MUNICIPAL LEGAL BRIEFS

A publication of the Michigan Municipal League printed in partnership with the Michigan Association of Municipal Attorneys

GUEST ARTICLES

Thanks to Charles W. Thompson, Jr., executive director, general counsel, International Municipal Lawyers Association (IMLA) for the following article.

CASES OF INTEREST AND THE IMLA LEGAL ADVOCACY PROGRAM

One of the benefits of IMLA membership includes updates on recently decided cases that affect local government. While some of the cases arise in jurisdictions outside a member's, they often help inform the member about changing trends and developing issues. Some of these cases are part of IMLA's advocacy program, while others help develop that program or become a part of it. Some months ago, IMLA reported on a case out of the Second Circuit involving legislative prayer at a town meeting. *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012). That case is now before the Supreme Court where the Court will rule on "whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity." Although this case involves important issues for local government, IMLA's advocacy committee chose not to file an amicus brief. The respondents recently raised the concern that the town seeks to have the Court conclude that legislative prayer amounts to a limited public forum which the respondents assert will then prevent local governments that allow legislative prayer from interfering or limiting the language of the prayer.

In its amicus brief in *Town of Greece* the United States argues that legislative prayer has never fallen into a pigeon hole incorporated in public forum analysis. Rather, legislative prayer belongs to the public body as a means of solemnizing its proceedings and however pursued, cannot be characterized as any sort of public forum. Bearing in mind that the Supreme Court reverses close to 80% of the cases it agrees to review, one can expect that the Court will uphold the town's legislative prayer policy. The Court will likely marginalize the argument that the Christian faith dominated the town's prayers by recognizing that within the town's boundaries there are almost no other religious organizations to choose from.

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Another major case before the Court invokes another clause in the First Amendment. In *McCullen v. Coakley, (citation below:* 708 F.3d 1 (1st Cir. 2013)), the issues are (1) Whether the First Circuit erred in upholding Massachusetts's selective exclusion law – which makes it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility" – under the First and Fourteenth Amendments, on its face and as applied to petitioners; (2) and whether, if *Hill v. Colorado* permits enforcement of this law, *Hill* should be limited or overruled. In *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), the Supreme Court upheld a Colorado statute regulating communicative activities within 100 feet of healthcare facility entrances

As described by the First Circuit, the law regulating conduct at "reproductive health care facilities" in Massachusetts provides in pertinent part:

> that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility" (RHCF) within a designated and clearly marked buffer zone. Mass. Gen. Laws ch. 266, § 120E 1/2(b), (c). The buffer zone spans a radius of 35 feet of any portion of an entrance, exit or driveway of a[n RHCF] or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a[n RHCF] in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Id. § 120E l/2(b). Four categories of persons identical to those enumerated in the 2000 version of the law are exempted:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

This case raises the question of when and under what circumstances public safety buffer zones can survive Constitutional challenge. Motivating the buffer zone in this case were concerns that vulnerable women might be harassed and intimidated while trying to enter a facility. Similar concerns motivate other public safety buffer zones. Most states limit the distance from a polling place in which people can campaign; some states and local governments have chosen to limit the proximity of protests to funerals following *Snyder v. Phelps* and the Court's apparent approval of laws imposing those limits; and states and local governments have imposed other buffer zone requirements when faced with handling First Amendment events (such as the DNC and RNC conventions, the World Bank meetings, the G-8, etc.) and other special events. IMLA will be filing an amicus brief to remind the court that buffer zones serve an important public safety purpose and are content and viewpoint neutral.

IMLA recently participated as an amicus in the Supreme Court of Oregon successfully supporting the City of Portland in arguing that its law prohibiting a person from carrying a loaded gun in public should survive a Second Amendment challenge. In mid-August, Oregon's Supreme Court upheld a Portland ordinance (Ordinance) which makes it unlawful for a person to carry a firearm in public without having removed its ammunition. PCC 14A.60.010(A) provides: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm."

The case arose after Portland police arrested Jonathan Christian for carrying two loaded semi-automatic handguns in a backpack which he had placed in a convenience store. (In addition to the loaded handguns, Christian's backpack and nearby vehicle contained knives, pepper spray, handcuffs, police batons and other related paraphernalia).

Christian was charged with violating an Oregon state law prohibiting the carrying of a concealed weapon without a license as well as the Ordinance prohibiting the public possession of a loaded weapon. He challenged the laws based on the Second Amendment as well as Oregon's own constitutional "right to bear arms" provision, but was convicted on all counts at trial. In a split en banc decision, the Oregon Court of Appeals affirmed. Christian appealed, challenging the Ordinance.

The Oregon Supreme Court upheld the conviction and affirmed the constitutionality of the Ordinance. In doing so, the Court found ample evidence that Oregon's "right to bear arms" constitutional provision did not foreclose reasonable limitations to protect public safety. It cited not only Oregon precedent but also drew on legislative and judicial history from Indiana, whose constitutional clause on firearms possession was copied almost verbatim by Oregon lawmakers. The court concluded that "The ordinance reflects a legislative determination that the risk of death or serious injury to members of the public moving about in public places is increased by the threat posed by individuals who recklessly fail to unload their firearms."

