NYSBA FALL 2013 | VOL. 27 | NO. 3

Municipal Lawyer

A publication of the Municipal Law Section of the New York State Bar Association, produced in cooperation with Touro Law Center

Message from the Chair

About a century ago, my granddad owned a cabin overlooking Ridgeway, Colorado. Of all the places he ever lived, he loved that place the best. And what he loved most of all was a small grove of young quaking aspens right outside his front door. He loved how their leaves quivered at the slightest breeze and how they turned bright gold every fall.

He had just one problem. Occasionally—not too often, but occasionally—a bear would come down from the mountains and raid his chicken coop, killing one or two chickens. But what really irritated him was the fact that he couldn't catch that bear. He set traps, but the bear ignored them. He'd stay up at night with his rifle, but the bear wouldn't come. So finally he took a whiskey barrel, drove spikes at a downwards angle around the top, placed a honey comb in the bottom, and set the barrel in the midst of the aspen grove. Still the bear didn't come.

Then one night when my granddad was away hunting, the bear came. Sure enough, he stuck his head down inside that whiskey barrel to get at the honey comb. And, sure enough, he couldn't get his head out because of the spikes. The bear went berserk. And in his rage he ripped apart every tree in that aspen grove. When my granddad returned the next day, sure enough, the bear was gone, never to return again. But the stand of quaking aspens was no more. In ridding himself of a small nuisance, my granddad had destroyed what he loved most about his home.

The moral of this story for municipal attorneys is clear: we must never let the perfect be the enemy of the good.[1] This adage guides the Section, particularly in its proposals for municipal ethics reform, the topic of this column.

For decades the Section has proposed amendments to Article 18 of the General Municipal Law, the state

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law establishing statewide minimum ethical standards for municipalities and municipal officials in New York State outside New York City. Article 18 was enacted in 1964 and substantially amended in 1970. But apart from the addition of financial disclosure mandates in 1987 for certain municipalities, that law has not been updated in over 40 years, despite repeated attempts by the Commission on Government Integrity, the Temporary State Commission on Local Government Ethics, the Comptroller's Office, and the State Bar Association. As a consequence of the state's rejection of those efforts, Article 18 remains injurious to municipalities, devoid of guidance to honest public servants, and a trap for unwary and wary officials alike.

Space does not permit the detailing of the manifold sins and wickedness of Article 18, but the following examples illustrate its perniciousness:

On the one hand, Article 18 renders unlawful certain interests that would seem to be reasonable under certain circumstances. For example:

- The wife of a trustee of a rural village is a four-percent partner in the only hardware store within a 20-mile radius. The hardware store supplies the village with about $10,000 of small equipment and supplies each year. The village seeks three quotes on every purchase from the hardware store over $100; the trustees recuses himself from any involvement in the purchases; and the wife forgoes for herself any profit from the sale of any items by the store to the village. Under Article 18, the trustee has committed a misdemeanor, and the purchases are void ab initio.
- A town board member in the Southern Tier owns the only dump in the area for bulk items. Article 18 requires that the town cart the items to Pennsylvania to dispose of them, at considerable additional expense to the town; sealed bids and recusal would not mitigate the violation.

On the other hand, Article 18 often does not prohibit problematic or questionable actions. For example:

- A town planning board member votes today to approve a major subdivision in the town and, as permitted by Article 18, goes to work tomorrow for the developer, working on the subdivision.
- The mayor of a small city, consistent with Article 18, "requests" that his subordinates in the mayor's office buy tickets, at $50 each, to a fundraiser for his son's hockey team.
- A small town hires both a town attorney and a separate attorney, from another law firm, for the ZBA and planning board. As permitted by Article 18, the town attorney appears before the ZBA on behalf of a private client.
- Consistent with Article 18, a city building inspector inspects a building owned by his brother.
- A large local university that regularly has matters before the town board, town ZBA, and town planning board—but does not currently have any such matters—gives free season passes for university football games to members of those bodies and an additional 25 passes to the town supervisor for distribution to town employees as she sees fit, gifts that *may* be permissible under Article 18, although the law's gift permission is so vague that officials are left to guess whether they may accept these gifts or not.
- A village trustee, as allowed by Article 18, votes to hire his wife as the village clerk.
- A town board member receives $10,000 in compensation for appearing as an architect before the town planning board on behalf of a private developer, in violation of Article 18, and even invoking his town office during that representation; but in the absence of any town ethics board with the power to impose civil fines, no action is taken against the board member.

Any good, sensible ethics code would not countenance these results. Article 18 desperately needs a dramatic overhaul, as the Section and the Association have long sought.

But in seeking that overhaul, one must, again, never let the perfect be the enemy of the good. Thus, for example, one should not refuse to support an ethics law merely because it permits relatively small gifts to officials by those doing business with others in their municipal agency, even though the better practice would call for an outright prohibition on all such gifts. That said, no ethics reform is better than ethics reform that violates the most fundamental principles of government ethics. Bad ethics reform is worse than no ethics reform at all.

Reform of Article 18 has long been a priority of the Section, and remains so. But any chance of success depends upon a united front—among the Association, the Governor's Office, the Comptroller's Office, the Attorney General's Office, the civic groups, and the municipal associations. If you have an interest in joining us in this endeavor, please let us know by contacting me at davies@coib.nyc.gov or our Section liaison, Beth Gould, at bgould@nysba.org; and we will put you in contact with our Government Ethics and Professionalism Committee.

Endnote

1. The admonition is attributed to Voltaire, *La Bégueule* (1772) ("Dans ses écrits, un sage Italien / Dit que le mieux est l'ennemi du bien" ("In his writings, a wise Italian said that the best is the enemy of good")).

Mark Davies

Letter from the Editors

It should come as no surprise that matters of municipal law occasionally engender controversy. Municipal law issues affect our daily lives and often generate strong views when there is disagreement over an issue. In this issue, we explore a number of controversial legal issues currently facing the municipal bar. These issues range from the technically complex subject of hydraulic fracturing (or "fracking") to the arguably easily understood concerns raised by the City of New York's efforts to regulate the size of containers for sodas and other sugary drinks. What seems consistent in these controversies is that they are driven by the law's efforts to keep up with developments in science and technology. Not surprisingly, sometimes it is difficult for law and regulation to keep up with these changes. With the articles in this issue, we hope to do our part in helping you keep up with these developments as they related to municipal law.

Mark Stulmaker is to be applauded for wading into perhaps the most complicated legal development of the past few years, the Affordable Care Act (ACA). His article explores the possibilities for entities, including municipalities, to self-insure their health plans under the ACA. As he explains, there were incentives to self-insure before the ACA, and now there are more under the new law. However, he also notes that self-insurance creates financial risks for any employer and raises issues under New York law that are unique to municipal employers.

No less controversial than the ACA, it would seem, is fracking, which has been hailed as an efficient solution to our energy concerns and disparaged as a dire environmental and public health threat. Fracking is not new. But it has become more popular—and controversial—because of technological developments that have improved the yield of natural gas or oil, substantially decreased its cost, and increased its appeal.

As debate continues to rage on whether New York should lift its moratorium on hydrofracking and as New Yorkers (and jurisdictions around the world) await a New York Court of Appeals ruling on whether local governments can regulate fracking within their jurisdictions through local zoning controls, we devote three articles to fracking in this issue. The first article, by Drs. Robert Michaels and Randy Simon, introduces readers to the science of fracking in terminology accessible to non-scientists. They discuss recent data on fracking-related environmental impacts and identify benefits and costs to be weighed when deciding whether fracking should be allowed and, if it is allowed, what measures should be taken to protect the public and the environment.

The second article, by Jordan Lesser, examines the New York legal landscape with respect to land use regulations of fracking. As his article explains, the Court of Appeals in *Norse v. Town of Dryden* will decide whether state regulatory programs governing oil and gas development preempt local ordinances that prohibit fracking on the lands within the local government's jurisdiction. Mr. Lesser discusses the statutory analysis and precedent likely to shape the Court's decision as it examines potential limits on local lawmaking.

The third article, by Evan Zablow, provides an overview of federal, state and private responses to the disclosure of fracking chemicals and wastewater. Mr. Zablow's article addresses various approaches state lawmakers and private parties are adopting in response to the absence of federal regulation on the discharge of hydrofracking fluids and wastewater, focusing specifically on the issue of disclosure of the contents of these discharges.

Fracking presents a familiar environmental law problem: how do we balance the costs of drilling, extraction, and the use of natural gas with the benefits to the general public of a relatively inexpensive increase in our energy supply and an arguably cleaner fuel than coal and oil? In New York City, Mayor Michael Bloomberg has attempted to rethink the costs associated with day-to-day public health concerns, such as smoking and obesity. Rodger Citron and Paige Bartholomew discuss Mayor Bloomberg's efforts to regulate the size of containers in which sugary drinks, such as soda, are served. Thus far the proposed rule has been blocked by litigation.

Law develops outside the realm of news headlines, of course, and we have two articles that describe current legal doctrine. Alyse Terhune examines when claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) are justiciable. In particular, she focuses on the doctrine of ripeness as a possible

obstacle for plaintiffs seeking to bring claims under the Act.

Karen Richards writes about a potentially costly inconsistency in the Title VII "Rules of the Road" of the Vehicle and Traffic Law, at least as interpreted by the Fourth Department and affirmed by the Court of Appeals. Among other things, this law provides that "it is a traffic infraction for any person to do any act or fail to perform any act" required by Title VII, although, as she notes, certain notable exceptions have been carved out. Ms. Richards discusses a recent case that dramatically narrowed one of these exceptions. She warns that a consequence of this decision is that, while road workers are exempt from following the rules of the road unless their conduct evinces a reckless disregard for the safety of others, emergency responders, who must make split-second decisions when responding to an emergency, are held to a higher standard unless their conduct falls within very limited statutorily enumerated exemptions.

In our last issue, Mark Davies, Steven G. Leventhal and Thomas J. Mullaney provided the first part of an abbreviated history of government ethics law. This issue presents the second and final part, which focuses on New York City and the United States.

Finally, Howard Protter discusses the New York State Bar Association's Committee on Mass Disaster Response. As he explains, the purpose of the Committee is to provide free, short-term legal assistance to victims in the immediate aftermath of a disaster and prevent unlawful solicitation of victims. His article provides an overview of the Committee's work and procedures and also provides guidance on some of the most frequently asked legal questions that arise when a mass disaster incident occurs.

Sarah Adams-Schoen and Rodger D. Citron

Self-Insurance and the Affordable Care Act

By Mark L. Stulmaker

Over the past decade, there has been steady growth in the percentage of employees covered by health plans that are self-insured by their employers.[1] Rising health care costs, state-mandated coverage requirements, and premium taxes have encouraged many large employers to evaluate their plans and to opt out of the insurance market in favor of the self-funding of their benefit programs. The Patient Protection and Affordable Care Act (ACA)[2] contains additional incentives for employers, both large and small, municipal and private, to self-insure their health benefit programs and will likely accelerate this trend.[3]

However, self-insurance creates financial risks for any employer and raises issues under New York law that are unique to municipal employers. For example, New York's General Municipal Law prohibits the establishment of a reserve fund to accumulate money for the payment of uninsured health care expenses. It also regulates the contractual relationship that a municipality may have with an administrator of a self-insured program.[4] Furthermore, New York law specifically recognizes only two funding arrangements for a self-insured plan sponsored by a government employer: a municipal cooperative health benefit plan authorized by article 5-G of the General Municipal Law and regulated under Article 47 of the Insurance Law, and a collectively bargained welfare fund recognized by case law and Article 44 of the Insurance Law. Both of these funding arrangements require complicated legal and bargaining relationships that may not coincide with a municipality's own goals and finances.

This article begins with a description of self-funded health plans. It then briefly outlines the federal mandates and requirements that apply to those plans before discussing in detail those changes to be ushered in by the ACA. The article then turns to the special considerations of New York municipalities in connection with offering a self-insured health plan, including the funding options available to municipalities for such plans.

Self-Funded Health Plans

A self-funded health plan is an insurance arrangement in which an employer directly assumes the risk of paying the health expenses incurred by participants in the plan.[5] This contrasts with an insured arrangement, by which the employer contracts with a health insurance company or Health Maintenance Organization ("HMO") to assume these risks.[6]

Self-funded plans are most prevalent among large employers that can spread the risk of large claims over a greater number of participants. Of those employed by employers with 200 or more employees in 2012, 81% received their health benefits from plans in which the employer directly assumed some or all the risk, versus only 15% of those employed by employers with less than 200 employees.[7] Overall, 72% of all employees employed by a state or local government were covered by a plan in which their employer self-insured some of the risk.[8]

"[S]elf-insurance creates financial risks for any employer and raises issues under New York law that are unique to municipal employers."

In the past, consultants and actuaries have recommended that employers consider a self-funded arrangement when they have 1,000 or more employees.[9] Claims become more predictable at that level, and any one large claim is not a material financial risk. The New York State Comptroller recommends that municipal employers should consider a self-insured health plan only if they have 500 or more employees.[10] However, as noted above, the majority of employers with 200 or more employees now self-insure at least a portion of their health benefit programs.[11]

Smaller employers can purchase stop-loss insurance to protect themselves against the risk of large claims. Stop-loss coverage reimburses the insured employer for claims exceeding a set attachment point for individual large claims and is also available to insure against a large number of claims over a single plan year.[12] In 2012, 58% of workers covered by self-insured plans were in plans covered by stop-loss insurance.[13]

While stop-loss insurance reduces the financial risk associated with self-insuring health benefits, it does not eliminate those risks.[14] Consultants and human resource professionals report that "lasering"—the practice of excluding high-risk individuals from coverage under the stop-loss policy—is often a problem, especially in a tight insurance market.[15]

Further, stop-loss insurance may create cash flow problems for an employer. Beginning in 2014, the ACA prohibits health plans from imposing an annual cap on essential health benefits for any individual.[16] Claims

from any single illness will only grow larger and the stop-loss contract may require the employer to lay out these claim dollars, even to the extent they exceed the policy's attachment point, prior to being reimbursed by the insurance company after a determination process. Some policies provide for these reimbursements to be advanced by the insurer as claims are paid and reconciled at year-end.[17] Clearly, such a provision would be beneficial to an employer concerned that available cash may fall short of what is needed to timely pay health care providers.

Finally, employers relying on the protection afforded by stop-loss insurance must be aware of the financial condition of the company issuing the policy. Stop-loss insurance is not covered by any of New York's guaranty funds, which protect those insured by life, health, property and casualty insurance companies from a company's insolvency or default.[18]

Federal Mandates and the Affordable Care Act

The Employee Retirement Income Security Act of 1974 ("ERISA")[19] regulates non-governmental, self-insured health plans. Any state regulation of these health plans is preempted by ERISA.[20] States may regulate the content of any insurance policy issued to provide the benefits of a health plan,[21] but a state cannot "deem" an employer plan or trust to be an insurance company in order to mandate the benefits the employer provides.[22] For these reasons, employers can self-insure their health plans to customize and limit their health plan offerings and those employers operating in more than one state can avoid the expense of complying with multiple states' regulations.

Plans that are established or maintained by the government of the United States, by the government of any state or political subdivision, or by any agency or instrumentality of any of the foregoing, are excluded from coverage by ERISA.[23] While this exception for governmental plans would seem to allow more regulation by state legislatures, to date, New York has only mandated benefits offered through group insurance contracts,[24] and this seems to be the case with other states as well.[25]

New York, like many states, mandates insurance coverage for a number of benefits, including substance abuse, chiropractic, and autism-related services.[26] It imposes a number of fees and taxes for health services, some of which can be avoided by self-insured plans.[27]

Self-insured plans also avoid administrative charges and risk charges associated with insurance products. While most self-insured plans have administrative costs of their own, large employers frequently determine that they can administer the plan either on their own or hire a third-party administrator to do it on a cheaper basis.[28]

Although no one of these factors appear to drive employers to leave the insurance market for a self-insured plan, the combination seems to have moved employers over time.[29]

More recently, federal mandates have begun to even the regulatory environment surrounding self-insured and fully insured health plans. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)[30] improved access to coverage by allowing an employee or dependent who has lost his or her coverage to elect to continue the same benefits by paying a monthly premium. The Health Insurance Portability and Accountability Act (HIPAA)[31] limited the extent to which a health plan could exclude preexisting conditions from coverage, and limited premium variations based on health conditions.

Among the additional federal requirements imposed on health plans are those included in the Newborns' and Mothers' Health Protection Act of 1996,[32] mandating minimum covered hospital stays after child birth; the Women's Health and Cancer Rights Act[33] requiring the coverage of reconstructive surgery after a mastectomy; and the Mental Health Parity and Addiction Equity Act of 2008, requiring mental health benefits on a par with benefits for physical health.[34]

The ACA continues this trend, requiring that children be covered up to the age of 26[35] and that certain preventative services be provided without a deductible or co-pay.[36]

ACA Changes to the Small Insured Plan Market

But the ACA also brings changes to the small insured plan market and adds new fees, and it is these changes that may have unexpected results.

Small insured plans will be required to include a set of essential health benefits covering ten categories of claims, to be defined by Health and Human Services. These must include prescription drug coverage and mental health and substance abuse disorder services.[37] In order to improve access to coverage, the ACA imposes new rating requirements on plans in the small group market. The ACA defines a small employer as one that employs an average of at least one but not more than 100 employees on business days during the preceding calendar year.[38] The ACA requires that all fully insured, small group plans (other than plans that have been grandfathered) not vary the premiums they charge except for variations caused by the value of the benefits offered by the plan, the family size covered, the geographic location of those covered, and tobacco use status.[39] Any rating variation based on health status or claim history is prohibited.

Beginning January 1, 2014, a health insurance issuer that offers health insurance coverage in the individual or group markets (regardless of whether the coverage is offered in the large or small group market)

is required to accept every employer and individual in the state that applies for that coverage.[40] This is called guaranteed issue, and it removes a big concern for employers considering a move to a self-insured plan. After January 1, 2014, if a small employer's health claim experience is worse than that of the community's, it can always return to a community-rated policy.

For plan years beginning before January 1, 2016, each state may elect to define a small employer as an employer with less than 50 employees on business days during the preceding calendar year.[41] New York continues to define a small employer as one in this manner and the Governor's proposed legislation directs the New York Health Benefit Exchange to determine whether to increase the size of small employers to not more than 100 employees prior to January 1, 2016.[42]

The ACA has created a series of new fees to help fund various aspects of the law.[43] The most significant is an annual fee on insurers and certain multiple-employer welfare arrangements.[44] The amount payable by each insurance company for a calendar year is the company's proportionate share of the aggregate fee based on net premiums written. The aggregate fee is set by statute and will be $8 Billion in 2014. The first fee payment is due by September 30, 2014, and it has been estimated to add 2.5-3% to premiums in years 2014 to 2018.[45]

In 2016, the ACA's guaranty-issue requirements will apply to employers with less than 100 employees. As a result, there is concern that the move to self-insurance may accelerate.[46] The concern is that younger, healthier groups will leave the insurance market, thereby increasing average claims and premiums for those left behind.[47] Stop-loss insurance with low attachment points can blur the line between insurance and self-insurance, and carriers have begun to market these products.[48]

In New York, stop-loss insurance cannot be sold to a small employer group.[49] This should forestall movements by groups under 50 to self-insured products. It has been recommended that the law be amended in 2016 to provide that stop-loss insurance not be provided to employers with less than 100 employees.[50] Smaller towns and villages should be careful to monitor legislation if they are self-funded or are considering such a move.

The end result of these mandates and fees is to encourage consultants and their clients, regardless of size, to seriously consider self-insurance.

Special Funding Considerations of New York Municipalities

The annual budget process for municipalities in New York is governed by statute.[51] Budgets are prepared under the cash method of accounting, meaning that transactions are recognized only when they occur, either when an expense is paid or when revenue is received.[52] An expense incurred late in a prior fiscal year, such as a medical bill, is budgeted for payment in the subsequent fiscal year, when the bill is paid. This is in contrast with an accrual method of accounting, generally used for a municipality's financial statements, where the medical bill incurred in the prior fiscal year would be recorded as a liability in that prior year.[53]

The budget process for health care expenses under an insured arrangement is quite simple. Premium rates are provided by the insurance company before the fiscal year, and the budget process is completed by estimating the number of employees who will qualify for insurance.[54]

When budgeting for a self-funded program, the employer must estimate claims that have been incurred during the prior fiscal year that will need to be paid in the subsequent fiscal year. These incurred but not reported (IBNR) claims usually amount to 20-25% percent of total annual claims, meaning that during the first three months of the fiscal year payments will need to be made for claims incurred in the prior fiscal year.[55]

In the first year of a self-insured plan, the employer does not have an obligation for insurance premiums so it can take the opportunity in the first few months to begin to set aside funds that will be needed in subsequent years. Unfortunately, New York law does not allow the municipality to set aside a reserve for these claims. Under the various budget provisions, revenues received in one fiscal year may be reserved and carried over into a subsequent fiscal year only for "stated purposes pursuant to law."[56] Fund balances may be carried over to subsequent fiscal years only if established as a legal reserve fund.[57]

Article 2 of the General Municipal Law does allow for local governments to establish reserve funds for certain purposes, but none would apply here. In particular, General Municipal Law Section 6-n authorizes municipal corporations to establish an insurance reserve fund, but this type of fund explicitly carves out payments for claims for which a municipal corporation can obtain insurance. Further, General Municipal Law Section 6-p authorizes the establishment of an "employee benefit accrued liability reserve fund." In this case, employee benefits are defined to mean payments for the monetary value of accrued but unused and unpaid sick leave, personal leave, holiday leave, vacation time, and time allowances granted in lieu of overtime compensation. These are payments in the nature of wages and not reimbursements for health claims.

There is no provision under New York law allowing for a reserve by a municipal corporation for the payment of health care costs.[58] While this may not be an issue on an on-going basis, it can severely limit a municipality's options in the future. Should a mu-

nicipality wish to switch back to an insured arrangement, it would have a liability for claims incurred in the prior year that would need to be paid in the first part of its next plan year, together with its liability for insurance premiums. If not funded in advance, the municipality would start with a 20-25% percent increase in health care costs.

The only possible funding for claim run-outs are those amounts that may be set aside as part of the unappropriated, unreserved fund balance. A "reasonable amount" of unappropriated, unreserved fund balance may be carried each year if consistent with prudent budgeting practices and if necessary to ensure the orderly operation of government.[59]

While towns, villages and counties are permitted to retain a "reasonable amount" of any remaining estimated, unappropriated, unreserved fund balance for each of their legal funds, school districts are limited to retaining 4% of the current school budget in unreserved, unappropriated fund balance.[60]

In making a determination of a "reasonable" amount, the following factors may be considered by a town, village or county:

- the size of the fund (a set percentage may not be appropriate);
- cash flow requirements (the timing of receipts and disbursements in an ensuing fiscal year);
- the certainty with which revenues and expenditures may be estimated (the greater the uncertainty, the greater the need may be for unappropriated funds); and
- the government's experience in prior fiscal years.[61]

There is no guidance from the State Comptroller as to what portion, if any, of a municipality's health claim liability might be funded through unappropriated fund balance.

Prudent financial planning would suggest that the IBNR liability be monitored and set aside to insure that a big increase in appropriations is not needed if the municipality wishes to change funding arrangements in the future. Municipal employers should be ready to document claim payments and trends to support any reserve balances they may wish to retain. They may need to retain a consultant to provide an independent report in support of added reserves, especially in the early years of a self-funded arrangement. The State Comptroller has provided links to state procurement contracts for actuarial consulting services in its guidance for the financial reporting of post-employment health costs.[62]

Special Contractual Considerations of New York Municipalities

In addition to funding restrictions placed on municipalities by New York law, New York law also regulates the contractual relationship between the employer sponsor of a self-funded health plan and its contract administrator. Paragraph 6 of Section 92-a of the General Municipal Law requires that any such agreements be entered into pursuant to competitive bidding, or written requests for proposals, in accordance with Section 104-b of the General Municipal Law.

In addition, GML Section 92-a prescribes provisions that must be included in any agreement with a health plan's contract administrator. They include:

- a statement that payment of services will be made only after the services are rendered;
- a provision that the contract administrator will be liable to the public corporation for any loss or damage that may result from any failure of the contract administrator to discharge their duties, or from any improper or incorrect discharge of those duties, and reserves to the public corporation all legal rights are set off;
- a requirement for the contract administrator to hold the public corporation harmless from any loss occasioned by or incurred in the performance of its services for the public corporation;
- a requirement that the administrator post a surety bond, letter of credit or other security to secure its performance under the agreement;
- a requirement that the contract administrator undergo an annual audit by an independent certified public accountant of its accounting procedures and controls; and
- a limit on the term of the agreement of five years but allowing the municipal corporation to terminate the agreement upon 30 days' notice.[63]

These provisions will likely be at odds with the standard service agreement to be proposed by a third-party administrator. These administrators invariably ask for a "gross negligence" standard with respect to imposing liability for their mistakes. Further, the need for an independent audit will eliminate smaller companies that do not currently undergo that process. In order to be sure that their service agreement conforms to General Municipal Law requirements, the employer should enclose a proposed service agreement, with the required provisions, in its requests for proposals from third-party administrators.

Funding Options

New York does recognize two arrangements that will allow for the appropriate funding for a self-insured health plan.

Article 47 of the New York State Insurance Law allows for the establishment of a municipal cooperative health benefit plan (MCHBP), a shared funding arrangement among municipalities to provide health benefits for their employees. The standards for establishing a MCHBP are set forth in detail in Article 47.

Article 47 requires that at least three municipal corporations participate in the plan and that there be at least 2,000 covered employees (including retirees, but not including dependents).[64] The plan must have a written commitment for stop-loss insurance and must have premium rates established by an actuary, evidencing that its premiums will be sufficient to meet its contractual obligations and satisfy reserve and surplus requirements.[65]

A MCHBP must have a reserve fund for the payment of claims and related expenses reported but not yet paid, and claims and related expenses incurred but not yet reported, no less than 25% of the expected incurred claims and expenses for the current plan year.[66]

Section 4706 of the Insurance Law allows a MCHBP to reduce the 25% minimum reserve based upon a demonstration by a qualified actuary that a lesser amount would be adequate. The Superintendent of the Insurance Department must approve the application for a lower reserve.[67]

Because of the need to pre-fund these reserves prior to the establishment of a MCHBP, there are currently only eleven of these certified plans in New York State. Only one, the Greater Tompkins County Municipal Health Insurance Consortium, has been certified since 2003. As a result, the Department of Financial Services issued a report on the impact of the claim reserve requirements under Section 4706 of the Insurance Law, recommending additional flexibility in the initial reserves required.[68] That report recommends separate reserve determinations by actuaries for medical claims and prescription drug claims and a reserve of no less than 17% of incurred claims for medical claims and no less than 5% for prescription drug claims. To date, the Insurance Department (now the Department of Financial Services) has agreed to reduce the 25% reserve minimum to a level no less than 17% of expected incurred claims and expenses for all but two MCHBPs now operating in the state.[69]

The second method by which a municipality may set aside funds to self-insure benefits is through payments, pursuant to a collective bargaining agreement, to a union welfare fund that would provide those benefits to its members.[70] The State Comptroller has recognized that municipalities may contract to make fixed contributions under a collective bargaining agreement to a union fund for the purchase of health insurance benefits.[71]

Union welfare funds are governed by Article 44 of the New York Insurance Law and are defined to include any trust fund established or maintained jointly by one or more employers together with one or more labor organizations.[72] Unlike in the private sector, where such funds must be governed by a joint board with an equal number of representatives from employers and unions, many of these welfare funds established by municipal unions are administered solely by union-designated trustees.[73]

"While many public employers may be enticed to consider self-funding their health benefit plans to control costs in the new regulatory environment brought about by the Affordable Care Act, the fiscal controls placed on these employers by New York law make budgeting and planning for these changes difficult and compound the risks that apply to any employer that self-insures."

Because welfare funds administered only by union trustees are exempt from registration with the State, there is little information on the number of these welfare funds and the assets they hold.[74] Jointly administered welfare funds must file annual financial statements with the New York State Department of Financial Services.[75] As of 2012, there were twenty-two such welfare funds registered with the State.[76]

Article 44 of the Insurance Law does not contain any reserve requirements or any other requirements as to premiums or funding similar to those imposed on municipal cooperative health benefit plans. The bargaining parties must agree upon contribution levels that will cover current costs and maintain adequate reserves. For that reason, any employer that contributes to such a fund should obtain assurances that the fund has adequate reserves to pay any claim run-outs so that employees are adequately protected.

