERICH EISELT
IMLA Assistant General Counsel

Justice Delayed

By March 2020 municipalities in the opioid war could rightfully feel some optimism. Plaintiffs were routinely defeating motions to dismiss and succeeding in discovery battles. Newly released DEA data revealed the total number of opioids distributed around the nation exceeded $100 billion, substantially greater than previously known. A series of upcoming trials presented defendants with a threatening gauntlet which might finally cascade towards an omnibus settlement and fund relief from the opioid crisis.

As with virtually other aspect of American life, COVID-19 upended that momentum. The litigation has slowed dramatically, handing defendants an unexpected gift—but it continues. Herewith is a snapshot:

Judge Polster-Persevering Against Headwinds

From the day he was appointed in December 2017 to oversee the National Prescription Opiate Litigation (17 md 2804), Aaron Polster has championed settlement and the cause of victims. This posture has been denounced by defendants as a presupposition that they lack meritorious arguments and will be forced to settle. It has even resulted in a motion, rejected at the Sixth Circuit, to have Polster removed from the MDL for bias. But he has persisted, overseeing a first settlement in October 2019 which enabled Ohio's Summit and Cuyahoga counties to receive nearly $300 million from manufacturers in the "Track 1A" bellwether case.

Remand

Polster has also fulfilled a primary purpose of the MDL--to marshal evidence, facilitate discovery, and dispose of motions such that cases can be returned to their originating federal court and proceed efficiently. Over the ever-present objections of defendants, he has remanded significant cases, including those brought by Chicago and San Francisco, each of which is being litigated by IMLA member law departments. Other remands have returned the Cherokee Nation bellwether to Oklahoma's Eastern District, and the action by Huntington and Cabell County to the Southern District of West Virginia, where they seek recourse against the distributors in "Track 2."

The Mandamus-and the Response

The settlement in late 2019 did not include pharmacies, who became defendants in a new bellwether case-"Track 1B." The counties had added the pharmacies to their complaints before the court's deadline in April 2018, but only in their capacity as "distributors" of opioids, declining to cite them as "dispensers."

In November 2019, Judge Polster allowed the counties to amend their Track 1B complaints to include dispensing claims, opening pharmacies to liability for filling suspicious "red flag" prescriptions (unusually large amounts, repeated refills, combinations of opioids/benzodiazepines/ muscle relaxers, prescriptions from unlicensed prescribers, and so on). He also granted additional discovery requests, ordering the pharmacies to collect and deliver 13 years' of nationwide prescribing data.

When Polster refused the pharmacies' motions for relief, they sought mandamus at the Sixth Circuit. While mandamus is an extraordinary measure, reserved for "exceptional circumstances" involving a "judicial usurpation of power" or a "clear abuse of discretion" the Circuit found such irregularities. On April 16, 2020, in acerbic language, it required that Judge Polster strike the dispensing claim from Track 1B: "Not a circuit court in the country, so far as we can tell, would allow a district court to amend its scheduling order under these circumstances."

Unbowed, Polster immediately ordered a new bellwether-"Track 3" to try the dispensing actions. On April 30, he ordered that Track 3 would consist of cases brought by Ohio's Lake and Trumbull counties. He further directed that the original Track 1B distribution case against the pharmacies move forward towards its scheduled November 2020 trial:

> Given that most of the discovery has been done on these claims, the Court believes that, even with the exigencies of COVID-19, the current schedule culminating in a November 2020 trial remains reasonable and realistic.

Continued on page 34

IMLA acknowledges these sponsors who helped underwrite our 2020 Virtual Seminar. We greatly appreciate your support!

AMERICAN LEGAL Publishing Corporation

ARCADIS

COUNTY OF RIVERSIDE Riverside County, California

ARRAN CAPITAL

BB&K BEST BEST & KRIEGER ATTORNEYS AT LAW

Robbins Geller Rudman & Dowd LLP

GMSR APPELLATE LAWYERS GREINES, MARTIN, STEIN & RICHLAND LLP

THOMSON REUTERS®

LegalFiles® Managing what matters to you.

Xakia

IMLA



IMLA AMICUS AWARDS

IMLA congratulates our 2020 Amicus Award recipients, who contributed their time and talents over the past year to author amicus briefs promoting the interests of local government. They make IMLA's legal advocacy program possible, and we express our sincere appreciation to all.

SUPREME COURT CASES:

John Korzen, Director, Appellate Advocacy Clinic, Wake Forest University Law School, Greensboro/ Winston-Salem, NC

Department of Commerce v. New York - Supreme Court Merits

ISSUE: whether the Secretary of Commerce violated the Administrative Procedure Act or the Constitution by placing a citizenship question on the U.S. Census.

Lauren Kuley, Partner and Co-chair, Appellate and Supreme Court Practice, Squire Patten Boggs, Cincinnati, OH

Mitchell v. Wisconsin - Supreme Court Merits

ISSUE: whether a statute statute a blood draw from an unconscious motorist provides an exigent circumstances exception to the warrant requirement.

Erin Kuka, Deputy City Attorney, and **Molly Alarcon**, Deputy City Attorney, San Francisco, CA

United States v. Sineneng-Smith - Supreme Court Merits

ISSUE: whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain is facially unconstitutional.

Kirti Datla, Senior Associate, **Heather Briggs**, Associate, and **Kristina Alekseyeva**, Associate, Hogan Lovells, Washington DC and New York NY

Carney v. Adams - Supreme Court Merits

ISSUE: whether the First Amendment invalidates Delaware's constitutional limit on judges affiliated with one party to a "bare majority" on the state's highest courts, with the other seats reserved for judges affiliated with the "other major political party."

Misha Tseytlin, Partner, Troutman Sanders, Chicago, IL

Lomax v. Ortiz-Marquez - Supreme Court Merits

Issue: whether a dismissal without prejudice for failure to state a claim counts as a strike under 28 U.S.C. 1915(g).

Scott Smith, **Alexandra Dugan** and **Stephen Parsley**, Bradley Arant Boult Cummings LLP, Huntsville, AL, Nashville, TN and Birmingham, AL

City of Chicago v. Fulton - Supreme Court Merits

ISSUE: whether an entity retaining possession of property in which a bankruptcy estate has an interest must return that property to the estate immediately upon the filing of the bankruptcy petition.

Emory Law School Supreme Court Advocacy Program, Atlanta, GA (two cases)

McGirt v. Oklahoma - Supreme Court Merits

ISSUE: whether prosecution of a member of Oklahoma's Creek Tribe for crimes committed within historical Creek boundaries is subject to exclusive federal jurisdiction.

Winstead v. Johnson - Supreme Court Petition Stage

ISSUE: whether claims of self-incrimination based on statements used at a criminal trial before conviction are deferred under *Heck v. Humphrey* and whether such convictions are barred.

Elizabeth Prelogar, Cooley LLP, Washington, DC

Torres v. Madrid - Supreme Court Merits

ISSUE: whether an unsuccessful attempt to detain a suspect via physical force is a "seizure" under the Fourth Amendment, as the Eighth, Ninth and Eleventh Circuits hold, or whether such attempt must be successful as the Tenth and the District of Columbia Circuits hold.

Collin Udell, Partner, Jackson Lewis P.C., Hartford, CT (affiliation at time of writing brief)

Fort Bend County v. Davis - Supreme Court Merits

Issue: whether Title VII's administrative-exhaustion requirement is a jurisdictional prerequisite to suit, or a waivable claim-processing rule.

Andre Monette, Partner, Best Best & Krieger, Washington DC

Hawaii Wildlife Fund v. County of Maui - Supreme Court Merits

Issue: whether a whether a Clean Water Act violation occurs only when a pollutant is released directly into navigable waters, or whether it is enough that the pollutant is released indirectly.

G. Michael Parsons, Assistant Professor of Law, New York University School of Law, New York, NY

***Lamone v. Benisek / Rucho v. Common Cause* - Supreme Court Merits**

ISSUES: whether plaintiffs have standing for partisan gerrymandering claims; whether those claims are justiciable; whether North Carolina's 2016 congressional map is an unconstitutional gerrymander; and whether the legal claims articulated by the panel in *Benisek* are unmanageable.

Lawrence Rosenthal, Professor of Law, Chapman University, Orange, CA

***New York State Rifle & Pistol Association, Inc. v. City of New York* – Supreme Court Merits**

ISSUE: whether ban on transporting a licensed, locked and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the commerce clause and the constitutional right to travel.

Michael Dundas, Senior Attorney, Los Angeles, CA

***Department of Homeland Security v. Regents of the University of California* - Supreme Court Merits**

ISSUES: (1) whether decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision is lawful.

Geoffrey Eaton, Partner, Winston & Strawn, Washington DC (two cases)

***McDonough v. Smith* - Supreme Court Merits**

ISSUE: whether the statute of limitations for a claim based on fabrication of evidence begins when criminal proceedings terminate in the defendant's favor or when the defendant first becomes aware of the tainted evidence and its improper use.

***Manuel v. City of Joliet* - Supreme Court Petition Stage**

ISSUE: whether a Fourth Amendment claim for unlawful post-process, pretrial detention is subject to a special rule of delayed accrual.

John Baker, Founding partner, Greene Espel, LLC, Minneapolis, MN (two cases)

Barr v. American Association of Political Consultants, Inc. – Supreme Court Merits

ISSUE: whether the government-debt exception to the Telephone Consumer Protection Act of 1991's automated-call restriction violates the First Amendment, and whether the remedy is to sever the exception from the remainder of the statute.