(The Oregon Supreme Court differed with the lower courts' parsing of the Ordinance. The positioning of the word "recklessly" created ambiguity. While the courts below had concluded that "recklessly" modified "possess or carry," the Oregon Supreme Court concluded, as did the parties, that "recklessly" modified "fail[ure] to remove all the ammunition." This nuance expanded the breadth of the Ordinance and made it more vulnerable to challenge: "knowingly" being in public with a loaded gun was a violation, whether one had "recklessly" carried the weapon there was irrelevant. However, the court noted that the Ordinance included significant limitations. It obviously did not apply within the home, and it contained 14 categories of exceptions, including one for holders of concealed-carry permits.)

Christian's constitutional attack on the Ordinance was two-fold. He first argued that a blanket prohibition against weapons in public places was overbroad in violation of Article I, section 27 of the Oregon Constitution which permits the use of arms in self defense: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]".

As the Oregon court explained, "overbroad" facial challenges are of special and limited applicability. They do not assert that the challenged law is "facially" flawed and inherently unconstitutional as written; nor are they "as applied" attacks, which specify the particular context in which the challenged law has violated a plaintiff's constitutional rights. Instead, an overbreadth challenge simply asserts that there are circumstances in which the law would be unconstitutional. The Oregon Supreme Court found that "overbreadth" challenges were singularly associated with First Amendment case law—the judicial aversion to undermining free expression is so great that courts will infer circumstances where a suspect statute might have a chilling effect.

Proponents of the Ordinance argued that overbreadth did not apply to gun laws. After reviewing Supreme Court precedent, the Oregon court concurred: “We agree with the city and amicus that, unlike protected speech and assembly, recognizing overbreadth challenges in Article I, section 27, cases is not necessary because the enforcement of an overbroad restriction on the right to bear arms does not tend to similarly deter or "chill" conduct that that provision protects.” The court declined to allow Christian’s overbroad challenge and explicitly overruled Oregon precedents to the extent they implied that overbreadth was compatible with Article I, section 27 cases.

Christian was left with a “traditional” facial challenge: the Ordinance was not capable of constitutional application in any circumstance. This clearly was not the case under the Oregon Constitution’s Article I, section 27 “self-defence” provision, because holders of valid concealed carry permits could carry loaded guns in public. And a facial challenge to the Ordinance was equally futile under the Second Amendment to the United States Constitution. Christian urged that Heller's recognition of an individual’s right to keep and bear arms for the purpose of self-defense within the home implied a right to keep and carry loaded firearms in public without restriction. The court rejected this expansion, citing Heller’s often-quoted language regarding “presumptively lawful regulatory measures” limiting who can own guns and where they can be used. In response to Christian’s assertion that “strict scrutiny” review should apply to the Ordinance (requiring the showing of a “compelling state interest” and “narrowly tailored” statutes), the Oregon court countered that the majority of federal courts have applied an “intermediate scrutiny” standard in the wake of Heller. This required the showing of “an important governmental objective” and means “substantially related” to that objective. Because the Ordinance did not seek to ban all public carry of loaded firearms, strict scrutiny was inapposite, and “intermediate” review was proper. On that basis, the Ordinance passed Constitutional muster: “Applying the standard of intermediate scrutiny, we conclude that the city has demonstrated that it is important to protect the public from the many risks associated with the presence of loaded firearms in public places. We also conclude that enforcement of the ordinance, as carefully drawn, is substantially related to that objective and advances that objective.”

NOTE: IMLA thanks Larry Rosenthal of Chapman University for writing our brief with Paul C. Elsner, Beery, Elsner & Hammond, LLP, Portland, Chad A. Jacobs, Portland, and John Daniel Reaves, Washington DC. IMLA was joined on its amicus brief by the U.S. Conference of Mayors and the Major Cities Chiefs Association and IMLA thanks them for their support. Thanks, too, to Jerry Lidz, Eugene City Attorney's Office, who filed the brief for amicus curiae League of Oregon Cities. With him on the brief was Sean E. O'Day, League of Oregon Cities. Finally, IMLA salutes Harry Auerbach who argued the case for the City of Portland.

Without the support of our members, IMLA would be unable to further its stated goal of advocating on behalf of local governments for sufficient autonomy to develop

policies and further the interests of their residents and to limit local liability. If you are not an IMLA member, let us know what we can do to change that fact. You can contact me at cthompson@imla.org or 202-742-1016.

Thanks to Judith Greenstone Miller and Paul R. Hage, Jaffe Raitt Heuer & Weiss, P.C. for the following article.

