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LIABILITY OF LOCAL GOVERNMENTS IN FEDERAL COURT FOR THE VIOLATION OF FEDERAL RIGHTS-- MONELL, OWEN, AND THIBOUTOT

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THIS LOCAL GOVERNMENT LAW BULLETIN discusses landmark developments in the liability of local governments for damages in lawsuits brought under the federal statute 42 U.S.C. § 1983. It begins with an analysis of the United States Supreme Court's decision in Monell v. Department of Social Services,¹ which reversed nearly twenty years of precedent forbidding Section 1983 lawsuits against local governments to recover damages. The Bulletin concludes with an analysis of two United States Supreme Court cases decided in 1980 that significantly affect local government liability in lawsuits brought under Section 1983: Owen v. City of Independence² and Maine v. Thiboutot.³

Local Governments May be Sued for Damages Under Section 1983--Monell v. Department of Social Services

The federal statute 42 U.S.C. § 1983⁴ authorizes a person to sue and recover damages for the violation of a federal constitutional or statutory right caused by official conduct. In 1961 the United States Supreme Court examined the statute's legislative history and decided that a local government

1. 436 U.S. 658 (1978).
2. 48 U.S.L.W. 4389 (1980).
3. 48 U.S.L.W. 4859 (1980).
4. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1976).

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could not be sued under Section 1983 to recover damages for civil rights violations caused by the acts of its public officers and employees.⁵ A Section 1983 lawsuit to recover damages for a violation of federal rights could be brought only against the individual public officer or employee who caused the injury. Since that decision the federal courts have been swamped with Section 1983 lawsuits against public officials. In 1978 the United States Supreme Court, in Monell v. Department of Social Services,⁶ reversed its earlier decision and declared that under certain circumstances local governments could be sued under Section 1983 and required to pay damages for the violation of federal rights.

The Court's decision in Monell held that a local government may be required to pay money damages in a lawsuit brought under Section 1983 if the violation of federal rights is caused by the local government's official policy or custom. However, the Court significantly restricted the potential scope of local government liability by ruling that a local unit may not be held responsible in a Section 1983 lawsuit for the violation of federal rights caused solely by the independent wrongful acts of its employees. A local government may be liable for damages under Section 1983, for example, if someone's rights are violated in the implementation of an ordinance, regulation, or decision officially adopted by the local governing body. And even if the governing body has not formally approved an official practice or custom, the local unit may be liable if the government practice or custom causes the violation of someone's federal rights. The local government may also be liable in a Section 1983 lawsuit if the violation is caused by a public officer whose "acts may fairly be said to represent official policy. . . ."⁷ In other words, a local government may be found liable under Section 1983 only for wrongful acts caused by its official policy or custom--not because it happens to employ someone who violates another's federal rights.

The Monell standard of local government liability under Section 1983 focuses on official policy or custom and is easy to apply at the extremes of a hypothetical range of possible governmental action. A formal decision by the town council that infringes on a person's federal rights constitutes official policy for which the town may be found liable. There is no official policy for which the city may be held liable, on the other hand, if a local police officer independently makes an unconstitutional arrest. Unfortunately, the Monell standard of liability is most difficult to apply in deciding

5. Monroe v. Pape, 365 U.S. 167 (1961).

6. 436 U.S. 658 (1978). See Dellinger, "A New Supreme Court View of Governmental Immunity," Local Government Law Bulletin (July 1978).

7. 436 U.S. at 694.

which actions by public officers between those two extremes constitute official policy for which the local government may be held liable.

No analytical framework can successfully predict the outcome of Section 1983 lawsuits for every conceivable set of circumstances under which a local government may be found liable for violating someone's federal constitutional or statutory rights. Nevertheless, to determine whether a particular action that violates someone's federal rights is caused by an official government policy or custom and gives rise to liability under Monell, a five-step analytical framework based on the following series of questions will be useful.

Step 1. Was the violation of federal rights caused by the implementation of an ordinance, regulation, or decision formally adopted by the highest legislative body of the local government, such as the city council or board of county commissioners? (If the answer is yes, the local government is liable under Monell; if not go to Step 2.)

Step 2. Was the violation of federal rights caused by the implementation of a decision by a lesser board or council that had been delegated final decision-making authority in the area involved, such as the board of adjustment, parks and recreation commission, library board of trustees, or board of health? (If the answer is yes, the local government is liable under Monell; if not, go to Step 3.)