Palardy v. Township of Milburn - Supreme Court Petition Stage

ISSUE: whether *Connick's* "public concern" inquiry applies to First Amendment associational claims by public employees or whether union membership is always a matter of public concern.

Christopher Balch, Founder, Balch Law Group, Atlanta, GA

Craig v. O'Kelley – Supreme Court Petition Stage

ISSUE: whether a circuit court's panel decision nine days earlier put officers on notice that the law was clearly established for purposes of qualified immunity.

Megan Mahan, City Attorney, Grand Prairie, TX

***Hunter v. Cole* - Supreme Court Petition Stage**

ISSUES: whether clearly established law prohibits officers from firing to stop a person from moving a firearm forward if they shouted a warning and waited to determine whether the imminent threat to life has subsided.

Wynetta Massey, City Attorney, and **Lindsay Rose**, Senior Attorney, Employment Division, Colorado Springs, CO

***City of Trinidad v. Hamer* - Supreme Court Petition Stage**

ISSUE: whether the repeated violations doctrine extends the statute of limitations for claims under Title II of the Americans with Disabilities Act and the Rehabilitation Act.

Timothy Coates, Managing Partner, GMSR Appellate Lawyers, Los Angeles, CA

***City of Cleveland v. Jackson* - Supreme Court Petition Stage**

ISSUES: (1) whether a Section 1983 wrongful conviction action survives the tortfeasor's death; (2) whether *Brady* violations allegedly committed by officers were clearly established in 1975; and (3) whether a single incident of an officer's alleged failure to disclose exculpatory information can give rise to deliberate indifference under *Monell*.

Katie Zoglin, Senior Deputy City Attorney and **Maren Clouse**, Senior Deputy City Attorney, San Jose, CA

***City of Boise v. Martin* - Supreme Court Petition Stage**

ISSUE: whether enforcement of generally applicable laws regulating public camping and sleeping constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment.

CIRCUIT COURT CASES:

Sarah Fox, Assistant Professor of Law, Northern Illinois University School of Law, DeKalb, IL

***Portland Pipeline Corporation v. City of South Portland* - First Circuit**

ISSUE: whether an ordinance prohibiting handling of petroleum for the bulk loading of crude oil onto any marine tank vessel is a valid exercise of police powers or is preempted and/or violates the dormant commerce clause.

Robert Peck, Founder, Constitution Litigation Law Firm, Washington DC (two cases)

***Rhode Island v. Chevron Corp. / Board of County Commissioners of Boulder County v. Suncor Energy (USA) Inc.* - First Circuit / Tenth Circuit**

ISSUE: whether municipalities may bring state common law claims seeking compensation for climate change.

Andrew Cashmore, Associate, and **Alexis Casamassima**, Associate, Fried Frank Harris & Shriver, New York, NY

***Reilly v. Harrisburg* - Third Circuit**

ISSUE: whether buffer zone around abortion clinic entrance violates First Amendment standards under *Reed*.

Michael Burger, Executive Director, Sabin Center for Climate Change Law, Columbia University, New York, NY

***Mayor and City Council of Baltimore v. BP P.L.C.* - Fourth Circuit**

ISSUE: whether municipalities may bring state common law claims seeking compensation for climate change.

Daniel Peterson, Counsel, Parker Poe, Charlotte, NC

***Reyazuddin v. Montgomery County* - Fourth Circuit**

ISSUE: where, after a jury found that the County violated the Rehabilitation Act by failing to provide reasonable accommodations, but before judgment was entered, the County accommodated the Plaintiff, did the district court err in finding that she was not the "prevailing party"?

Philip Hartmann, Partner and **Jessie Shamp** and **Thaddeus Boggs**, Associates, Frost Brown Todd, LLC, Columbus, OH

***Taylor v. City of Saginaw* - Sixth Circuit, Petition for Rehearing En Banc -**

ISSUE: whether chalking a parked car's tires to obtain information for parking enforcement violates the Fourth Amendment.

Robert Hagemann, Partner, **Stephanie Gumm**, Associate, **Colin McGrath**, Associate, Poyner Spruill LLP, Charlotte, NC

***Bennett v. Metropolitan Government of Nashville and Davidson County* - Sixth Circuit**

ISSUES: whether a 911 operator's racially charged social media language regarding a national election is constitutionally protected and whether under *Pickering*, workplace disharmony factors as heavily as heavily for a 911 dispatcher as for police and firefighters.

Brian Connolly, Partner and **David Brewster**, Associate, Otten Johnson, Denver, CO

***O'Brien v. Village of Lincolnshire* - Seventh Circuit**

ISSUE: whether the municipality's dues to the Illinois Municipal League constitutes a compelled subsidy by taxpayers or whether the League engaged in government speech.

Ryan Walsh, Partner, Eimer Stahl, Madison, WI

***First Midwest Bank v. City of Chicago* - Seventh Circuit**

ISSUE: whether Chicago is liable under *Monell* for its alleged failure to investigate an off-duty officer shot his friend while they were drinking.

Douglas Church, Partner, Church Church Hittle & Antrim, Noblesville, IN

***EFT Transit, Inc. v. Indiana Alcohol and Tobacco Commission* - Seventh Circuit**

ISSUE: whether the FAAA preempts the Indiana Prohibited Interest Statutes, and its three-tier distribution system for alcoholic beverages which provides that a wholesaler cannot hold an interest in both a beer and liquor permit.

Christopher Balch, Founder, Balch Law Group, Atlanta, GA

***Smart v. City of Wichita* - Tenth Circuit**

ISSUE: whether officers violated the Fourth Amendment when killing a suspect after an active shooter situation and whether the relevant law was clearly established.

STATE COURT CASES:

Erin Scharff, Assistant Professor, Sandra Day O'Connor School of Law, Arizona State University, Tempe, AZ

***City of Athens v. McClain* - Ohio Supreme Court**

ISSUE: whether Home Rule Amendment grants municipal corporations a general power of municipal taxation, and if so, where a State law engulfs municipal corporations' general power of taxation, whether that law is unconstitutional.

Zindia Thomas, Assistant General Counsel, Texas Municipal League, Austin, TX

***Texas v. City of Double Horn*, Court of Appeals of Texas**

ISSUE: whether a state may overturn voters' incorporation of a new municipality which is significant government functions there was no commercially developed area within the the municipality prior to incorporation.

Matthew Segal, Partner, Pacifica Law Group, Seattle, WA

***Seattle v. Long* - Washington Court of Appeals**

ISSUE: whether impounding a homeless person's illegally parked vehicle violated substantive due process and whether of fines was excessive or violated the state Homestead Act.

AMICUS

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

The Impact of COVID -19 on the Supreme Court

The world has turned upside down for many of us in recent weeks and the Supreme Court is no exception. On Thursday, March 12th, the Court announced that it was closed to the public "until further notice" "[o]ut of concern for the health and safety of the public and Supreme Court employees."[1] This is the first time the Court has closed its doors to the public since the 1918 influenza pandemic other than for a week in 2001 due to an anthrax scare.[2]

In two separate press releases, the Supreme Court also postponed all oral arguments that were scheduled for its March and April sessions (March session: March 23-25 and March 30-April 1; April session: April 20-22 and April 27-29).[3] On April 13th, in a third press release, the Court announced that it would reschedule oral argument for a number of its March and April cases for dates in May and will hold oral arguments in those cases remotely.[4] The Court noted that it "anticipates providing a live audio feed of these arguments to news media," which would mean the public would have live audio access to the arguments.[5] Typically, the Court does not release audio from its arguments until the end of the week and it has been reluctant to allow any cameras or other live audio into the courtroom, so this will be a first (even if it is just audio).[6]

The Court explained that all other business of the Court will proceed as usual, including the Justices "meeting" (either in person or telephonically) for their regular conferences where they decide on petitions for certiorari, issue other orders related to cases, and occasionally issue summary decisions without argument.[7] The Court will also continue to issue opinions and indeed, given that it will not hold arguments in March or April, may actually do so more quickly than we would have anticipated in some cases. Additionally, on Thursday, March 19th, the Court issued a new order extending the deadlines for petitions for certiorari to 150 days which will remain in effect until the Court issues a new order.[8]

What Does All This Mean for Local Governments

Oral Arguments for March and April Sessions

Two of the cases that were postponed for the March session were cases in which IMLA filed an amicus brief and that impact local governments: *Torres v. Madrid* and *Carney v. Adams*. Neither *Torres* nor *Carney* were on the list of cases the Court has rescheduled for remote argument for May.

The issue in *Torres* is whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment or whether physical force must be successful in detaining a suspect to constitute a "seizure."[9]

The issue in *Carney* is whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the state's three highest courts, with the other seats reserved for judges affiliated with the "other major political party."

The April session included four additional cases in which IMLA participated as an amicus:

- *City of Chicago v. Fulton,* which as described in the last issue of *Municipal Lawyer*, involves the question of whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.
- *McGirt v. Oklahoma* involves the question of whether the prosecution of an enrolled member of the Creek Tribe for crimes committed within the historical Creek boundaries is subject to exclusive federal jurisdiction. As a practical matter and as relevant to local governments, the question is essentially whether the entire eastern half of Oklahoma, includ-

Continued on page 26

Amicus *cont'd from page 25*

ing Tulsa, are within the bounds of an Indian reservation.

- *Barr v. American Association of Political Consultants, Inc.* asks whether the government-debt exception to the Telephone Consumer Protection Act of 1991's automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute. As relevant to local governments, the cases implicates the breadth and scope of *Reed v. Town of Gilbert*. IMLA and the SLLC urged the Court to cabin *Reed* by recognizing that purpose or function discrimination is not always content discrimination.
- *Trump v. Pennsylvania* is relevant to local governments because it addresses the question of the applicability of nationwide injunctions issued by federal district courts.