Chapter 9 of the Bankruptcy Code: What You Need to Know

After being appointed as the Emergency Manager for the City of Detroit, Kevyn Orr was unable to effectuate a consensual restructuring of the City's finances and, as a result thereof, he obtained authorization from the Governor of Michigan to file a petition under chapter 9 of the Bankruptcy Code on behalf of the City. The actual petition was filed in the United States Bankruptcy Court for the Eastern District of Michigan on July 19, 2013 and the chapter 9 case is being administered by Judge Steven W. Rhodes pursuant to an appointment by Chief Judge Alice M. Batchelder, United States Court of Appeals for the Sixth Circuit. Likewise, a number of other municipalities in Michigan and elsewhere are struggling to meet their short and long-term financial obligations such that chapter 9 is increasingly a subject for discussion. The following is an overview of some of the major aspects of a chapter 9 bankruptcy.

1. **How is a chapter 9 commenced?**

   A chapter 9 is commenced by the filing of a voluntary petition by the municipality. Creditors may not force a municipality into a bankruptcy.

2. **What is the scope of the bankruptcy court's power in a chapter 9 case?**

   A bankruptcy court's power is greatly limited under chapter 9 in deference to the Tenth Amendment of the U.S. Constitution and principles of federalism that reserve to the states sovereignty over their own internal affairs. Accordingly, the state maintains its powers to control municipalities (subject to specific Bankruptcy Code provisions). The bankruptcy court cannot interfere with the political or governmental powers, property, revenues or use or enjoyment of income-producing property of the municipality.

3. **Can a municipality liquidate in chapter 9?**

   No, the purpose of a chapter 9 is to provide a means to restructure and adjust debt through a plan. Liquidation is not an alternative for a municipality in chapter 9.

4. Can a party in interest seek to convert a chapter 9 case to a chapter 7 liquidation or seek the appointment of a trustee?

Creditors have limited rights in a chapter 9 case; neither the creditors nor the Office of the United States Trustee ("U.S. Trustee"), can file a motion to convert the case or for appointment of a trustee. A bankruptcy court can appoint an examiner or a trustee only for limited purposes relating to the recovery of avoidable transfers.

5. What are the powers and rights of the U.S. Trustee in a chapter 9 case?

The U.S. Trustee has no general supervisory authority in a chapter 9 case because it would constitute an improper interference with the political and financial affairs of the municipality. Accordingly, there is no first meeting of creditors and the municipality does not have reporting obligations with the U.S. Trustee. The U.S. Trustee's role is basically limited to appointing a creditors' committee.

6. Who is eligible to file a chapter 9 petition?

Only municipalities, in other words a "political subdivision or public agency or instrumentality of a State." Municipalities generally include cities, towns, counties and various governmental organizations. Municipalities are eligible to file a chapter 9 case subject to specific legislative authority existing in the State in which the governmental entity is located. In Michigan, the governor must consent in writing to the filing, among other requirements.

The Bankruptcy Code requires the municipality to specifically show that it is eligible for filing by demonstrating that (i) it is insolvent; (ii) it desires to effect a plan to adjust and, not simply to delay or evade payment of, its debts; (iii) it (a) has obtained an agreement on a plan from creditors holding at least a majority in amount of claims in each class that the municipality intends to impair under a plan; (b) has negotiated in good faith with creditors but failed to obtain such agreement; (c) is unable to negotiate with creditors because negotiations are impracticable; or (d) reasonably believes that a creditor may try to obtain a preferential payment or transfer of the municipality's assets. Good faith has been found to be lacking when a municipality provides a "take it or leave it" offer and does not negotiate a feasible plan with creditors or waits until just before the filing to meet with creditors. If the municipality is not eligible to file a chapter 9, the court must dismiss the case.

7. Who has the right to appear and be heard in a chapter 9 case?

Any party in interest may appear, including all creditors and the Secretary of the Treasury of the United States. Representatives of the state in which the municipality is located may intervene with respect to matters specified by the bankruptcy court.

8. Does the automatic stay apply in a chapter 9?

Yes, the automatic stay in chapter 9 cases is broader than under other Bankruptcy Code chapters. It prohibits creditors from taking actions against: (i) the municipality, (ii) its property, and (iii) its officers and inhabitants if the action seeks to enforce a claim against the municipality.

However, the automatic stay does not apply to the application of pledged special revenues to payment of indebtedness secured by such revenues. Thus, an indenture trustee or other agent for such bonds may apply pledged funds to payments coming due or distribute the pledged funds to bondholders during the chapter 9 case without violating the automatic stay or an order of the bankruptcy court.

9. Can a municipality reject executory contracts in a chapter 9 and what limitations are imposed on such right?

Yes, a municipality, as part of the exercise of its business judgment, may assume or reject executory contracts. In order to assume an executory contract or unexpired lease, the municipality must cure any defaults and provide adequate assurance of future performance. If a contract is rejected, it is treated as a pre-bankruptcy breach of the contract, giving rise to an unsecured claim for damages.