In order for a welfare fund to be considered as maintained pursuant to collective bargaining agreement, the Department of Financial Services looks to federal regulations.[77] These regulations only allow 10% of the employees covered by the fund to be non-union employees.[78] Therefore, this arrangement may not be an option for the employer's entire workforce.

Conclusion

While many public employers may be enticed to consider self-funding their health benefit plans to control costs in the new regulatory environment brought about by the Affordable Care Act, the fiscal controls

placed on these employers by New York law make budgeting and planning for these changes difficult and compound the risks that apply to any employer that self-insures. The lack of an established funding mechanism for reserves needed for incurred but unpaid medical claims and possible changes in the stop-loss insurance market should make employers cautious. Existing funding arrangements permitted by New York Insurance Law require the employer to affiliate with other employers or unions and may not fit the employer's needs.

Endnotes

1. *See* THE HENRY J. KAISER FAMILY FOUNDATION, *Section 10: Plan Funding*, Kaiser / HRET Survey of Employer-Sponsored Health Benefits, (Sept. 11, 2012), http://kff.org/report-section/ehbs-2012-section-10 (hereinafter Kaiser / HRET Survey).
2. *See generally* Protection and Affordable Care Act (PPACA), PUB. L. NO. 111-148, 124 Stat. 119 (2010); Health Care and Education Reconciliation Act (HCERA) of 2010, PUB. L. NO. 111-152, 124 Stat. 1029 (2010)(providing the statutory requirements for health care reform).
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38. *Id.* §2791(e)(4), 58 Stat. (codified as amended at 42 U.S.C.A. §300gg-91(e)(1) (West 2010)).

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Fracking in New York: Weighing Risks and Benefits

By Robert A. Michaels, PhD, CEP, and Randy W. Simon, PhD

Introduction

Robert A. Michaels

"Fracking," short for "hydrofracturing," in New York State would enable drillers to extract gas from vast deposits in the Marcellus Shale, which also extends into Pennsylvania, West Virginia, and Ohio. The Southern Tier and Western New York State include a high proportion of economically depressed areas that might benefit from fracking if done correctly.[1] Exploitation of these gas deposits in Pennsylvania and beyond already has nurtured a profitable industry. The costs, however, have included adverse impacts on public and environmental health (described below), and on the social fabric and economic life of affected communities. Alarmists prejudge these adverse impacts as being intrinsic to fracking, and therefore inevitable, based upon past experience. We believe that a more realistic view is that early phases of implementation in many industries, such as aviation, reveal problems that are often mitigated with further development.

"Without prejudging whether fracking can be undertaken safely, we discuss the science of fracking, and explore whether it can be accomplished with minimal negative impacts."

The magnitude of gas reserves in the Marcellus and other shale formations is controversial. Estimates made at the beginning of the shale boom recently have come down substantially. Nonetheless, the era of large-scale exploitation of this resource is well under way, and has brought the issues of health and environmental impacts of fracking to the forefront. Rapid expansion of fracking technology adds urgency to issues raised by its use.

Without prejudging whether fracking can be undertaken safely, we discuss the science of fracking, and explore whether it can be accomplished with minimal negative impacts.

Background

The role of natural gas in the overall U.S. and global energy portfolio has grown dramatically because of the emergence of shale gas as an economical resource for large-scale production. Shale gas is natural gas that is trapped within formations of shale, which are fine-grained sedimentary rocks that can contain large amounts of gas and oil. The existence of extensive deposits of shale gas has been known for decades, but extracting it was uneconomical until development of horizontal drilling and hydraulic fracturing technologies in the 1980s and 1990s. Indeed, shale gas accounted for only 1.6% of U.S. natural gas production in 2000.[2] Development of new technologies under government-sponsored programs and a successful demonstration project in the Barnett Shale in north Texas together fueled a boom in shale oil production around the world. In the U.S., the Marcellus Formation, spanning much of the Appalachian Basin, propelled a major expansion of the U.S. gas industry starting in 2008. By 2010, shale gas accounted for more than 20 percent of U.S. natural gas production and, by the end of 2011, it reached 34 percent.[3]

Randy W. Simon

The term "hydrofracking" denotes forceful injection of fluid at high temperature and pressure to break up ("fracture") deep bedrock, and thereby extract trapped natural gas. The term is a euphemism, because 'hydro' implies misleadingly that the injected fluid is just water. Actually it is a mixture of water (98-99.5 percent) and a proprietary cocktail of organic and inorganic additives including sand and fluids (0.5-2.0 percent): acids to improve gas flow, biocides to prevent clogging, corrosion and scale inhibitors to prevent leaks, gels or gums to add viscosity, and friction reducers to maintain pressure from surface pumps to the furthest reaches of the wells.[4] These fluids may include toxic chemicals that are linked to cancer and other adverse health and environmental effects.[5] The specific composition of fluids is unknown, however, because the gas drilling industry has guarded the composition of fracking fluids.

New technologies now enable horizontal drilling in all radial directions, like spokes of a bicycle wheel, from the base of a vertical shaft, producing a shaped array of horizontal shafts miles beneath groundwater aquifers to deliver fracking fluids explosively. The same shafts then collect natural gas from all directions in an area of approximately 640 acres[6] (or more if horizontal shafts extend up to several kilometers[7]) delivering it to the

central vertical shaft that conveys gas upward, through aquifers, to the surface. In a perfect world, natural gas is collected for sale, and toxic fracking fluids are recycled. Residual gas and fracking fluids remain in the fractured bedrock, but are safely sequestered miles beneath the surface, never to pollute air, surface soil, or water. The real world and real bedrock, however, are imperfect.

Natural gas and fracking fluids must be contained reliably within lined well shafts, from which leakage of gas and fracking fluids otherwise can occur if containment is inadequate. Leakage, especially near the surface, can contaminate groundwater, surface water, surface soils, and air. If recovered fracking fluids are stored in open lagoons, they can leach into soils and groundwater and vaporize into air. Contaminated groundwater or surface water used for residential or institutional drinking supplies also can pose risks to public health.[8] In Pennsylvania, some homes were reported to have gas emanating from water faucets, causing odors and posing risks of fire and even explosion, though the linkage to fracking has been difficult to verify.[9]

Global Issues

The main global issue is whether fracking will generate more planetary greenhouse warming than its energy alternatives. Greenhouse gas generation from nuclear power, for example, is virtually nonexistent, and the potential for harnessing clean energy from sustainable solar, geothermal, wind, tidal, and other renewable sources is enormous. The current political and economic environment, however, is hostile to nuclear power; and renewables, for a combination of technical and economic reasons, are not yet in a position to provide for the majority of our energy needs. Thus, for a substantial period of time, we must rely heavily upon fossil fuels.

Natural gas is cleaner to burn than coal, oil, or gasoline. Coal is used to generate 80 percent of the world's electricity, and constitutes the largest man-made source of greenhouse gas emissions. Replacement of coal plants by natural gas plants would cut carbon dioxide (CO_2) emissions by 30-50 percent, and virtually eliminate emissions of mercury and other toxic metals, nitrogen oxides, and acid gases such as sulfates that contribute to acid rain.[10] Replacing gasoline or diesel fuel with natural gas in vehicles would yield a 10-30 percent reduction in CO_2 emissions.[11] Clearly, if natural gas can be extracted without negative consequences, its use as a replacement for other fossil fuels would benefit pubic health and the environment.

The salient question is therefore whether substantial substitution of fracking-derived natural gas for coal and oil in power generation, and for oil in automotive transportation, will reduce the climate effects of greenhouse gas emissions. If methane leakage from fracking is excessive, it might not. Greenhouse gases are released not only from using natural gas, but also from leakage of natural gas during production. Most of this leaked gas is methane, the primary constituent of natural gas. Unfortunately, investigators have failed to reach consensus on either the magnitude of the methane release problem or its variation among gas fields and among well operators. Estimates of methane leakage range from as little as 1% to as much as 10% of what is being extracted from natural gas wells.[12]

Methane release from fracking contributes to total release of methane and, more broadly, to total release of greenhouse gases. In 2009, with fracking on the rise but the U.S. economy in recession, methane constituted only a small fraction of total U.S. greenhouse gas emissions according to the U.S. Energy Information Agency (EIA).[13] Even when increased to equivalent CO_2 to account for its greater greenhouse warming potency, methane constituted only 11.1 percent of the total. However, this value cannot and should not be accepted uncritically. Data on methane leakage from fracking are incomplete and variable.

The preponderance of greenhouse gas effects is exerted by CO_2, which accounted for 81.5 percent of U.S. greenhouse gas emissions in 2009, if EIA's methane leakage value is correct. The EIA reported that, in early 2012, CO_2 emissions reached a 20-year minimum,[14] constituting approximately 70 percent of CO_2 emission reductions targeted by the Kyoto Protocol relative to future forecasts that were made in 1998. This reduction of carbon emissions relating to energy consumption EIA attributed to increased shale gas production, largely accomplished via fracking. The implication is that increased methane emission due to fracking may be the price of decreasing CO_2 emissions, with net benefit regarding global climate change.

A different picture, however, emerges from extensive modeling of climate impacts of large-scale replacement of coal with natural gas obtained by fracking. The models assume a variety of methane release rates. Models incorporating high methane release rates predict a greater rise in global temperatures than if coal burning continued. That is, methane leakage would contribute more to global warming than the gases that would have been emitted by burning coal. Likewise, a study published in the Proceedings of the National Academy of Sciences concluded that methane leakage rates would have to be below 1.6 percent for natural-gas-powered cars to exert less effect on climate change than cars running on gasoline.[15]

A recent study by the Environmental Defense Fund (EDF), published in the Proceedings of the National Academy of Sciences,[16] quantifies methane leakage at 190 on-shore natural gas sites. The EDF's

conclusion is that extracting gas via fracking, when done properly, releases less methane than previously thought: only one percent leakage was reported. These results, however, do not necessarily document what is happening in the preponderance of fracking sites, as other recent studies have found dramatically higher methane leakage levels.[17] Nonetheless, the EDF results do demonstrate that the fracking industry feasibly can reduce methane leakage to a very low level, if provided with economic and regulatory incentives to do so.

Transitions from mature technologies to emerging technologies often are characterized by relatively high environmental and public health impacts of the emerging technology, which may abate as the technology matures. Given the urgent time constraints for controlling global climate change, this transition in the case of fracking must be controlled more effectively than has been achieved during previous transitions. One approach that could help accomplish this goal would be to require the gas industry to continue quantifying methane leakage from shale wells, and to develop and implement a program to hold methane leakage to acceptable emission rates.

All methods of natural gas extraction result in some level of methane release into the atmosphere. This also is true of coal mining and other fossil fuel extraction activities. If shale gas is to continue to be a major source of energy, it must be extracted in a manner that substantially retains the environmental benefits of natural gas, and thereby mitigates the impacts of extracting and using coal and oil.

U.S. National Issues

The main national issue relating to fracking is the need to develop energy self-sufficiency and strategic independence from uncertain foreign energy sources. Our energy portfolio of domestic resources currently is dominated by coal. The abundance of coal and its resultant low price have provided a strong economic incentive for its continued use despite negative environmental and health consequences. Recently, however, fracking has reduced the price of natural gas, and strong demand for coal, especially in China, has increased its price domestically. As a result, reliance on gas has overtaken reliance on coal for energy in New York State.[18] Coal is less versatile than natural gas, as shown by unsuccessful efforts to convert it to a vehicle fuel. These factors have in turn prolonged U. S. dependency on foreign oil. Thus, the U.S. may have a strong national interest in promoting the use of more versatile natural gas, even if obtained from environmentally costly fracking.

The costs of reliance upon foreign energy sources include political, economic, and military costs. These considerations may have led to a hands-off national policy on fracking. The Obama Administration, however, appears to be seeking to restore some Federal oversight, despite gas industry opposition. Indeed, current Energy Secretary Ernest J. Moniz, a former M.I.T. physics professor, is an advocate of accelerating replacement of oil and coal with natural gas,[19] much if not most of which would be obtained via fracking, and the EPA is conducting a major study of its potential impacts on drinking water supplies.[20]

New York State Issues

New York State is grappling with the question of whether, and under what conditions, fracking might be permitted.[21] Based on the reports of environmental and public health concerns from other states, New York should consider, at a minimum, imposing conditions on fracking. For example, New York should provide incentives for the industry to prevent accidents by establishing a fracking "superfund" to cover damage, if it occurs. More generally, fracking should be regulated like any technology that potentially poses significant public health and environmental risks. Drillers should be required to avoid sensitive locations such as drinking-water reservoirs, and avoid damaged bedrock, such as previously drilled areas. They should be required to disclose the composition of fracking fluids that will be used, thereby assuring that detected contamination patterns can be matched to their source(s). Permits should specify use of Best Management Practices (BMPs) and Best Available Control Technology (BACT). BMPs and BACT for fracking should include monitoring equipment capable of detecting contaminant releases before they become unmanageable, which could include double-hull piping to detect leaks in the inner tube that would be contained by, and detected within, the outer tube pending repair or replacement. The regulatory package also should prohibit open, unlined lagoons, instead requiring closed containers for storing, recycling, and transporting fracking fluids.

Local Issues

At the local level, communities must balance between competing collective versus individual interests. Individuals may have an interest in selling mineral rights or rights-of-way to gas drillers. Communities, in contrast, typically have an interest in controlling the pace and direction of development and preventing environmental and public health problems.

Mechanisms for regional coordination of communities have been developed, for example, to select and permit a deep geological repository for long-term storage of low-level radioactive waste from nuclear power plants.[22] But, as may eventually be the case with fracking wastes, the problem of long-term storage of so-called "rad-wastes" remains a major obstacle to siting nuclear power plants, notwithstanding their neg-

ligible greenhouse gas emissions and global climate impact. For example, the proposed Yucca Mountain repository in a Nevada salt dome was considered and litigated for decades, and is still not built. A case study of cumulative impacts of fracking on brook trout in a Marcellus Shale watershed further illustrates trade-offs between energy development and the benefits provided by natural ecosystems.[23]

Evolution of Energy Sources

Exploitation of most if not all energy sources poses risks to public health and the environment. Like the proverbial lunch, ultimately it is not free. This raises the question of whether our society should exploit energy sources even though doing so poses risks. Modern societies can increase their energy efficiencies, but ultimately they still depend upon having access to substantial amounts of energy. The bottom line is that societies must manage the risks inherent in meeting their needs in order to keep those risks within acceptable limits.

Risk management includes evaluating fracking as a choice among alternative energy strategies, rather than simplistically viewing fracking as either safe or unsafe. Alternatives such as expanded coal mining and drilling for undersea oil have serious consequences. New energy sources tend to be the most difficult to reach, the most expensive to extract, and the most onerous for public health and the environment; indeed, this explains in part why their exploitation, and the enabling technologies, are relatively recent developments. The "ecological footprint" of an average barrel of oil accordingly has increased since 1950, and will continue to increase.[24] For example, greenhouse gas emissions released in extracting a barrel of oil from newly exploited oil sands in Alberta, Canada were 23 times greater than emissions from extracting an Alberta barrel of oil via conventional drilling.[25] Thus, as the most accessible traditional sources of fossil energy become progressively more difficult to reach, and therefore more environmentally costly to extract, a decision to refrain from exploiting our abundant shale gas reserves conceivably could have a net negative environmental impact.

Nor will renewable resources provide a timely alternative to fracking—unless the pace of renewable resource development accelerates dramatically. Currently, exclusive reliance upon renewable resources remains impractical because of the relative immaturity of renewable energy technologies, as well as their intrinsic properties. The major renewable technologies, specifically wind and solar, deliver power only intermittently. Therefore they cannot meet the base power needs of the grid, and will remain insufficient pending availability of a viable energy storage technology or, alternatively, development of a sufficiently interconnected smart grid that can shuttle power effectively to where it is needed on demand. Even the most optimistic studies, however, suggest that complete transition to renewable energy will take 20 to 30 years.[26] In that time, the damage to public health and the environment caused by, for example, the planned 1,000 or more additional coal burning plants (many in China)[27] might be overwhelming.

"We must evolve, therefore, toward efficiency, moderation, and adoption of a sustainable 'portfolio' of energy sources."

Human societies will continue to increase their use of energy. We must evolve, therefore, toward efficiency, moderation, and adoption of a sustainable 'portfolio' of energy sources. We must invest heavily in renewable energy sources so they eventually will suffice for our energy needs. At best, therefore, natural gas displacement of other fossil fuels, most notably coal, may represent a bridge between our near-term energy needs and long-term goal of meeting those needs sustainably. If we fail to do this in a proactive and timely manner—that is, immediately—it will be "a bridge too far," and our options for addressing global climate change will close quickly and irrevocably.[28] All of this means, most essentially, that continued development of depletable, non-renewable, non-sustainable energy sources such as natural gas from fracking requires adoption of the safest practices now, and a firm exit strategy that will assure a sustainable future.

Endnotes

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9. NYS DEC, *supra* note 5, at 10-1 ("In 2009, the appearance of methane in water wells in an area in Dimock Township, Susquehanna County, was attributed to excessive pressures and improperly or insufficiently cemented casings at nearby Marcellus wells. Numerous occurrences of methane migration into residential water wells during 2010 in Tuscarora, Terry, Monroe, Towanda and Wilmot Townships, Bradford County were attributed to the failure to properly case and cement wells." (footnote omitted)), citing Pennsylvania Department of Environmental Protection, *In re Cabot Oil and Gas Corporation*, Consent Order and Agreement at 3 (Nov. 4, 2009).

10. US EIA data, http://www.eia.gov/tools/faqs/faq.cfm?id=73&t=11 (October 19, 2013).

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Local Land Use Regulations and Hydrofracking: The Next Step

By Jordan A. Lesser

In a relatively short period of time since 2008, the United States has seen a huge increase in oil and gas drilling activity. Through the use of a new technology, known as horizontal high-volume hydraulic fracturing, or "fracking," large reserves of previously noneconomic oil and gas trapped in tight shale rock formations are now commercially exploitable. As the world's population increases exponentially, and increasing wealth across the world leads to higher energy usage, the ability to extract a new source of energy has led to a "land rush" across the United States. Historically low natural gas prices, and the abundance of gas replacing some conventional coal-fired power plants across the country, have led extraction companies to target for leasing many communities overlying potentially profitable shale formations.[1] Yet even as the leases are secured, the process remains controversial, as concerns over the possibility of groundwater contamination, air pollution and industrialization of rural environs persist. In response to citizens' environmental and "community character" objections, many local governments have enacted bans or moratoria on oil and gas development within their jurisdiction.

As part of a comprehensive plan, municipalities may identify gas drilling or heavy industry of any kind as incompatible with the stated long-term land use planning goals of the community. Local governments use several different strategies to plan for and manage the impacts of the drilling process as well as associated pre-drilling and post-drilling impacts. On the one hand, existing local laws of general applicability are sometimes insufficient to address the effects of large-scale drilling operations. On the other hand, such laws, enacted to protect the health, welfare and safety of residents, sometimes cover many areas of concern related to drilling operations, such as light, noise, dust and odor pollution; storm water management regulations; wetland provisions; land use provisions concerning industrial uses; erosion control regulations; identification of critical environmental areas; and tree cutting regulations.[2] While these laws must be enacted in a timely manner, and cannot target any one industry in particular, they can provide mitigation and protection for communities that do so. Additionally, restricting truck traffic to certain routes, as long as it does not wholly impede delivery, or entering into road use agreements to repair damaged hauling routes are viable options for localities to manage transportation impacts.

However, many communities across the state have not wanted to simply mitigate shale gas drilling impacts, but instead use local ordinances to prevent the process from going forward at all on the lands under their jurisdiction. These local ordinances potentially conflict with state regulatory programs governing oil and gas development. In order to resolve such disputes, the courts must evaluate if an individual ordinance is preempted based on the exact language of the ordinance, and the degree of conflict with state law.

One of the highest profile examples of an oil and gas zoning ordinance preemption lawsuit, *Norse v. Town of Dryden*, was decided by the New York Appellate Division, Third Department in May 2013.[3] The case was on appeal following a ruling by Judge Rumsey of the Tompkins County Supreme Court in favor of the Town of Dryden in February 2012.[4] During pendency of the appeal, Norse Energy Corporation USA acquired the Dryden leases of the predecessor in interest, Anschutz Energy Corp., and was substituted in the proceeding. However, most of the 22,000 acres held by Anschutz were allowed to expire, and Norse only took over "a few" leases to retain standing in the case.[5] Again, the plaintiff on appeal seeks to invalidate a local zoning ordinance that bans oil and gas drilling, and related development, as a prohibited "heavy industry" use.

In New York, local governments have been granted a broad range of powers "to adopt and amend local laws not inconsistent with the provisions of [the] constitution or any general law relating to its property, affairs or government" under Article IX of the state constitution. These powers, enshrined in the constitution, have been affirmatively granted to municipalities by the New York legislature, including the express authority to regulate land use through zoning laws.[6] In *Dryden*, the Appellate Division considered whether the town's zoning ordinance banning all activities related to the exploration, production and storage of natural gas and petroleum was unenforceable due to either 1) express preemption, or 2) implied preemption.[7] Addressing the parameters of land use authority in New York, the court noted that "one of the most significant functions of a local government is to fos-

ter productive land use within its borders by enacting zoning ordinances." The court also recognized, however, that preemption "represents a fundamental limitation on home rule powers."[8] The gravamen of the preemption complaint relies on interpretation of the supersession clause of the Oil, Gas and Solution Mining Law (OGSML) within New York's Environmental Conservation Law (ECL), §23-0303(2), which provides that the OGSML "shall supersede all local law relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the Real Property Taxation Law.…" Proper analysis requires a careful look at the legislative intent of the statute, beginning with a plain language textual examination.[9]

In relevant part, ECL § 23-0303(2) prohibits municipalities from passing local laws "*relating to the regulation* of the oil, gas and solution mining industries" (emphasis in original).[10] But, what limits does this supersedure clause place on municipal zoning authority? As no definition of "regulation" appears in the ECL, the court invoked a standard dictionary definition to conclude that a "regulation" is "an authoritative rule dealing with details or procedure." Here, the zoning ordinance at issue does not seek to affect the technical details or procedure of oil and gas drilling in New York, as governed by the state ECL regulatory program, but rather establishes permissible and prohibited uses of land generally.[11] Citing Court of Appeals precedent concerning analogous zoning authority over gravel mining, the Appellate Division stated that "[w]hile the Town's exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon the oil, gas and solution mining industries, we conclude that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML."[12]

The court premised its preemption determination on a comprehensive assessment of the legislative history of ECL § 23-0303(2). In the original 1963 enactment, the legislature crafted the first official policy to govern oil and gas development in New York. After a careful review the Appellate Division found "[n]otably, the provisions of the enactment focus on matters that are regulatory in nature, such as well spacing, delineation of pools and procedures for obtaining permits.… They do not address any traditional land use issues that would otherwise be the subject of a municipality's zoning authority."[13] Subsequent amendments to the ECL in 1978 altered the language governing OGSML policy, clarifying that the intent was "to regulate the development, production and utilization of natural resources of oil and gas.…"[14] This shift in language, replacing "to foster, encourage and promote" in the original enactment with "to regulate," clarified that regulation by the Department of Environmental Conservation (DEC) is the intent of the ECL. The most recent 1981 amendments, at issue in this case, explain the purpose of the amendments as "establishing new fees to fund additional regulatory personnel for the industry and to provide a fund to pay for past and future problems which resulted [from] the industry's activities [and] establish[ing] a uniform method of real property taxation for oil and natural gas lands."[15] The sponsor's memorandum of support states the industry "will benefit from the expeditious handling of permits and improved regulation" especially because "the recent growth of drilling in the State has exceeded the capacity of [DEC] to effectively regulate and service the industry."[16]

Following its review of the legislative history of ECL §23-0303(2) and the 1981 amendments, the court found that the intent of the legislature was to provide uniform statewide standards with respect to the technical operations of the oil, gas and solution mining industries.[17] The court concluded that "we find nothing in the language, statutory scheme or legislative history of the statute indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land in their jurisdictions."[18] The court harmonized the state and local laws at issue by interpreting ECL § 23-0303(2) as preempting only those local laws that affect the operation, process and technical details of oil and gas development, and not—in the absence of clear legislative intent to the contrary—local land use controls more generally.[19]

In addition to the preemption analysis, Court of Appeals precedent concerning a nearly identical provision in the Mined Land Reclamation Law (MLRL) supports the Appellate Division's ruling. In *Frew Run Gravel Prods. v. Town of Carroll*, the Court of Appeals faced a similar supersession provision in the MLRL, which stated at that time that "this title shall supersede all other state and local laws relating to the extractive mining industry.…"[20] Here, the Court looked to the plain language meaning of the phrase "relating to the extractive mining industry" and construed that the MLRL did not preempt zoning law, as it does not relate to the regulation of the mining industry, but rather to an entirely different subject matter and purpose for the regulation of land use generally.[21] Only local regulations that conflict with the actual operations and process of extractive mining conflict with the purpose of the MLRL, which is to streamline mining operations through standardized state-wide regulation.[22] While zoning ordinances may affect the mining industry in an incidental manner, the Court concluded that local laws related to land use do not frustrate the legislative intent of the MLRL.[23]

Accordingly, the Appellate Division's assessment of the plain language meaning of the ECL superses-

sion clause at issue in *Dryden*, the history and policy objectives underlying the ECL, and Court of Appeals precedent interpreting the similar MLRL supersession provision led the *Dryden* court to hold "that ECL § 23-0303(2) does not serve to preempt a municipality's authority to enact a local zoning ordinance prohibiting oil, gas and solution mining or drilling within its borders."[24]

The court also dismissed an implied preemption argument, which sought to invalidate municipal zoning over oil, gas and solution mining based on a conflict with specific ECL well spacing provisions.[25] Although implied preemption will overturn any local law found to be inconsistent with constitutional or general law, here the court found that the Town's zoning ordinance does not conflict with either the language or the policy of the ECL.[26] The court found that well spacing provisions are technical and operational aspects of drilling that are separate and distinct from traditional zoning considerations such as land use compatibility and permissible uses. The court noted that the two "may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the ECL instructs operators as to the proper spacing of the units within those districts in order to prevent waste."[27] Continuing, the Appellate Division discussed spacing provisions that encourage prevention of waste and a policy declaration to "maximize recovery," clarifying that "this does not equate to an intention to require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that local."[28] Furthermore, the ECL also directs that oil and gas development be conducted in such a manner that "the rights of all persons including landowners and the general public may be fully protected."[29] This purpose, the court holds, is achieved when municipalities can determine if oil or gas development is compatible with their communities.[30]

Norse Energy Corp., USA filed a Motion for Leave to Appeal to the New York State Court of Appeals on May 31, 2013. On August 28, 2013 the New York Court of Appeals agreed to take the case.[31]

While courts in New York have, to this point, ruled in favor of upholding a municipality's zoning authority over oil and gas development, the legal battle is ongoing. With a Court of Appeals ruling expected sometime in 2014, the issue will become settled law. New Yorkers, and jurisdictions across the world, will be watching for the final ruling, as local government control promises to shape the course of the natural gas extraction industry. The exercise of local democracy and decision making over industrial uses in one's community has captured the public's interest in a way rarely seen. Local zoning control affords the citizenry ultimate public input over the future of oil and gas development in their towns, and New York's ruling will be closely scrutinized.