Both *Barr* and *McGirt* are being rescheduled for the Court's remote oral arguments in May, *Barr* for May 6th and *McGirt* for May 11th.[10] Many of the cases the Court has decided to hear remotely in May are time sensitive and/or raise serious constitutional questions. For example, *Trump v. Vance* (consolidated with *Trump v. Mazars USA, LLP,* and *Trump v. Deutsche Bank AG*), was set for the March session and involves the President's tax returns and has implications for separation of powers between Congress and the Executive branch as well as an ongoing grand jury investigation. This is exactly the type of case that the Justices would want to schedule oral argument for, given the high stakes and political implications for a Court that wants to be seen as apolitical. It is also highly time sensitive.

Barr and *McGirt* are interesting choices for remote oral arguments for different reasons. On its face, *Barr* presents a fairly bland question about the constitutionality of the Telephone Consumer Protection Act. But, if the Court is inclined to strike down a Congressional Act, given the separation of powers issues with such a decision, it makes sense that the Court would want to hear oral argument on the case, rather than decide it on the papers. *McGirt* is a somewhat surprising choice for oral argument because the Court actually heard oral argument on this very issue in its last Term, but failed to reach an opinion when Justice Gorsuch was recused from the case (presumably the Court was split 4-4).[11] The Court then accepted *McGirt* for this Term and Justice Gorsuch is not recused because this case, while raising the same issue, was decided in state court. Given that the Court already heard oral argument on the issue presented in *McGirt,* it would seem like a prime candidate to be decided on the papers, but on March 30th, the Court issued an order dividing oral argument and enlarging the time for argument in *McGirt*, so there was some foreshadowing that the Court was considering hearing oral argument in the case, which ended up becoming reality.

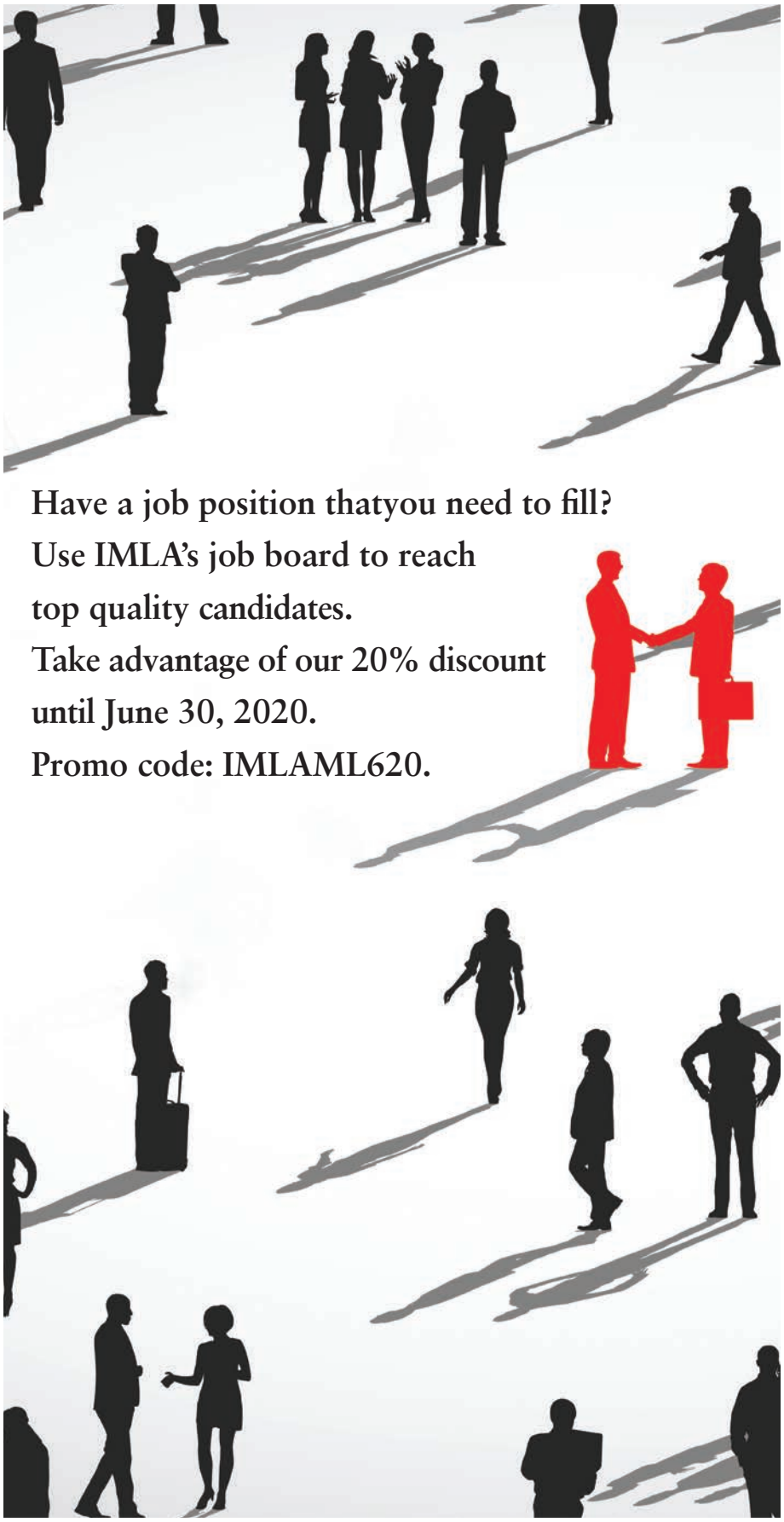
The next question about the Court's new remote oral argument experiment is how exactly this will work. Given how many different questioners there are on a nine-Justice Court (in practice eight given that Justice Thomas rarely asks a question) and the fact that the Court has been reluctant to adopt technology in the courtroom, it is a bit of a surprising move that the Court decided it will hold remote oral argument. That said, both the Texas Supreme Court and Kansas Supreme Court managed to successfully hold oral arguments via a live video streaming service in April and that may have given the Supreme Court some solace.[12]

But another question looms large: How will the remainder of the postponed cases from March and April be handled? Veteran Supreme Court advocate Tom Goldstein offered some insight on SCOTUS blog indicating the likely options the Court may take (and that it may choose to take different options for each case).[13] First, it can decide any postponed cases on the papers without oral argument.[14] This option seems baked into the Court's press release, where it states that it will consider rescheduling "some" of the cases from its March and April sessions. It seems likely that some of those that are not being rescheduled for May will be decided on the papers. Second, Goldstein notes the Court can postpone arguments indefinitely and reschedule them once restrictions on gatherings are lifted.[16] Again, this appears to have a sound basis in the Court's own words.[17]

Most of the cases remaining that are relevant to local governments likely can be decided on the papers, rather than necessitating oral argument. That said, the 2020 Term (which typically would start in October 2020) has plenty of room on the docket, so the Court could certainly reschedule arguments for the fall in these cases. As with everything related to COVID-19, a lot of uncertainty remains around how the Court will handle these issues. That said, we can be certain that the Court will work to issue opinions on the cases in which it already heard arguments, which means many of blockbuster issues should be decided in the next couple of months, including the hotly watched Title VII cases and the DACA case. ML

Notes

1. https://www.supremecourt.gov/
2. https://www.scotusblog.com/2020/03/supreme-courts-closure-could-be-first-disease-related-shuttering-in-a-century/
3. https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20; https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20
4. https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20
5. *Id.*
6. Although the Supreme Court has yet to adopt live video for oral arguments, other circuit courts have done so even prior to the coronavirus outbreak. The Ninth Circuit for example, has been live video streaming oral arguments since 2015, and the DC Circuit began doing so in 2018. *See* Lydia Wheeler, *Key Appeals Court to Start Live Streaming Oral Arguments*, The Hill, May 23, 2018, available at: https://thehill.com/regulation/court-battles/389020-key-appeals-court-to-start-live-streaming-oral-arguments
7. *Id.*
8. https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf
9. This case was previously described in the March / April 2020 issue of *Municipal Lawyer.*
10. https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20
11. That case was *Sharp v. Murphy*.
12. https://www.statesman.com/news/20200408/in-first-texas-supreme-court-goes-live-on-youtube; https://www2.ljworld.com/news/2020/apr/11/kansas-supreme-court-hears-arguments-in-governors-suit-against-lawmakers-decision-could-come-saturday/
13. https://www.scotusblog.com/2020/03/what-next-for-oral-arguments/. Goldstein also mentions a fourth option, but dismisses it as unlikely: that the Court could utilize video streaming for oral arguments.
14. *Id.*
15. https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20
16. *Id.*
7. *Id.* Goldstein offered two other options that the Court seems to have already considered in its decision regarding the May arguments, but his article was published before the Court made that decision.



Access to All IMLA Webinars! Be sure to register for IMLA's 2020 Webinar Package

Your ENTIRE office will receive 40+ CLE distance learning webinars for a fraction of what it would cost separately!

With ever-increasing workloads and limited budgets for attorney training, everyone is looking to do more with less. One subscription to IMLA's "Kitchen Sink" package will provide your entire office with access to all of IMLA's CLE-accredited distance learning programs—at least 30 webinars, delivered by domain experts--for a full year! These 30 sessions are in addition to the 10 FREE webinars IMLA offers to all members. So, Kitchen Sink subscribers will receive at least 40 distance learning programs for one small price!