The municipality is not required to follow the steps for rejecting collective bargaining agreements set forth in section 1113 of the Bankruptcy Code, (requiring, among other things, collective bargaining with the union) which is not applicable in chapter 9. Rather, the municipality only needs to show that: (i) the collective bargaining agreement burdens the estate, (ii) after careful scrutiny the equities balance in favor of contract rejection, and (iii) reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.

10. May a municipality borrow funds postpetition?

A municipality may borrow money and incur debt with priority over any or all administrative expenses or secured by a lien on the municipality's property; however, some state laws restrict the ability of a municipality to borrow money to fund operating expenses. A municipality is not required to seek permission from the court to use cash collateral or obtain financing.

11. Is there a creditors' committee in a chapter 9 case?

Yes, the U.S. Trustee is charged with appointing a creditors' committee, but no committee can be appointed until after the determination that the municipality is eligible to be a chapter 9 debtor.

12. Does a municipality file schedules and a statement of financial affairs?

No, municipalities are not required to file schedules or a statement of financial affairs. The municipality, however, is required to file a list of creditors, which functions like schedules in a chapter 11 case. Any claim on the municipality's list of creditors is deemed allowed, unless the municipality lists the claim as contingent, disputed or unliquidated, in which case, a proof of claim must be filed.

13. What impact does chapter 9 have on a municipality's ability to pay pre-petition debts?

Chapter 9 does not prevent a municipality from paying its pre-petition debts. Due to constitutional issues, the bankruptcy court lacks authority over the property of the municipality and, thus, the municipality can spend money without court approval.

14. Is there a process for a municipality to pay post-petition debts?

A municipality is free to use its cash to pay creditors post-petition, both in and outside of the ordinary course of its business and the bankruptcy court is not permitted to interfere with such payments.

15. Can creditors obtain administrative expenses in chapter 9?

Yes … sort of. The municipality is free to pay such creditors but creditors are not given an administrative expense by statute to help ensure payment. Making matters worse, it is not clear whether such claims, if not paid during the case, will be deemed discharged as part of confirmation of a plan. Accordingly, creditors face increased risk doing business with a municipality in bankruptcy vis-à-vis a chapter 11 debtor and, thus, they should consider whether they can get additional protections to ensure payment (i.e. pre-payment, cash on delivery). Creditors should also cease providing services post-petition if their receivable starts to grow to an unusual level.

16. Can a municipality bring preference, fraudulent transfer and other avoidance actions?

Yes, a municipality has the power to pursue avoidance actions, including fraudulent and preferential transfer actions, except with respect to a payment to a bond or note holder. If the municipality refuses to pursue an avoidance action, on request of a creditor, the court may appoint a trustee solely to pursue such cause of action.

17. Does the court need to approve settlements?

No, only if the municipality wants a court order approving the proposed compromise.

18. Does a municipality file a plan and disclosure statement?

Yes. The municipality retains the exclusive right to file a plan of adjustment through the case and creditors may not file a competing plan. The court is authorized to fix a deadline for filing a plan.

19. What are the requirements to confirm a plan?

Generally speaking, confirmation of a plan of adjustment resembles confirmation of a plan of reorganization under chapter 11 of the Bankruptcy Code with respect to contents of a plan, impairment, disclosure and solicitation, acceptance, confirmation, feasibility, compliance with the Bankruptcy Code and cram down (i.e., the plan is "fair and equitable" and does not "discriminate unfairly"). Chapter 9 also imposes additional requirements, including: (i) the plan must comply with the provisions of chapter 9, (ii) any amounts to be paid by the municipality or any third party under the plan for services or expenses in the case must be reasonable, and (iii) any regulatory or electoral approval necessary in order to carry out the plan has been obtained.

20. What is the effect of confirmation of a plan?

Confirmation of a chapter 9 plan binds the municipality and all of its creditors, so long as they received notice of the bankruptcy case.

21. Can a chapter 9 case be dismissed?

Yes, a chapter 9 case can be dismissed at any time for cause, including: (i) want of prosecution, (ii) unreasonable delay by the municipality that is prejudicial to creditors, (iii) failure to propose or confirm a plan within the time fixed by the court, (iv) material default by the municipality under a confirmed plan, or (v) termination of a confirmed plan by reason of the occurrence of a condition specified therein. Because there is no concept of liquidation in a chapter 9 case, arguably the best remedy for a creditor who believes it is being treated unfairly is to move for a dismissal of the case.

The facts and circumstances of each and every party and case are unique. This summary is not intended, and should not be used, as legal advice or opinion and readers are cautioned not to act on information provided without seeking specific legal advice with respect to their unique circumstances.

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CASE SUMMARIES

Thanks to Kester K. So and Brandon C. Hubbard, Dickinson Wright, for preparing the following case summaries.

MICHIGAN SUPREME COURT

Michigan Supreme Court: *People v Koon*
No. 145259, 494 Mich 1; 832 NW2d 724
(May 21, 2013)

Michigan Supreme Court holds that the Michigan Vehicle Code's zero-tolerance provision does not apply to the "medical use" of marijuana.