Endnotes

1. For an up to date treatment of this subject, *see generally* Erica Levine Powers and Beth E. Kinne, BEYOND THE FRACKING WARS: A GUIDE FOR LAWYERS, PUBLIC OFFICIALS, PLANNERS AND CITIZENS, A.B.A Section of State and Local Gov't Law, *available at* http://apps.americanbar.org/cle/programs/t13bfw1.html (October 20, 2013).
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3. *Norse Energy v. Town of Dryden*, 108 A.D.3d 25, 36, 964 N.Y.S.2d 714, 723 (3d Dep't 2013), *leave to appeal granted*, 21 N.Y.3d 863 (2013).
4. *See Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. 2012), *aff'd, Norse Energy v. Town of Dryden*, 108 A.D.3d 25, 36, 964 N.Y.S.2d 714, 723 (3d Dep't 2013), *leave to appeal granted*, 21 N.Y.3d 863 (2013). In the *Anschutz* ruling, the court upheld as a valid exercise of the town's local zoning authority an amendment to the town zoning ordinance ("Zoning Amendment") to prohibit use of town land for: (1) exploration for or extraction of natural gas and/or petroleum; (2) storage, treatment and disposal of natural gas and/or petroleum exploration and production materials; (3) storage, treatment and disposal of natural gas and/or petroleum exploration and production wastes; and, (4) natural gas and/or petroleum support activities. But, the court struck down Dryden Zoning Ordinance § 2104(5), the portion of the Zoning Amendment that provided that: "[n]o permit issued by any local, state or federal agency, commission or board for a use that would violate the prohibitions or this section or of this Ordinance shall be deemed valid within the Town." This provision was ruled *ultra vires*, as the Town has no authority to invalidate a permit lawfully issued by another government entity. *Id.* at 465.
5. Catherine Wilde, *Norwegian Firm Takes on Appeal of Dryden Drilling Ban*, CORTLAND STANDARD, Sept. 20, 2012, *available at* http://blog.shaleshockmedia.org/wp-content/uploads/2012/09/Anschutz-doa.pdf (October 20, 2013).
6. *See* N.Y. CONST. art. IX, § 2(b)(1); § 2(b)(2).
7. *Norse Energy v. Town of Dryden*, 108 A.D.3d 25, 36, 964 N.Y.S.2d 714, 723 (3d Dep't 2013), *leave to appeal granted*, 21 N.Y.3d 863 (2013).
8. *Id.* at 37.
9. *Id.* For more on preemption, refer to Brief for *Amici Curiae*, *Norse Energy v. Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dep't 2013) (the "law professors' brief"), *available at* http://lawoftheland.files.wordpress.com/2012/12/12-10-2012-dryden-corrected-brief.pdf (October 20, 2013).
10. *Norse Energy*, 108 A.D.3d at 25, 964 N.Y.S.2d at 714.
11. *Id.* at 32.
12. *Id.*
13. *Id.* at 34.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 26.
18. *Id.*

19. *Id.*

20. *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126, 129, 524 N.Y.S.2d 25, 27 (1987).

21. *Id.* at 131.

22. *Id.*

23. *Id.*

24. *Norse Energy v. Town of Dryden*, 108 A.D.3d 25, 36, 964 N.Y.S.2d 714, 723 (3d Dep't 2013), *leave to appeal granted*, 21 N.Y.3d 863 (2013).

25. *Id.* at 37.

26. *Id.*

27. *Id.*

28. *Id.* at 38.

29. *Id.*

30. Readers who have been closely following N.Y. oil and gas preemption challenges may recall another case seeking invalidation of a town zoning ordinance based on ECL § 23-0303(2) and the OGSML. The Appellate Division, Third Department issued a ruling in *Cooperstown Holstein Corp. v. Town of Middlefield* 2013, N.Y. Slip Op. 515498, at the same time, on May 2, 2013, stating that: "For the reasons set forth in *Matter of Norse Energy Corp. USA v. Town of Dryden* (supra), "we find plaintiff's claim to be without merit and affirm Supreme Court's judgment declaring that defendant's zoning law is valid." The *Middlefield* plaintiff, a dairy farmer with 380 acres under lease, sought a declaration that the state preempts all local control over oil and gas drilling, per ECL § 23-0303(2). However, the ordinance provided clear data on the incompatibility of HVHF with the town's community character and was upheld in its entirety, including a variance procedure. For background of the *Dryden* and *Middlefield* zoning ordinances and cases, *see generally* Erica Levine Powers, *Home Rule Meets State Regulation: Reflections on High Volume Hydrofracking for Natural Gas*, in A.B.A. Section of State and Local Gov't Law, STATE & LOCAL NEWS, vol. 35, no. 2 (Winter 2012), http://www.americanbar.org/publications/state_local_law_news/2011_12/winter_2012.html (October 20, 2013).

31. *Norse Energy v. Town of Dryden*, 108 A.D.2d 25, 36, 964 N.Y.S.2d 714, 723 (3d Dep't 2013), *leave to appeal granted*, 21 N.Y.3d 863 (2013).

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Any Colour You Like, as Long as It's Frack: The Disclosure of Fracking Fluid Constituents as Long as They Are Not Trade Secrets

By Evan Zablow

Introduction

Hydraulic fracturing well stimulation, also known as hydrofracking, is not a new development; it was used as early as the 1940s.[1] What is comparatively new, however, is the combination of hydrofracking with horizontal drilling.[2] Horizontal drilling is a drilling technique in which a horizontal well is drilled to stem from a vertical well.[3] Both the frequency of hydrofracking and the yield of natural gas or oil per use have increased due to the coupling of these techniques.[4] A study by MIT predicts that natural gas will double from 20 to 40 percent of America's energy resources in a few decades.[5]

While supporters of hydrofracking claim that hydrofracking is safe, opponents argue that the advent of the two techniques is too recent for its synergy to be properly assessed.[6] What is certain, however, is that the increased use of fracking has created a ripple effect that influences the price of fuel, the creation of jobs, and energy independence or security, among other things.[7]

An absence of federal regulation combined with the rapid expansion of hydrofracking has forced states to deal with regulation of not only the hydrofracking process, but also the disclosure issues resulting from the release into the environment of hydrofracking fluids and the copious amount of wastewater that hydrofracking generates.[8] State laws concerning the public disclosure and protection from disclosure of the content of the fluids used in the hydraulic fracturing process are a growing component of hydrofracking regulations.[9]

In December 2010, Governor David Paterson issued Executive Order 41.[10] It banned new permits for drilling in order to allow time to update New York regulations to take into account new technologies and practices.[11] This moratorium was continued by Governor Andrew Cuomo's Executive Order No. 2 in January 2011 and is still in effect.[12] The New York State Department of Environmental Conservation (DEC) proposed alterations to its regulations that would require hydraulic fracturing fluid disclosure to the DEC, but allow information to be protected from public disclosure as trade secrets.[13] An alternate proposed bill, Senate Bill 1234, would have also required disclosure of hydrofracking materials to the New York State Department of Environmental Conservation.[14]

"Debate continues to rage regarding whether New York should lift its moratorium on hydrofracking, and, if (and when) it does, whether and to what extent New York should require disclosure of the contents of hyrdofracking fluids and wastes."

On March 6, 2013, the New York State Assembly signed, by a margin of 103 to 40, Assembly Bill 5425-A.[15] This bill would suspend the issuance of permits for natural gas extraction in areas such as the Marcellus and Utica shale formations until May 15, 2015 and also require a school of public health within the state university of New York system to conduct an extensive comprehensive health impact assessment to examine the potential public health impacts of hydrofracking.[16] This bill still needs to gain a majority vote in the Senate and be signed by the Governor before it becomes law.[17] Assembly Speaker Sheldon Silver notes that the bill is intended to provide the Legislature time to review the findings of the DEC once they are completed.[18] Speaker Silver reasoned that there is plenty of time to carefully examine the benefits and consequences of hydrofracking despite a "struggling upstate economy," national energy crisis, and need for energy independence.[19] Silver further reasoned that the gas is not going anywhere and industry profits should not take priority over the health and well-being of the State's people.[20]

Debate continues to rage regarding whether New York should lift its moratorium on hydrofracking, and, if (and when) it does, whether and to what extent New York should require disclosure of the contents of hyrdofracking fluids and wastes. To this end, this article provides an overview of federal, state and private responses to the disclosure of fracking chemicals and wastewater.

Background

Hydraulic fracturing involves the injection of fluid into underground wells to release natural gas from rock formations. This fluid is mostly composed of water, but it also contains chemical additives and propping agents, such as sand and aluminum.[21] This mixture increases efficiency and safety because it reduces friction and prevents bacterial growth that could be dangerous to the extraction operation.[22] The composition of the fracking fluid at each well is tailored to optimally operate within the depth and type of rock in each unique formation.[23] In recent years, scientific developments have led to fracking fluids that require fewer additives.[24]

The propping agents remain in the target formation to keep the gaps between rocks open once the pressure from the fracking process releases trapped natural gas from between the rocks.[25] This propping effect allows the newly released natural gas and at least some of the injected fracking fluid to be extracted from the formation.[26] The retrieved fracking fluid is called wastewater or "flowback" and much controversy surrounds its disposal.[27]

The Clean Water Act sets standards for industrial wastewater discharges.[28] Wastewater from fracking is typically transported to publicly owned treatment works (POTWs) because the effluent guidelines for oil and gas extraction prohibit on-site discharge of wastewater into the waters of the United States.[29] Treatment of wastewater is a burdensome issue for regulators because it potentially provides an economic stake in hyrdofracking for municipal water treatment plants, which may wish to take part in the lucrative endeavor of treating the exponentially increasing amount of wastewater.[30]

Wastewater has some of the chemical additives from the fracking fluid, cadmium and benzene, which are both known carcinogenics, and Total Dissolved Solids (TDS).[31] TDS contains salt and minerals from the underground shale.[32] Wastewater with TDS can be five times saltier than sea water and while TDS is not directly harmful to people, this salty sediment can, among other things, disrupt and corrode machinery in sewage treatment plants and other utility companies, cause household dishwashers to malfunction, and "change the color[,] taste and odor of drinking water…."[33] Further, TDS' constituents cause process inhibitions at POTWs: sulfates disrupt anaerobic digestion processes and chloride disrupts nitrification processes and biological treatment units.[34] These constituents cause these errors at levels that are significantly lower than what are found in shale gas wastewater.[35] Pretreatment of wastewater is necessary because most POTWs do not significantly remove TDS.[36] In addition, POTWs may violate their permits because there is a "significant possibility" that wastewater will "pass through" the POTWs because of the disruptions that wastewater causes.[37] The EPA has warned municipal sewage plants not to treat and discharge wastewater into waterways for these reasons.[38] There is a serious need to find an efficient way to treat fracking wastewater as the amount of wastewater produced by fracking grows exponentially.

Regulation of the Disclosure of Fracking Chemicals and Flowback

Once a state allows hydrofracking, one point of contention is the degree of disclosure of the fracking chemicals required by state law.[39] Public disclosure of the type and volume of fracking chemicals is not required in most states.[40] However, the new wave of state hydrofracking regulations requires some public disclosure of the composition of fracking fluids.[41]

Proponents of disclosure argue that regulations involving public disclosure need to be enhanced in response to public concern.[42] The Shale Gas Production Subcommittee of the Secretary of Energy Advisory Board contends that public disclosure of as much information about natural gas production as possible will improve regulations, environmental safety, and help alleviate public concerns.[43] A federal disclosure requirement could provide uniformity and impose a floor for all states, thereby ensuring best practices.

A. Public Disclosure and Trade Secret Protection

Neither federal law nor many state laws require full disclose of the composition of the hydrofracking fluids. Rather, many of these laws offer protection as trade secrets to at least some of the contents.[44]

The Uniform Trade Secrets Act defines a trade secret as "information, including a formula,…method, technique, or process,…" where its owner reasonably protects its secrecy and generates economic value or potential because it is not "generally known…" by or "readily ascertainable by…other persons."[45] Many states have enacted the Uniform Trade Secrets Act.[46] Others provide their own definition of trade secrets in their applicable regulations.[47]

New York uses comment (b) to **§** 757 of the Restatement of Torts to define trade secrets.[48] The Restatement defines a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[49] New York also adheres to the factors that the Restatement suggests to consider when deciding whether information is a trade secret.[50] Those factors are:

> (1) the extent to which the information is known outside of [the] business;
> (2) the extent to which it is known by

> employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[51]

Trade secret protection prevents scientists, regulators, and those who live near fracking sites from knowing what substances are possibly endangering groundwater.[52] Therefore, investigations into fracking's link to water contamination cannot properly be conducted.[53] Aside from protection of proprietary information, the Shale Gas Production Subcommittee found no economic reason to prevent public disclosure of fracking fluid contents;[54] Exxon Mobil agrees.[55]

B. Federal Regulation

Those who oppose federal regulation of fracking argue that current regulations of fracking are sufficient and that expanded federal regulations will only slow the growth of this increasingly important industry.[56] They reason that the current state regulatory schemes have yielded lower fuel prices, more domestic jobs, and have led toward national energy independence and security.[57] Supporters of federal regulation, on the other hand, claim that an added federal regulatory component will not unduly hinder the already booming gas industry and will ensure that concerns over public safety, namely drinking water quality, are addressed.[58]

Many federal regulations currently do not cover hydrofracking. Most notably, the Energy Policy Act of 2005 amended the Safe Drinking Water Act (SDWA) to exclude hydraulic fracturing from its protection.[59] This has colloquially become known as the Halliburton Loophole because Halliburton has large economic interests in fracking as well as influence in Washington.[60] Drilling fluids and other liquid waste are exempt from the federal Solid Waste Disposal Act.[61] Air emissions created by the drilling process are not subject to regulation by the Clean Air Act.[62] Similarly, the Clean Water Act excludes hydrofracking fluids left in wells from its otherwise expansive definition of "pollutants" as long as the state has approved of the well and the state determines that the fluid will not degrade ground or surface water.[63] The result: states shoulder the majority of the burden of regulating hydraulic fracturing and the states' share of responsibility is likely to increase.[64]

While the Secretary for Pennsylvania's Department of Environmental Protection Michael Krancer argued that a "one size fits all" federal regulation would be inappropriate,[65] federal regulation could help ensure some uniformity and consistency, particularly in the area of disclosure of fracking chemicals and wastewater constituents. A federal law requiring disclosure of fracking fluids and additives would ensure a floor of best practices and help deter a regulatory race to the bottom because states could no longer attract industry by enacting less strenuous regulations than other states. The EPA and environmental groups like Earthworks and the Sierra Club argue that federal regulations will foster uniformity and assure "that all developers follow established 'best practices' for drilling, to catch up with companies that are already doing so."[66] However, any federal regulations ought to be drafted so that states and local municipalities will not be preempted if they decide to take the goals of the federal regulation further.

One such proposed federal bill, the Fracturing Responsibility and Awareness of Chemical Act (FRAC Act), was introduced to both the House of Representatives and the Senate in 2011.[67] The bill drew support from 72 of 435 possible cosponsors in the House of Representatives[68] and only 11 of the possible 100 seats in the Senate;[69] neither total is near the majority needed to pass.[70] Opponents of the FRAC Act claimed that it would have added burdensome and unnecessary requirements because the current scheme, in which states have their own regulations, best allows the gas industry to develop.[71]

Despite its failure to gain acceptance, the FRAC Act had four noteworthy parts. First, it would have undone § 322 of the Energy Policy Act of 2005 by adding hydraulic fracturing back into the SDWA.[72] Second, the SDWA would have been further amended to require the disclosure of chemical additives of fracking fluid to respective state agencies, which would in turn have had to post all information that is not subject to trade secret protection on an internet website.[73] Third, the bill contained a medical emergency provision which would have required even information that is protected by trade secret to be disclosed when "the proprietary chemical formula of a chemical used in hydraulic fracturing operations is necessary for medical treatment" of a medical emergency.[74] Finally, the FRAC Act would have set a minimum level of regulation to which all states must adhere, but would not have preempted the states from adding additional regulations.[75]

C. Patchwork of State Regulations

Although public disclosure of the type and volume of fracking chemicals is not required in most states,[76] states are increasingly requiring some public disclosure of the composition of fracking fluids.[77]

Wyoming was the first state to require disclosure of fracking chemicals.[78] However, Wyoming, like many other states, offers protection from disclosure to "trade secrets, privileged information and confidential commercial, financial, geological or geophysical data…."[79] Arkansas also limits disclosure by protecting additives as trade secrets.[80] Moreover, while disclosure of the "types and volumes" of fracking fluids that are not protected as trade secrets is required,[81] the disclosure is limited because only the general type of the additive—such as acid or proppant—must be disclosed.[82] Arkansas is different in that it chooses to define trade secrets under the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11042 (b).[83] A proposed bill in Arkansas would have made public disclosure of chemical additives a requirement, but it was subsequently withdrawn.[84] Texas also exempts trade secrets from its disclosure law.[85] For additives that are not trade secrets, Texas requires disclosure of each additive in the hydraulic fracturing fluid and the concentration of those additives. To protect trade secrets, Texas allows disclosure of the chemical family name only of the additive, unless that too "would disclose information protected as a trade secret."[86] Texas is an outlier in that it relies on its common law and the Restatement of Torts to define trade secrets.[87]

Michigan's regulations encourage a greater amount of disclosure than other states because confidentiality of trade secrets is not extended to information about chemicals used in gas exploration or production.[88] Fracking companies that operate in Michigan are required to disclose where they obtain the water they use in the fracking process and the amount of water recovered from the operation (also known as "flowback"), and must post information about the chemical additives and their potential impacts.[89] Michigan also requires disclosure of, among other things, concentrations of hydrofracking chemicals.[90]

D. Proposed New York Regulations

New York does not have any regulations in effect as a moratorium on new permits has been imposed.[91] The Department of Environmental Conservation (DEC) has proposed a set of new regulations.[92] However, there is political pressure to wait for a comprehensive study of hydrofracking before any regulations are enacted.[93]

New York's proposed regulations would require the owner or operator to provide information about the fracking fluid's composition such as the "proposed volume of each product to be used—" and the identification of each additive to the DEC[94] and also to FracFocus.org, the chemical disclosure registry.[95] The department would then disclose all the information that the owner or operator did not claim was a trade secret pursuant to title six § 616.7 of the Compilation of Codes, Rules and Regulations of the State of New York.[96] The information protected as trade secrets would only have to be described by their chemical family on FracFocus.org.[97] Section 616.7 of title six is nearly identical to comment (b) to section 757 of the First Restatement of Torts.[98]

E. FracFocus.org: Can a Medium Operated by Industry Adequately Facilitate Disclosure?

FracFocus calls itself "*the* national hydraulic fracturing chemical registry."[99] It is operated by the Groundwater Protection Council, a group of state water regulatory officials,[100] and the Interstate Oil and Gas Compact Commission, a multi-state government agency.[101] It receives funding from America's Natural Gas Alliance and the API, two Washington-based industry groups and recent grants of close to $4 million from the U.S. Department of Energy with more than $2 million on its way in 2014.[102]

Pennsylvania,[103] Colorado,[104] North Dakota,[105] and Texas[106] require chemical information to be posted directly to the public on FracFocus or a comparable website. On the other hand, Arkansas,[107] Idaho,[108] Michigan,[109] New Mexico,[110] West Virginia,[111] and Wyoming[112] require disclosure to state agencies only. Some of those states then give the agencies the choice to post that information online.[113] The disclosure requirements in Louisiana[114] and Montana[115] are satisfied when information is either disclosed directly to the state agency or posted online. A handful of states require disclosure on an unspecified Internet website.[116]

Opponents argue that FracFocus is not a proper medium for disclosure, but is merely propagated by industry as a fig leaf.[117] Among eight states from April to December, 2011, energy companies only reported on FracFocus three of every five wells that they fracked.[118] The data in this study suggests that, not only is disclosure on a voluntary basis not a great enough incentive, disclosure is still inadequate even in states that require disclosure to FracFocus.[119] From April 11, 2011 through December 31, 2011, two out of every five wells in those eight states and more than half of the new wells in Texas, Oklahoma, and Montana were not reported on FracFocus.[120] This is despite the fact that two of those eight states, Texas and Colorado, require reporting to FracFocus.[121]

The Natural Resources Defense Council (NRDC) attacks FracFocus for not being flexible enough to disclose all that is required by state rules.[122] The FracFocus disclosure form contains limited subsets of information that states require.[123] Further, FracFocus does not report all chemical constituents, but only those that would appear on Material Safety Data Sheets (MSDS).[124] Therefore, FracFocus allegedly does not allow the state disclosure requirements to be fulfilled

because the site does not retain and disclose all of the information that state regulations mandate.[125]

Sometimes, the only way to obtain information that is not on FracFocus, yet is required to be disclosed, is through a state database, which requires an expensive subscription, or by sifting through the well records at the state agency.[126] This obstacle frustrates the purpose of medical emergency provisions because of the increased time and effort it would take health care professionals to locate the withheld information.[127] Accordingly, any website responsible for publishing disclosures should be capable of retaining and displaying all the information required by state regulations.

Conclusion

It is understood that federal regulation will not stop hydrofracking.[128] However, that should not be the point of federal oversight. Hydrofracking is too productive and too important to our nation's energy supply to be banned. The only caveat is that it must be performed responsibly. While federal implementation is not necessary for these objectives, it appears to be the most effective way of doing so. Further, if state enforcement of its own regulations is "woefully inadequate[,]"[129] then states should welcome a federal regulation. Federal oversight would free up time, money, and manpower for states to enforce their remaining regulations. Moreover, federal oversight could promote uniformity and suppress a regulatory race to the bottom. If federal regulations on hydrofracking are added, it is vital for optimal productivity that some powers be reserved in the states.[130]

However, the exemptions for fracking in federal laws and the failure of federal legislation like the FRAC Act suggest that it will be some time before federal oversight occurs (if ever). Municipal treatment plants bear too much responsibility and need guidance from either the Federal or New York Legislature. Either set of laws or regulations should encourage fracking to be practiced in a responsible and safe manner. This can be accomplished many ways; if, for example, laws or regulations impose best practice for ensuring well casing integrity, medical emergency provisions protect the public and ease their concerns, disclosures that occur both before fracking to establish baseline tests and after to allow for amended information, uniform disclosure and information withholding standards, or a chemical registry that can properly display all of the information to be disclosed and allows for comparisons to be drawn between wells in different states.

Uniform, full (or nearly full) disclosure would facilitate regulators' and lawmakers' ability to evaluate enforcement trends,[131] develop the public's trust in hydrofracking and, arguably, make gas production even more efficient because industry could identify best practices by comparing performance at different wells.[132] On the other hand, industry may lose out on the competitive advantages that trade secret laws were enacted to protect. Financial gain should not take priority over environmental degradation that can permanently affect generations to come in either case.

"If federal regulations on hydrofracking are added, it is vital for optimal productivity that some powers be reserved in the states."

Endnotes

1. *See Testimony for the U.S. H. Comm. on Sci., Space, and Tech.: Review of Hydraulic Fracturing Tech.*, 112th Cong. 3 (2011) (statement of Elizabeth Ames Jones, Chairman, R.R. Comm'n of Tex.) (*available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Hydraulic%20Fracturing%20Written%20Testimony-Final-5-9-2011%20jones.pdf) (claiming hydraulic fracturing was first employed in 1948); *Hydraulic Fracturing Operations—Well Construction and Integrity Guidelines*, AM. PETROLEUM INST., at 15, (2009) http://www.api.org/~/media/files/policy/exploration/api_hf1.ashx [hereinafter API, *Fracking Guidelines*] (stating that industry has used hydraulic fracking since 1947).
2. *See* SHALE GAS PROD. SUBCOMM. OF THE SEC'Y OF ENERGY ADVISORY BD., 112th Cong., Ninety-Day Report, at 8 (Comm. Print 2011), http://www.shalegas.energy.gov/resources/081111_90_day_report.pdf [hereinafter SEAB] ("But it was only in 2002 and 2003 that the combination of two technologies working together—hydraulic fracturing and horizontal drilling—made shale gas commercial."); *Down to Earth: The Dark Side of the Fracking Boom*, EARTHJUSTICE (Recorded June 2012), http://earthjustice.org/print/features/campaigns/down-to-earth-the-dark-side-of-the-fracking-boom.
3. U.S. EPA, DIRECTIONAL DRILLING TECHNOLOGY, at 1 (last visited March. 5, 2013) http://www.epa.gov/coalbed/docs/dir-drilling.pdf (prepared for the EPA by Advanced Resources International under Contract 68-W-00-094).
4. Timothy J. Considine ET AL., *The Econ. Opportunities of Shale Energy* Dev., Energy Policy & the Env't Report, May 2011, at 1, *available at* http://www.manhattan-institute.org/pdf/eper_09.pdf.
5. 156 CONG. REC. S8121-02 (daily ed. Nov. 19, 2010) (statement of Sen. Inhofe) *available at* 2010 WL 4683655.
6. See SEAB, *supra* note 2, at 13 ("Advocates state that fracturing has been performed safety [sic] without significant incident for over 60 years, although Modern Shale Gas fracturing of two mile long laterals has only been done for something less than a decade.").
7. *Id.*
8. Joaquin Sapien, *What Can Be Done With Wastewater?*, PROPUBLICA (Oct. 4, 2009), http://www.post-gazette.com/stories/news/environment/what-can-be-done-with-wastewater-360358/ ("Oil and gas wells disgorge about 9 million gallons of wastewater a day in Pennsylvania, according to industry estimates used by the DEP. By 2011 that figure is expected to rise to at least 19 million gallons, enough to fill almost 29 Olympic-sized swimming pools every day.").

9. *See* Jeffrey C. King ET AL., *Factual Causation: The Missing Link in Hydraulic Fracture-Groundwater Contamination Litigation*, 22 DUKE ENVTL. L. & POL'Y F. 341, 359-60 (2012).

10. GOVERNOR OF THE STATE OF N.Y. DAVID A. PATERSON, EXEC. ORDER NO. 41: REQUIRING FURTHER ENVTL. REVIEW (2010), *available at* http://www.governor.ny.gov/archive/paterson/executiveorders/EO41.html.

11. *Id.*

12. GOVERNOR OF THE STATE OF N.Y. ANDREW M. CUOMO, EXEC. ORDER NO. 2 REVIEW, CONTINUATION AND EXPIRATION OF PRIOR EXEC. ORDERS (2011), *available at* http://www.governor.ny.gov/executiveorder/2.

13. N.Y. STATE DEP'T OF ENVTL. CONSERVATION, REVISED EXPRESS TERMS 6 NYCRR PARTS 550 THROUGH 556 AND 560, 6 NYCRR 560.3 (d) (proposed), *available at* http://www.dec.ny.gov/regulations/87420.html; *see infra* section D.

14. N.Y. State S. B. 1234, 234th Session. (N.Y. 2011) (see § 2, 23-2913.6.1). This bill would have also ensured that New York City's drinking water supply would not have been exposed to risks of contamination from fracking because it would have prohibited drilling for gas within five miles of the city's watershed. *Id.* (see § 2, 23-2913.6.1).

15. N.Y. State Assemb. 5424-A, 200th Gen. Assemb., Reg. Sess. (N.Y. 2013).

16. *Id*.

17. N.Y. Const. art. III, §§ 1, 14, *available at* http://www.dos.ny.gov/info/constitution.htm.

18. Press Release, Assembly Speaker Sheldon Silver, Announcing Hydrofracking Moratorium Legislation (March 6, 2013) *available at* http://assembly.state.ny.us/Press/20130306a/.

19. *Id.*

20. *Id.*

21. SEAB, *supra* note 2, at 23; N.Y. STATE DEP'T OF ENVTL. CONSERVATION, REVISED DRAFT SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS, AND SOLUTION MINING REGULATORY PROGRAM, Glossary at 7, 12 (2011), http://www.dec.ny.gov/energy/75370.html [hereinafter REVISED DRAFT SGEIS]. Some of these chemical additives can be found in household products like detergent. Ken Cohen, *"Fracking" Fluid Disclosure: Why It's Important*, Exxon Mobil (Aug. 25, 2011), http://www.exxonmobilperspectives.com/2011/08/25/fracking-fluid-disclosure-why-its-important/.

22. Cohen, *supra* note 21.

23. REVISED DRAFT SGEIS, *supra* note 21, ch. 5 at 94; U.S. DEP'T OF ENERGY, OFFICE OF FOSSIL ENERGY & NAT'L ENERGY TECH. LAB., MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES, at ES-4 (Apr. 2009) (prepared by Ground Water Protection Council & ALL Consulting under DE-FG26-04NT15455).

24. King ET AL., *supra* note 9, at 343 ("Today, the fluid mixture used for the hydraulic fracturing process is approximately 98 to 99.5% water and sand.") (citing API, *Unlocking Natural Gas*, *supra* note 85).