May 5 - Code Enforcement

Tiny Homes

With the rising cost of rent and homeownership and housing shortages, some have turned to living in tiny homes as their solution. For many, tiny houses represent a cheaper, eco-friendly option. For local governments, the growing popularity of tiny homes presents challenges from inspections to ensuring compliance with building and zoning regulations. This webinar is intended to aid local government attorneys navigate the complex array of issues tiny homes generate. Additional topics may be included.

Speakers: James McKechnie, Senior Assistant City Attorney, Wichita Falls, TX and **Terry Floyd**, Director of Community Services, Wichita Falls, TX

May 7 - Personnel

The Fourth Amendment and Drug Policies in the Workplace

It has often been said that one of the largest components of a local government's budget is for personnel costs. While there are many similarities between guiding employers between the public and private sectors, public employers have some additional concerns not faced by their private employment counterparts. The goal of this presentation is to provide public sector employers, particularly local governments, guidance and roadmaps to navigate through the complex issue of drug policies in the workplace and related issues. Additional topics may be presented.

Speakers: Deidra Sullivan, Member, Labor, Employment and Civil Rights Section, Houston Legal Department and **Robin Cross**, Township Attorney, The Woodlands Township, TX

May 12 - Construction Contracts

Alternative Project Delivery: What Went Wrong

When traditional design, bid, build methods are not appropriate or will not provide the flexibility or outcome necessary, you may need to turn to alternative delivery methods. Unfamiliar methods may present challenges such as delays due to incorrect negotiations, impacts on time for review and inspection, and overall less control. This webinar seeks to educate and provide resources for local government attorneys when dealing with alternative project delivery. Additional topics may be presented.

Speakers: Joseph Seibold, Executive Vice President/Leader, Contract Solutions Group and **Bryan Payne**, Civil Engineer, Arcadis, New York, NY

May 13 - Law Enforcement

Defending Law Enforcement: Qualified Immunity

One of the best defenses for a local government or official is qualified immunity. This presentation will explore how the qualified immunity doctrine works, where it applies, and discuss litigation strategies revolving around qualified immunity in the context of defending law enforcement. Additional topics may be presented.

Speaker: Patricia Miller, Chief, Special Federal Litigation Division, New York City Law Department, New York, NY

May 18 - Telecommunications

Cell Tower Leasing for Units of Government: Getting the Benefits, Avoiding the Pitfalls

Once your local government leases property for a cell tower or cell antenna, you will routinely receive offers to buy the cell tower lease for a lump sum payment (often plus a

percentage of future revenues), coupled with a long term (or perpetual) easement. The most common question is whether these are good deals for governments. This program, taught by John Pestle, Esq. and Dr. Jonathan Kramer, Esq., both highly experienced local government telecommunications attorneys, covers (1) how to determine whether a sale of a cell lease and future leasing rights is in a municipality's best interest, (2) descriptions of the non-binding bid process which will commonly lead to the best price and terms, (3) the significant legal issues, business issues and potential pitfalls involved in selling the lease, and (4) some of the traps hidden in the lengthy "Communications Easement" you will be asked to execute. This program will help you spot the major issues in the very one-sided documents typically offered by buyers. Key points to be addressed include (a) making sure the municipality is not hindered in using its property for its primary public use; (b) ensuring that future sums and duties promised by the purchaser in fact are performed; (c) unique insurance and bankruptcy issues; (d) special questions of municipal authority; (e) compliance with bond obligations and IRS tax-exempt bond regulations; (f) municipal finance/procurement statutes; and (g) prohibitions on waste. Extensive handouts in PDF format will be provided to participants, which commonly include local government attorneys, city managers and the real estate property managers working for local governments. A lively and interactive Question and Answer session will follow the presentation.

Speakers: John Pestle, Counsel, Varnum, LLP, Grand Rapids, MI and **Jonathan Kramer**, Partner, Telecom Law Firm, PC, Los Angeles, CA

May 20 - Code Enforcement

Constitutional Risks in Inspections and Best Practices

This presentation will cover constitutional requirements, legal risks, and ways to minimize risk during and after an inspection. Additional topics may be included.

Speaker: Patricia "Trish" Link Assistant City Attorney, Austin, TX

May 27 - Disaster Relief

We Are Not Here To Make Friends; We Are Here To Save Lives in a COVID-19 World: Enforcement of State and Local Stay-at-Home And Public Health Orders Against Faith-Based Groups and Institutions

The Riverside County Counsel's Office will provide a summary of its enforcement efforts to move Faith-Based Groups to streaming or other technology to reach its congregants in lieu of in-person services and the constitutional issues attendant to responding to the COVID-19 Pandemic.

Speakers: Greg Priamos, County Counsel and **Kelly Moran**, Deputy County Counsel, Riverside County, CA

May 28 - Telecommunications

Update: FCC Cable Franchising Proceeding

In 2019, the FCC sought to further strip local governments of their authority regarding use of their rights of way as related to cable franchising. Last year, the FCC published a report and order entitled "Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable TV Consumer Protection and Competition Act of 1992". This Order, among other things, significantly restricts a local government's ability to impose franchise fees, and prohibits local government from regulating most non-cable services which includes broadband Internet services provided over a cable system. This webinar will cover the changes to local authority in cable franchising as a result of the Order as well as provide information as to litigation efforts. Additional topics may be covered.

Speaker: Gerard Lederer, Partner, Best Best & Krieger, Washington DC

June 3 - Construction Contracts

Construction Contract Drafting & Litigation Strategies

This presentation will address construction contract drafting issues and how provisions of various contracts can mitigate your risk of liability in the event that your municipality faces suit. This presentation will also address when construction contracts go wrong and different litigation strategies. Additional topics may be included.

Speakers: Mary DeVuono Englund, Senior Deputy Prosecuting Attorney, King County, WA and **Karl F. Oles**, Partner, Stoel Rives LLP, Seattle WA

June 11 - Preemption

Local Financing

This year, local governments served in critical leadership roles in the public health response to COVID-19 and in efforts to provide welfare to those whose livelihoods have been threatened by the pandemic. As centers of democratic activity, local governments provide essential public services for people, from safety infrastructure to innovative policies that create thriving, healthy communities. Yet, local governments continue to face

significant fiscal challenges. This webinar will discuss the Local Solutions Support Center's recent white paper, The Essential Role of Fiscal Authority in Local Democracy, which researches the decreased use of state aid and the increased use of preemption to limit the authority local governments need to raise revenue or receive funding. It will provide an overview of the recent trend of state preemption policies that have further limited local fiscal authority, and offer suggestions for policies that allow municipalities to better carry out their important responsibilities as engines of local democracy.
Speaker: Erin Scharff, Associate Professor, Sandra Day O'Connor Law School, Arizona State University, Tempe, AZ

June 17 - Transportation
Transportation Oriented Development
This will be a comparative presentation on how Atlanta has handled transportation-oriented development in their communities. This presentation will explore legal issues associated with this type of development and highlight the benefits of thoughtful planning as it can support economic development. Additional topics may be included.
Speaker: Jonathan Hunt, Chief of Corporate Law and Real Estate, Metropolitan Atlanta Rapid Transit Authority, Atlanta, GA

June 23 - Construction Contracts
Change Order Management
Construction project change orders are common and can have the effect of slowing down your project as well as increasing project price from the original amount the construction contractor bid. This webinar will cover how to manage change orders to avoid unnecessary delays and cost increases. Additional topics may be covered.
Speakers: Mark Guevara, Senior Claims Analyst and **Brian Goodreau**, Operations Leader, Contract Solutions Group, New York City, NY

July 7 - Municipal Governance
Public Information Acts and Their Application to Electronic Documents
Attorneys must interpret public records laws to determine if certain electronic documents must be disclosed. However, there is no consensus among the varying jurisdictions about which documents are subject to disclosure. Although we have some federal guidance, this guidance is not comprehensive as it does not address all aspects of electronic records. This presentation will discuss electronic records and provide guidance to local government attorneys for how to handle electronic documents.
Speaker: Hilary Ruley, Chief Solicitor, General Counsel Division, City of Baltimore Department of Law, Baltimore, MD

July 9 - Personnel
Workers Compensation 101 and Best Practices
This presentation will cover the basics of worker's compensation and provide practical recommendations for how to manage such disputes. Additional topics may be presented.
Speaker: Robin Cross, Township Attorney, The Woodlands Township, TX

July 14 - Ethics
Attorney-Client Privilege
The bounds of the attorney-client relationship can be complicated for those who represent government entities, including local governments. This webinar will focus on the parameters of the attorney-client relationship when the organization is the client and on the attorney-client privilege in the government context. ABA Model Rule 1.6 and ABA Model Rule 1.13 will be covered during this webinar.
Speaker: Henry Bernstein, Assistant Parish Attorney, Caddo Parish, LA

July 16 - Transportation
Planning for Autonomous Vehicles
This presentation will discuss how to prepare your locality for the eventual launch of autonomous vehicles. It will also cover the current legal landscape and prospective changes on the horizon. Additional topics may be presented.
Speaker: Crista Cuccaro, Assistant City Attorney, Durham, NC

July 22 - Land Use
Penn Central Regulatory Takings and Inverse Condemnation Part 1
This presentation will provide an overview of property law and of takings law discussing the differences between a Lucas taking, a Penn Central taking; and the exaction cases Nolan and Dolan and the elements of an inverse condemnation claim. This presentation is the first of a two-part series on takings and condemnation.
Speaker: Jefferson L. Blomquist, Partner, Funk & Bolton, Baltimore, MD

To subscribe to IMLA's Kitchen Sink program--or to sign up for an individual IMLA Webinar—please email info@imla.org or visit the "Webinars" tab on the IMLA.org website.