In a decision that further clarifies the often contested Michigan Medical Marihuana Act ("MMMA"), the Michigan Supreme Court held in *People v Koon* that the MMMA protects registered patients from prosecution under the Michigan Vehicle Code ("MVC") when registered patients drive with marijuana in their system but are not otherwise "under the influence" of marijuana.

In *Koon,* a police officer stopped the Defendant for speeding in Grand Traverse County. During the traffic stop, the Defendant voluntarily produced a marijuana pipe and informed the arresting officer that he was a registered patient under the MMMA and was permitted to possess marijuana. A blood test later revealed that the Defendant's blood had a THC (tetrahydrocannabinol) content of 10 nanograms per milliliter. The prosecution charged the Defendant with operating a motor vehicle with a schedule 1 controlled substance in his body in violation of MCL 257.625(8) -- the MVC's zero-tolerance provision -- and sought a jury instruction that the presence of marijuana in the Defendant's system constituted a *per se* violation. The Defendant argued that the MVC's zero-tolerance provision did not apply to MMMA registered patients because the MMMA protects against the "medical use" of marijuana, including internal possession, and only withdraws that protection when the patient drives while "under the influence" of marijuana.

Both the district court and the circuit court agreed with the Defendant, each concluding that the MMMA's prohibition against driving while "under the influence" of marijuana is inconsistent with the MVC's zero-tolerance provision, and that the Defendant was protected from prosecution unless the prosecution could prove that the Defendant was impaired by the presence of marijuana in his body. The Court of Appeals reversed, reasoning that the MMMA yielded to the Legislature's determination under the MVC (and its zero-tolerance provision) that it is unsafe for a person to drive with *any* marijuana in his or her system.

In reversing the Court of Appeals and reinstating the circuit court's judgment, the Supreme Court reasoned that the "MMMA, rather than legalizing marijuana, functions by providing registered patients with immunity from prosecution for the medical use of marijuana." And because the statutory definition of "medical use" includes "internal possession," the Supreme Court found that "the MMMA shields registered patients from prosecution for the internal possession of

marijuana, provided that the patient does not otherwise possess more than 2.5 ounces of usable marijuana" or operate a motor vehicle "while under the influence of marihuana." The Supreme Court noted that the MMMA "does not define what it means to be 'under the influence' of marijuana," but found that it "contemplates something more than having any amount of marijuana in one's system and requires some effect on the person." The Supreme Court thus held that the MMMA extends protection "to a registered patient who internally possesses marijuana while operating a vehicle unless the patient is under the influence of marijuana." And because the MMMA contains a provision providing that the MMMA will control when other acts are inconsistent with the MMMA, the Michigan Supreme Court found that the MVC's zero-tolerance provision did not govern.

In recognizing that the Legislature may wish to clarify when a registered patient is "under the influence" of marijuana, the Supreme Court recommended that the Legislature consider adopting a "legal limit"—similar to that applicable to alcohol—which would establish when a registered patient is outside the MMMA's protection.

Michigan Supreme Court: *In re Bradley Estate*
No. 145055, 2013 Mich LEXIS 1122
(July 26, 2013)

Michigan Supreme Court holds that governmental agencies are immune from civil contempt proceedings that seek indemnification damages.

In a decision that addresses when a governmental agency is immune from tort liability pursuant to Michigan's Governmental Tort Liability Act ("GTLA"), the Michigan Supreme Court held in *In re Bradley Estate* that a governmental agency is immune from liability that would otherwise arise from a civil contempt petition seeking indemnification damages. In this case, the petitioner originally filed a petition in Kent County Probate Court. The petition sought to hospitalize the petitioner's brother out of a concern for his mental health, and requested a court order directing a peace officer to take the brother into protective custody. The probate court granted the petition, and the petitioner submitted the order that same day to the sheriff's department for execution. The sheriff's department did not execute the order and, nine days after the probate court entered the order, the brother committed suicide.

The petitioner thereafter filed a petition for civil contempt in probate court, named the sheriff's department as a defendant, and alleged that the sheriff's department's failure to execute the probate court's order constituted contempt of court—entitling the petitioner to indemnification damages pursuant to MCL 600.1721 (the "Contempt Statute"). The sheriff's department moved for summary disposition, arguing that the GTLA provided immunity because the petitioner sought to impose tort liability under the guise of a civil contempt petition. After multiple, conflicting decisions among the probate court, circuit court, and Michigan Court of Appeals, the Michigan Supreme Court granted leave to appeal to decide whether the "petitioner's claim for civil contempt indemnification damages under [the Contempt Statute] is barred by the GTLA."