25. Considine ET AL. *supra* note 4, at 2.

26. REVISED DRAFT SGEIS, *supra* note 21, ch. 5 at 5.

27. REVISED DRAFT SGEIS, *supra* note 21, Glossary at 5; *See, e.g.* King ET AL., *supra* note 9, at 359-60; *Hydraulic Fracturing and the FRAC Act: Frequently Asked Questions*, SIERRA CLUB ET AL., at 2 (March 2011) [hereinafter SIERRA CLUB ET AL., *FRAC Act FAQ*] http://newyork.sierraclub.org/documents/FracAct_Facts_3_11.pdf; Frances Beinecke, *Calling for National Fracking Standards and Empowering Local Communities*, NAT'L RES. DEF. COUNCIL (Aug. 30, 2012), http://switchboard.nrdc.org/blogs/fbeinecke/calling_for_national_fracking.html.

28. 33 U.S.C. § 1311.

29. *Natural Gas Extraction—Hydraulic Fracturing*, EPA (last updated July 12, 2013), http://www2.epa.gov/hydraulicfracturing#swdischarges.

30. Sapien, *supra* note 8. Drillers offered to pay five cents a gallon for a municipal sewage treatment plant in Clairton, Pennsylvania to process their wastewater.

31. Sapien, *supra* note 8; REVISED DRAFT SGEIS, *supra* note 21, Glossary at 5.

32. Sapien, *supra* note 8.

33. *Id.*

34. *Natural Gas Drilling in the Marcellus Shale: NPDES Program FAQs*, EPA (March 16, 2011), http://www.epa.gov/npdes/pubs/hydrofracturing_faq.pdf [hereinafter EPA, NPDES FAQs]; *see also* Sapien, *supra* note 8 ("Of even more concern, TDS can disrupt the plants' treatment of ordinary sewage by killing organisms that are needed to treat human waste.").

35. EPA, NPDES FAQs, *supra* note 34.

36. *Id*.

37. *Id*.

38. *Id*.; Sapien, *supra* note 8.

39. *See, e.g.*, King ET AL., *supra* note 9, at 359-60; SIERRA CLUB ET AL., *FRAC Act FAQ*, *supra* note 27, at 2; Beinecke, *supra* note 27.

40. SIERRA CLUB ET AL., *FRAC Act FAQ*, *supra* note 27, at 2; Beinecke, *supra* note 27.

41. *See* King ET AL., *supra* note 9, at 359-60.

42. SEAB, *supra* note 2, at 3.

43. SEAB, *supra* note 2, at 13-14 ("Disclosure of data permits regulators to identify cost/effective regulatory measures that better protect the environment and public safety, and disclosure gives the public a way to measure progress on reducing risks.").

44. *See infra* Part III.

45. U.L.A. Trade Secrets Act § 1(4) (1985).

46. U.L.A. Trade Secrets Act § References and Annotations (1985).

47. *See* 178-00-001 ARK. CODE. R. § (k)(8) (2011) (citing the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11042 (a)(2), for Arkansas' trade secret definition); 16 TEX. ADMIN. CODE § 3.29 (a)(26) (2011) (citing *Hyde Corp. v. Huffins*, 314 S.W.2d 763, 776 (Tex. 1958) and Restatement (First) of Torts § 757 Cmt. b (1939) for Texas' definitions of trade secret).

48. *E.g., Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912, 918 (1993).

49. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

50. *E.g., Ashland Mgmt. Inc.*, 82 N.Y.2d at 407.

51. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

52. SIERRA CLUB ET AL., *FRAC Act FAQ*, *supra* note 27, at 2-3.

53. *Id.*

54. SEAB, *supra* note 2, at 3.

55. Cohen, *supra* note 21.

56. *Testimony for the Comm. on House Oversight and Gov't Reform*, 112th Cong., at *1 (May 5, 2012) [hereinafter *Testimony*] (statement of Michael L. Krancer, Sec'y, Pa. Dep't of Envntl. Prot.) (*available at* 2012 WLNR 11472703).

57. *Id.*

58. SIERRA CLUB ET AL., *FRAC Act FAQ*, *supra* note 27, at 4. A race to the bottom is when entities offer pollution control standards that are more lax then their neighbors in an effort to attract industry. Richard L. Revesz, *Rehabilitating Interstate Competition:*

Rethinking the "Race-to-the-Bottom" Rational for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1210 (1992).

59. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 322, 119 Stat. 594, 694 (codified as amended at 42 U.S.C.A. 300h (d)(1)(B)(ii)).

60. *The Halliburton Loophole*, N.Y. Times (Nov. 2, 2009), http://www.nytimes.com/2009/11/03/opinion/03tue3.html?_r=0&adxnnl=1&adxnnlx=1355872250-i2EvoUmhvgbEgqvedfzvqQ; *Thank You For Co-Sponsoring The FRAC Act!*, Earthworks http://www.earthworksaction.org/issues/detail/inadequate_regulation_of_hydraulic_fracturing#.UND3Xm-zgaM (last updated July 2011).

61. 42 U.S.C. § 6921 (b)(2)(A) (2006).

62. 42 U.S.C. § 7412 (n)(5) (1999).

63. 33 U.S.C. § 1362 (6) (2008) (excluding from definition of "pollutant" "water, gas, or other material which is *injected into a well* to facilitate production of…gas, or water derived in association with…gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources").

64. Jacquelyn Pless, *Fracking Update*, Nat'l Conference of State Legislatures (July 2011), http://www.ncsl.org/issues-research/energyhome/fracking-update-what-states-are-doing.aspx.

65. *Testimony*, *supra* note 56 (statement of Sec'y PADEP, Michael L. Krancer).

66. Lauren O'Neil, *EPA Prepares More 'Back Door' Regulations on Hydrofracking*, 27 Natural Gas Week 49 (Dec. 5, 2011), *available at* 2011 WLNR 26222714.

67. S. 587 § 1, 112th Cong. (as heard by S. Comm. on Environment and Public Works and S. Subcommittee on Water and Wildlife Environment and Public Works, Apr. 12, 2011); H.R. 1084 § 1, 112th Cong. (as referred to the H. Committee on Energy and Commerce, Mar. 15, 2011 and the H. Subcommittee on Environment and the Economy, Mar. 21, 2011).

68. *Bill Summary & Status: H.R. 1084*, Library of Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:hr1084: (last visited Feb. 11, 2013).

69. *Bill Summary & Status: S. 587*, Library of Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s587: (last visited Feb. 11, 2013).

70. U.S. Const. art. I, § 5, cl. 1.

71. *Hydraulic Fracturing: Unlocking America's Natural Gas Res.*, Am. Petroleum Inst. (July 19, 2010), http://www.api.org/policy/exploration/hydraulicfracturing/upload/hydraulic_fracturing_primer.pdf.

72. Senate Bill 587 § 2 (a); House Bill 1084 (a).

73. Senate Bill 587 § 2 (b); House Bill 1084 § 2 (b).

74. Senate Bill 587 § 2 (b); House Bill 1084 (b).

75. Sierra Club et al., *FRAC Act FAQ*, *supra* note 27, at 3.

76. Sierra Club et al., *FRAC Act FAQ*, *supra* note 27, at 2; Beinecke, *supra* note 27.

77. *See* King et al., *supra* note 9, at 359-60.

78. 055-3 Wyo. Code. R. § 45 (d) (LexisNexis 2011); *see also* Pless, *supra* not 78.

79. 055-3 Wyo. Code. R. § 45 (f) (LexisNexis 2011). *See also* 58 Pa. Cons. Stat. § 3222.1 (b)(5) (requiring information to be part of public record, but exempting additives entitled to protection as trade secrets). What is distinctive about Pennsylvania is that well operators must have a predetermined plan for disposing of stimulation fluids and production fluids associated with gas wells and they must identify methods of disposal. 25 Pa. Code § 78.55 (a), (b) (2011).

80. 178-00-001 Ark. Code. R. § (k)(8) (2011).

81. *Id.* § (k)(2).

82. *Id.* § (k)(4).

83. 178-00-001 Ark. Code. R. § (k)(8) (2011).

84. Ark. H. of Rep. 1396, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

85. 16 Tex. Admin. Code § 3.29 (c)(1) (2011); Tex. Gov't Code Ann. § 552.110 (2011).

86. 16 Tex. Admin. Code § 3.29 (c)(1)(B) (2011).

87. 16 Tex. Admin. Code § 3.29 (a)(26) (2011) (citing *Hyde Corp. v. Huffins*, 314 S.W.2d 763, 776 (Tex. 1958) and Restatement (First) of Torts § 757 Cmt. b (1939) for Texas' definitions of trade secret).

88. *Id.* "Information on volumes, concentrations, and times of releases, spills, or leaks of gas, brine, crude oil, oil or gas field waste, or products and chemicals used in association with oil and gas exploration, production, disposal, or development is not subject to confidentiality." *Id.*

89. Brad Wurfel, *Michigan Issues New Orders for Fracking*, Michigan Department of Envrionmental Quality (May 25, 2011), http://www.michigan.gov/deq/0,4561,7-135-3308_3323-256844--,00.html.

90. Mich. Admin. Code r. 324.416 (3) (2012).

91. *Supra* notes 10-12 and accompanying text.

92. N.Y. State Dep't of Envtl. Conservation, Revised Express Terms 6 NYCRR Parts 550 through 556 and 560 (proposed) *available at* http://www.dec.ny.gov/regulations/87420.html.

93. N.Y. State Assemb. 5424-A, 200th Gen. Assemb., Reg. Sess. (N.Y. 2013); *see supra* notes 15-20 and accompanying text.

94. N.Y. State Dep't of Envtl. Conservation, Revised Express Terms 6 NYCRR Parts 550 through 556 and 560, 6 NYCRR 560.3 (d)(1) (proposed), *available at* http://www.dec.ny.gov/regulations/87420.html.

95. *Id.* at § 560.5 (h)(4) (proposed).

96. *Id.* at § 560.3 (2) (proposed).

97. *Id.* at § 560.5 (h)(4)(ii) (proposed).

98. *Compare* 6 NYCRR 616.7 (2013) *with* Restatement (First) of Torts § 757 cmt. b (1939).

99. *About Us*, Ground Water Prot. Council & Interstate Oil and Gas Compact Comm'n, http://www.fracfocus.org/welcome (last visited March 5, 2013) (emphasis added).

100. *About Us*, Ground Water Prot. Council, http://www.gwpc.org/about-us (last visited October 12, 2013).

101. *About Us*, Interstate Oil and Gas Compact Comm'n, http://www.iogcc.state.ok.us/about-us (last visited October 12, 2013).

102. Benjamin Haas, et al., *Fracking Hazards Obscured in Failure to Disclose Wells*, Bloomberg 6 (Aug. 14, 2012), http://www.bloomberg.com/news/print/2012-08-14/fracking-hazards-obscured-in-failure-to-disclose-wells.html.

103. 58 Pa. Cons. Stat. § 3222.1 (b)(2) (2012).

104. Colo. Code Regs. § 404-1:205A (b)(2) (2013).

105. N.D. Admin. Code 43-02-03-27.1 (1)(g), (2)(i) (2013).

106. 16 Tex. Admin. Code § 3.29 (c)(2)(A) (2012).

107. 178-00-001 Ark. Code R. § B-19 (k), (l)(3) (2012).

108. Idaho Admin. Code r. 20.07.02.056 (2013).

109. Mich. Admin. Code r. 324.416 (3) (2012).

110. N.M. Code R. § 19.15.16.19 (B) (2012).

111. W. VA. CODE R. § 22-6A-7 (e)(5) (2012), *available at* http://www.legis.state.wv.us/WVCODE/ChapterEntire.cfm?chap=22&art=6A&section=7#06A.

112. 055-3WYO. CODE R. § 45 (d), (h) (2012).

113. Arkansas has a handful of wells available on its own website. *Well Fracture Information*, STATE OF ARK. OIL AND GAS COMM'N, http://www.aogc.state.ar.us/Well_Fracture_Companies.htm (last visited March 5, 2013).

114. LA. ADMIN. CODE tit. 43, § 118 (C)(1), (C)(4) (2012).

115. MONT. ADMIN. R. 36.22.1015 (4) (2012).

116. *See supra* notes 110-114 and accompanying text.

117. *See* BLOOMBERG, *Fracking Hazards Obscured in Failure to Disclose Wells*, *supra* note 102, at 1, 7. U.S. Representative and Democratic Chief Deputy Whip Dianna DeGette of Colorado said "FracFocus is just a fig leaf for the industry to be able to say they're doing something in terms of disclosure." *Id. at* 1.

118. *Id.* The eight states are Arkansas, Colorado, Louisiana, Montana, Oklahoma, Texas, Utah, and Wyoming. *Id.*

119. *Id.*

120. BLOOMBERG, *Fracking Hazards Obscured in Failure to Disclose Wells*, *supra* note 102, at 1-2.

121. 16 TEX. ADMIN. CODE § 3.29(c)(2)(A) (2012); COLO. CODE REGS. § 404-1:205A(b)(2) (2013).

122. Matthew McFeeley, *State Hydraulic Fracturing Disclosure Rules and Enforcement: A Comparison*, NAT'L RES. DEF. COUNCIL 8 (July 2012), http://www.nrdc.org/energy/files/Fracking-Disclosure-IB.pdf [hereinafter NRDC, *Disclosure Rules and Enforcement*].

123. *Id.* Even though some state regulations call for exact concentrations, FracFocus merely requests concentration ranges. *Id.*

124. SEAB, *supra* note 2, at 23-24. Material Safety Data Sheets are used to report potentially hazardous chemicals in an occupational setting as required by the Occupational Safety and Health Administration (OSHA). *Id. at* 24. Therefore, "chemicals that might be hazardous if human exposure occurs through environmental pathways…" are not reported on FracFocus. *Id.*

125. NRDC, *Disclosure Rules and Enforcement*, *supra* note 122, at 8.

126. *Id.*

127. *Id.*

128. SIERRA CLUB ET AL., *FRAC Act FAQ*, *supra* note 27, at 4.

129. Beinecke, *supra* note 27; *see* Sapien, *supra* note 8.

130. SEAB, *supra* note 2, 4.

131. SEAB, *supra* note 2, at 14. The Subcommittee believed that "public concern about the nature of fracturing chemicals suggest[ed] that the benefit of immediate and complete disclosure of all chemical components and composition of fracturing fluid completely outweigh[ed] the restriction on company action, the cost of reporting, and any intellectual property value of proprietary chemicals." *Id.* at 24.

132. *Id.*

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The Soda Ban or the Portion Cap Rule? Litigation Over the Size of Sugary Drink Containers as an Exercise in Framing

By Rodger Citron and Paige Bartholomew

Rodger Citron

Among the most controversial actions taken by a municipality in recent years was New York City's (the City) efforts to restrict restaurants, movie theaters, and other food-service establishments from serving sugary drinks in sizes larger than sixteen ounces. The City adopted the rule as part of its efforts to address rising rates of obesity. The measure received extensive news coverage, drew dueling newspaper editorials, and thus far has been blocked by litigation.[1]

The rule in question has been referred to as the "Soda Ban."[2] In fact, it does not ban soda. It only regulates the size of the container in which soda or other sugary drinks may be served. The "Portion Cap Rule," as it has been labeled by the City, was adopted by the New York City Board of Health (Board of Health) in September 2012 and was scheduled to go into effect in March 2013.

Before that occurred, however, the rule was challenged in court. In 2013, the New York County Supreme Court held that the rule was not valid, and this decision was affirmed by the First Department of the Appellate Division.[3] As detailed below, both courts essentially held that the Board of Health did not have the authority to adopt the rule and therefore violated separation of powers doctrine in doing so.

As this article went to press, the City was pursuing an appeal of the First Department's decision in the Court of Appeals.[4] This article discusses the litigation over the City's efforts to restrict the size of sugary drink containers. It provides a history of the rule, from its promulgation by the Board of Health to the Appellate Division's decision invalidating the rule.

The article also comments on the dispute between the parties over how to frame the rule. Opponents of the rule, including the parties who filed suit to block the rule, characterize the measure as an unwarranted and unprecedented incursion of consumer choice and personal freedom. They decry the "Soda Ban." On the other hand, proponents of the "Portion Cap Rule," including the City, view the rule as a modest measure intended to address obesity, a significant—even alarming—public health issue. (For the rest of this article, we will refer to the rule in question as the "soda container rule.")

Paige Bartholomew

As will be discussed, the disagreement over how to frame this dispute illustrates the nature of the judgment the courts have made thus far. In determining whether the Board of Health has the authority to promulgate the soda container rule, the courts have applied the four-factor test set out by the Court of Appeals in *Boreali v. Axelrod* in order to draw the "difficult-to-demarcate line" between permissible agency rulemaking and impermissible legislating.[5] In making this determination, the courts engage in something akin to a gestalt judgment—not only is the application of the *Boreali* factors discretionary, but some factors require nothing more than an exercise of classification or judgment. Thus far, the petitioners have been more successful than the City in persuading the courts that their view of the soda container rule—and of the governing separation of powers principles—is correct.

Promulgation of the Rule

The soda container rule was developed by two City agencies: the Board of Health and the New York City Department of Health and Mental Hygiene (DOHMH). To understand the authority of the Board of Health, it is necessary to first understand the authority of DOHMH. As the First Department summarized: "DOHMH is an administrative agency that is charged with regulating and supervising all matters affecting health in the city, including conditions hazardous to life and health, by regulating the food and drug supply of the City, and enforcing provisions of the New York City Health Code."[6]

The Board of Health "is empowered to amend the Health Code with respect to all matters to which the power and authority of DOHMH extend."[7] This includes Article 81 of the Health Code, which sets out the rules regulating City food service establishments (FSEs).[8]

On May 30, 2012, Mayor Michael Bloomberg announced the soda container rule, a proposed amendment to Article 81 that would require FSEs to cap at sixteen ounces the size of cups and containers used

to serve sugary beverages. The stated purpose of the rule was to address rising obesity rates in the City. In a news article about the announcement, Mayor Bloomberg said, "Obesity is a nationwide problem, and all over the United States, public health officials are wringing their hands saying, 'Oh, this is terrible.'" He added, "New York City is not about wringing your hands; it's about doing something."[9]

A day later, "14 members of the City Council wrote to the Mayor opposing the [proposed rule] and insisting that, at the very least, it should be put before the Council for a vote."[10] However, the proposed soda container rule never was put before the City Council for a vote.

Instead, DOHMH presented the proposed amendment to the Board of Health in June 2012 and a public hearing on the soda container rule was held on July 24, 2012. According to the First Department: "Of more than 38,000 written comments received prior to the public hearing, approximately 32,000 (84 percent) supported the proposal and approximately 6,000 (16 percent) opposed it. In addition, New Yorkers for Beverage Choice submitted a petition opposing the proposal, signed by more than 90,000 people."[11]

The DOHMH made no changes to the initial proposal submitted to the public. Instead, the DOHMH provided the Board with a memorandum summarizing and responding to the written comments. In the memorandum, the DOHMH pointed out that "the scientific evidence supporting associations between sugary drinks, obesity, and other negative health consequences is compelling."[12]

The DOHMH also noted that the proposed rule would have a "material impact" on consumption of sugary drinks because "patterns of human behavior indicate that consumers gravitate toward the default option." Thus, the DOHMH concluded, "if the proposal is adopted, customers intent upon consuming more than 16 ounces would have to make a conscious decision to do so."[13] In response "to the critics' assertion that the rule would result in economic hardship for certain businesses, the agency responded that the freedom to sell large sugary drinks 'means little compared to the necessity to protect New Yorkers from the obesity epidemic.'"[14]

On September 13, 2012, the Board of Health voted to adopt the rule, and a "Notice of Adoption of Amendment (§ 81.53) to Article 81 of the Health Code" was published in the City Record. The rule was scheduled to go into effect on March 12, 2013.[15]

Litigation in the Supreme Court

Before the rule went into effect, it was challenged by a number of groups who brought an action in the Supreme Court of New York County seeking to invalidate the soda container rule.[16] The petitioners claimed that the Board's adoption of the Portion Cap Rule usurped the role of the City Council and imposed social policy by executive fiat, contending that the Board "may not bypass the legislature, under the guise of public health, and make fundamental policy choices and establish far-reaching new policy programs all by themselves, no matter how well-intentioned they may be."[17]

The Supreme Court declared the regulation invalid, primarily on the ground that the Board of Health exceeded its authority and violated the separation of powers doctrine set out in *Boreali v. Axelrod*.[18] It also found that the rule itself was arbitrary and capricious.[19]

The First Department's Decision—*Boreali* as a Controlling Case

The principal issue on appeal was whether the Board of Health exceeded the bounds of its authority as an administrative agency when it promulgated the soda container rule. The First Department held that the Board of Health exceeded the bounds of its lawfully delegated authority as an administrative agency when it promulgated the rule and therefore affirmed the Supreme Court decision.[20]

The court first pointed out that the starting point for analyzing whether the rule violates the separation of powers doctrine is the New York State Court of Appeals' landmark decision in *Boreali v. Axelrod*.[21] *Boreali* depended upon and articulated a type of delegation doctrine. A state administrative agency not only is a creature of the legislature, it also "may not, in the exercise of rulemaking authority, engage in broad-based policy determinations."[22] The court acknowledged that the line between permissible rulemaking authority and impermissible policy determination is "difficult to demarcate."[23]

In *Boreali*, which involved regulations promulgated by the Public Health Council (PHC), the Court relied on four factors to determine whether an agency acted beyond the bounds of its delegated authority and engaged in impermissible legislative policymaking:

> First, the Court found that the PHC had engaged in the balancing of competing concerns of public health and economic costs, "acting solely on its own ideas of sound public policy." Second, the PHC did not engage in the "interstitial" rule making typical of administrative agencies, but had instead written "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." Third, the PHC's regulations concerned "an area in which the legislature had repeatedly tried—and

> failed—to reach an agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions." The separation of powers principles mandate that elected legislators, rather than appointed administrators "resolve difficult social problems by making choices among competing ends." Fourth, the PHC had overstepped its bounds because the development of the regulations did not require expertise in the field of health.[24]

The First Department also relied on *Matter of Campagna v. Shaffer*, in which the Court of Appeals explained that "[a] key feature of the *Boreali* case… was that the Legislature had never articulated a policy regarding public smoking."[25] According to the First Department, subsequent to *Boreali*, "courts have consistently held that so long as an action taken by an administrative agency is consistent with the policies contemplated by the Legislature, the action taken will survive constitutional scrutiny under the doctrine of separation of powers."[26]

The First Department's Decision—Applying *Boreali*

The First Department noted that the Board of Health, although delegated a broad range of powers that are essentially legislative in nature, has no inherent legislative power.[27] Accordingly, the court stated, the Board derives its power to establish rules and regulations directly and solely from the City Council. The court then went on to assess the factors enunciated in *Boreali*. In doing so, it found that all four *Boreali* factors indicative of the usurpation of legitimate legislative functions are present in this case.[28] A brief summary of the analysis of each factor follows.

The first *Boreali* factor is whether the agency has balanced competing concerns of public health and economic costs. In *Boreali*, the court found that the PHC's inclusion of exceptions and exemptions that reflected the agency's own balancing of economic and social implications of the regulations was clear evidence that the regulatory scheme was inconsistent with the agency's legislative authority.[29] The PHC had exempted certain establishments, such as bars and certain restaurants, from the indoor smoking bans. According to the court, this effort to "strike the proper balance among health concerns, costs and privacy interests…is a uniquely legislative function."[30] In *Boreali*, the presence of exemptions was telling because such exemptions did not reflect the agency's charge to protect public health but instead reflected the agency's own policy decisions with respect to the balance between protecting public health and ensuring economic viability of certain industries.[31]

The First Department found that the first *Boreali* factor was satisfied in this case. The DOHMH and the Board members themselves indicated that they weighed the potential benefits against economic factors during the public comment period and public hearings.[32] Just as in *Boreali*, the exemptions and exceptions to the soda container rule also evince a compromise of social and economic concerns as well as private interests, the First Department held.[33] The rule does not apply to all FSEs, nor does it apply to all sugary beverages.[34]

The court also found that the soda container rule "looks beyond health concerns, in that it manipulates choices to try to change consumer norms."[35] In essence, the rule was inherently a policy decision that reflected a balance between health concerns, an individual consumer's choice of diet, and business financial interests in providing the targeted sugary drinks.[36] Such a policy decision is suited for legislative determinations, the court stated, because it involves "difficult social problems" that must be resolved by "making choices among competing ends."[37] In sum, the court held that the first *Boreali* factor was met because the selective restrictions enacted by the Board of Health reveal that the health of New York City residents was not its sole concern.[38]

The second *Boreali* factor—whether the Board of Health exceeded its authority by writing on "a clean slate" rather than using its regulatory power to fill in the details of a legislative scheme—was also met in the soda container case. Administrative agencies may engage in what is known at "interstitial rule making," or the process of filling in the details of a broad legislative mandate and making that legislation operational.[39] An agency exceeds the limits of its authority when the agency's action goes beyond filling in the details of a broad legislative scheme.[40]

In *Boreali*, there was no legislation authorizing the PHC to regulate smoking in public places. Thus, the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance."[41] Similarly, the First Department found that in the soda container case the Board's actions did not constitute the type of interstitial rule making described in *Boreali*. Here, the Board of Health did not fill in the gaps of an already existing legislative scheme, but instead wrote on a clean slate. In the First Department's view, the Board's actions were not the sort of interstitial rule making that typifies administrative regulatory activity.[42]

The Board of Health insisted that it possessed the authority to act, citing the City Charter's grant of broad authority to regulate "all matters affecting health in the City."[43] The court held that although the Board's power is broad in scope, the City Charter did not authorize the Board's actions.[44] Such an exercise of power

would be an "unfettered delegation of legislative power."[45] In addition, the First Department stated the City Charter provides that the Board of Health may exercise its power to modify the health code as long as it is "not inconsistent with the constitution," or with the laws of the state and the City Charter.[46] The court held that the City Charter's Enabling Act, granting the Board of Health explicit power to establish, amend, and repeal the Health Code, was clearly intended by the legislature to provide the agency with the discretion to engage in interstitial rule making designed to protect the public from health hazards.[47] Thus, the court found that because Board of Health did not designate soda consumption as a health hazard per se, the Board of Health's action in curtailing its consumption was not the type of interstitial rule making intended by the legislature.[48]

The third *Boreali* factor focused on the fact that the legislature had repeatedly tried to pass legislation implementing indoor smoking bans, yet had failed to do so.[49] In the *Boreali* court's view, this reflected the legislature's inability to agree on the "goals and methods that should govern in resolving" the issue.[50] There, the agency's attempt to impose a solution of its own was improper. The court also distinguished the case of failed legislative action from mere inaction, holding that mere legislative inaction on a particular issue should not satisfy this factor.[51]

With respect to the soda container rule, the First Department noted that both the City and State legislatures have unsuccessfully attempted "to target sugar-sweetened beverages."[52] The City Council rejected several resolutions such as warning labels, prohibiting food stamp use for purchase, and taxes on such beverages.[53] The State Assembly has introduced, but not yet passed, bills prohibiting the sale of sugary drinks on government property and prohibiting stores with ten or more employees from displaying candy or sugary drinks at the check-out counter or aisle.[54] The court found that although the rule employed different means of targeting sugary beverages, it nevertheless pursued the same end and thus addressed the same policy area in which measures had been rejected by both the State and City legislatures.[55] According to the Court this was a strong indication that the legislature remains unsure of how best to approach the issue of sugary beverage consumption.[56] The First Department concluded that the legislature's inaction demonstrated that the legislature had been unable to reach an agreement on the goals and methods that should govern in resolving a society-wide health problem.[57]

The final *Boreali* factor in determining whether an administrative agency has exceeded the bounds of its legislative authority is whether any special expertise or technical competence was involved in the development of the regulation. In *Boreali*, the PHC used its broad legislative grant of authority to develop a "simple code" that banned indoor smoking and exempted certain groups.[58] The *Boreali* court found that no technical competence or agency expertise was necessary to develop this code.[59] This indicated to the court that the agency had engaged in unauthorized policy-making rather than interstitial rulemaking.[60]

In the soda container case, the court found that the Board of Health did not exercise any special expertise or technical competence in developing the soda container rule.[61] Rather, the rule was drafted and proposed by the Office of the Mayor and submitted to the Board, which enacted it without making any substantive changes.[62] This factor, although less compelling than the others, also weighed in favor of invalidating the rule, according to the First Department.[63]

After applying the four-factor test set forth in *Boreali*, the court concluded that the Board of Health had overstepped the boundaries of its authority by violating the state principle of separation of powers. The court did not address the argument that the regulation was arbitrary and capricious.[64]

Framing the Dispute in the Appellate Division

The litigation over the soda container rule has involved a number of disputes over how to frame the controversy. As an initial matter, as noted earlier, the petitioners referred to the rule in their brief before the First Department as "the Ban"[65]—a term that suggests an authoritarian edict that deprives consumers of certain beverages. It frames the dispute as a zero-sum contest in which the Board of Health undeniably denies consumers the opportunity to purchase soda. The City, by contrast, defends what it calls "the Portion Cap Rule"—a phrase that is meant to be neutral and scientific and indicates an effort to clothe the rule in the garb of scientific expertise. There is no explicit mention of soda or sugar and no suggestion that consumers are being deprived of choices. In determining whether the Board has engaged in the broader task of policymaking or the more limited act of interstitial rulemaking, it surely makes a difference in how the Board's rule is defined and described. The Soda Ban suggests the former while the Portion Cap Rule connotes the latter.