FEDERAL

BY: DEANNA SHAHNAMI
IMLA Associate Counsel

The False Claims Act: Fraud Spikes When Disaster Strikes

The spread is invisible but the destruction is not. In response to the novel coronavirus (COVID-19) pandemic, federal and state governments have approved massive government spending bills for all matters in the healthcare industry, the sale of goods and services, businesses, individuals, and state and local governments. As history shows, fraud claims spike when the disaster makes landfall. COVID-19 made landfall as early as January 21, 2020, when the first person in the United States was reportedly diagnosed with the infection.

Congress has authorized unimaginable levels of funding to combat the crisis. On March 6, President Trump signed the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020, an $8.3 billion aid package including, but not limited to, an emergency telehealth waiver, vaccine development, support for state and local governments, and assistance for small business.[1] On March 13, Trump declared a national emergency to free up $50 billion in federal resources,[2] and on March 18, he signed The Families First Coronavirus Response Act (FFCRA), which provides free virus testing for uninsured, emergency paid sick leave, expanded family and medical leave programs, unemployment assistance, food aid and federal funding for Medicaid.[3] Larger infusions followed. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[4], a $2.2 trillion package impacting individuals, small businesses, large corporations and state and local governments was signed was signed by the President on March 27. On April 24, another $484 billion was added to the relief effort.[5]

This unprecedented economic response triggers heightened scrutiny, potential enforcement and compliance risk.

The False Claims Act

The False Claims Act (FCA) is the federal government's primary tool to deter and redress fraud, waste, and abuse from businesses and individuals. The FCA makes it unlawful for a person to knowingly: (1) present or cause to be presented to the government a false or fraudulent claim for payment, or (2) make or use a false record or statement that is material to a claim for payment.[6] A person acts "knowingly" under the FCA if he or she acts with knowledge, deliberate ignorance or reckless disregard of the truth or falsity of information."[7] Innocent mistakes or negligence are not actionable.[8]

In 1986, the FCA was amended to incentivize more whistleblowers to file lawsuits (*qui tam* actions) alleging false claims on behalf of the government. If the government prevails in a *qui tam* action, the whistleblower, also known as the relator, typically receives a portion of the recovery ranging between 15 and 30 percent.[9] The 1986 amendments also increased the recovery from double damages to treble damages.[10] Recoveries since 1986 now total more than $62 billion.[11] *Qui tam* suits have been essential to enforcing FCA liability. In 2019, whistleblowers filed 633 *qui tam* suits, and the Department of Justice (DOJ) recovered over $2.1 billion.[12]

Applicability to Municipalities

States have long been held to be beyond the reach of the FCA, but municipalities are not. A wide array of local functions receive federal funding, including healthcare (hospitals and nursing homes); education (colleges, schools and libraries); transit (bus and subway); infrastructure (sewer, water treatment, roads and bridges); first responders (police, fire and EMS); and many more. As recipients, local governments may run afoul of FCA's requirements to devote funding for its intended purpose and to certify compliance with applicable regulations. These provisions have triggered FCA actions against New York City (using Hurricane Sandy funds to replace already-junked vehicles/certifying Medicaid compliance by personal-care services program); Los Angeles (certifying compliance with federal disabled-accessibility housing standards); and other jurisdictions. It is evident that, as COVID-19 funding begins coursing to local governments, the potential for misuse and inaccurate certification will heighten, and municipal attorneys will need to be vigilant in assuring FCA compliance.

State and Local False Claims Statutes

While the federal FCA originated during the Civil War, as the Lincoln administration sought to prevent massive contractor

Continued on page 32

False Claims Act *cont'd from page 31*

fraud, state FCAs are much more recent. much more recent. They sprang to life in response to President Bush's 2005 Deficit Reduction Act,[13] which incentivized states to enact FCA-like laws to redress runaway Medicare payments. Since that time, more than 30 states have passed their own FCAs. Those state-level statutes have further evolved, with at least a third of state FCAs authorizing local governments to take enforcement action. Nine municipalities have enacted their own such statutes.[14]

For municipal lawyers, this has presented an expanded horizon. While they may be defending their jurisdictions against allegations of fraud or misuse by federal or state FCA authorities, they may also be prosecuting FCA-type claims on behalf of their localities. Such affirmative litigation has emerged, for example, in Chicago's effort to redress the opioid crisis.

The City of Chicago's False Claims Act allows action against any person who (1) knowingly presents, or causes to be presented, to an official or employee of the city a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the city; [or] (3) conspires to defraud the city by getting a false or fraudulent claim allowed or paid. MCC § 1-22-020. In *City of Chicago v. Purdue Pharma*, No. 1:14-cv-04361 (Ill. Cir. Ct. Oct. 25, 2016), Chicago includes a count based on its FCA, alleging, among other claims, that the opioid defendants knew or should have known that their marketing and promotional efforts created false and misleading impressions about the risks, benefits, and superiority of opioids for chronic pain, which cost the City millions of dollars in unnecessary purchases.

Federal Anti-Fraud Actions

FCA is but one federal response to the broader problem of fraud as the pandemic spreads. In the wake of congressional spending to mitigate harsh economic consequences, the DOJ has prioritized federal anti-fraud efforts. On March 16, Attorney General William Barr released a memorandum directing all U.S. Attorneys to prioritize the investigation and prosecution of COVID-19-related fraudulent schemes.[15] The Federal Trade Commission and the Food and Drug Administration (FDA) have sent warning letters to companies allegedly selling unapproved products that may violate federal law by making deceptive or scientifically unsupported claims about their ability to treat or cure COVID-19.[16] The recipients are companies that advertise products—including teas, essential oils, and colloidal silver—as able to treat or prevent COVID-19.[17] According to the FDA, however, there are no approved vaccines, drugs, or investigational products currently available to treat or prevent the virus.[18]

The current environment, in which the demand for personal protective equipment (PPE) and certain medical equipment has surpassed the supply, inevitably lures wrongdoers perpetrating advance fee and business email compromise schemes.[19] The Federal Bureau of Investigation (FBI) warns government and healthcare industry buyers of rapidly emerging fraud trends related to procurement of PPE, medical equipment such as ventilators, and other supplies or equipment in short supply during the current pandemic.[20] The FBI warning came three days after a Georgia resident was arrested and charged in federal court with wire fraud for attempting to sell millions of nonexistent respirator masks to the Department of Veterans Affairs in exchange for large upfront payments.[21] Other reported schemes related to the crisis include individuals and businesses selling fake cures for COVID-19 online, phishing emails from entities posing as the World Health Organization or the Centers for Disease Control and Prevention, malicious websites and apps that appear to share COVID-19 related information to gain and lock access to devices until payment is received, soliciting donations for illegitimate or non-existent charitable organizations, and medical providers obtaining patient information for COVID-19 testing and then using that information to fraudulently bill for other tests and procedures.[22] On March 19, Attorney General Jeffrey A. Rosen directed each U.S. Attorney to appoint a "Coronavirus Fraud Coordinator" to serve as the legal counsel for the federal district on matters relating to COVID-19, direct the prosecution of COVID-19-related crimes, and to conduct outreach and awareness.[23]

On March 20, the DOJ issued a press release urging the public to report suspected fraud schemes related to COVID-19 by contacting the National Center for Disaster Fraud (NCDF), a national coordinating agency within the DOJ's Criminal Division, established in the wake of Hurricane Katrina.[24]

Since 2005, the NCDF has received over 95,000 complaints relating to disaster fraud.[25] Past NCDF reports show that fraud begins as early as any disaster does—without waiting for government funds. For example, in 2017, the NCDF received 79 fraud reports the week before Hurricane Harvey and 425 in the week after the storm hit.[26] Two weeks after Harvey made landfall, President Trump signed the Continuing Appropriations Act of 2018 and Supplemental Appropriations for Disaster Relief Requirements of 2017, which provided $15.25 billion in supplemental appropriations.[27]

The DOJ has already led the way with immediate action. On March 21, it filed its first action in federal court to combat fraud related to the COVID-19 pandemic.[28] A temporary restraining order was issued after the government filed for a temporary, preliminary, and permanent injunction against the website "coronavirusmedicalkit.com," which fraudulently promoted and purported to allow consumers to order free World Health Organization "vaccine kits" if they paid $4.95 for shipping.[29]

State Anti-fraud Actions

State Attorneys General are acting as fast as their federal counterparts to warn companies and the people of their states about consumer fraud and price gouging. On March 11, New York Attorney General Letitia James ordered two companies to immediately cease and desist selling and marketing products as a treatment or cure for COVID-19.[30] On March 16, Florida Attorney General Ashley Moody issued a consumer alert asking all Floridians to be cautious when researching information about COVID-19, illegitimate charities or organizations claiming to help those affected by COVID-19, and price gouging.[31] On April 16, Attorney General Moody warned Floridians about a growing number of robocalls in that offer everything from COVID-19 treatments and cures to work-from-home schemes.[32]

Conclusion

The COVID-19 disaster is far from over, and its trajectory is unknown. Calls to reopen American society will require massive expenditures in medical testing, followed by national deployment of therapeutics and vaccines, once perfected. No doubt stimulated in part by whistleblower provisions, claims for fraud, misuse and noncompliance will be asserted by local governments, and against them. The FCA and its state and municipal equivalents will play an important role redressing overreach, safeguarding taxpayer dollars dedicated to combating the pandemic. ML