The Supreme Court found that the GTLA's grant of immunity from "tort *liability*," rather than a "tort action" or a "tort claim," "indicates that [the] focus must be on the *nature* of the *liability* rather than the type of action pleaded." For this reason, the Supreme Court declined "to limit the GTLA's application to suits expressly pleaded as traditional tort claims." The Supreme Court further explained that courts "considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim." To this end, "[i]f the wrong alleged is premised on the breach of a *contractual* duty, then no tort has occurred, and the GTLA is inapplicable." But "[i]f the action permits an award of damages to a private party as compensation for an injury caused by [a] *non*contractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable."

In analyzing the Contempt Statute -- which permits a court to order a contemnor to "indemnify" the petitioner for a loss caused by contemptuous conduct -- the Supreme Court found that "the statute clearly sanctions legal responsibility, or liability, in the form of compensatory damages." The Supreme Court thus concluded that the Contempt Statute "contemplates what is, in essence, a tort suit for money damages." And because the Contempt Statute expressly provides that it acts as an "absolute bar to any action" once a petitioner is indemnified under the statute, the Supreme Court reasoned that "a civil contempt claim seeking indemnification damages functions as a substitute for any underlying claim and, thus, bars monetary recovery that could have been achieved in a separate cause of action," *i.e.*, the Contempt Statute is "effectively a proxy for a tort claim." The Supreme Court thus concluded that "[b]ecause [the GTLA] immunizes governmental agencies from tort liability, governmental entities are immune from civil contempt petitions seeking indemnification damages" under the Contempt Statute.

MICHIGAN COURT OF APPEALS

Michigan Court of Appeals: *City of Holland v French*
No. 309367, 2013 Mich App LEXIS 1130
(June 18, 2013)

Michigan Court of Appeals upholds the first of two conflicting arbitration awards that decide wrongful termination claims.

This case illustrates how difficult it is to vacate an arbitration award. Here, the City of Holland ("City") terminated its city clerk because the City believed that the clerk "had falsely claimed residence" in the City. The clerk and the clerk's spouse owned two homes—one in the City and one outside. The issue of the clerk's residence arose when the clerk filed a principal residence tax exemption ("PRE") affidavit identifying the City home as her principal residence. City officials believed that the clerk resided in the home outside the City and, therefore, terminated the clerk for allegedly falsifying the PRE. After the City terminated the clerk, the Michigan Tax Tribunal ("MTT") found that the clerk's City home did not qualify as the clerk's "true, fixed, and permanent abode" and denied the clerk a PRE.

Notwithstanding the MTT's decision, the clerk decided to challenge the City's termination. The parties submitted the issue to arbitration pursuant to the employee handbook, thus leaving an arbitrator to decide whether the City had just cause for the termination. The arbitrator found in the clerk's favor, concluding that because the clerk did not "dishonestly" identify the City home as her principal residence, the City lacked just cause for the discharge. The circuit court vacated the arbitration award, finding that it conflicted with the MTT's opinion and that the arbitrator failed to address every reason advanced by the City in support of the clerk's termination. A second, subsequent arbitration resulted in an award in the City's favor.

The City argued on appeal that the MTT's decision collaterally estopped the clerk's arbitration demand. The Court of Appeals disagreed, finding that "the MTT's resolution of [the clerk's] PRE claim did not resolve her employment dispute" because the "MTT reached no conclusion regarding whether [the clerk] honestly believed that she was entitled to a PRE, or whether just cause supported her dismissal."

The Court of Appeals also discussed the evidence submitted to both arbitrators. The evidence included the fact that the clerk lived outside the City at least part-time, but registered to vote in the City. The clerk acknowledged that, "as the official in charge of voter registration in the city, she knew that a person who only intends to move into the city but has not yet done so is not entitled to register to vote there." Water records also indicated low use levels at the City home, further supporting the City's belief that the clerk lived outside the City. Finally, when confronted about the voter registration and PRE, the clerk indicated that she intended to move to the City home and that she told her husband about the need to expedite their move to the City home. Despite the foregoing evidence, the Court of Appeals held that "the first arbitrator directly and decisively addressed the core issue he was specifically empowered to decide—whether [the clerk] had been terminated for just cause." Continuing, the Court of Appeals stated that "the circuit court should not have subjected the [first arbitrator's] reasoning … to beady-eyed scrutiny," and further noted that a court "may not engage in a review of an arbitrator's mental path leading to the award."

The Court of Appeals thus reversed the circuit court's order vacating the first arbitration award and remanded the case for entry of an order enforcing the award. In closing, the Court of Appeals stated that "because the circuit court should have enforced the initial arbitration award, it obviously erred in ordering a second course of arbitration and in enforcing the subsequent award." Judge O'Connell issued a dissenting opinion, arguing, *inter alia*, that the first arbitrator exceeded his powers by overlooking all but one of the City's reasons for the termination.

Michigan Court of Appeals: *Wilcoxon v City of Detroit Election Commission*
No. 317012, 2013 Mich App LEXIS 1211
(July 11, 2013)

In a dispute involving the validity of signatures, the Michigan Court of Appeals finds that a nominating petition for the office of City Clerk for the City of Detroit is valid.