In their briefs before the First Department, the parties also engaged in a framing dispute over the extent to which the case involved an abstract question of law or a practical matter of policymaking. The petitioners adopted a formalistic approach, insisting that there should be no discussion of science or policy unless the Board of Health, as a threshold matter, possesses the authority to adopt the soda container rule. The preliminary statement of their brief begins: "This case is not about obesity in New York City of soft drinks. It is about whether the Mayor and his Board of Health can usurp the authority of the City Council and decide for

themselves what the law should be."[66] For the petitioners, the dispute was one that should be resolved within the confines of black letter law.

The City, by contrast, sought to persuade the court that obesity is a crisis that demands governmental action. The preliminary statement of the City's brief states: "The Portion Cap Rule regulates how businesses serve a product whose overconsumption is driving an epidemic."[67] Before addressing the legal issues raised by the petitioners, the City devoted nearly two pages of its preliminary statement to describing the extent of the obesity "health crisis" and the role of sugar and soda in causing obesity; it then explained how the soda container rule "is a measured response" to that crisis.[68] Confronted with such an alarming health concern, the brief suggests, surely the Board of Health has the authority to act—especially when its actions are modest and supported by sufficient data.

The last framing dispute has been, thus far, the most consequential. And that dispute is over the authority invested in the Board of Health. Is the Board wrongly claiming, as the petitioners insist, that it is "unique among all State and City agencies" and therefore "not bound by constitutional limitations imposed by the separation of powers"?[69] Or is the City correct in asserting that the Board is not "typical" and in fact "is empowered to issue substantive rules and standards in public health matters," with the authority to protect "the health of New Yorkers from chronic and preventable diseases and conditions"?[70] Thus far, the petitioners have persuaded the courts to accept their view of the Board's authority.

The First Department acknowledged that the New York City Charter "explicitly grants" the Board of Health "the power to supervise and regulate the safety of the water and food supplies" in order to address "inherently harmful matters," but found that mere "soda consumption" did not constitute such a "health hazard."[71] Rather, the court stated, "the hazard arises from the consumption of sugary soda in 'excess quantity.'"[72] Therefore, the First Department reasoned, the Board's "action in curtailing its consumption was not the kind of interstitial rulemaking" permitted under *Boreali*. This discussion accords with how the petitioners have framed the dispute.

However, if it is accepted that obesity is a crisis that results, in large part, from the consumption of sugary soda in excess quantities—that is, if excessive soda consumption is found to be a "health hazard"—and it is accepted that the soda container rule does not ban the consumption of soda but only regulates how it may be sold to consumers, then isn't the soda container rule the sort of interstitial rulemaking allowed under *Boreali*? The answer depends, it would seem, on how the rule is framed by the parties and, ultimately, by the Court of Appeals.

Endnotes

1. *See* Robert H. Frank, *Mixing Freedoms in a 32-Ounce Soda,* N.Y. Times, March 24, 2013, at BU6; William Glaberson, *Legal Battle Over Limits on Sugary Drinks May Outlast Bloomberg's Tenure,* N.Y. Times, Mar. 13, 2013, at A20; E.C. Gogolak, *Another State Court Rejects Limits on Sugary Drinks,* N.Y. Times, July 31, 2013, at A17; Michael M. Grynbaum, *City Argues to Overturn Ruling That Prevented Sugary Drinks Limits,* N.Y. Times, Junes 12, 2013, at A21; Anemona Hartocollis, *To Gulp or to Sip? Debating a Crackdown on Big Sugary Drinks,* N.Y. Times, June 1, 2012, at A22. *Compare* Editorial, *A Ban Too Far,* N.Y. Times, June 1, 2012, at A26 (opposing the City's measure), *with* Op-Ed., *Bring back the soda ban,* N.Y. Daily News, Apr. 26, 2013, http://www.nydailynews.com/opinion/bring-back-soda-ban-article-1.1327732 (supporting the portion cap rule).
2. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 204 (1st Dep't 2013).
3. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *16 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd*, 970 N.Y.S.2d 200 (App. Div. 1st Dep't 2013).
4. *See* Joel Stashenko, *Court of Appeals to Weigh Ban on Big Drink Containers,* 250 N.Y. L.J., 1, 4 (Oct. 18, 2013), *available at http://www.newyorklawjournal.com/pdfwrapper.jsp?sel=NYLJfridayA* (discussing the New York State Court of Appeals decision to review the First Department's holding that the Board of Health did not have the authority to adopt the portion cap rule).
5. Boreali v. Axelrod, 71 N.Y.2d 1, 11 (1987).
6. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 204.
7. *Id.*
8. *Id; see also* N.Y. City R. & Regs. tit. 24, § 81.03(s) (2012) (defining an FSE as a "place where food is provided for individual portion service directly to the consumer, whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle.").
9. Michael M. Grymbaum, *Mayor Planning A Ban on Big Sizes of Sugary Drinks,* N.Y. Times, May 31, 2012, at A1.
10. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 204.
11. *Id.* at 205.
12. *Id.*
13. *Id.*
14. *Id.*
15. The First Department provided the following summary of the rule: The "Portion Cap Rule limited the maximum self-service cup or container size for sugary drinks to 16 fluid ounces for all FSEs within New York City, and defined 'sugary drink' as a non-alcoholic carbonated or non carbonated beverage that is sweetened by the manufacturer or establishment with sugar or another caloric sweetener, has greater than 25 calories per 8 fluid ounces of beverage, and does not contain more than 50 percent of milk or milk substitute by volume as an ingredient." *Id.* The court elaborated: "The rule targeted non-diet soft drinks, sweetened teas, sweetened black coffee, hot chocolate, energy drinks, sports drinks, and sweetened juices, but contained carve-outs for alcoholic beverages, milkshakes, fruit smoothies and mixed coffee drinks, mochas, lattes, and 100% fruit juices." Furthermore, the rule "applies only to those FSEs that are subject to the agency's inspections. As a result, the ban applies to restaurants, delis, fast-food franchises, movies theaters, stadiums, and street carts, but not to grocery stores, convenience stores, corner markets, gas stations and other similar businesses." *Id.*

16. The petitioners included New York Statewide Coalition of Hispanic Chambers of Commerce, The New York Korean-American Grocers Association, Soft Drink and Brewery Workers Union, Local 812, International Brotherhood of Teamsters, The National Restaurant Association, The National Association of Theatre Owners of New York State, and The American Beverage Association.
17. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 206.
18. Boreali v. Axelrod, 71 N.Y.2d 1,(1987), *discussed in* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *8–18 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd*, 970 N.Y.S.2d 200 (App. Div. 1st Dep't 2013).
19. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, at *20.
20. The decision was written by the Hon. Dianne T. Renwick. The other judges on the panel were David Friedman, Rosalyn H. Richter, and Paul G. Feinman. The decision was unanimous; there was no dissent.
21. *See Boreali*, 71 N.Y.2d at 6 (holding that although the State Legislature "gave the Public Health Council (PHC) broad authority to promulgate regulations on matters concerning public health" it nevertheless held that "the scope of the PHC's authority…was limited by its role as an administrative, rather than a legislative body."); *see also* N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 207 (2013) ("In *Boreali*, the PHC promulgated regulations prohibiting smoking in a wide variety of public facilities following several years of failed attempts by members of the state legislature to further restrict smoking through new legislation."). *Id.* The regulations at issue in *Boreali* were invalid "because, although the PHC was authorized to regulate matters affecting public health, the agency 'stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.'" *Id.* (quoting *Boreali*, 71 N.Y.2d at 9).
22. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 206-07 (quoting Rent Stablization Ass'n v. Higgins, 83 N.Y.2d 156, 169 (1993), *cert. denied*, 512 U.S. 1213 (1993)).
23. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 207.
24. *Boreali v. Axelrod*, 71 N.Y.2d 1, 14 (1987) (alteration in original) (citation omitted).
25. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 208 (citing and discussing Matter of Campagna v. Shaffer, 73 N.Y.2d 237, 243 (1979)).
26. *Id.* at 208.
27. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce* ,970 N.Y.S.2d at 206 (citing *People v. Blanchard*, 288 N.Y. 145 (1942)).
28. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 208.
29. *Id.* (quoting *Boreali*, 71 N.Y.2d at 12).
30. *Id.*
31. *Id.*
32. *Id.*
33. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 209.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (quoting *Boreali*, 71 N.Y.2d at 13).
38. *Boreali*, 71 N.Y.2d at 10.
39. *Id.* (quoting *Boreali*, 71 N.Y.2d at 13).
40. *Id.*
41. *Boreali*, 71 N.Y.2d at 13-14.
42. *Id.* at 13.
43. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 210.
44. *Id.* at 211.
45. *Id.*
46. *Id.*
47. *Id.*
48. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 211.
49. *Id.*
50. *Boreali*, 71 N.Y.2d at 8.
51. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 212.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 212.
57. *Boreali*, 71 N.Y.2d at 13.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 213.
62. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 213.
63. *Id.*
64. *Id.*
65. Brief for Respondents at 2, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12 (App. Div. 1st Dep't Apr. 24, 2013).
66. Brief for Respondents at 1, N.Y. Statewide Coal. of Hispanic Chambers of Commerce, No. 653584/12 (App. Div. 1st Dep't Apr. 24, 2013).
67. Brief for Petitioner at 1, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12 (App. Div. 1st Dep't Mar. 25, 2013).
68. Brief for Petitioner, *supra* note 67, at 2-4.
69. Brief for Respondents, *supra* note 65, at 3.
70. Brief for Petitioner, *supra* note 67, at 3-4.
71. *N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 970 N.Y.S.2d at 211.
72. *Id.*

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When Is an RLUIPA Claim Justiciable?

By Alyse Terhune

In the Fall 2012 issue of the *Municipal Lawyer*, I reviewed the five principles applied by New York courts when deciding Religious Land Use and Institutionalized Persons Act (RLUIPA)[1] cases[2] and sounded a note of warning that environmental review under the State Environmental Quality Review Act (SEQR)[3] can run afoul of RLUIPA when used as the "primary vehicle for making a zoning decision."[4] Here, I will consider the issue of justiciability in as-applied RLUIPA claims. I will leave the issue of facial challenges for another day.

Before a court reaches the merits of an RLUIPA claim, it must first decide whether it has jurisdiction to decide the case. As a threshold matter, the issues involved must be issues that can be decided by a court, not by a political body or agency,[5] and the complainants must have standing to bring the case. In order to establish Article III standing, the plaintiff must establish three things:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly… trace[able] to the challenged action of the defendant, and not…th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision."[6]

If there is no remediable injury in fact fairly traceable to the defendant, then there is no "case or controversy" and the complainants do not have standing to bring the suit.

But the jurisdictional inquiry does not end there. Once the court has established that the issues presented are legal and not political, that the complainants have standing to sue and have brought the action within the required statute of limitations, the court must then decide mootness and ripeness. With respect to mootness, the court must determine whether some other action or failure to act has stripped the court of jurisdiction. For example, the court must examine whether a change in circumstance rendered the controversy moot, such as a challenge to a residential use variance after construction has been substantially completed.[7] With respect to ripeness, the court must decide whether the decision is "final." A question often implicated in the finality inquiry is whether the petitioner has exhausted available administrative remedies**.** Whether an RLUIPA claim is justiciable often turns on the doctrine of ripeness.

Ripeness Defense in RLUIPA Claims

Unlike facial challenges, which "are generally ripe the moment the challenged regulation or ordinance is passed,"[8] "[an RLUIPA] claim does not become ripe at the first whiff of government insensitivity or whenever a government official takes an adverse legal position, even if one potential response is to curtail protected activities."[9] In RLUIPA cases, as in many land use matters, it is not unusual for defendants to move to dismiss on ripeness grounds, arguing that the decision was not final or that the plaintiff has not exhausted its administrative remedies. Plaintiffs survive the motion if they can offer persuasive proof that a definitive position on the issue has been reached and the decision inflicted an actual concrete injury in the first instance, or further pursuit of an application or administrative remedy would have been futile in the second instance.

Ripeness Under *Williamson*

Courts faced with a ripeness defense in land use cases, including RLUIPA cases, often turn to the first prong of a two-prong test articulated by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[10] In *Williamson*, the Supreme Court overturned damages awarded by the Sixth Circuit to a landowner as just compensation after the Sixth Circuit concluded that the application of zoning regulations amounted to a "taking" in violation of the Fifth Amendment. The Supreme Court reversed, finding the claim was not ripe for review because the government entity charged with implementing the regulations had not reached a final decision regarding the application of the regulations to the property. The Court concluded the claim was not ripe because (1)

the property owner had not exhausted its administrative remedies by seeking variances or waivers that would have allowed it to develop its land, thus there had been no "final" decision[11] and (2) the property owner failed to seek just compensation through state procedures provided for that purpose.[12] The Court determined that it did not have jurisdiction to decide the case because the claim was not ripe under either of these two independent prongs.[13] Of the two prongs, "[t]he central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the [land use authority] determining the permitted use for the land."[14] Thus, under *Williamson,* a takings claim would not reach the second prong of the ripeness test absent a final decision under the first prong.[15]

The Finality Prong of *Williamson* in "As-Applied" RLUIPA Cases

Although *Williamson* involved a Fifth Amendment takings claim, the Second Circuit and other courts have employed the first prong of the *Williamson* test, known as the "prong-one ripeness" test,[16] to determine justiciability in as-applied challenges under RLUIPA, the First Amendment, the Equal Protection Clause, and the Due Process Clause.[17] This is also known as the "finality" prong of the ripeness doctrine. Under *Williamson's* finality analysis a land use claim is not ripe for judicial review unless "the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" and the injured party has exhausted available administrative remedies.[18]

Williamson's finality test was applied in the seminal Second Circuit case, *Murphy v. New Milford Zoning Commission*.[19] In *Murphy*, the New Milford Zoning Commission issued a cease and desist order after neighbors complained that Robert and Mary Murphy were holding weekly prayer meetings in their home for 25 or more non-family individuals, finding that the meetings were not a customary accessory use in the single-family residential zone. The Murphys did not appeal the order to the zoning board, as they could have, but instead filed RLUIPA and First Amendment Free Exercise claims in federal district court. The district court determined that the RLUIPA claim was ripe for review because "only institutions such as a church…[and] not individuals" had to appeal a local land use decision to a zoning board of appeals or apply for a variance before commencing a federal action.[20] The district court reserved decision on the Free Exercise claim.

The Second Circuit reversed, holding that the case was not ripe under the first prong of the *Williamson* ripeness test. In an interesting foray into congressional intent, the court concluded that it was not necessary to distinguish the RLUIPA claim from the Free Exercise claim to determine ripeness in the RLUIPA context. The court reasoned that RLUIPA was Congress's attempt to codify existing Free Exercise jurisprudence, even though "[o]ur decision today does not require us to determine whether Congress in fact succeeded in this endeavor."[21] Therefore, although the burden to show finality (or futility) is "somewhat relaxed" when determining whether a Free Exercise First Amendment claim is ripe, the Second Circuit found that it was not necessary to relax the doctrine when determining an intertwined Free Exercise and RLUIPA claim. This decision was consistent with earlier (and later) Second Circuit decisions.[22]

The court applied the "less relaxed" *Williamson* ripeness test to the *Murphy* facts and concluded the RLUIPA and Free Exercise claims were not ripe for judicial review. Under the first prong of *Williamson,* the Murphys were required to (1) obtain a final decision from the land use authority, and (2) exhaust the variance or waiver process so that the court could know exactly how the regulation was applied to the Murphys' land, which would also (3) foreclose the possibility that administrative relief could decide the issue on non-constitutional grounds, thus keeping the federal courts from "becoming the Grand Mufti of local zoning boards."[23]

In addition, by not appealing the order, the Murphys did not establish a factual record upon which the court could act. As a result, the court could not answer key questions, *to wit*: Had the zoning law been applied in a discriminatory manner? Was attendance also limited at regularly scheduled secular events or had variances been granted for such events? How did New Milford arrive at less than "25" as the threshold number of non-family members who could attend the prayer meetings before a violation occurred? Could the prayer meetings have been accommodated in some way without snarling neighborhood parking? Without an appeal, and the record it produces, the court was being asked to resolve constitutional claims that hinge on factual circumstances not fully developed.

Furthermore, the court pointed out that an appeal would have immediately stayed the cease and desist order under Connecticut General Statutes, § 8-9,[24] and that, even if the Murphys had done absolutely nothing, New Milford did not have the authority to impose civil fines or imprisonment without first filing suit in Connecticut Superior Court.[25] Therefore, the order alone did not impose an immediate injury on the Murphys.

Finally, in the absence of a factual record that would have been established had the Murphys exhausted the administrative remedies available to them, the Second Circuit found that it could not determine

whether New Milford's cease and desist order served a "compelling government interest" and was the "least restrictive means of furthering that compelling government interest" as is required under RLUIPA.[26]

Departures from *Williamson*

Not all circuit courts apply *Williamson*'s severe finality test when determining ripeness in land use and RLUIPA cases. If the court determines that the mere enactment of a land use law harms the plaintiff, the court will address the merits of the case regardless of whether a final decision has been reached.

For example, in *Roman Catholic Bishop v. City of Springfield*,[27] decided July 22, 2013, the First Circuit considered whether a city ordinance that placed a restriction on one, and only one, church parcel in a historic district violated RLUIPA and the Free Exercise clause. The ordinance was enacted four months after the Roman Catholic Bishop of Springfield (RCB) announced that it would close Our Lady of Hope Church, built in 1925. Under Roman Catholic canon law, the church had to be "deconsecrated" before the building could be used for another purpose. Deconsecration required the Bishop to protect religious ornamentation and, in extreme cases, demolish the church if the ornamentation could not be removed or otherwise protected before the building was put to a "profane" use, i.e., any use that was detrimental to the good of souls. Placing Our Lady of Hope Church in a historic district required the RCB to subject its "deconsecration" plans to the city's historic commission before doing anything to the outside of the building. It was clear on the facts that the ordinance was enacted to prevent the RCB from demolishing the church, if it came to that.

The day after the ordinance went into effect, RCB filed First Amendment Free Exercise, RLUIPA, and state constitutional claims. On appeal, the First Circuit ruled that only the facial challenge was ripe, finding that RCB's deconsecration planning, otherwise governed by religious canon, was subject to decision making by the city historic commission.

However, in the absence of an application and subsequent record, the court found that the mere enactment of the ordinance did not impose a substantial burden on religious practice under RLUIPA or show that the RCB was treated differently than non-religious institutions. Thus, the as-applied challenge did not meet the ripeness test because the RCB had taken no action with regard to deconsecration and had not made even one submission to the historic commission. The court determined that in the absence of an application RCB's "claims lack[ed] the requisite concreteness to warrant resolution of whether hypothetical outcomes transgress RLUIPA or either the federal or state constitutions."[28]

Even though the First Circuit arguably reached a similar conclusion as the Second Circuit might have reached under *Williamson*, the First Circuit relied on traditional notions of ripeness rather than the "specialized *Takings Clause* ripeness doctrine" formulated in *Williamson* to determine that the facial challenge was ripe but the as-applied challenge was not. The court explained that traditional ripeness analysis focuses on two factors, "fitness" and "hardship." On the one hand, fitness is determined based on its own two-prong analysis (1) whether there is jurisdiction (a case or controversy) and (2) whether it is prudent to decide the case or whether it should be postponed until further administrative action might dispel the constitutional issues. On the other hand, the hardship inquiry is wholly prudential in nature—i.e., has there been a concrete injury? Thus, under the traditional ripeness analysis employed by the First Circuit, the mere enactment of the ordinance was justiciable under the two-prong "fitness" test because it created a controversy and subjected certain of RCB's religious canons to secular oversight. But, the plaintiff failed to meet the "hardship" prong because, in the absence of an application, the court could not know how the ordinance would be applied to the RCB.

Likewise, the Eleventh Circuit has declined to apply the severe finality prong of *Williamson* to RLUIPA cases where it found that the mere enactment of the law inflicted injury. In *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*,[29] the court explained:

> [W]here…the plaintiff alleges that the mere act of designating his or her property historic was motivated by discriminatory animus, *Williamson* is inappropriate because the injury is complete upon the municipality's initial act, and staying our hand would do nothing but perpetuate the plaintiff's alleged injury. In such cases, we think traditional notions of ripeness provide the appropriate mode of analysis, and so we apply them here.

The dispute arose in *Temple B'Nai* when, due to falling attendance, the Temple aligned its religious beliefs away from Conservative Judaism, "a modern approach to the religion that seeks to conserve traditional elements of the faith but nonetheless permits for some degree of modernization," to Orthodox Judaism, which applies "a rather strict interpretation and application of Talmudic law."[30] The Temple, a former Lutheran Church, had a footprint in the form of a triangle to symbolize the Christian Holy Trinity and a floor plan in the shape of a crucifix. In order to

conform to Orthodox beliefs, the Temple building had to be reconfigured so that the seating area faced west towards Jerusalem and men and women sat in separate sections. The required changes led to the decision to demolish the building and construct a new Temple that adhered to Orthodox precepts.

The former Temple congregation, including the Mayor, objected to the proposed demolition. The Mayor had been instrumental in organizing a reunion at the Temple for approximately 200 local Holocaust survivors. The reunion was held in March 2004. The Temple became Orthodox later that same year and the Mayor left the Temple congregation. When Temple representatives met with the Mayor to discuss the expansion plans, the Mayor was anything but receptive, allegedly referring to the Sephardic Jewish community as a "bunch of pigs" and using an expletive when the Rabbi asked if the Mayor could be quoted on that.[31]

It went downhill from there, if that is possible. The City unsuccessfully tried to buy the property, which was next to City Hall. The Mayor directed the City's code enforcement officer to inspect the Temple and 12 separate violations were issued over a 17-month period between 2007 and 2009. Multiple building and demolition permits were denied and a temporary moratorium on all permits for the demolition of any non-residential structures was enacted pending the City's study of potential additions to the City's register of historic places. Finally, in June 2010, the City's historic preservation board designated the Temple, built in 1964, as a historic landmark, based in part upon the 2004 Holocaust survivor reunion. Although the historic preservation board had considered other properties for inclusion, including the City's first 4-story hotel, the Golden Strand, built in 1946 and host to visitors from Grace Kelly to members of the Dupont, Vanderbilt and Guggenheim families, as well as the last Florida residence of Babe Ruth, only the Temple was honored with historic site designation. In fact, the Temple was the City's first and only historic landmark. Designation as a historic site meant that the Temple could not be demolished. The Temple commenced a lawsuit claiming RLUIPA, Free Exercise, and other state and federal constitutional violations.

Like the First Circuit in *Roman Catholic Bishop of Springfield*, decided a month earlier, the Eleventh Circuit declined to apply *Williamson's* prong-one finality ripeness test to determine whether *Temple B'Nai's* claims were ripe for review. Instead, the court focused on the "fitness" and "hardship" inquiries imbedded in traditional ripeness principles. The court found that the Temple's RLUIPA, Free Exercise, and other constitutional claims were justiciable because the Temple suffered a concrete injury stemming from the initial act of designating it a historic site. It was not necessary to further develop the record to answer the constitutional issue of "whether the City designated the Temple to be a historic site for discriminatory reasons" because "the record is sufficiently developed so as to render that issue fit for judicial resolution." In fact, "that issue became as ripe as it will ever be the moment the Temple was initially designated a landmark."[32]

The Eleventh Circuit cited to the First Circuit's reasoning in *Roman Catholic Bishop of Springfield* when it determined that the Temple's allegations were ripe for review. Certainly, the two cases have a similar fact pattern. Both buildings were given single-site historic landmark designation in an effort to prevent possible demolition. Also, the plans for historic landmark designation were set in motion by members of the former congregation of Our Lady of Hope Church, and–arguably–the City Commission of Sunny Isles where three of the five Commissioners who designated the building a historic landmark (the Mayor and two others) were former members of the Temple's Conservative congregation.[33]

The Public Face of Government

In these two cases the "public face" of the government–officials' deeds and words–infused the records with a veneer of finality sufficient to satisfy traditional notions of ripeness, even in the absence of a "final" land use decision as required under *Williamson*. For example, in addition to the alleged name-calling and expletive used by the Mayor of Sunny Isles Beach, the *Temple B'Nai* court specifically relied on two lengthy quasi-judicial public hearings held before the Preservation Board and the City Commission to determine that the issue was "clearly primed and at the ready for judicial review."[34] During the public hearing before the City Commissioners, Gerry Goodman, a member of the former congregation and current commissioner, asked the Rabbi why the Temple was closed on certain days, restricting Goodman's visits to a loved one's memorial plaque. Goodman also asked the Rabbi whether the Rabbi had called the commissioner an anti-Semite in the local newspaper. Immediately following Councilman Goodman's questions, Commissioner George "Bud" Scholl, who identified himself as the former chairman of the historic preservation board and "the only non-Jew on the Commission," characterized the argument for adopting an ordinance that would "burden [Temple B'Nai's] property rights" as "emotional" and "a little flimsy." The Eleventh Circuit quoted his comments at length. "Despite Commissioner Scholl's comments" the ordinance was adopted. Councilman Scholl cast the only dissenting vote.[35]

Similarly, in *Roman Catholic Bishop of Springfield*, the First Circuit found that the City Council's actions were

sufficient to infer unconstitutional intent. For example, on at least two occasions RCB's attorney warned the City Council that creating the single-parcel historic district might violate RCB's constitutional rights. Although the ordinance was referred to the City's law department, the City Council acted before waiting for a response. In fact, during the public hearing, the City Council called in the City solicitor and asked whether the law department had reviewed the ordinance. The solicitor stated that the review had not yet been completed and offered to consult with the Council in executive session. The offer was refused. Not only had the City Council acted before it heard from its law department, it also voted without the benefit of a report from the Council subcommittee to which the ordinance had been referred for study. Finally, the court noted that during the public hearing, one member of the City Council asked RCB's attorney why parishioners had not been invited to participate in the pastoral planning process. When the attorney responded that they had, the councilman accused him of lying. Taken together, the First Circuit concluded that the City Council's actions implied unconstitutional animus toward the RCB.

However, the facts of these two cases diverge in one important area. In *Roman Catholic Bishop of Springfield,* the RCB filed its lawsuit one day after the challenged ordinance was enacted without filing even one land use application. RCB's as-applied challenges were dismissed because they were based on speculative future harm, although, as discussed above, its facial challenges were considered ripe for review. In contrast, the Temple B'Nai Zion had filed several land use applications and each had been denied. Even so, the Eleventh Circuit did not base its decision on the denial of those applications or the failure to seek a final resolution of how the property would ultimately be affected by the historic landmark designation, which would have been an essential element under *Williamson*; rather, the court determined that the alleged discriminatory designation of the property as historic inflicted a present injury under the traditional "fitness" and "hardship" doctrine of ripeness.

Thus, at least two circuit courts have declined to apply the severe *Williamson* prong-one "finality" ripeness test to RLUIPA challenges where the complainant can reasonably show discriminatory animus on the part of the land use authority. Unfortunately, some individuals serving on municipal governing boards continue to make that showing relatively easy.

Williamson Redux

Notwithstanding the First and Eleventh Circuit decisions, the Second Circuit continues to rely on the finality prong of the *Williamson* ripeness test when deciding whether federal challenges to the application of land use regulations, including RLUIPA claims, are ripe for review.