Notes

1. American Soc'y of Clinical Oncology, *Congress Passes Funding Bill To Respond To Coronavirus*, https://www.asco.org/practice-policy/policy-issues-statements/asco-in-action/congress-passes-funding-bill-respond (last visited Apr. 11, 2020).
2. CNN, *Here's what Trump's coronavirus emergency declaration does*, https://www.cnn.com/2020/03/13/politics/states-coronavirus-fema/index.html (last visited Apr. 8, 2020).
3. See NCSL, *State Fiscal Responses to Coronavirus (COVID-19)*, https://www.ncsl.org/research/fiscal-policy/state-fiscal-responses-to-covid-19.aspx (last visited Apr. 5, 2020).
4. CARES Act, Pub. L. No. 116-136 (2020).
5. NPR, *What's Inside the Senate's $2 Trillion Coronavirus Aid* Package, https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package.
6. 31 U.S.C. §§ 3729(a)(1)(A)-(B) (2009).
7. § 3729(b).
8. *Hindo v. University of Health Sciences*, 65 F.3d 608, 11 I.E.R. Cas. (BNA) 74 (7th Cir. 1995); 31 USCS § 3729.
9. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019. *See Fraud Statistics - Overview – Oct. 1 1986 – Sept. 30 2019*, https://www.justice.gov/opa/press-release/file/1233201/download.
10. *Id.*
11. *Id.*
12. *Id.*
13. *See* Pietragallo Gordon Alfano Bosick & Raspanti, LLP, *Municipalities' False Claims Acts* (last visited Apr. 16, 2020), https://www.falseclaimsact.com/states-municipalities-fcas/ (other municipalities with FCA-like statutes include New York, Washington DC, Pennsylvania's Allegheny County and the Florida towns of Hallandale Beach and Bay Harbor Island).
14. Phillips & Cohen LP, *Whistleblower Laws by State – False Claims*, (last visited Apr. 16, 2020), https://www.phillipsandcohen.com/state-false-claims-statutes/.
15. U.S. Dep't of Justice, Memorandum from Attorney Gen. William P. Barr to all U.S. Attorneys (Mar. 16, 2020), https://www.justice.gov/ag/page/file/1258676/download.
16. Press Release, Fed. Trade Comm'n, *FTC FDA Send Warning Letters to Seven Companies about Unsupported Claims that Products Can Treat or Prevent Coronavirus* (Mar. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/03/ftc-fda-send-warning-letters-seven-companies-about-unsupported.
17. *Id.*
18. *Id.*
19. Press Release, FBI Nat'l Press Office, *FBI Warns of Advance Fee and BEC Schemes Related to Procurement of PPE and Other Supplies During COVID-19 Pan- demic* (Apr. 13, 2020), https://www.fbi.gov/news/pressrel/press-releases/ fbi-warns-of-advance-fee-and-bec- schemes-related-to-procurement- of-ppe-and-other-supplies-during- covid-19-pandemic.
20. *Id.*
21. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Georgia Man Arrested for Attempting to Defraud the Department of Veterans Affairs in a Multimillion-Dollar COVID-19 Scam* (Apr. 10, 2020), https://www.justice.gov/opa/pr/georgia-man-arrested-attempting-defraud-department-veterans-affairs-multimillion-dollar-covid.
22. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud* (Mar. 20, 2020), https://www.justice. gov/opa/pr/attorney-general-william- p-barr-urges-american-public-report- covid-19-fraud.
23. *Id.*
24. *Id.*
25. U.S. Dep't of Justice, Nat'l Ctr. for Disaster Fraud, https://www.justice.gov/disaster-fraud
26. Washington Post, *Fraud inevitably follows disasters so authorities in Texas Florida prepare for post-storm scams* (last visited Apr. 16, 2020), https://www.washingtonpost.com/news/true-crime/wp/2017/09/08/

Continued on page 37

OPIOID UPDATE *cont'd from page 20*

The New York Frontrunner

While Judge Polster's MDL justifiably garners significant national interest, the case materializing before Judge Jerry Garguilo in Suffolk County, New York is arguably more consequential at this writing. Until COVID-19 required the closing of his courtroom, Garguilo's case, brought by the State of New York, Suffolk and Nassau counties against all three groups of defendants, was slated to go to trial on March 20. Since that time, pretrial activity has slowed substantially.

One significant development in the Suffolk court is Garguilo's Decision and Order, filed April 13, 2020, granting summary judgment to CVS, Walgreen, Walmart and Rite-Aid on the dispensing issue. He found that the parent enterprises could not be held liable for dispensing practices of individual stores, at least on a public nuisance claim. Given the robust interplay between various opioid courtrooms, that ruling, although grounded in New York law, seems destined to surface elsewhere. It may also have undercut a useful holding by Garguilo that pharmacies could not shift responsibility to John Doe prescribers who wrote the red flag prescriptions to begin with.

The Bankruptcy Gambit

After agreeing to pay Oklahoma $270 million in May 2019 to avoid what would have been an unpalatable televised trial prosecuted by AG Mike Hunter, Purdue filed for Chapter 11 bankruptcy in September, proposing to settle all claims against it via a $14 billion fund, including some $3 billion from Sackler family members. That proposal was initially directed at state and local government litigants, who could not reach accord as to its adequacy. The Purdue bankruptcy has recently become more complex due to an accelerating campaign soliciting personal injury claims from individuals harmed by opioids, required to be filed with the Bankruptcy Court before a June 2020 deadline.

The majority of opioid cases in the MDL and in state courts around the country name Purdue Pharma L.P. as a primary defendant. The company's bankruptcy has obviously stayed all plaintiffs from pursuing such actions, with the most recent stay order extending through October 2020. Ironically, one request was recently made for a limited exception to the stay, but not by plaintiffs. Distributors in the New York opioid case made the request, seeking to add Purdue to the verdict form for the purpose of attributing liability; the solvent defendants would ostensibly be apportioned the remaining non-Purdue share of liability. Given that public nuisance liability is joint and several under New York law, the plaintiffs have strenuously objected. On April 22, 2020, Bankruptcy Judge Robert Drain declined to rule, finding the issue premature.

While settlement discussions involving Purdue no doubt proceed apace behind the scenes, a perusal of the Bankruptcy Court docket shows scant activity—other than fee requests. These come not only from firms representing the debtors' interests, but also from counsel representing creditors' committees. The requests reveal many millions millions of dollars going to lawyers each month, significant portions of which are billed at rates nearing $1700 per hour.

Purdue will likely not be the only defendant to seek protection. Mallinckrodt, the Irish headquartered entity whose SpecGX US subsidiary is believed to have supplied upwards of 70% of all oxycodone in Florida and roughly one-third across the nation, has also announced its intent to shield further liability via bankruptcy.

The Negotiation Class

The fate of the Negotiation Class, giving a stake in an opioid settlement to more than 30,000 municipal and local government entities, remains with the Sixth Circuit. Given that fewer than 700 jurisdictions opted out, the Class, if approved, will afford defendants one large bloc of plaintiffs with which to negotiate. While that will be only one part of various tectonic shifts needed to achieve an omnibus resolution, it may well be critical.

Moving Forward

As referenced above, the opioid defendants have pressed to delay proceedings, pushing a day of reckoning ever farther into the future. Plaintiffs argue that there are now technologies to compensate for the absence of face to face proceedings, as they asserted in a March 25, 2020 MDL filing:

> While our changed circumstances no doubt present challenges, current technology is more than adequate to allow the parties to proceed with discovery, including depositions. Consistent with production determinations and directives from other courts and the Federal Rules, Plaintiffs' counsel have developed a comprehensive deposition protocol to enable the parties to take depositions remotely. The protocol includes the use of widely available videoconferencing technology that allows multiple individuals to participate in a deposition without requiring them to be physically present or proximate. The protocol will solve the logistical problems posed by COVID-19 in a workable fashion, and in a way that does not needlessly slow this important case down.

For municipalities and their constituents already reeling from the opioid crisis, COVID-19 has only heightened the need for funding. It is essential that courtrooms continue to function, forcing progress towards settlement. ML

LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

Emergency Trip follows IMLA Footprint Across America

This sounds like the intro to a novel…. "Against government advice on travel restrictions during a deadly pandemic, a tired old lawyer sets off alone in a rented car on a cross country trip to rescue his one and only daughter from isolation in a location where she knows nobody and has no resources or other help. Against the clock, he races down dark interstates at night, with nobody in sight, to beat the government-ordered shutdowns in various states along the way. Will he make it in time without getting arrested? Or, will his daughter, who is more than 1000 miles from home, be confined by a shelter in place order with nowhere to stay?"

Yes, that is exactly what I faced this past month. My original plan was to fly her home, and indeed an airline trip was scheduled. Unfortunately, it fell victim to the pandemic. I had anticipated this possibility and had reserved a rental car as a last resort backup plan. Suddenly, Plan B had become Plan A. As I plotted my route, I chose a more "southern" path than Google had suggested. This was in an effort to avoid a large projected storm moving in my direction.

Google informed me that I had 1,680 miles to go (each way) on the journey. Stroke of luck number one came in the form of my rental car not being ready. Consequently, I was given another vehicle car which turned out to be a luxury BMW. I was ok with this. I set out on my nine-state trip thinking (as I always do) about who I would call if I ran into trouble in any particular spot along the way. This is where IMLA came to mind. "I am going to know someone practically everywhere I go," I thought to myself. I found this thought comforting in the face of the somewhat daunting task I faced.

Upon leaving South Carolina and entering my first new state, I entered into the jurisdiction of Rusi Patel, Becky Tydings, Drew Whalen and Jim Elliott. The map called it Georgia. A little indulgence please, as I speak about this phase, based solely on my own personal experience. Far and away the worst driving I encountered was found here. The state could save auto purchasers money by not installing unused car parts like brakes and turn signals. There was not even a close second for this prize, and if it were a softball game, it would have ended early due to the ten-run rule. Other than that, however, Georgia was a relatively pleasant state with plenty of familiar sites since it was so close to home. I didn't stop in this venue.