This decision further clarifies what is required under the law when obtaining signatures for nominating petitions reviewed by a city clerk. Here, the Plaintiff filed nominating petitions for the office of City Clerk for the City of Detroit in anticipation

of the August 6, 2013 election. The Detroit City Charter provides that the petition shall be signed by "not less than five hundred (500) signatures of qualified voters of the City of Detroit and not more than … one thousand (1000) signatures of qualified voters of the City of Detroit." The Plaintiff's nominating petitions contained 561 signatures. After investigating the petitions, both the city clerk and the city's Department of Elections determined that 58 signatures were invalid, leaving 503 valid signatures. Thereafter, the City of Detroit's Director of Elections sent the Plaintiff a letter stating that she had submitted "sufficient signatures" to qualify to have her name appear on the ballot for the upcoming election. But the letter did not advise the Plaintiff that both the city clerk and the Department of Elections found 58 signatures to be invalid.

On May 14, 2013, a challenge to the Plaintiff's petition was filed with the city's Department of Elections. On May 22, 2013, the Director of Elections sent a letter to the Plaintiff advising her of the challenge, and called attention to the circulators oath on two pages of the petitions that were dated November 7, 2013—a date that had not yet occurred. Based in part upon a statute that provides that a "filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate," the Director of Elections invalidated the signatures contained on those two pages. That invalidation left the Plaintiff with only 475 signatures—25 short of the required amount. On May 23, 2013, the Detroit Election Commission chose not to certify the Plaintiff as a candidate for City Clerk.

On June 5, 2013, the Plaintiff filed a complaint for mandamus, superintending control, preliminary injunction and other relief in the circuit court. On June 21, 2013, the Plaintiff filed a third amended complaint that challenged the validity of 27 signatures. After being encouraged by the circuit court to work together, the Plaintiff and the Defendant reached an agreement that the Plaintiff had 494 valid signatures, making it necessary for the circuit court to resolve the validity of at least six signatures in order for the Plaintiff to be certified for placement on the ballot. As to three signatures invalidated by the Defendant for the reason that no date appeared next to the signatures, the circuit court found that the applicable statute, MCL 168.544c, does not mandate that a person date his or her signature. As to four signatures invalidated by the Defendant for the reason that it could not be determined that the individual signing was a registered voter, the circuit court compared the signatures on the petitions with the signatures on voter cards and found that they were the same, thus evidencing a registered voter and giving the Plaintiff 501 signatures. The circuit court "then declared 'the candidate is on the ballot.'"

On appeal, the Court of Appeals addressed a number of issues. Of particular importance, the Court of Appeals held that because MCL 168.544c requires only the circulator, not electors, to date the petition, the Court of Appeals could "not conclude that a person's failure to date his or her signature renders the signature invalid." With regard to the circuit court's comparison of four signatures to voter cards, the Court of Appeals found that a person challenging the city clerk's invalidation of signatures may present evidence establishing that the signature on the nominating petition is the signature of a person who is registered to vote. And after noting that the circuit court did not need to hear testimony from a handwriting expert, the Court of Appeals affirmed the circuit court's finding that the "signatures matched" the voter cards and found that "the circuit court's review of the signatures was proper." The Court of

Appeals thus found that the Plaintiff "demonstrated that she had the minimum number of valid signatures" and "had a clear legal right to the relief granted by the circuit court."

Michigan Court of Appeals: *Maple BPA, Inc v Charter Township of Bloomfield*
No. 302931, 2013 Mich App LEXIS 1349
(August 6, 2013)

Michigan Court of Appeals upholds zoning ordinance that prohibits the sale of alcohol at gasoline stations if the stations do not meet certain standards.

Maple BPA, Inc. ("Maple") owns property in Bloomfield Township comprised of a number of land uses, including gasoline fuel pumps. Maple desired to sell alcohol and sought a license permitting same, but Bloomfield Township amended its zoning ordinance to ban the sale of alcoholic beverages at gasoline stations absent certain standards being met, including that: (1) alcohol is not sold less than 50 feet from where vehicles are serviced; (2) no drive-thru operations are conducted in the same building; (3) the store meets a minimum floor area and lot size requirements; (4) the store has frontage on a major thoroughfare and is not in a residential area; and (5) the store is either located in a shopping center or maintains a minimum amount of inventory.

The Liquor Control Commission ("Commission") denied Maple's application for a liquor license because Maple did not satisfy the ordinance. As a result, Maple filed a complaint that challenged the ordinance, and sought a declaratory judgment that state law preempts the ordinance and that the ordinance violates Maple's right to equal protection. In the context of state law preemption, Maple argued that Bloomfield Township is preempted from regulating the sale of alcoholic beverages because the State granted the Commission exclusive control over same. Disagreeing with Maple, the Court of Appeals stated that it has long been recognized that local communities possess extremely broad powers to regulate alcoholic beverage traffic within their bounds through the exercise of general police powers, subject to the authority of the Commission when a conflict arises. After noting that the Commission itself recognizes a township's authority to regulate the sale of alcohol, the Court of Appeals concluded that "the State has not expressly provided that [the State's] authority to regulate the field of liquor control is exclusive." The Court of Appeals thus rejected Maple's state law preemption argument.