As recently as October 16, 2013, the Second Circuit upheld the application of *Williamson* to an RLUIPA dispute. In *St. Vincent De Paul Place v. City of Norwich*,[36] St. Vincent's de Paul Place and St. Joseph's Polish Roman Catholic Congregation (together, the "Church") filed RLUIPA, and federal and state constitutional claims when the City denied the Church's application for a special use permit to provide services to the homeless. The Church wanted to relocate a soup kitchen and shelter to a former religious school building located at 120 Cliff Street that had been used by the Roman Catholic Diocese from 1925 until 2010. The Church had obtained a temporary six-month zoning permit to use the Cliff Street property after it had been constructively evicted from a location it had leased in downtown Norwich because the downtown building had been structurally compromised. Although the Church diligently searched for other property to buy or lease during the term of the temporary permit, it found no feasible alternative to the Cliff Street location.

The Church applied to the City for a special use permit, which was denied on December 18, 2012, "despite extensive evidence during multiple sessions of the public hearing that denial of St. Vincent's application would leave St. Vincent with no alternative location to operate."[37] On January 4, 2013, eight days before the temporary permit was due to expire, the Church sued the City in Connecticut District Court. The City issued violations on January 14, 2013, subjecting the Church to civil penalties. On February 1, 2013, the Church appealed the violations to the Zoning Board of Appeals (the "ZBA") and applied for a variance to operate the Cliff Street property.

The district court granted the City's motion to dismiss, finding that the Church failed the first prong of the *Williamson* ripeness inquiry, which "conditions federal review on a property owner submitting at least one meaningful variance application…which is necessary to determine whether a plaintiff will be granted an administrative exception to the normal land use requirements."[38] No such application had been filed at the time the action was commenced. Nor had the Church "demonstrated that application for a variance would be futile or merely remedial."[39] The Church urged the district court to apply the more relaxed ripeness inquiry established for First Amendment claims in *Dougherty v. Town of North Hempstead Board of Zoning Appeals*.[40] The Church argued that a variance application and final land use determination was not a prerequisite of judicial review under *Dougherty*. However, the district court declined to apply *Dougherty*, where, as

here, no First Amendment retaliation claim was made by the Church.

The decision was appealed to the Second Circuit.[41] The Church again argued that the lower court should have applied *Dougherty*, not *Williamson*, to the ripeness inquiry.[42] However, on May 14, 2013, before the circuit court could decide the merits, the ZBA denied the Church's application for a variance and the court asked for letter briefs from the parties on the implications of the ZBA's determination to their positions. On October 16, 2013, the Second Circuit vacated the lower court's dismissal and remanded the case for a decision on the merits. The Second Circuit acknowledged the district court's reliance on *Williamson* and clarified its holding in *Dougherty* that a First Amendment retaliation claim is afforded a relaxed ripeness inquiry where, like *Dougherty*, the plaintiff suffers an immediate injury and where pursuing additional administrative remedies would not clarify or develop the record as to the alleged injury.[43] The court found that the ZBA's determination rendered the issue ripe "even under the more stringent ripeness inquiry of Williamson County."[44]

Therefore, as of now, there does not appear to be a movement away from *Williamson* in the Second Circuit. Whether and to what extent other federal appellate courts, including future Second Circuit decisions, move away from *Williamson* toward a more relaxed finality analysis when determining RLUIPA and Free Exercise claims is yet to be seen.

Exceptions to the Finality Doctrine

The *Williamson* ripeness test is not mechanically applied and is subject to certain fact-based exceptions. Plaintiffs are excused only where they can show futility, i.e., that there is no available administrative remedy, or that the zoning authority has "dug in its heels and made clear that all such applications will be denied."[45] An alternative way zoning authorities "dig in their heels" is to exercise delay and obstruction, rather than outright disapproval, to deny the project.[46]

RLUIPA plaintiffs often plead futility. Again, the resolution of this issue is informed by Fifth Amendment takings claims that invoke *Williamson County* and its progeny's ripeness analysis. In the first instance, futility is generally rejected unless at least one application has been filed and administrative remedies to an adverse decision have been sought and rejected. However, if there is no administrative discretion to grant relief, then the futility exception applies.

For example, in *Suitum v. Tahoe Regional Planning Agency*,[47] the Supreme Court ruled that the plaintiff's takings claim was ripe for review where the landowner's Lake Tahoe property could not be developed because it was located in a watershed and no administrative appeal was available. The Court invoked the "two independent prudential hurdles" under *Williamson County*: (1) final decision, and (2) just compensation procedures. The Court found that finality was satisfied because there was no question that Suitum could not develop her land and the regional plan did not provide for variances or exceptions. The only remaining ripeness issue required the Court to determine whether the plaintiff's failure to market her "Transferable Development Rights (TDRs)" to others before filing suit constituted a failure to obtain a final decision as to the number and value of the TDRs. On this issue, the Court determined that although the parties "contest the relevance of the TDRs to the issue of whether a taking has occurred, resolution of that legal issue will require no further agency action of the sort demanded by *Williamson County*."[48]

Likewise, in *Hoehne v. County of San Benito*,[49] the Ninth Circuit held that the takings claim was ripe under *Williamson* because the county board of supervisors was required to reject subdivision plans that did not comply with the county's general land use plan. The court stated:

> It would have been futile for the Hoehnes to seek a zoning variance to accommodate their application because the supervisors, by legislative act, changed the zoning designation from a minimum lot size of five acres to one of forty acres. The record does not show that any other type of variance was available to the Hoehnes. The County indicates that the landowners could have sought a variance from the General Plan policy against development on slopes greater than thirty degrees. However, variance is not available for exceptions to the requirements of the General Plan.[50]

Thus, where the local zoning authority has no discretion to grant a variance, waiver or some other relief, the futility exception is a viable defense to the finality prong of the *Williamson* ripeness analysis.

The absence of administrative relief is a straightforward exception to the finality requirement. The more difficult claim is that administrative relief is futile because the zoning authority has "dug in its heels," especially where government obfuscation is not obvious. In fact, even though "[g]overnment authorities may not burden property by imposing repetitive or unfair land-use procedures in order to avoid a final decision,"[51] the futility exception has been applied narrowly and some courts have even held that "no amount of delay or hostility alone is enough to trigger the futility exception."[52] No better example of government delay can be found

than *Sherman v. Town of Chester*.[53] In *Sherman*, the plaintiff purchased a 398-acre tract of land in 2000 for $2.7 million and applied to the planning board for subdivision approval for a 385-unit residential development that would include an equestrian facility, baseball field, tennis courts, clubhouse, on-site restaurant, and a golf course. Over the next 11 years, the town followed a course of action that included, among other things:

1. The imposition of a moratorium on development made retroactive to the exact date of plaintiff's application;
2. The adoption of a new master plan during SEQR review of the project;
3. The modification of the zoning regulations six times during the review of the project without alerting the plaintiff—each zoning modification affected the plaintiff's development plan and necessitated substantial and costly modifications to the project; meanwhile, the plaintiff was busy amending the plan and his SEQR documents to comply with the last amended, soon-to-be-obsolete zoning law;
4. The refusal of the Town to consider the plaintiff's application while it considered another developer's application;
5. The appointment to the Planning Board of opponents to the plan;
6. The replacement of the Town engineer and subsequent cost to bring a new engineer up to speed;
7. A delay of months, apparently without reason, before the Planning Board would set a public hearing, which was then conditioned on paying $25,000 in consultant fees, for which invoices were not provided in a timely manner; and,
8. Subsequent review was conditioned on another payment of $40,000 in consultant fees.

In approximately year eight of the review, the plaintiff partnered with a business whose representative was obviously an observant Orthodox Jew, after which the town became, according to the plaintiff, even more hostile. The plaintiff claimed multiple impermissible intentions including that the Town wanted to make his property a *de facto* nature preserve, retaliation for commencing lawsuits and "because Plaintiff is Jewish, one of his business associates is Jewish… the Town residents are worried about Plaintiff creating a Hasidic community."[54] The plaintiff argued that the town had reached a "[s]ecret final decision" to block him from developing his property and alleged violations of several constitutionally protected rights, including freedom of religion, freedom to petition, substantive and procedural due process, equal protection and a taking without just compensation.[55] The Town moved to dismiss.

Incredibly, given the record, the court granted the town's motion, finding that the claims were unripe under *Williamson's* prong-one ripeness analysis because, even after 11 years of trying, the plaintiff had not received a final decision. *Apparently, seemingly endless administrative hoop-jumping does not constitute futility unless the plaintiff can prove the proverbial brick wall at the end of its travails.* "At the end of the day, Plaintiff still has not developed his property, has not derived any monetary gain from it, and, *more importantly, has not received a final decision on his plans*."[56] The court explained that:

> [Even though] the ripeness doctrine does not require litigants to engage in futile gestures such as to jump through a series of hoops, the last of which is certain to be obstructed by a brick wall, the presence of that brick wall must be all but certain for the futility exception to apply…Here, all that is known is that Plaintiff has jumped through many hoops—more, perhaps, than sound policy should require—and there are one or more hoops in the future. The inference that there is a brick wall at the end is hard to establish, and it is not established here, though it is a close case.[57]

Therefore, because there was no final decision and because the plaintiff could not show that all development plans would be rejected, the court dismissed the proceeding.

Sherman was decided by the district court on March 20, 2013, and—not surprisingly—is on appeal. It is likely that the Second Circuit will be asked to more clearly define what constitutes governmental "heel-digging" and when delay constitutes a "final" decision under the *Williamson* prong-one "finality" standard. The Second Circuit's decision on appeal will have wide implications for land use cases, including those claiming RLUIPA violations. Stayed tuned.

Endnotes

1. 42 U.S.C. § 2000cc.
2. The five general principles are: (1) religion is beneficial to public welfare; (2) a court will not second-guess legitimate, sincerely held professed religious practice; (3) local boards must make every effort to accommodate religious use; (4) religious use cannot be prohibited in a residential district and it is unclear whether it can be prohibited in a commercial district; and (5) generating tax revenue is not a legitimate purpose of zoning.

3. State Environmental Quality Review Act, ECL Article 8.

4. *Fortress Bible Church v. Feiner*, 694 F.3d 208, 216 (2d Cir. 2012) (SEQRA is a land use regulation within the purview of RLUIPA, which applies "when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions").

5. *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("It is well established that the federal courts will not adjudicate political questions.").

6. *United States v. Windsor*, 133 S. Ct. 2675, 2685-86 (2013), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (footnote and citations omitted).

7. *Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 173, 746 N.Y.S.2d 429, 434 (2002).

8. *Suitum v. Tahole Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997).

9. *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 540 (6th Cir. 2010) (RLUIPA claim unripe where religious order failed to seek zoning board interpretation or variance prior to commencement of federal proceeding).

10. 473 U.S. 172, 193 (1985) (takings claim not ripe where petitioner did not seek a variance from land use regulations or use state procedures to obtain just compensation).

11. *Id.* at 194.

12. *Id.* ("Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances.… Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its takings claim is premature.").

13. *Horne v. Dep't of Agric*., 133 S. Ct. 2053 (2013) (explaining that takings claim in *Williamson County* was not ripe because the plaintiff could not show it had been injured by the Government's action when there had been no final decision and was also not ripe because the plaintiff had not sought compensation through the procedures provided by the state); *see also Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005) (the two-prong ripeness test in *Williamson* consists of two distinct requirements, independent of each other, either one sufficient to strip the court of jurisdiction).

14. *Palazzolo v. Rhode Island*, 533 U.S. 606, 608 (2001).

15. *St. Vincent De Paul Place, Norwich, Inc. v. City of Norwich*, 3:13-cv-00017-WWE, 2013 U.S. Dist. LEXIS 34495, at *7 (D. Conn. Mar. 13, 2013) ("The *Williamson County* ripeness test consists of two prongs, but only the first prong is applicable here as this [land use] case does not involve a takings challenge.").

16. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005).

17. *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 597 (S.D.N.Y. 2013).

18. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985).

19. 402 F.3d 342.

20. *Id.* at 346.

21. *Id.* at 350, n.6.

22. *See Dougherty v. Town of North Hempstead Bd. of Appeals*, 282 F.3d 83 (2d Cir. 2002) (applying the finality requirement to First Amendment retaliations claims in the context of a land use challenge); *Adrian v. Town of Yorktown*, 210 Fed. Appx. 131 (2d Cir. 2006) (district court erred in applying *Williamson* prong-one ripeness in a First Amendment context without first evaluating whether constitutional injury had already been inflicted).

23. *Murphy*, 402 F.3d at 349, quoting *Hoehnev. Cnty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

24. Conn. Gen. Stat. § 8-9; *see also New York counterpart provisions at* Town Law § 267-a(6), Village Law § 7-712-a(6), and General City Law § 81-a(6).

25. Conn. Gen. Stat. § 8-12, *citing Gelinas v. Town of West Hartford*, 225 Conn. 575 (1993).

26. 42 U.S.C. § 2000cc(a)(1).

27. 724 F.3d 78 (1st Cir. 2013).

28. *Id.* at 87.

29. *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1357 (11th Cir. 2013).

30. *Id.* at 1351.

31. *Id.* at 1352.

32. *Id.* at 1358.

33. The decision does not clearly articulate a direct connection between the Mayor and the City's Historic Preservation Board. However, the connection can be inferred from the statements and actions of the Mayor. Also, the City Commission, headed by the Mayor, is the appointing authority for the City's Historic Preservation Board and Advisory Committee.

34. *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1359 (11th Cir. 2013).

35. *Id.* at 1354-56.

36. 3:13-cv-00017-WWE, 2013 U.S. Dist. LEXIS 34495 (D. Conn. Mar. 13, 2013).

37. *Id.* at *3-4.

38. *Id.* at *9, *see also id.* at *8 (finding that the second ripeness prong of *Williamson*, the requirement of a property owner to seek just compensation, is not applicable where the case does not involve a takings challenge).

39. *Id.* at *11.

40. 282 F.3d 83 (2d Cir. 2002).

41. *St. Vincent De Paul Place v. City of Norwich*, 13-1302-cv, 2013 U.S. App. LEXIS 20859 (2d Cir. 2013).

42. *Id.* at *3, n. 1 ("Under *Dougherty*, a claim is ripe if 1)…the [plaintiff] experienced an immediate injury as a result of [a defendant's] actions and (2) [if] requiring the [plaintiff] to pursue additional administrative remedies would further define their alleged injuries.' *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 351 (2d Cir. 2005) (citing *Dougherty*, 282 F.3d at 90)).").

43. In *Dougherty*, the plaintiff commenced an Article 78 proceeding in state court after he was denied a building permit to do construction on his non-conforming bungalow unit, which denial was upheld by the ZBA. No application for a variance was filed. Plaintiff also filed in federal court claiming due process and equal protection violations. During the pendency of the federal action, a building permit was issued (apparently in error) and substantial work was done on the unit before the permit was revoked by the Town. The district court dismissed the complaint under *Williamson* because Dougherty had not submitted an application to the ZBA for a variance. The district judge also denied Dougherty's request to amend his compliant to add a First Amendment retaliation claim, holding, without any discussion, that such an amendment would likewise be found unripe under *Williamson*. On appeal, the Second Circuit agreed that the complaint was not ripe under *Williamson*, but found that the district court erred in denying the motion to amend the complaint. The circuit court reasoned that Dougherty's First Amendment retaliation claims "should not be subject to the application of the *Williamson* ripeness test" because he suffered an immediate injury the moment the Town

revoked his permit and additional administrative action would do nothing to further define his injury.

44. *Id.* at *4.
45. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005).
46. *Sherman v. Town of Chester*, 12 Civ. 647 (ER), 2013 US Dist. LEXIS 38774, *21-22 (S.D.N.Y. Mar. 20, 2013).
47. 520 U.S. 725 (1997).
48. *Id.* at 739.
49. 870 F.2d 529 (9th Cir. 1989).
50. *Id.* at 534-35.
51. *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001).
52. *Sherman v. Town of Chester*, 12 Civ. 647 (ER), 2013 US Dist. LEXIS 38774, *22 (S.D.N.Y. Mar. 20, 2013) (citing *Missere v. Gross*, 826 F. Supp. 2d 542 (S.D.N.Y. 2011)).
53. *Id.*
54. *Id.* at *12.
55. *Id.* at *13.
56. *Id.* at *12-13 (emphasis added).
57. *Id.* at *25.

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Disregarding Rules of the Road: Emergency Vehicles Finish Behind Road Work Vehicles

By Karen M. Richards

In 1957, the legislature created a uniform set of traffic regulations by enacting what is now "Title VII—Rules of the Road" of the Vehicle and Traffic Law.[1] Although this statute provides that "it is a traffic infraction for any person to do any act or fail to perform any act" required by Title VII, certain notable exceptions have been carved out.[2] Often the beneficiaries of these exceptions to the rules of the road are municipalities. A Fourth Department decision, affirmed by the Court of Appeals, has dramatically narrowed one of these exceptions.[3]

"Despite the broad statutory language, courts have narrowly construed the situations in which a municipal defendant is afforded the reckless disregard standard of care."

Vehicle and Traffic Law § 1103

The first such exception appears in Vehicle and Traffic Law § 1103. Section 1103(a) exempts the "drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state" from the rules of the road.[4] Section 1103(b) further specifies the exception:

> [u]nless specifically made applicable, the provisions of this title… shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation.[5]

When § 1103(b) was originally enacted, it was silent on the standard of care, but in 1974, the legislature added "reckless disregard" language to the statute.[6] The 1974 amendment provides that the provisions of the statute

> shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others.[7]

This language was added "to soften the outright exemption of vehicles engaged in road work from the rules of the road, allowing them to drive at any speed or in any manner 'which suits their fancy, without any prohibition from the Vehicle and Traffic Law.'"[8] It imposed a "minimum standard of care"—reckless disregard—on drivers of such vehicles.[9]

Reckless disregard requires more than a momentary lapse in judgment. As one court stated:

> [It] demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims. It requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.[10]

The Joint Legislative Committee that convened to revise the Vehicle and Traffic Law expressed concern about granting vehicles engaged in road work the benefit of the same lesser standard of care enjoyed by emergency vehicles. The committee observed that the "reason for extending emergency privileges to non-emergency vehicles…is not apparent…The danger to highway users and true emergency vehicles is greatly increased by the special status which is unnecessarily given to non-emergency vehicles."[11]

Despite the broad statutory language, courts have narrowly construed the situations in which a municipal defendant is afforded the reckless disregard standard of care. For example, "the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)—not on the nature of the vehicle performing the work."[12] In *Guzman v. Bowen*, the plaintiff was allegedly injured when the vehicle she was driving came into contact with a garbage truck owned by the City of New Rochelle.[13] The court noted that "Vehicle and Traffic Law § 1103(b) applies only to vehicles 'actually engaged in work upon a highway,' which is limited to vehicles performing 'construction, repair, maintenance or similar work.'"[14] At the time of the accident, the garbage truck was engaged in ordinary municipal refuse collection, which was not construction, repair, maintenance or similar work. Therefore, the statute was inapplicable and the ordinary negligence standard applied in this action.[15]

To be entitled to the § 1103 exemption, a municipality must also have a responsibility to perform the road work. In *Niro v. Village of Lake George*, the defendant was employed by the Village as acting superintendent of highways.[16] He was permitted to take a village truck to his home in a nearby town because, as the acting superintendent, he was on call 24 hours. While home, he used the village truck to plow his own driveway. After backblading snow from his driveway into the street and then plowing the snow out of the street, he backed up to reenter his driveway and collided with the plaintiff's vehicle, causing injuries to the plaintiff. The court found that the acting superintendent was not acting within the scope of his village employment and neither he nor the Village of Lake George were entitled to the reckless disregard standard of care because they had no responsibility for snow removal in another municipality's territorial limits. His status at the time of the accident "was no different from any private snow removal contractor plowing a client's driveway."[17]

Moreover, § 1103(b) is applicable only if the vehicle was actually performing work on a highway at the time of the accident. In *Hofmann v. Town of Ashford*, the plaintiff sustained injuries when her vehicle collided with a snowplow at an intersection.[18] At the time of the collision, the snowplow driver was not engaged in plowing his assigned route, but rather, was traveling from one part of his route to another by way of a road that he was not responsible for plowing. The sole issue in this case was whether the snowplow driver was actually engaged in work on a highway at the time of the collision. The court reasoned that inclusion of the phrase "actually engaged in work on a highway" indicated that the § 1103(b) exemption applies only when such work was in fact being performed at the time of the accident. It concluded that "[t]he exemption does not apply to a driver who is traveling from one work site to another."[19] Therefore, the standard of care to be applied at trial was ordinary negligence.[20]

There is no doubt that § 1103 affords drivers of road work vehicles, and the municipalities that are vicariously liable for their conduct, a substantial defense to injury-causing conduct that does not comply with the rules of the road. Liability is limited to reckless disregard for the safety of others if they were actually engaged in work on or adjacent to a highway at the time of an accident. However, if the vehicles were not engaged in such work, the lower ordinary negligence standard of care applies.

Vehicle and Traffic Law § 1104

Vehicle and Traffic Law § 1104 does not afford drivers of "authorized emergency vehicles" engaged in an "emergency operation" as much freedom to disregard rules of the road as § 1103 gives to drivers of road work vehicles.[21] In fact, § 1104(b) specifically allows emergency drivers, when engaged in an emergency operation, to disregard only the following rules of the road:

1. Stop, stand or park irrespective of [Vehicle and Traffic Law provisions];
2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as doing so does not endanger life or property; and,
4. Disregard regulations governing directions of movement or turning in specified directions.[22]

Notwithstanding the exemptions provided to emergency vehicles in § 1104, the statute further cautions emergency vehicle drivers that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."[23] Thus, if the conduct causing the accident does not fall within one of the categories of privileged conduct set forth in § 1104(b), the standard of care for determining civil liability is governed by the principles of ordinary negligence.[24]

In 2011, the Court of Appeals in *Kabir v. County of Monroe* analyzed the circumstances under which the reckless disregard standard of care provided in § 1104(e) applies to drivers of authorized emergency vehicles.[25] In *Kabir*, the accident occurred when a police deputy was responding to a radio call of a possible

burglary in progress. He momentarily took his eyes off the road to glance down at his mobile data terminal to ascertain the location of the burglary. When he lifted his gaze, he realized that traffic had slowed, and although he immediately applied his brakes he was unable to stop before rear-ending the vehicle in front of him. Although he may arguably have been involved in an emergency operation, taking his eyes off the road to glance down at his mobile data terminal was not conduct that fell within one of the specified categories of § 1104(b).[26] Thus, the applicable standard for determining the defendants' liability was the standard of ordinary negligence.[27]

In reaching its conclusion, the majority in *Kabir* reasoned that if the legislature wanted to create a safe harbor from ordinary negligence for emergency vehicles, it could easily have done so by structuring § 1104(a) and (b) the same as § 1103(b) to exempt emergency vehicles from all the rules of the road, subject to any statutory exceptions.[28] Inasmuch as the legislature did not see fit to do so, the Court determined that the reckless disregard standard of care in § 1104(e) must be limited to accidents or incidents caused by an authorized emergency vehicle involved in an emergency operation while engaged in one of the four enumerated categories of privileged conduct exempt from the rules of the road.

However, the decision in *Kabir* was not unanimous. Justice Graffeo, in her dissent, in which Justices Ciparick and Smith concurred, wrote:

> By concluding that the conduct of a driver of an emergency vehicle involved in an emergency operation should be assessed under the reckless disregard standard of care under Vehicle and Traffic law § 1104(e) only when the driver is engaged in one of the activities privileged in section 1104(b), the majority reads a limitation into section 1104(e) that I believe is unworkable, incompatible with our precedent and unwarranted given the language in the statute.[29]

Prior to *Kabir*, cases were dismissed even though the injury-causing conduct of the driver was not listed in § 1104(b). For example, in *Hughes v. Chiera*, a case where the facts closely resemble those in *Kabir*, a police officer driving a patrol car responded to an emergency operation following his receipt of a police dispatch.[30] While replacing the microphone into its holder, he looked down, and the patrol car rolled into the intersection where it collided with another vehicle. The municipal defendants established as a matter of law that the officer's conduct did not rise to the level of reckless disregard, and accordingly, the Fourth Department reversed the lower court's denial of summary judgment. Post-*Kabir* it would appear that the courts must deny any similar motions.

In another case decided prior to *Kabir*, *Palmer v. City of Syracuse*, a police officer was responding to a radio call to assist another police officer.[31] As the assisting officer approached an intersection with lights and sirens activated, his direction of travel had a red stop light. He stopped before entering the intersection, then inched forward into the lane but collided with the plaintiff's vehicle. The municipal defendants successfully demonstrated that this conduct did not amount to the reckless disregard for the safety for others, and the case was dismissed against them. It is unlikely the court would have made the same decision following *Kabir.*

In a post-*Kabir* case, *LoGrasso v. City of Tonawanda*, the conduct of the vehicle was similar to that in *Palmer*, and yet, the court in *LoGrasso* held that the reckless disregard standard, the standard applied in *Palmer*, did not apply.[32] In *LoGrasso*, the plaintiff allegedly sustained injuries when the vehicle he was driving was struck by a police vehicle being driven by a detective. While engaged in an emergency operation, the detective stopped and looked both ways before entering the intersection and striking the plaintiff's vehicle. Since stopping and looking both ways before entering into the intersection was not specific conduct exempted from the rules of the road, the Fourth Department concluded that the detective's injury-causing conduct was governed by the principles of ordinary negligence. Thus, the caution exercised by the detective worked in favor of the plaintiff, but against the detective.

Similarly, in another post-*Kabir* case, the conduct in question was also governed by ordinary negligence principles. In *Gonzalez v. City of New York*, a fire truck being driven to the scene of an emergency collided with a van, injuring one of its passengers.[33] The driver of the fire truck had stopped at an intersection and was turning right with the traffic light in his favor when the collision occurred. The court found that the fire truck driver "was not stopping, standing or parking in violation of the rules of the road, proceeding past a red signal or stop sign, speeding, or proceeding in the wrong direction or making an unlawful turn"—conduct permitted by § 1104(b). Accordingly, it ruled that his conduct was not governed by the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e).[34]

By contrast to *LoGrasso* and *Gonzalez*, the injury-causing conduct in *Spencer v. Astralease Assoc., Inc.*, decided after *Kabir*, was privileged.[35] As the vehicle driven by the infant plaintiff's mother proceeded through an intersection with a green light in her favor, it was struck by an ambulance responding to an emergency situation. "The evidence established that [the ambulance driver] activated his siren and emergency

lights prior to the accident and hit the ambulance's air horn several times and slowed his rate of speed as he approached the intersection."[36] He thus had a qualified privilege to proceed through the red light because Vehicle and Traffic Law § 1104(b)(2) provides that the driver of an authorized emergency vehicle, such as an ambulance, may, after slowing down, proceed past a steady red signal. Accordingly, the court found that since there was no evidence that the ambulance driver acted with reckless disregard for the safety of others during an emergency operation, the owner of the ambulance and the driver of the ambulance were entitled to summary judgment.

The decisions in *LoGrasso*, *Gonzalez*, and *Spencer* underline the concerns voiced by Justice Graffeo in *Kabir*:

> The majority's new rule is also inconsistent with the public policy underlying section 1104 because it creates an unjustifiable distinction that extends the protection of qualified immunity only to police, fire or ambulance personnel who speed, run a red light or violate a handful of other traffic laws while responding to emergency calls. Thus, the majority holding has the perverse effect of encouraging conduct directly adverse to the public policy of requiring emergency responders to exercise the utmost care during emergency operations.[37]

The result of *Kabir* is that an emergency responder who chooses to follow the rules of the road and exercises caution when proceeding to an emergency is now faced with the possibility that the exercise of caution may give rise to civil liability under the ordinary negligence standard. On the other hand, if a driver of an emergency vehicle engages in conduct permitted by § 1104(b), conduct inconsistent with the rules of the road, he may not be liable unless he acts in reckless disregard for the safety of others.

Conclusion

Road workers are exempt from following the rules of the road and are liable for conduct that evinces a reckless disregard for the safety of others. Emergency responders, on the other hand, who must make split-second decisions when responding to an emergency, are held to the reckless disregard standard only if their conduct falls within very limited statutorily enumerated exemptions. As dissenting Justice Graffeo wrote in *Kabir*, "Because road workers are exempt from all of the provisions of the Vehicle and Traffic law (except DWI and DWAI), the end result [of the majority's decision in *Kabir*] is that the 'reckless disregard' standard will be applied to virtually all accidents involving vehicles engaged in road work but only a subset of accidents involving emergency responders."[38]

"Unless the legislature amends § 1104 to comport more closely to the language in § 1103, municipalities may find that the injury-causing conduct of their emergency vehicle drivers could potentially result in costly liability to the municipalities."