Now, I understand the theory of stopping every couple of hours to stretch and keep from getting tired. But I was facing a deadline. It was Sunday, and I had to be in Denver by Tuesday around lunch time. So, as I completed my race through Georgia, I crossed the state line on I-20 and entered into the Central Time Zone and the jurisdiction of Ken Smith and Lori Lein. The map calls this venue Alabama. Cars on the road had already become scarce, and as I passed the Talladega Speedway, I couldn't help but think that some of my fellow travelers could finish in the big money on race day at this facility. Speed limits were being treated as a suggestion - a widely disregarded one.

My first stop was near the small town of Jasper, Alabama. I found a BP station way out in the country and stepped out to get fuel. Wow! I felt like I had been run over by a truck, as I stepped out of the vehicle playing a chorus of cracking bones and moans from the feeling of aching muscles. The kid next to me must have heard me. "Travelling, huh?" I replied that I was, and he proceeded to tell me he too was traveling to his grandmother's house to shoot racoons.

A cardboard sandwich and lemonade sufficed for lunch, as I took off and headed Northwest on

Continued on page 36

Listserv *cont'd from page 35*

I-22. This road was simply devoid of traffic and rolled along for what seemed like an endless amount of time. Finally, as I exited Alabama, I entered into the jurisdiction of Ben Griffith, otherwise identified as Mississippi. I took a quick 10-100 in Tupelo, but otherwise didn't stop in the state. I did note, however, that the Mississippi Interstate changed color several times. It went from a "clay" color to black asphalt and then to cement. No particular problems, but I couldn't help but wonder what led to the lack of uniformity.

I slithered into a small corner of the jurisdiction of Karen Blake, Roger Horner, Shauna Billingsley and Kristen Corn, as I left Mississippi and entered into Jennifer Sisk's hometown of Memphis, Tennessee. I didn't get a fair look at Memphis, as I rode only through an industrial district of the Distribution Center of America. My quick trip through the Volunteer State ended as I crossed the Mississippi River, where I entered into the jurisdiction of Bill Mann, Mark Hayes and Tom Carpenter, otherwise identified as Arkansas.

The first thing I noticed was that the location of the state line varied on the respective sides of the road. Travelling westward, you encounter a "Welcome to Arkansas" sign in the middle of the bridge. However, a quick glance over my shoulder and in the rearview mirror did not reveal a "Welcome to Tennessee" sign on the other side of the road. "I wonder where you are when you are between the signs," I chuckled to myself.

Arkansas' flat topology, at least on my route, allowed for generous use of the accelerator. I zipped down I-40 at a speed protected from disclosure by the Fifth Amendment and drove relentlessly until I tuckered out in Fort Smith, where I spent the night at a nice Hampton Inn. There were no dine in options, so I decided on pizza and beer for the evening. The pizza part worked out great, but the beer not so much; I found out Sunday beer sales are still outlawed in Arkansas. No harm, no foul though. I needed food and sleep more than anything. So, lemonade sufficed for the libation on this evening.

Like clockwork, I rolled out of bed at 6:00 am in Fort Smith, showered and shaved, grabbed a sack of breakfast and took off. Meals on the road had become a recurring ritual, and the interior of the classy BMW was beginning to look like my Mustang did in college: wrappers, bottles and cans everywhere. I despise eating in the car but had no other choice.

Google had warned me there would be tolls on my trip, and I had grabbed two rolls of quarters before leaving South Carolina. This turned out to be a good decision. I quickly found myself in the jurisdiction of Beth Anne Childs, John Bowling, Mary Ann Karns and John Dorman, otherwise known as the Cherokee Nation or great State of Oklahoma. Construction and tolls proved to be the name of the game here, I thought, as I rolled along at the crack of dawn.

Shortly, I turned off I-40 and onto the Oklahoma Turnpike. The sun had risen, but it was an overcast and forlorn looking day as I rode along without another car in sight. $11.80 worth of tolls later, I was off the turnpike and headed north along I-35. More flat country, I thought, although elevation was higher than I had encountered in nearby Arkansas.

A bit later, I encountered another state line as I rolled into the jurisdiction of Larry Baer, Amanda Stanley and Bob Myers, also known as Kansas. I stopped in Park City, on the north side of Wichita. It was lunch time, so I gassed up and grabbed a Barbecue Sandwich at QT. Remember, choices were extremely limited, and my eating had to be done in the car.

A couple of observations here – first, Kansas City Style BBQ is very good, even in a sandwich from a gas station. Second, reddish brown barbecue sauce does not come out of a BMW seat easily. Third, my garnet red USC Law shirt does a much better job of hiding the stuff.

Another Kansas observation – you can encounter a toll road and have no idea what the required toll is going to be. I reached for my pile of change as I approached a toll booth but was instead met with a ticket dispensing machine. I retrieved it and noted the list of destinations on the back, showing what the toll would be if that was your exit. Well, this doesn't do much good for a SC guy who has no idea what the names of the exits are, particularly the one where his GPS route will take him. I just assumed I'd be paying the highest toll on the list and rolled onward.

Not long after exiting the toll section of I-35, I began to think of the colleagues in Kansas. I mean, I had nothing but time on my hands as I rolled through the expansive and flat countryside. I placed a hands-free call to the quarantined Amanda Stanley in Topeka, who was excited to talk to a live person as she endured confinement. To her credit, folks, Amanda gets up every morning and prepares for work just as if she was still going to the office, even though she never leaves her home. I was informed by her that I would not encounter any more tolls on my way to Colorado, for which I was thankful.

As I turned the "corner" onto I-70 in Kansas near Salina, I now had a one road straight shot to Denver with no apparent construction. It

was a long and arduous task, but I decided to make the drive all the way that evening, and then sleep "late" in the morning. I was amazed at the many wind turbines in the Kansas fields, and equally by the pictures of Jesus that seemed to randomly pop out of the fields right at me.

I stopped once more for gas, a car-edible snack and a 10-100 in the jurisdiction of John Bird, aka Hays, Kansas. A long, straight and slightly boring drive ensued for the rest of the evening. I rolled into Denver, in the jurisdiction of Tom Carr and Ken Fellman, around 8:30 pm Mountain time, and discovered my hotel was literally next door to Mr. Fellman's office. Text messaging revealed he was not there but was stuck on a cruise ship somewhere with no moorage in sight because of quarantine restrictions. "Somebody has always got it tougher," I thought…

I made my deadline and retrieved my daughter on time. I will spare you the details of the trip back, due to time and space constraints, but can summarize some of what I learned on the trip that is not recited above. I endured five straight days of driving, eating in the car and learning about the laws and emergency restrictions of nine different states. Nothing was being done the exact same way in any two places. Drive through food, truck stop restrooms and the like get old quickly. I'd have given anything for a location that could allow me to sit down and eat a square meal with a drink that had ice in it.

I learned many random things: They LOVE football in Oklahoma… There are more Waffle Houses in this country than there are people… The same tired old cashier works at every truck stop in the entire country, and although she is not in the South she stills calls you "honey" between cigarette puffs… Speed limits west of the Mississippi River increase, and so do the drivers' speeds, although not proportionately… If you drive a sedan, you are invisible… People in Colorado love tattoos and marijuana… The 420-mile marker in Colorado keeps getting stolen because 420 is some sort of code term for marijuana. (Sure enough, when I passed the location for this marker, it was missing)…The Oklahoma Turnpike has no lights on it, other than toll booths, and can be sort of scary at 11 p.m. when you are the only car on the road…It is actually possible (but not advisable) to drink tea, eat chips and tune the car radio at the same time all while driving at night … Folks in Alabama are VERY proud their football team… "Kum and Go" is legitimately the name of a convenience store chain… It takes at least 1,000 licks to get to the tootsie roll center of a tootsie pop because that is the point where I lost interest or lost count…Yes, it was a long trip…

But, circling back, the most important thing I remember is that through IMLA, I know and/or have met someone in every jurisdiction I traversed that I could call for information if needed. I found this very comforting as I ventured through uncharted waters. It is a testament to IMLA and its membership that one can drive across the country and never feel totally alone or left without someone to call if in need of help. This is especially important during a time of such urgency, uncertainty and changing laws and restrictions. Thanks to the IMLA membership for "riding along with me" during a difficult time. Now will someone please tell me what day it is and in which state I am sitting?

The prosecution takes a much-needed rest, your honor… ML

Federal *cont'd from page 33*

fraud-inevitably-follows-disasters-so-authorities-in-texas-florida-prepare-for-post-storm-scams/,
21. Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56 131 Stat. 1129.
27. *Id.*
28. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Files Its First Enforcement Action Against COVID-19 Fraud* (Mar. 22, 2020), https:// www.justice. gov/opa/press-release/file/1260126/ download.
29. *See* Complaint, U.S. v. John Doe, a/k/a "coronavirusmedicalkit.com", No. A-20-CV-306 (W.D. Tex. Mar. 21, 2020). *See also* Temporary Restraining Order and Order to Show Cause Why A Preliminary Injunction Should Not Issue, U.S. v. John Doe, a/k/a "coronavirusmedicalkit.com", No. A-20-CV-306 (W.D. Tex. Mar. 21, 2020).
30. Press Release, N.Y. State Office of Attorney Gen., *Attorney General James Orders Companies to Stop Selling Fake Treatments for Coronavirus* (Mar. 11, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-orders-companies-stop-selling-fake-treatments-coronavirus.
31. News Release, Fla. State Office of Attorney Gen., *Consumer Alert: Attorney General Moody Warns Consumers to Watch for Coronavirus Scams* (Mar. 16, 2020), http:// www.myfloridalegal.com/newsrel.nsf/ newsreleases/DDE8965546C4337E-8525852D005583E9.
32. News Release, Fla. State Office of Attorney Gen., *Video Consumer Alert: COVID-19 Robocall Scams Abound* (Apr. 16, 2020), http:// www.myfloridalegal.com/newsrel.nsf/newsreleases/28036E3DF20C1F-B88525854C004F55A5?Open&.

INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

Rainbow Flags, Lighted Bridges and Tow Trucks

Allowing Rainbow Flag but Not Canadian Christian Flag is Not Discriminatory
Simpson v. City of Langley, 2020 BCHRT 92 http://www.bchrt.bc.ca/shareddocs/decisions/2020/apr/92_Simpson_v_City_of_Langley_2020_BCHRT_92.pdf *http://www.bchrt.bc.ca/*

The Complainant, a resident and organizer for the National Day of Blessings, filed an application against the City of Langley (City) alleging discrimination under s. 8 of the British Columbia *Human Rights Code* [RSBC 1996] Chapter 210, which states "no one should be discriminated against in the provision of service, accommodation, and facility, on the basis of religion, sexual identity and gender identity or expression." The basis for her application was the City's decision to deny her request to fly the "Canadian Christian Flag" in front of City Hall on the National Day of Blessings but permit the LGBTQ+ Rainbow Flag to be flown during Pride Week. The City denied discrimination and relied on its Flag Raising Policy which ensures that all flags at City Hall are displayed in a consistent manner; furthermore, the City stated that it maintains the right to deny any flag application. The City ultimately sought to dismiss the complaint on the basis of no reasonable prospect of success.

HELD: Complaint dismissed.

DISCUSSION: The Complainant argued that the City discriminated against her contrary to s. 8 of the *Code,* first by amending its Flag Raising Policy to permit and ultimately fly the Rainbow Flag, and second by denying her request to fly the "Canadian Christian Flag." City Council in Langley passed a motion to amend its Flag Raising Policy to permit the Rainbow Flag to fly for a one-week period during the City of Vancouver's annual Pride Week, which, the Complainant argued, "endangered" her life and the "security" of those around her. The Tribunal found that the values associated with the Rainbow Flag do not undermine safety or security but rather promote non-discrimination. By passing a motion to fly the Rainbow Flag, the City sought to advance values of a diverse community.

The Tribunal held that there was no reasonable prospect of success of the Complainant's first argument. Upon review of the second argument, the Tribunal relied on the Supreme Court of Canada's decision in *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78 which held that that a government does not have a positive obligation to provide any particular service, however once that service is provided it must be governed in a way that does not discriminate.

The Supreme Court of Canada in *Moore v. British Columbia*, 2012 SCC 61 has recognized that a Complainant must show that they have a characteristic protected from discrimination; that they have experienced an adverse impact in a protected area; and that the protected characteristic was a factor in the adverse impact. The Tribunal noted that differential treatment does not automatically imply discrimination and provided further discussion that differential treatment to historically marginalized or disadvantaged groups are sometimes necessary to promote equality. The Tribunal held that this distinction was reflective of the matter before it, particularly that flying the Rainbow Flag increases representation of the LGBTQ+ community and attempts to offset the disadvantages experienced historically. The Tribunal held that the City's decision to fly the Rainbow Flag and not the Canadian Christian Flag could be viewed as differential treatment but absent evidence from the Complainant differential treatment did not equal discrimination. Without further evidence from the Complainant suggesting an adverse impact, the complaint was dismissed.

Prejudice Must be Shown to Block Amendment to Application
Alberta March for Life Association v. Edmonton *(City),* 2020 ABQB 220 http://canlii.ca/t/j65cb

Throughout the year, the City of Edmonton (City) receives applications from community groups requesting to light-up the City's High-Level Bridge, referred to as "light the bridge." The Alberta March for Life Association (Applicant), an independent pro-life group, submitted such an application on the day of its annual march to raise awareness for pro-life issues. The City initially approved the application, but upon further review denied it, citing that the subject was polarizing. The Applicant unsuccessfully sought clarification and evidence of what the City deemed 'polarizing,' and filed an application for judicial review of the

City's denial. It then sought to amend the application to add "bias" to its argument.

HELD: Amendments permitted.

DISCUSSION: The Applicant argued that the City's denial of its application "demonstrated partiality and prejudice on political or ideological grounds…this breaches the government's duty of neutrality as required by the *Charter,* and also politicizes the Bridge." Upon submission into Court, the Applicant sought to add 'bias' to its argument suggesting that the City's denial "demonstrated bias, partiality and prejudice." The Court looked to the City to fulfill its onus to demonstrate prejudice if the amendment was permitted. Amendments are generally permitted, subject to four circumstances. First, is there a serious prejudice that cannot be repaired by an award of costs? With no evidence to the contrary the Court held that no serious prejudice would likely result. Second, is the amendment hopeless? Given that the City provided no evidence to contradict Applicant's allegations of bias, the Court looked to *Elliot v. Rainbow Homes Ltd.,* 2018 ABQB 328, noting that the evidence required to support an amendment is not onerous, and holding that the amendment was not hopeless. Third, will the amendment add a new cause of action outside of the limitation period? The Court held that the amendment merely offered further support of the original cause of action; it was not a new one and was within the limitation period. Finally, is the amendment indicative of bad faith? The Court swiftly determined that there was nothing before it that would demonstrate a bad faith argument. The City did not meet its onus; none of the four circumstances prohibiting amendment were brought forward, and the amendment was permitted.

Regional Tow Truck Bylaw Conflicting with Provincial Legislation is Repealed

Waterloo (Regional Municipality) v. Pahal, 2020 ONCJ 73 http://canlii.ca/t/j55c6

The Defendant, a tow truck driver in the Regional Municipality of Waterloo (Region) came across a two-vehicle collision and stopped to offer tow truck services to a person involved. The Defendant was charged with two offences contrary to the Regional Municipality of Waterloo Bylaw 18-023 (By-law), for offering tow truck services to a person within 200 metres of an accident on a highway, and for being the operator of a tow truck positioned within 200 metres of an accident or an apparent accident. The Defendant did not dispute these findings, but rather argued the By-law was inconsistent with the *Highway Traffic Act* R.S.O. 1990 c. H. 8 (*HTA*) and should be repealed. The Region argued that the By-law proposed no conflict with the *HTA* and instead enhanced the regulation by imposing higher standards.

HELD: By-law is repealed; charges against the Defendant dismissed.

DISCUSSION: Since the By-law was amended five months prior to the Defendant being charged, the Court reviewed the original By-law 16-023 as well as the By-law. By-law 16-023 stated:

No person shall station or position a tow truck on a highway within 200 metres of

a) The scene of an accident or apparent accident; or
b) A vehicle involved in an accident, if there is a sufficient number of tow trucks already at the scene to deal with all vehicles that apparently require the services of a tow truck.

When amended, the Bylaw deleted a portion of subsection 2(b), specifically: "if there is a sufficient number of tow trucks already at the scene to deal with all vehicles that apparently require the services of a tow truck."

The Applicant argued that the amendment to the Bylaw was inconsistent with the tow truck regulations in the *HTA*. The Court reviewed the validity of the Bylaw, in conjunction with s. 171 and s. 177 of the *HTA* noting that it had the authority under s. 195 of the *HTA* to repeal the Bylaw it if it was inconsistent. The Court interpreted s. 177, the general provision section which affects all highways in Ontario; ss. 177(2) speaks to a prohibition of stopping or approaching a motor vehicle to offer services, while ss. 177(3) permits an exception: "subsection (2) does not apply to the offer, sale or provision of towing or repair services or any other commodity or service, in an emergency."

The Court grappled with the definition of *emergency*. Since neither party provided arguments or case law to define an *emergency*, nor was it defined in the *HTA* or the By-law, the Court relied on Blacks Law Dictionary. Blacks defined *emergency* as "a sudden unexpected happening; an unforeseen occurrence or condition…" The Court also reviewed the definition of *accident* in Blacks, which reads "an untoward and unforeseen occurrence in the operation of the automobile which results in injury to the person or property of another…" Having reviewed the definition of both *emergency* and *accident*, the Court was satisfied that both could be used interchangeably and as such concluded that an *accident* is an *emergency* in respect to the *HTA*, and both versions of the Region's By-law. The Court held that the By-law conflicted with s. 177(3) of the *HTA* as it prohibited any tow truck driver from being within 200 meters of an accident. The ability for tow truck drivers to offer services in emergencies is permitted by the *HTA* and as such binding on the Region. The By-law was repealed, and the charges against the Defendant were dismissed. ML

International Municipal
Lawyers Association
51 Monroe Street, Suite 404,
Rockville, MD 20850

Nonprofit Organization
U.S. Postage
PAID
WEST

municode

CONNECTING YOU & YOUR COMMUNITY

Codification & Recodification

Legal Reviews

Self-Publishing Software

ADA Website Design



HELPING STRENGTHEN DEMOCRACY

We've helped attorneys across the nation for over 65 years and innovated every step of the way. That legacy helps us create best in-class software solutions for codification, government website design, and agenda management.

We're inviting our attorneys to join the MuniAtty Listserv. The listserv is a joint effort between Municode and IMLA that has grown into a professional community of over 900 municipal attorneys that share sage advice and sympathetic ears with their peers across the nation.

info@municode.com
800.262.2633