In addressing Maple's argument that the ordinance violates equal protection, the Court of Appeals recognized that where, as here, "a party is not a member of a protected class and does not allege a violation of a fundamental right, the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate governmental interest." Here, Maple asserted that "there is no rational reason to treat a business with fuel pumps differently than a business without fuel pumps." But Bloomfield Township's stated purpose for the ordinance was "reducing alcohol-related deaths and injuries." And even though Maple asserted that "the ordinance's stated reasons for distinguishing automobile service stations from other types of buildings or land uses are merely irrational prejudices," Maple "provided no evidence from which the trial court could determine that a question of fact existed concerning the ordinance's arbitrariness." The Court of Appeals therefore upheld the ordinance

despite Maple's equal protection challenges. The Court of Appeals also dismissed Maple's other challenges, including Maple's assertion that the ordinance (1) directly conflicted with state statutory requirements; (2) violated the Michigan Zoning Enabling Act; and (3) violated Maple's right to due process of law.

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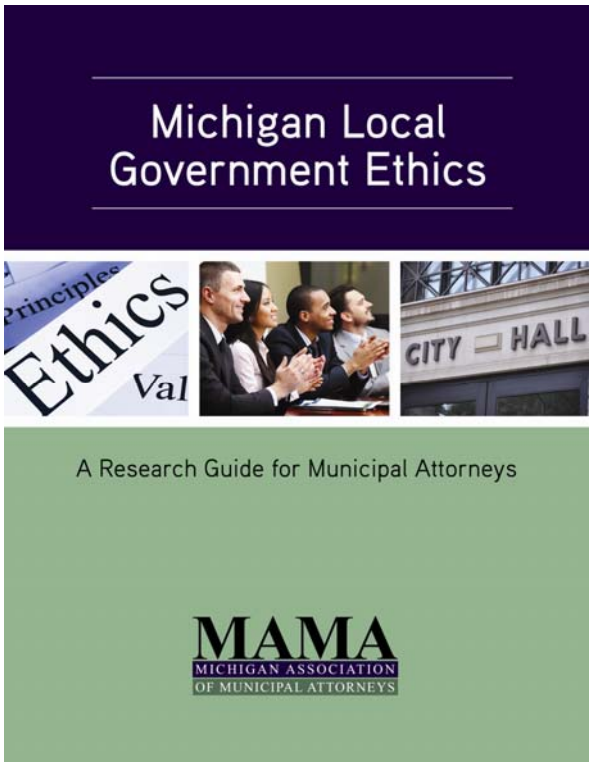

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WANTED

Articles of interest for municipal attorneys

If you've written an article or a brief that you would like to share with municipal attorneys in the Municipal Legal Briefs, please submit it in word format to Tawny Pearson (tpearson@mml.org). Also wanted are topics of interest. If you haven't had the time to write an article on a topic that is worthy of exploration, please let us know—we'll find an author!

UPCOMING EVENTS

September 17-20, 2013
Michigan Municipal League Annual Convention
Detroit Marriott at the Renaissance Center

Friday, September 20, 2013
Municipal Law Program & MAMA Annual Meeting -- Detroit

The Michigan Association of Municipal Attorneys is presenting a full-day workshop designed for attorneys to sharpen their skills in municipal law.

Topics will include:

- Technology & The Law: What Gadgets Every Municipal Attorney Should Have in Their Briefcase;
- What Can Be Learned From Canadian Law;
- An Owner's Guide to AIA 201 and Other Construction Contracts;
- Transparency in Local Government: What the Media Wants;
- When Disaster Strikes: What are the Unique Laws; and more!

The 2013 MAMA Awards Luncheon will be held immediately following the Annual Meeting. Tickets to attend only the awards luncheon and annual meeting are available for $30.00. Please contact tmurphy@mml.org for more information.

To register, visit www.mama-online.org

Location:
University of Detroit Mercy Law School
651 E Jefferson Avenue
Detroit, MI 48226

Schedule of Events
Check In 8:00 am
Begin 8:30 am
Adjourn 4:30 pm

Cost per person
MAMA Member: $120.00 (includes luncheon)
MAMA Non-Member: $165.00 (includes luncheon)
Luncheon Only: $30.00

September 29-October 2, 2013
IMLA 78th Annual Conference, San Francisco

June 20-21, 2014
MAMA/PCLS Summer Educational Conference
Harbor Springs, Boyne Highlands

September 10-14, 2014
IMLA 79th Annual Conference, Baltimore

October 4-7, 2015
IMLA Annual Conference