Following *Kabir*, cases that might previously have been dismissed against a municipality are now being tried, giving plaintiffs the opportunity to prove that they sustained a "serious injury" within the meaning of New York's No-Fault Law as a result of a collision with an authorized emergency vehicle. Unless the legislature amends § 1104 to comport more closely to the language in § 1103, municipalities may find that the injury-causing conduct of their emergency vehicle drivers could potentially result in costly liability to the municipalities.

Endnotes

1. Vehicle and Traffic Law § 1100; *Riley v. County of Broome*, 95 N.Y.2d 455, 461, 719 N.Y.S.2d 623, 625 (2000).
2. Vehicle and Traffic Law § 1101.
3. *Kabir v. Cnty. of Monroe*, 16 N.Y.3d 217, 920 N.Y.S.2d 268 (2011).
4. Vehicle and Traffic Law § 1103(a).
5. Vehicle and Traffic Law § 1103(b). For purposes of this article, the hazard vehicles, motor vehicles, persons, teams, and other equipment mentioned in Vehicle and Traffic Law § 1103(a) and (b) are referred to collectively as "road work vehicles."
6. *Kabir*, 16 N.Y.3d at 239.
7. Vehicle and Traffic Law § 1103(b).
8. *Riley v. County of Broome*, 95 N.Y.2d 455, 465, 719 N.Y.S.2d 623, 628 (2000), *quoting* Mem. of Senator Frank Padavan, Bill Jacket, L. 1974, ch. 223, at 4.
9. *Id.* at 466, *quoting* Padavan Mem., *op. cit.*, at 4.
10. *McLeod v. State*, 8 Misc. 3d 1009(A) (N.Y. Ct. Cl. 2005) (citations omitted).
11. *Riley*, 95 N.Y.2d at 467-468 (citations omitted).
12. *Id.* at 464.
13. *Guzman v. Bowen*, 38 A.D.3d 837, 837, 833 N.Y.S.2d 548, 548 (2d Dep't 2007).
14. *Id.* (citations omitted).
15. *Id.* at 838.
16. *Niro v. Village of Lake George*, 299 A.D.2d 689, 689, 749 N.Y.S.2d 589, 589 (3d Dep't 2002).
17. *Id.* at 690.
18. *Hofmann v. Town of Ashford*, 60 A.D.3d 1498, 1498, 876 N.Y.S.2d 588, 588 (4th Dep't 2009), *leave denied*, 64 A.D.3d 1200 (2009).
19. *Id.* at 1499.

20. *Id.* . By contrast, in *McLeod v. State*, 8 Misc. 3d 1009(A) (N.Y. Ct. Cl. 2005), the court found that a snowplow was actually engaged in work on a highway. In this case, when the snowplow was stopped at the traffic light, the plow and wing plow were raised off the ground and no plowing was taking place and no salt or sand was being dispensed. The claimants contended that, under these circumstances, there was a question of fact as to whether the snowplow was actually engaged in work on a highway. However, because the snowplow driver was in the middle of a plowing and salting "run" while stopped at the traffic light, the court found that as a matter of law he was actually engaged in work on a highway for purposes of § 1103(b).

21. Vehicle and Traffic Law § 101 defines authorized emergency vehicles as ambulances, police vehicles or bicycles, correction vehicles, fire vehicles, civil defense emergency medical service vehicles, blood delivery vehicles, county emergency medical services vehicles, environmental emergency response vehicles, sanitation patrol vehicles, and hazardous materials emergency vehicles and ordinance disposal vehicles of the armed forces of the United States. Vehicle and Traffic Law § 114-b defines an emergency operation as: "The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service."

22. Vehicle and Traffic Law § 1104(a) and (b). *See also Ayers v. O'Brien*, 13 N.Y.3d 456 (2009) (holding "that the reckless disregard standard of liability does not apply in determining the culpable conduct of the operator of an emergency vehicle when he or she is the individual bringing the action.").

23. Vehicle and Traffic Law § 1104(e).

24. *Kabir*, 16 N.Y.3d at 220.

25. *Id.*

26. *See Chessey v. City of New York*, 88 A.D.3d 625, 931 N.Y.S.2d 502 (1st Dep't 2011) (recognizing that to invoke the reckless disregard standard, the driver of an emergency vehicle must be engaged in both an emergency operation and one of the four types of conduct enumerated in the statute); *see also Starkman v. City of Long Beach*, 106 A.D.3d 1076 (2d Dep't 2013) (finding Vehicle and Traffic Law §1104(b) did not apply where the police officer acknowledged that, at the time he struck the plaintiff, he was "not aware of any emergency situation that needed to be addressed").

27. *Kabir*, 16 N.Y.3d at 231.

28. *Id.* at 225.

29. *Id.* at 231.

30. *Hughes v. Chiera*, 4 A.D.3d 872, 872, 772 N.Y.S.2d 772, 772 (4th Dep't 2004). While *Hughes* was being litigated, Ms. Richards was an Assistant Corporation Counsel III for the City of Syracuse and was involved in the litigation of this case. In *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 555, 664, N.Y.S.2d 252, 254 (1997), decided prior to *Kabir*, the officer struck and killed a teenager riding a bike. At the time of the collision, the officer was glancing down from the road momentarily to turn on his emergency lights. The court stated, "At any rate, even if officer Pilat were negligent in glancing down, this momentary lapse in judgment does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach." *Id.* at 557. In *Kabir*, Justice Graffeo discussed *Szczerbiak* and wrote, "Although the officer's act of 'glancing down' was not conduct enumerated in Vehicle and Traffic Law § 1104(b), we nonetheless applied the reckless disregard standard to that conduct in determining whether that act could give rise to liability, concluding that it did not meet the heightened standard of liability as a matter of law." *Kabir*, 16 N.Y.3d at 280. Judge Graffeo further stated that the act of the deputy in *Kabir* was similar conduct that did not rise to the level of reckless disregard as a matter of law. *Id.*

31. *Palmer v. City of Syracuse*, 13 A.D.3d 1229, 1229, 787 N.Y.S.2d 802, 802 (4th Dep't 2004).

32. *LoGrasso v. City of Tonawanda*, 87 A.D.3d 1390, 1390, 930 N.Y.S.2d 129, 129 (4th Dep't 2011), *reargument denied*, 90 A.D.3d 1539 (2011).

33. *Gonzalez v. City of New York*, 91 A.D.3d 582, 582, 936 N.Y.S.2d 892, 892 (1st Dep't 2012).

34. *Id.*

35. *Spencer v. Astralease Assoc., Inc.*, 89 A.D.3d 530, 530, 932 N.Y.S.2d 480, 480 (1st Dep't 2011); *see Nikolov v. Town of Cheektowaga*, 96 A.D.3d 1372 (4th Dep't 2012) (stating that "the use of the siren and / or emergency lights is not required for police vehicles to obtain the benefit of the statute [see § 1104[c]])."

36. *Id.* at 531.

37. *Kabir*, 16 N.Y.3d at 231.

38. *Id.* at 240.

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An Abbreviated History of Government Ethics Laws—Part II[1]

By Mark Davies, Steven G. Leventhal and Thomas J. Mullaney

Mark Davies

Steven G. Leventhal

Thomas J. Mullaney

This is the second part of an article providing an abbreviated history of government ethics laws. In the first part, which ran in the previous issue of the *Municipal Lawyer*, we spanned the centuries and the globe, starting with the code of Hammurabi, promulgated by the King of Babylon in the 18th century B.C.E., and concluding with the Empire Public Officials Law of 1873 in Bismarck's Germany. In this part, we focus our attention on New York City and the United States, starting with municipal ethics laws and then turning to the relevant federal laws. And, as a reminder of the relative youth of the United States, our survey covers less than two centuries, as we start with a law imposing restrictions on New York City's Board of Alderman in 1830.

We reiterate a major caveat to this article: none of the authors is a historian, let alone a legal historian or philosopher or theologian. We therefore welcome any corrections or additions to the examples cited in this article, corrections and additions that they will seek to post on the Section's website.

NYC's Board of Alderman Restrictions of 1830

Starting with New York City in 1830, one notes the enactment of a law prohibiting members of the New York City Board of Aldermen and Board of Assistants from having any direct or indirect interest in any contract, the expense or consideration of which was to be paid under an ordinance of the Common Council.[2] The Board of Aldermen, together with the Board of Councilmen, formed the Common Council, the forerunner of the City Council.[3]

This provision was expanded over the years. By 1901, it included a prohibition on buying one's City office, in language virtually identical to today's N.Y.C. Charter §§ 2604(b)(10) and 2606(c).[4] The 1938 revision to the Charter expanded the provision further to prohibit certain appearances before City agencies or against the interests of the City, the forerunner of current Charter §§ 2604(b)(6)-(8), as well as the acceptance of gratuities, the forerunner of Charter § 2604(b)(13).[5]

After a detailed study of the ethics provisions of the Charter in 1957 and 1958, the state legislature and the Council in 1959 enacted major changes to the City's ethics laws, including most of the substantive provisions of the City's current conflicts of interest law in Charter Chapter 68, and established the Board of Ethics to render advice to public servants on the provisions of the ethics code.[6] That Board of Ethics consisted of the Corporation Counsel, the Director of Personnel, and three public members appointed by the mayor who were to serve without compensation.[7] In the Charter amendments of 1975, these provisions were expanded and shifted to a new Chapter 68 of the Charter.[8] Finally, in 1988 and 1989, Chapter 68 was amended to create the five-member Conflicts of Interest Board as an independent body and to add to that body's responsibilities conflicts of interest training, administration of annual disclosure, and enforcement.[9]

Moving from municipal government to the federal government, we see that the real watershed in ethics laws in the United States occurred at the federal level during the Civil War Era.

The Civil War

The Civil War caused a major procurement effort by the federal government and a corresponding amount of corruption by various providers. The word "shoddy" came into use during the Civil War to describe the many inferior and defective goods purchased by the federal government for use by Union soldiers. The term applied to everything from rifles and tents to shoes, blankets and uniforms.[10]

Revulsion against such fraud led to the passage of the False Claims Act on March 2, 1863.[11] The False Claims Act, also known at the time as the "Lincoln

Law,"[12] made it a criminal offense to submit any false or fraudulent bill or claim for the purpose of obtaining payment from the United States. Punishment was by fine or imprisonment as a court martial may adjudge, excepting only the death penalty. The law also contained a *"qui tam"* provision,[13] which allowed any person to bring a suit in his own name, as well as that of the United States, to recover the amount of a false claim against the government. If the suit was successful, the plaintiff would receive half of the forfeiture and the other half would be paid to the United States.

Various other statutes enacted during or about the time of the Civil War also addressed the avoidance of fraud and conflicts of interest. On February 26, 1853, Congress enacted "An Act to Prevent Frauds upon the Treasury of the United States," which forbade any officers of the U.S., and any members of Congress, from accepting any payment, or any share in a claim against the U.S., in exchange for aiding the prosecution such claims.[14] The same statute also made it a crime to offer anything of value to a member of the Senate or House of Representatives with intent to influence his vote or decision on any question and also criminalized the acceptance of such a payment. The penalties included fine and imprisonment, as well as forfeiture of one's public office and permanent disqualification from holding public office in the United States. In response to further ethical abuses during the Civil War, the statute was extended and applied to a wider range of matters and proceedings.[15]

On July 16, 1862, Congress enacted another statute that forbade any member of Congress from accepting anything of value in exchange for his aid to anyone in procuring any contract, office or place from the U.S. government. It provided for punishment by fine and imprisonment, and also provided that a contract so obtained may be declared null and void at the discretion of the President. Furthermore, that member of Congress or officer would be disqualified from holding any office under the U.S. government.[16]

From the Civil War to Watergate: The "Reform Era"

The Civil War era corruption in procurement and abuses of the spoils system led to a reform movement that continued through the middle of the 20th Century.

The assassination of James Garfield in 1880 by a disappointed office seeker rallied public support for civil service reform.[17] Garfield's successor, Chester Arthur, embraced the cause and the Pendleton Civil Service Reform Act was enacted in 1883.[18] The Pendleton Act provided for merit appointment in federal employment based on competitive examinations. The Act also prohibited retaliatory discharge or demotion of government employees for political reasons, and prohibited solicitation of campaign contributions on federal government property.

The Pendleton Act also created the United States Civil Service Commission. Initially, the Act applied to about ten percent of the federal civilian workforce. However, by 1896, a provision allowing outgoing presidents to protect their patronage appointees by converting their jobs to civil service positions led to most federal employees holding civil service titles. One such outgoing president was Arthur, who lost the support of his party due to his support of civil service reform.

In an 1887 essay entitled "The Study of Administration,"[19] Woodrow Wilson said that:

> …we must regard civil-service reform in its present stages as but a prelude to a fuller administrative reform. We are now rectifying methods of appointment; we must go on to adjust executive functions more fitly and to prescribe better methods of executive organization and action. Civil-service reform is thus but a moral preparation for what is to follow. It is clearing the moral atmosphere of official life by establishing the sanctity of public office as a public trust, and, by making service unpartisan, it is opening the way for making it businesslike. By sweetening its motives it is rendering it capable of improving its method of work.

In 1889, President Benjamin Harrison appointed Theodore Roosevelt as United States Civil Service Commissioner, based on Roosevelt's support of the New York State Civil Service Act of 1883, as well as his enthusiasm and effectiveness in challenging political corruption in New York. After only one week in office, Commissioner Roosevelt recommended the removal of examination board members in New York for selling test questions to the public for $50. Later, he had supporters of President Harrison arrested for buying votes in Baltimore.[20]

The assassination in 1901 of another president, William McKinley, resulted in the elevation of then Vice-President Theodore Roosevelt to President of the United States. As President, Roosevelt significantly expanded the federal government and introduced reforms that evolved into the modern merit system. Roosevelt-era reforms included the adoption of a definition of "just cause" for dismissal, stricter enforcement of restrictions against political activities by federal officials, prohibitions against the payment of illegally

appointed civil servants, and the classification of positions based on their duties.[21]

Twenty-four years and a World War separated the presidencies of Republican Theodore Roosevelt and his fifth cousin, Democrat Franklin Roosevelt.

President Franklin Roosevelt's urgent focus at the time of his first inauguration in 1933 was economic recovery, which, in Roosevelt's view, was rooted in ethical considerations. After assuring Americans that the only thing to they had to fear was fear itself, Roosevelt said that material wealth was a false standard of success. He decried the false belief that public office and high political positions were to be valued only by "the standards of pride of place and personal profit." Roosevelt called for an end to conduct in the fields of banking and business that gave "a sacred trust the likeness of callousness and wrongdoing." Confidence, Roosevelt stated, "thrives only on honesty, on honor, on the sacredness of obligations, on faithful protection, on unselfish performance; without them it cannot live." Restoration of public confidence called for more than "changes in ethics alone." The Nation, Roosevelt said, called for "action, and action now."[22]

Roosevelt sparked the Nation into action in the form of numerous government programs, collectively referred to as the New Deal. The implementation of the New Deal programs, the armament and wartime preparations, and the United States' subsequent entry into the Second World War dramatically expanded the size and role of the federal government, the military and American industry. In his famous farewell address of 1961, President Eisenhower warned of the dangers of concentrated power in the military-industrial complex.[23]

On July 4, 1966, President Lyndon Johnson signed the Freedom of Information Act into law.[24] A signing statement by the President demonstrated that the legislation sprang from "one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit" but noted the need for confidentiality in matters of national security and personal privacy.[25] The scope of the Freedom of Information Act has expanded through subsequent legislative enactments, including reforms enacted in 1974, following the Watergate scandal.

Watergate

The Watergate scandal resulted in two main categories of changes in the fields of ethics and government.

The first major change was a new and increased emphasis on the field of ethics and professional responsibility itself. The public and the profession took note of the fact that virtually all of the leading participants in the Watergate scandal were lawyers, including the President, the Attorney General, and many of their top assistants. By one count, twenty-nine lawyers were the subjects of disciplinary proceedings as a result of Watergate.[26]

"The Watergate scandal resulted in two main categories of changes in the fields of ethics and government."

This scandal led to important reforms in the field of ethics by the profession itself. In 1974, the year when President Nixon resigned, the American Bar Association (ABA) amended its standards to require all accredited law schools to offer mandatory instruction in professional responsibility.[27] The ABA also started the process of revising what would become the Model Rules of Professional Conduct. Many state bar examiners added professional responsibility to the subjects tested on the bar examinations.[28] It should be noted that these changes were not enacted by the federal government, but by members of the legal profession itself through the ABA, state courts, and various state bar associations.

The second major category of changes resulting from Watergate involved federal legislation designed to remedy perceived abuses of governmental powers.[29] Such changes included the 1974 amendments to the Freedom of Information Act, the Privacy Act, the Ethics in Government Act (including its special prosecutor provisions), the Civil Service Reform Act (including its "whistleblower" provisions), the Tax Reform Act of 1976 (including its tax information disclosure provisions), and the Right to Financial Privacy Act.

Many of these changes dealt with perceived abuses with respect to the gathering or use (of both) of information by the government. The 1974 amendments to the Freedom of Information Act were designed to force the government to reveal more information about itself to the public.[30] They required *in camera* inspection of records sought to be withheld for national defense and foreign policy reasons, and also limited the bases for invoking the "investigatory records" exception. The Privacy Act of 1974[31] controlled what the government could do with information that it gathered about private citizens, as did the disclosure provisions of the Tax Reform Act of 1976.[32] The Right to Financial Privacy Act of 1978[33] limited the government's access to financial records held by banks and other institutions.

The Ethics in Government Act[34] required financial disclosure by public officials, limited their outside employment and lobbying, and created the Office of

Government Ethics. But the Act's most direct response to Watergate was that, in its original form, it subjected various government officials to mandatory investigation of any information received by the Attorney General regarding a violation of federal law. Prosecution by a special prosecutor would follow unless the Attorney General certified to a court that there were no grounds for proceeding. (These matters are now governed by 28 C.F.R. Part 600—General Powers of Special Counsel.)

"Conflicts of interest, corruption, and unethical conduct among government officials have haunted humankind since the dawn of government itself. And for almost as long, or so it would seem, laws, rules, regulations, and precepts have sought to contain such misconduct."

Among other reforms of federal employment practices, the Civil Service Reform Act of 1978[35] protected federal employee "whistleblowers" who disclosed information that they reasonably believed provided evidence of "a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a specific and substantial danger to public health and safety." This was obviously designed to increase the level of scrutiny on the operations of the federal government, and to maximize the chances that dishonesty would be revealed.

Conclusion

Some two decades ago, a story circulated at ethics and anti-corruption conferences about three world leaders who, upon dying, each posed a question to the Creator. President Kennedy asked if the United States would ever put a man on the moon. "Sooner than you think," the Creator replied. Chairman Khrushchev asked if his nation would ever be able to feed itself. The Creator responded, "Yes, with time." Finally, Prime Minister Gandhi asked when corruption would finally be eliminated. Shedding a tear, the Creator answered, "Not in my lifetime."

Conflicts of interest, corruption, and unethical conduct among government officials have haunted humankind since the dawn of government itself. And for almost as long, or so it would seem, laws, rules, regulations, and precepts have sought to contain such misconduct. As municipal attorneys, we are called to continue that struggle.

Endnotes

1. This article is based on a panel conducted by the authors at the 19th annual Ethics in New York City Government Seminar, co-hosted by the New York City Conflicts of Interest Board and New York Law School on May 21, 2013.
2. Laws of 1830, ch. 122, § 11. For a history of Chapter 68 until 1975, *see* http://www.nyc.gov/html/conflicts/downloads/pdf2/Old%20NYC%20Ethics%20Laws.pdf and http://www.nyc.gov/html/conflicts/downloads/pdf2/Pre_January_1_1990_Chapter_68.pdf.
3. *See* D.T. Valentine, ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, ADOPTED BY THE COMMON COUNCIL AND PUBLISHED BY THEIR AUTHORITY 9 (rev. 1859), *available* at https://play.google.com/books/reader?id=S0s-AAAAYAAJ&printsec=frontcover&output=reader&authuser=0&hl=en.
4. *See* Laws of 1849, ch. 187, § 19; Laws of 1873, ch. 355, § 101; Laws of 1882, ch. 410, § 59; Laws of 1897, ch. 378; Greater NYC Charter § 1533, enacted in 1901. *Cf.* current N.Y.C. Charter § 2604(b)(10) ("No public servant shall give or promise to give any portion of the public servant's compensation, or any money, or valuable thing to any person in consideration of having been or being nominated, appointed, elected or employed as a public servant") and § 2606(c) ("Any person who violates paragraph ten of subdivision b of section twenty-six hundred four, on conviction thereof, shall additionally be forever disqualified from being elected, appointed or employed in the service of the city.").
5. 1938 N.Y.C. Charter §§ 886, 901. *Cf.* current N.Y.C. Charter § 2604(b)(6) ("No public servant shall, for compensation, represent private interests before any city agency or appear directly or indirectly on behalf of private interests in matters involving the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant"); § 2604(b)(7) ("No public servant shall appear as attorney or counsel against the interests of the city in any litigation to which the city is a party, or in any action or proceeding in which the city, or any public servant of the city, acting in the course of official duties, is a complainant.… This paragraph shall not in any way be construed to expand or limit the standing or authority of any elected official to participate in any litigation, action or proceeding, nor shall it in any way affect the powers and duties of the corporation counsel. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant."); § 2604(b)(8) ("No public servant shall give opinion evidence as a paid expert against the interests of the city in any civil litigation brought by or against the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant."); § 2604(b)(13) ("No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant's official action.").
6. 1959 N.Y.C. ADMIN. Code §§ 1106.1.0 (code of ethics), 1106-2.0 (board of ethics), and 1106-3.0 (post-employment); 1959 City Charter § 1106, enacted by the NYS Legislature, 1959 N.Y. LAWS ch. 532.
7. 1959 N.Y.C. ADMIN. Code § 1106-2.0(a). *See generally* Committee on Ethics and Standards of the City Council of New York, *The Board of Ethics of the City of New York: Council Report, Code of Ethics and Related Laws*, Feb. 3, 1959, at http://www.nyc.gov/html/conflicts/downloads/pdf2/Old%20NYC%20Ethics%20Laws.pdf.
8. Added at General Election, Nov. 4, 1975.
9. Adopted at General Election, Nov. 8, 1988, and Nov. 7, 1989 (increasing number of Board members from three to five and

adding a prohibition on certain high level officials holding certain political party offices). *See generally* New York City Charter Revision Commission, THE REPORT: DECEMBER 1986-NOVEMBER 1988, vol. 1, pp. 26-30, vol. 2, pp. 148-185, at http://www.nyc.gov/html/conflicts/downloads/pdf2/charter_revision/Report%20of%20Charter%20Revision%20Commission%201986%20to%201988.pdf.

10. Ron Soodalter, *The Union's 'Shoddy' Aristocracy*, N.Y.TIMES OPINIONATOR, (May 9, 2011, 9:30 PM); *see also* DEP'T OF THE SECRETARY OF STATE: STATE OF MAINE, *Maine State Archives*: *Civil War Sesquicentennial* (describing Col. George L. Beal's letter to E.K. Harding, Nov. 12, 1861), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=arcsesq&id=125216&v=article.
11. An Act to prevent and punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 327 (1863).
12. "Qui Tam A History." Whistleblower Info, http://www.whistleblowingprotection.org/?q=node/69 Retrieved 7-10-13.
13. The term is derived from, "*Qui tam pro domino rege, quam pro se ipso, in hac parte sequitur*," "He who sues on behalf of the sovereign sues just as much for himself in this case."
14. An Act to Prevent Frauds upon the Treasury of the United States, ch. 81, 10 Stat. 170 (1853).
15. An Act Relating to Members of Congress, Heads of Departments, and other Officers of the Government, ch. 119, 13 Stat. 123 (1864).
16. An Act to Prevent Members of Congress and Officers of the Government of the United States from taking Consideration for procuring Contracts, Office, or Place, from the United States, and for other purposes, ch. 180, 12 Stat. 577 (1862).
17. Garfield was attacked on July 2, 1881 and had been president for about four months. He was "shot by Charles Guiteau as he was about to board a train at the Baltimore & Potomac Railroad Station in Washington, D.C.…An unsuccessful lawyer, evangelist, and insurance salesman, Guiteau believed Garfield owed him a patronage position in the diplomatic corps, and that the president's political decisions threatened to destroy the Republican Party." *See* http://americanhistory.si.edu/presidency/3d1d.html.
18. Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).
19. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. 197-222 (1887).
20. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, *Our Mission, Role & History: Theodore Roosevelt*, *available at* www.opm.gov/about-us/our-mission-role-history/theodore-roosevelt/.
21. *Id.*
22. Inaugural Address of the President, Washington, D. C., March 4, 1933, www.archives.gov/education/lessons/fdr-inaugural/images/address-1.gif.
23. Farewell address by President Dwight D. Eisenhower, January 17, 1961; Final TV Talk 1/17/61 (1), Box 38, Speech Series, Papers of Dwight D. Eisenhower as President, 1953-61, Eisenhower Library; National Archives and Records Administration.
24. 5 U.S.C.A. § 552 (West 2009).
25. President Lyndon Johnson's Statement upon Signing the FOIA (Press Release, Office of the White House Press Secretary, "Statement by the President upon Signing S.1160."), dated July 4, 1966.
26. *The Legacy of Watergate: Rethinking Legal Ethics*, STREET LAW, INC., *available at* http://www.streetlaw.org/en/Page/728/The_Legacy_of_Watergate_Rethinking_Legal_Ethics; *see also Professional Discipline for Watergate-Related Criminal Conduct* (Table) 51 HASTINGS L. J. 678, 682 (2000).
27. *See* Peter K. Rofes, *Ethics and the Law School: The Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981 (1995) (describing ways in which American law schools implement ethics courses into their curriculums).
28. Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, A.B.A. Journal, June 2012.
29. *See generally*, Benjamin R. Civiletti, *Post-Watergate Legislation in Retrospect: Alfred P. Murrah Lecture on the Administration of Justice*, 34 S.W. L.J 1043 (1980).
30. 5 U.S.C.A. § 552 (West 2009); *see Freedom Of Information Act Source Book: Legislative Materials, Cases, Articles*, S. COMM. ON THE JUDICIARY, 93d Cong., 2d Sess. (Comm. Print 1974).
31. 5 U.S.C.A. § 552a (West 2010); *see Overview of the Privacy Act Of 1974*, DEP'T OF JUSTICE, *available at* http://www.justice.gov/opcl/1974privacyact.pdf.
32. I.R.C. § 6103 (West 2013); *see IRS Disclosure & Privacy Law Reference Guide*, INTERNAL REVENUE SERVICE, *available at* http://www.irs.gov/pub/irs-pdf/p4639.pdf.
33. 12 U.S.C.A. §§ 3401-20, -22 (West 2011).
34. Ethics in Government Act of 1978, PUB. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C.A. app.4 §101 (West 2006)).
35. Civil Service Reform Act of 1978, PUB. L. No. 95–454, 92 Stat. 1111 (codified as amended at 5 U.S.C.A. §2302(b)(8) (West 2013)).

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An Introduction to the New York State Bar Association Committee on Mass Disaster Response

By Howard Protter

The New York State Bar Association (NYSBA) Committee on Mass Disaster Response was formed in the aftermath of the crash of TWA Flight 800 off Long Island in 1996. Two hundred and thirty people were killed in that tragic accident. For the legal profession, there were painful and sobering lessons learned, including, first, an unseemly readiness of some lawyers to unlawfully exploit such tragic circumstances for professional gain; and, second, a lack of organization on the part of voluntary bar associations to help. With no legal organization in place to prevent unlawful solicitation or to explain the legal process and answer legal questions raised by the victims and their families, families and friends of the crash victims continued to experience confusion and frustration in the aftermath of the accident.

The NYSBA formed its Committee on Mass Disaster Response to address these problems. This article provides an introduction to the Committee. The first part of the article provides an overview of the Committee, describing the purpose of the Committee and the procedures governing its actions. In the second part, the article discusses some of the frequently asked questions that arise when a mass disaster incident occurs and provides summary answers and resources available to address those questions.

Part One: An Overview of the Committee on Mass Disaster Response

1. Mission Statement

The mission statement of the NYSBA Committee on Mass Disaster Response states that the Committee seeks to aid victims of mass disasters by (1) providing free, short-term legal assistance to victims in the immediate aftermath of the disaster; and (2) preventing unlawful solicitation of victims. The Committee's mission is to respond to the needs of a vulnerable population in the long tradition of pro bono service, thus helping to remind the public and members of the legal profession that lawyers are deeply committed to human welfare and to the higher goal of serving others.

2. Procedures and Protocol Under Federal Law

The Committee responds to local disasters caused by accident or incident, and not to those affecting larger geographic areas resulting from storm damage, flooding and the like.[1]

Established in the aftermath of the crash of TWA Flight 800 in 1996, as noted earlier, the Committee has since responded to the following disasters: the Amtrak crash in Syracuse in January 2001; the terrorist attacks on September 11, 2001, in New York City; the crash of American Airlines Flight 587 in New York City in November 2001; the Charter bus crash in Rochester in January 2005; the Continental Airlines Flight 3407 crash in Buffalo in February 2009; the American Civic Center shooting in Binghamton in April 2009; and the Bronx bus crash in April 2011.

The Committee responds at the official request of the National Transportation Safety Board (NTSB), New York State Office of Emergency Management (NYSOEM), Federal Emergency Management Agency (FEMA), New York State Police (NYSP), Port Authority of NY & NJ (NY / NJPAPD), or the New York City Office of Emergency Management (NYCOEM), as well as other government disaster relief or law enforcement agencies. In addition, the NYSBA President (or President-Elect) or his / her designee has the discretion to implement the Response Plan without a formal request from a government agency.

The NTSB is an independent federal agency charged by Congress to investigate all civil aviation accidents in the United States and significant accidents in other modes of transportation, including railroad, highway, marine and pipeline. The NTSB determines the probable cause of accidents and issues safety recommendations aimed at preventing future accidents. The NTSB functions independently from the Department of Transportation (DOT) and agencies such as the Federal Aviation Administration (FAA).

The NTSB operates in the context of the following legal landscape. In 1996, the Aviation Disaster Family Assistance Act[2] was enacted following several major aviation accidents in which air carriers, local responders, and federal agencies did not provide an effective coordinated effort to meet the needs of family members and survivors. The legislation requires air carriers to have plans detailing the notification to family members about an accident, the handling of manifests, the training of support personnel, the management of

personal effects, and the coordination of memorials. It also tasks the NTSB with coordinating the efforts of the air carrier, local responders, and federal agencies for the family assistance response. This includes coordination for the recovery and identification of victims and the release of accident investigation information to family members while at the accident location and during the investigative process. The legislation applies to any domestic or foreign commercial aviation accidents occurring within the United States, its territories, possessions, and territorial seas that result in a major loss of life.[3]

In 2008, Congress enacted similar legislation focusing on rail passenger accidents. The Rail Passenger Disaster Family Assistance Act sets out comparable requirements for Amtrak and future intra- and interstate high-speed passenger rail operators and the NTSB.[4]

Upon notification of a major accident, the NTSB launches a "Go-Team." On 24-hour alert, this team of experienced NTSB personnel brings focused technical knowledge to the accident investigation. In an aviation accident, a Go-Team is led by the investigator-in-charge (IIC) and typically includes specialists trained in witness interviews, aircraft systems and structures, maintenance, operations, air traffic control and meteorology. An NTSB Board Member often accompanies the team and serves as the Board spokesperson. Transportation Disaster Assistance specialists coordinate the resources of the various agencies assisting families. Media interactions are organized by an NTSB Public Affairs Officer.

The Aviation Disaster Family Assistance Act of 1996 requires the NTSB to coordinate the disaster response resources of federal, state, local, and volunteer agencies. The Board's staff of experienced disaster responders works closely with these agencies and the airline to meet the needs of aviation disaster victims and their families. Family counseling, victim identification and forensic services, communicating with foreign governments, and translation services are some of the services the Board coordinates.

Soon after an accident, the air (or rail) carrier will establish a Family Assistance Center (FAC), which is managed by Office of Transportation Disaster Assistance (TDA), and is typically located in a hotel, conference center, or similar setting agreed upon by the airline and the TDA Director.[5] Consideration is given to security, quality of rooms and facilities, and privacy for family members when selecting the FAC location. The FAC is a secure meeting place for accident survivors, family members, and friends to receive information regarding the accident investigation, victim identification process, management of personal effects, and the provision of disaster crisis counseling services.

In addition, a Joint Family Support Operations Center (JFSOC) is established at the same location and will serve as the focal point for coordination between representatives from federal agencies and local government emergency services. Information for daily family briefings is obtained through the JFSOC. These briefings update families on the progress of the investigation and allow for questions to be asked of the IIC, other NTSB personnel, the medical examiner or coroner, and other parties to the investigation.

Under these Acts, the NTSB designated the Red Cross as the "independent nonprofit organization" to provide for the emotional well-being of the survivors and the families of those who have perished or were injured in a disaster. Red Cross-trained personnel are deployed to the site and to the local/state government emergency operations center. They provide physical and emotional support in a nonintrusive and respectful manner. Canteen services may be provided for family members and rescue and recovery workers. The Red Cross is commissioned to establish and to implement a system to control and manage volunteers who arrive at the scene (and are often referred to as "spontaneous volunteers") and other voluntary organizations that wish to assist in the response. The Committee works closely with the Red Cross and is stationed at the Family Assistance Center.

Mass disasters are newsworthy events. Experience has shown that Committee members quickly learn of disasters through the media. The Committee Chair (or Vice-Chair), with the prior approval of the State Bar President, is authorized to reach out to government agencies, including, but not limited to, NYSOEM and NYCOEM, to offer assistance. Because NYSOEM is in immediate contact with law enforcement and disaster relief agencies on the scene, the Committee frequently relies on NYSOEM to relay the Committee's offer of assistance and to enable the Committee members to be allowed access to the site. There is no requirement that NYSOEM be used as a conduit if other relationships make a direct offer of assistance preferable, such as with County Emergency Managers or local law enforcement officials. In the case of an air or rail disaster the Committee Chair will reach out to NTSB to arrange for access at the earliest possible time to any Family Assistance Center that is established.

3. NYSBA Responsibilities and Functions

Committee members are issued NYSBA photo IDs, as well as an official NSYBA "Disaster Response Team" insignia, and business cards. (The individual members' personal business cards are not used.) The Committee makes arrangements with the governmental agency controlling the disaster response to gain admission to the family assistance center. Typically, that entity will issue to each responding Committee member a disas-

ter-specific credential that authorizes access to areas where victims and their family members are gathered.

As noted earlier, a primary responsibility of the Committee is to provide a rapid response to disasters and to provide short-term pro bono legal assistance outside of an attorney-client relationship. The Committee does not represent victims and does not serve as their lawyers. The victims are not pro bono clients of Committee members and they also cannot be or become fee-paying clients. If victims have legal needs that require specialized knowledge or ongoing assistance, the Committee is authorized to refer them to traditional pro bono services, including lawyer referral services maintained by NYSBA, the American Bar Association Young Lawyers Division if they respond to the disaster, or local bar associations. Committee members on their own do not make referrals to an individual lawyer or law firm.

Committee members are normally called upon to answer specific questions about such specialized matters as the issuance of death certificates, competing claims by family members to the release of the remains or property of the decedent, estate, guardianship and family law issues, landlord-tenant issues, motor vehicle questions and immigration concerns. Typically, Committee members will staff a table or a room at a family assistance center and be available to address the broad range of legal questions that may come up. The Committee member's response will depend on the nature of the questions presented, the knowledge of the Committee members and other volunteer lawyers on site, and the ability to access specialized knowledge of NYSBA volunteers or attorney referral services maintained by the NYSBA and other bar groups.

The Response Plan contemplates that Committee members will do screening, intake, and referral, where possible, in order to ensure that attorneys with the requisite knowledge will answer legal questions. Committee members may obtain the information for the victim (serving as a conduit) or may make arrangements for the victim to contact other lawyers through appropriate channels. If a question falls within a Committee member's area of practice or the member believes he or she can answer the question, the member may provide an answer. In any such instance, the member makes clear to the victim that the member is not serving as the victim's lawyer, and that the information should be confirmed with the victim's own lawyer.

Counsel for the NYSBA has rendered an opinion that the provision of legal assistance in the context of a free legal clinic as contemplated by the Response Plan is unlikely to create an attorney-client relationship, at least where a written disclaimer of any such relationship is provided to the victim.[6] The actions of Committee members should not give rise to exposure for legal malpractice liability. However, those involved are aware that a court could find that an attorney-client relationship was formed, notwithstanding the written disclaimer.[7] Further, since victims are approaching Committee members in their capacity as lawyers and are seeking legal advice, NYSBA Counsel is of the opinion that communications between victims and Committee members should be treated as privileged.[8]

Were a Committee member to be sued for legal malpractice for action within the scope of his or her duties as a Committee member, no policy of insurance maintained by the NYSBA provides a defense or indemnification. Each member maintains his or her own malpractice insurance, either individually or through his or her respective employer.

Although there are a number of "Good Samaritan" laws in New York, none appear to cover the anticipated activities of Committee members. However, the Volunteer Protection Act provides in relevant part that no volunteer of a nonprofit organization shall be liable for harm caused by an act or omission, if the volunteer was acting within the scope of the volunteer's responsibilities and the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.[9]

Committee members are trained to be aware of the structural, functional, practical and ethical limitations on providing legal assistance to victims (not to mention their own substantive competence) and tailor their answers accordingly. In all circumstances, it is appropriate for a Committee member to say that he or she does not have an immediate answer to a question, but will endeavor to secure one, either from another source or by referring them to an attorney referral program. Experience at family assistance centers reveals that Committee members are viewed more broadly as problem solvers than as lawyers, not only by the victims but also by responding agencies.

As also noted earlier, the other important responsibility of the Committee in responding to a mass disaster occurrence is to discourage and prevent unlawful solicitation of victims and their family members. The Committee's experience in responding to aviation and rail disasters has shown that personal injury lawyers and their agents or employees arrive at the disaster scene (or where families are gathering) before the police and other authorities restrict access. As a result, Committee members must respond quickly, even within the first hours of a disaster. A prompt response enables Committee members to begin the process of monitoring for unlawful solicitation, posting signs in an effort to prevent solicitation, advising victims and law enforcement of the ethical and legal prohibitions regarding lawyer solicitation, and issuing strong public statements warning against such solicitation.

In taking these actions, Committee members act in accordance with New York laws and Rules of Professional Conduct. Under New York State Judiciary Law, it is a crime (an unclassified misdemeanor) to solicit legal business "in person" or by telephone. This means that an attorney, or anyone working for the attorney, is prohibited from engaging in an unsolicited communication with a victim or the victim's representative for the purpose of obtaining legal work.[10]

New York's Rules of Professional Conduct prohibit lawyers and their agents from solicitation relating to a specific incident involving a potential claim for personal injury or wrongful death prior to the thirtieth day after the incident, unless a filing is made within thirty days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the fifteenth day after the incident.[11] A similar provision prohibits contact by lawyers or their associates, agents, employees or other representatives who represent actual or potential defendants or entities that may defend and/or indemnify such defendants.[12]

New York law does allow lawyers to solicit clients by mail and to run general advertisements targeting specific disasters after the thirty-day ban has been passed. In addition, general advertisements that do not specifically refer to an incident are permissible, even during the thirty-day period. Any such solicitations must comply with the filing, disclosure and record retention requirements of Rules 7.1 and 7.3.

New York Judiciary Law applies to any lawyer or agent, not just those admitted to practice in New York or living in New York. It governs the conduct of lawyers and agents where the act of solicitation occurs in New York, i.e., the attorney/agent is physically present in New York, or the attorney/agent telephones a prospective client who is physically present in New York. Similarly, New York Rule of Professional Conduct Rule 7.3(i) extends its application to a lawyer or members of a law firm not admitted to practice in this state who solicit retention by residents of this state.[13]

In the case of aviation and rail disasters, federal law preempts state law with respect to solicitation. Pursuant to the Aviation Disaster Family Assistance Act of 1996, attorneys and those on their behalf may not engage in any form of unsolicited communication until forty-five days after the aviation disaster occurred.[14] And pursuant to 49 U.S.C.A. § 1139, the forty-five day solicitation ban is applied to rail disasters.[15]

4. Members

The New York State Bar Association Committee on Mass Disaster Response consists of approximately eighteen volunteer lawyers, geographically dispersed throughout the state, with varying legal backgrounds and practices, and a small number of non-lawyers who bring special skills and experience in working with victims of mass disasters. Committee members serve minimum three-year terms and receive training specifically designed to help victims of disasters. Committee members are trained in the National Incident Management System (NIMS) and attend a three-day course on Family Assistance Centers at the National Transportation Safety Board's Training Center in Virginia.[16]

Part Two: Frequently Asked Questions (FAQs)

The Committee has operated for more than a decade and has responded to a number of mass disaster occurrences. Over time, it has consistently encountered a number of issues and questions. This part of the article discusses those issues and questions and provides some guidance and answers.

1. Multiple Languages

Past experience has shown that many victims and their families will be fluent in a language other than English. In the World Trade Center attack on 9/11 and American Airlines Flight 587 crash, the Committee relied upon members of the New York City Bar who were fluent in dialects spoken by victims. The Committee also availed itself of bilingual attorneys and others to construct warnings, no solicitation signs, and brochures in the language common to the victims, which were placed throughout the assistance center.

2. General Status Information

Many family members approach Committee members as a source of general information, which may or may not be legal in nature. In prior disaster occurrences, such as 9/11 or the airplane crashes noted earlier, it was necessary for Committee members stay up to date on all briefings given at the site by the controlling agencies. This enabled members to communicate updates to anyone inquiring about status or whose inquiry arose from an issue presented at the briefings. It was equally important to be in personal contact with all agencies at the site in order to direct family members to appropriate agency for further information of a specific nature.

3. Death Certificates

This is a common issue that must be addressed. Who issues death certificates? In the case of violent death, depending on the jurisdiction, either the medical examiner or coroner has the legal authority to issue a death certificate. The death certificate is usually issued following a positive identification of remains. However, the identification process can be very slow if there are multiple fatalities. If the identification can only be made by DNA testing, the process can take months. Where no remains are identified, the medical

examiner or coroner does not have jurisdiction to issue a death certificate except as discussed below.

There will likely be one governmental agency that will have jurisdiction over the issuance of death certificates. For instance, with respect to American Airlines Flight 587, the New York City Medical Examiner's office was the issuing agency.

How do you obtain a death certificate if remains are not found? The New York Estates, Powers and Trust Law specifically authorizes the Surrogate's Court to issue a decree that a person is dead, even if a body has not been found. As a result of the 9/11 disaster, New York City instituted a procedure whereby families had the opportunity to meet with attorneys, who assisted them in filling out affidavits that would be submitted to the court for a decree. For each missing person, two affidavits had to be completed; one attesting to personal information about the missing person; and the second to be completed by (1) the missing person's employer, or (2) in the event of an airline crash, by the airline. If all the information was in order, a court appearance would not be necessary.[17]

Where employment records were not available or if the missing person was visiting the World Trade Center, family members or others with personal knowledge of the missing person's whereabouts were required to file affidavits attesting that the missing person was at the location in question and had not reappeared since. The court might hold a hearing regarding the individual's disappearance in order to determine that the missing person was at the disaster location and to establish the efforts that were made to locate that person. If the court granted the decree, the medical examiner issued a death certificate and sent it to the New York City Department of Health for registration. New York City provided ten copies of the death certificate to the designated family member.[18]

a. Where to obtain a copy of the death certificate?

For a death within New York County, copies are obtained from the New York City Department of Health and Mental Hygiene.[19] Outside of New York City, a copy of a death certificate will be obtained from the city, town or village clerk where the death occurred.[20]

b. What about delays in connection with the issuance of death certificates?

At the early stage of the Committee's involvement in Flight 3407, which occurred in Erie County, it appeared that identification of the victims would be a several-week process. As a result, it was decided that the team would make the local Surrogate aware of what steps could be taken to expedite the issuance of a death certificate. Early contact was made with the Erie County Surrogate Barbara Howe regarding the Committee's efforts. We learned that she had independently started to assess procedures so that letters of administration could be issued on an expedited basis. However, this would apply only to estates within her jurisdiction, i.e., for family members of victims that were domiciled in Erie County. This would not address the needs of the families of victims not domiciled in that county.

Therefore, members of the Committee took steps to draft documents that could be used by the Surrogate in order to facilitate the issuance of a death decree. That decree would be relied upon by the medical examiner in order to issue a death certificate, on an expedited basis, for those families of decedents not domiciled in Erie County. As the investigation proceeded, it became clear that victim identification would take days, not weeks. Therefore, there was no need to resort to the expedited process proposed by our team.

It is a long-term plan of the Committee to explore whether these draft papers for expedited issuance of death certificates can be adopted by the Office of Court Administration as an approved form. That would mean that if a Surrogate in any of the state's sixty-two counties is faced with a mass disaster situation that involves long delays in victim identification, then there will be a process in place that will permit the Surrogate to grant expedited assistance to the families.

4. Estates Issues

Family members ask about kinship priorities with respect to the victims, access to their bodies, property and estates. While the Committee impresses upon the families the immediate need to attend to burials, it generally advises that Surrogate's Court will ultimately decide the priority and entitlement to the victim's assets. With respect to American Airlines Flight 587, families were told that they would have to provide documentation to establish priority kinship such as proof of marriage, birth or baptismal certificates, deeds, utility bills, bank statements, wills—basically, any document that showed that the interested party resided or had a combined relationship with the victim to accompany any applications that they eventually would present to the courts through a qualified estate attorney.

5. Access to Property Issues

Questions that have arisen in the aftermath of a mass disaster include how to access the victim's funds to pay rent, mortgage or other bills; freeze credit cards; secure the victim's car; gain access to home or apartment; care for minor or elderly survivors (guardianship); gain access to safety deposit boxes to recover documents; and secure immediate funds or aid to help in above items. Typical insurance questions include: How to discover victims' assets and policies? Who has standing to pursue? Committee members provide

general advice in response to these questions. In addition, occasionally, questions have arisen concerning orphaned pets. One valuable resource for the Committee is the State Bar's Standing Committee on Animals and the Law, which has offered to serve as a resource in this area.

6. Housing

The Small Business Administration, Red Cross and United States Department of Housing were available during 9/11 to do intake in order to help persons with temporary or immediate help for their business losses and rental obligations. The Red Cross and the local county's Child Protective Services are usually on hand to assist with temporary or immediate needs for food, clothing and shelter. If the disaster is a transportation accident, the airline, railroad or bus company will have personnel on hand to arrange for lodging and meal accommodations, along with funds for necessary and personal items.

7. Custody of Surviving Minors

Family members of deceased victims, who were custodial parents of surviving minors, including former non-custodial parents, grandparents, aunts, uncles, and adult siblings have questions concerning priorities and procedures for obtaining legal guardianship and custody. It is also not uncommon for surviving minors, particularly teenagers, to have questions about the extent to which they have rights or input in the decision-making process.

In response to the Binghamton shooting, a volunteer attorney (past NYSBA president, Kathryn Grant Madigan) agreed to serve as pro bono counsel for guardianship issues involving two children. Contact was also made with Child Protective Services and Catholic Charities.

8. Travel to the United States for Burial or Retrieval

A major issue for the Committee members responding to the Binghamton shooting was assisting with the efforts to bring family members into the United States from foreign countries for retrieval of next of kin or to attend a memorial service. A useful resource is the website of the U.S. Citizenship and Immigration Services (USCIS) (http://www.uscis.gov/portal/site/uscis). In the American Airlines Flight 587 crash, family members wanted to accompany a body to a foreign country for the funeral but some of the extended family members feared that they could not meet re-entry requirements back to the United States after the funeral. The Committee communicated with American Airlines and USCIS agents who were at the site for an overview of requirements and advised family members that it would be difficult to re-enter the United States without meeting the requirements. Committee members were then able to direct them to the proper channels to find answers to their specific concerns and used the website to provide the families with the required forms. American Airlines agreed to cover some of the application fees associated with the INS filings.

9. Interim Financial Needs

In the responses to the airlines crashes (American Airlines Flight 587 and Continental Flight 3407), each victim's family was provided with funds by the airline to cover immediate expenses. (This voluntary practice has been the trend.) In addition, the Department of Social Services, Red Cross and the Small Business Administration may be able to provide assistance.

10. Employment Issues

Victims who lose employment because of a disaster may be able to apply for Disaster Unemployment Assistance, which provides financial assistance to individuals whose employment or self-employment has been lost or interrupted as a direct result of a major disaster declared by the President of the United States. The following website provides more guidance: http://ows.doleta.gov/unemploy/disaster.asp.

11. Proof of Identity

Obtaining a replacement passport, visa, driver's license or other form of identification is of particular importance when surviving victims cannot travel because their documentation has been lost, destroyed, or is in a location to which access is being denied.[21]

Conclusion

In 2003, the Committee received the Governor's Award for Excellence in Emergency Management at that year's New York State Disaster Preparedness Conference. The committee is proud of the work it performs and strives to continue the efforts of those prior committee members who set the example of selfless service. That work cannot succeed without the pro bono assistance of the State Bar's substantive law sections. On many occasions, the Committee has reached out to a Section's executive committee's leadership for assistance or a referral to aid us in providing information and guidance to family members and victims. Frequently, all it has required is a telephone conference, and State Bar members have risen to the occasion when asked. The membership of the State Bar can rightly share in the pride we feel in the work we do.

Endnotes

1. The New York State Bar Association's disaster plan defines a "mass disaster" as "an unanticipated and unexpected event that causes injury, death, or property damage on a scale that may give rise to complex legal issues and/or massive compensation for the victims and/or their families. Examples

of such events are aircraft and train crashes, hurricanes / tornadoes / floods, hotel fires, explosions, chemical spills / environmental damages, civil disturbances, and blackouts / brownouts. Not every event that meets the definition of a mass disaster will warrant the invocation of the Response Plan and its delivery of immediate, short-term pro bono legal services. Certain catastrophes may occur that will not give rise to immediate legal needs and likewise do not create a risk of improper solicitation. For such disasters, traditional pro bono legal services provided through local bar associations may be the appropriate response." The New York State Bar Association Mass Disaster Response Plan, *available at* http: / / www.americanbar.org / content / dam / aba / migrated / barserv / disaster / newyork.authcheckdam.pdf.

2. Aviation Disaster Family Assistance Act of 1996, PUB L. NO. 104-264, 110 Stat. 3264 (codified as amended at 49 U.S.C.A. § 1136 (West 2003)).

3. *See* 49 U.S.C.A. § 1136 (West 2003) (providing assistance to families of passengers involved in aircraft accidents); *see also* 49 U.S.C.A. § 41113 (West 2003) (providing various plans to address needs of families of passengers involved in aircraft accidents); *see also* 49 U.S.C.A. § 41313 (West 2003) (providing plans to address the needs of families of passengers involved in foreign air carrier accidents).

4. *See* 49 U.S.C.A. § 1139 (West 2008) (providing assistance to families of passengers involved in rail passenger accidents); *see also* 49 U.S.C.A. § 24316 (West 2008) (providing plans to address needs of families of passengers involved in rail passenger accidents).

5. If it is thought that the incident was the result of criminal conduct, the Federal Bureau of Investigation becomes responsible for managing the FAC. *See generally* http: / / www.ntsb.gov / tda / doclib / Mass%20Fatality%20Incident%20Family%20Assistance%20Operations.pdf.

6. Op., N.Y. State 664 (1994).

7. *Id.*

8. Memorandum from Kathleen R. Mulligan Baxter, Counsel, Executive Offices, to Steven C. Krane, Esq., Proskauer Rose, LLP (Apr. 22, 1998) (on file with author).

9. 42 U.S.C.A. § 14503 (West 1997).

10. N.Y. Jud. Law §§ 479-82, -85 (McKinney 2013).

11. *See* N.Y. Rules of Prof'l Conduct R. 7.3 (amended 2013).

12. *See* N.Y. Rules of Prof'l Conduct R. 4.5 (amended 2013).

13. *See* N.Y. Rules of Prof'l Conduct R. 7.3(i) (amended 2013).

14. *See* 49 U.S.C.A. § 1136(g)(2) (West 2003) (prohibiting unsolicited communication concerning a potential action for personal injury or wrongful death by an attorney prior to the forty-fifth day following the date of the accident); *see also* 49 U.S.C.A. § 1155 (West 1996) (providing various aviation penalties).

15. *See* 49 U.S.C.A. § 1139 (g)(2) (West 2008) (providing assistance to families of passengers involved in rail passenger accidents).

16. Current Committee Roster, *Committee on Mass Disaster Response,* New York State Bar Ass'n, http: / / www.nysba.org / wcm / committeeroster?commId=A16700.

17. *Procedure for Issuance of Death Certificates For Individuals Currently Missing At The World Trade Center,* http: / / www.9-11summit.org / materials9-11 / 911 / acrobat / 27 / C9TheLegalAftermath / WTCDeathCertificateProcedures.pdf.

18. *Id.*

19. *Birth and Death Certificates,* The New York City Dep't of Health & Mental Hygeine, *available at* http: / / www.nyc.gov / html / doh / html / services / vr.shtml.

20. *See also,* http: / / www.health.state.ny.us / vital_records / death.htm.

21. *See Replace a Social Security Card for an Adult,* The Official Website of the U.S. Social Security Admin., *available at* http: / / www.socialsecurity.gov / (explaining how to replace a lost social security card); *see also Lost or Stolen Passports,* U.S. Dep't of State, *available at* http: / / travel.state.gov / passport / lost / lost_848.html (explaining how to replace a lost or stolen passport); *see also Lost and Stolen Passports, Visas, and Arrival-Departure Records (Form I-94),* U.S. Dep't of State, *available at* http: / / travel.state.gov / visa / temp / info / info_2009.html#I-94 (explaining how to replace lost arrival or departure documents); *see also Replacing a Lost New York Drivers License,* DMV.org: the DMV Made Simple, *available at* http: / / www.dmv.org / ny-new-york / replace-license.php#Replacing-a-New-York-Drivers-License-or-ID; *see also Replacing Your Vital Documents,* USA.gov, *available at* http: / / www.usa.gov / Citizen / Topics / Family-Issues / Vital-Docs.shtml (providing details on how to request a variety of documents).

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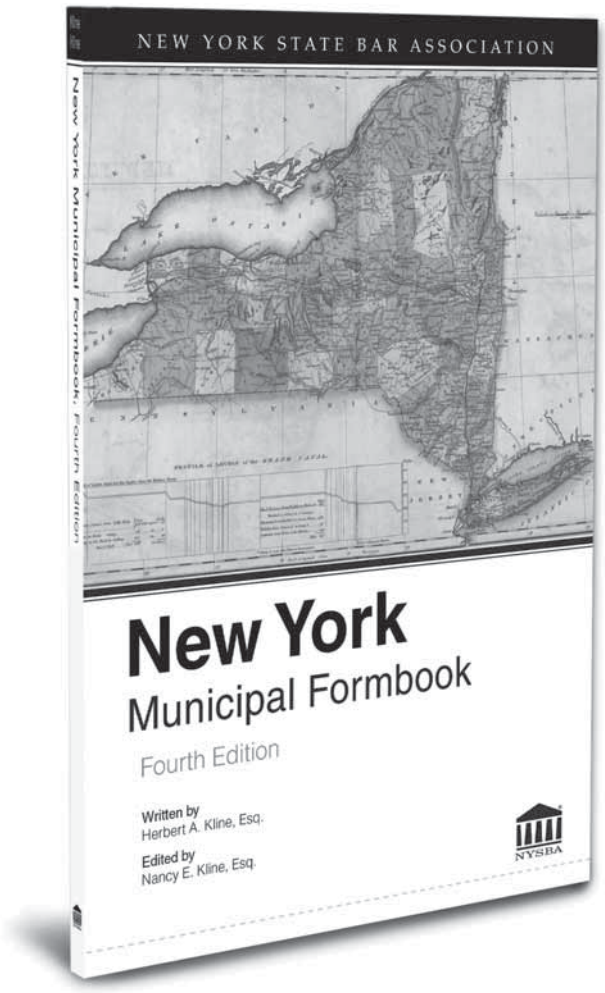

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MUNICIPAL LAWYER

ISSN 1530-3969 (print) ISSN 1933-8473 (online)