Step 3. Was the violation of federal rights caused by the implementation of a decision by a high-ranking public officer who has been delegated final decision-making authority in the area involved, such as a city or county manager or a particular department head? (If the answer is yes, the local government is liable under Monell; if not go to Step 4.)

Step 4. Was the violation of federal rights caused or encouraged by the deliberate failure of high-ranking public officers (1) to train new public officers or (2) to take remedial action after specific incidents of similar misconduct by a public officer or employee have occurred within a sufficiently short period of time? (If the answer to either part of Step 4 is yes, the local government is liable under Monell; if not go to Step 5.)

Step 5. Was the violation of federal rights caused by the independent, isolated act of a public officer or employee who lacked the authority to make final policy for the local government, such as an individual police

officer? (If the answer is yes, the local government is not liable under Monell.)

This proposed test attempts to define the contours of Section 1983 lawsuits against local governments on the basis of recent lower court interpretations of Monell. The following section will discuss each step in the proposed framework in light of those federal court decisions.

Federal Court Interpretations of Local Government Liability After Monell

Step 1. Was the violation of federal rights caused by the implementation of an ordinance, policy, regulation, or decision formally adopted by the highest legislative body of the local government? (If the answer is yes, the local government is liable under Monell; if not go to Step 2.)

It is easiest to ascertain whether the Monell standard of local government liability under Section 1983 has been satisfied in cases in which action of the local governing body is directly related to the violation of federal rights. In Milwaukee Mobilization for Survival v. Milwaukee County Park Commission,⁸ for example, the federal district court held that the county board of supervisors sued under Section 1983 in their official capacity⁹ were liable for damages because they enacted several unconstitutional ordinances regulating the use of public parks through arbitrary permit requirements. Official county policy was found to be responsible for violating the constitutional rights of permit applicants when employees of the county park commission applied the unconstitutional ordinance requirements to deny requested park permits. Similarly, in Citizens for a Better Environment v. City of Chicago Heights,¹⁰ the federal district court held that the plaintiffs could recover money damages in a Section 1983 lawsuit against the city because the implementation of a peddling ordinance violated their constitutional rights. A local government will be liable for damages in a Section 1983 lawsuit after Monell if someone's

8. 477 F. Supp. 1210 (E.D. Wis. 1979).

9. Lawsuits against public officers or employees in their official capacity are another way of suing the local government. Monell, 436 U.S. at 690, n. 55. The plaintiff must satisfy the official policy or custom requirements of Monell in order to recover damages in a Section 1983 lawsuit against officers or board members sued in their official capacity. A judgment against a public officer in his official capacity may be satisfied from the unit's funds. Burt v. Board of Trustees, 521 F.2d 1201, 1204 (4th Cir. 1975). A judgment in a Section 1983 lawsuit against a public officer in his individual capacity, on the other hand, may be collected only from that official's personal resources.

10. 480 F. Supp. 188 (N.D. Ill. 1979).

constitutional rights are violated in the execution of a properly adopted ordinance or regulation.¹¹

A local administrative unit other than a city or county government, such as a school district or housing authority,¹² may also be required to pay damages out of its public treasury if a decision by the unit's governing body violates someone's federal rights. A number of lower court decisions that illustrate this principle have involved alleged unconstitutional dismissals of teachers or other school employees. In Hawkins v. Board of Public Education,¹³ for example, a custodian sued the school board alleging that the board fired him upon the superintendent's recommendation without a hearing in violation of his constitutional rights to due process of law. The federal district court found that the custodian's due process rights had been violated and awarded him \$6,421 in damages to be paid out of the board's public treasury. The board of education was the local governing body for the school administrative unit and had exclusive responsibility and final authority for the administration of the public schools. Therefore, its official action that violated the custodian's constitutional rights satisfied the Monell standard of liability and permitted a recovery for damages against the board's public treasury. Other federal court decisions have also held that the public funds of a local school board or district may be reached in a Section 1983

11. In Carey v. Phipus, 435 U.S. 247 (1978), the United States Supreme Court held that a plaintiff who establishes a denial of procedural due process in a Section 1983 lawsuit must prove actual injury to recover more than nominal damages (\$1). The Court's decision in Carey overruled the prevailing practice by lower courts in Section 1983 lawsuits of awarding former employees back pay from the date of discharge until the court's later determination that the discharge was procedurally incorrect, even though the court also found that the discharge was for a valid reason and refused to order the employee reinstated. Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972). Government employees dismissed for a proper reason but not in technical compliance with due process notice and hearing requirements must prove some independent injury, such as emotional distress caused by being dismissed without a hearing, in order to recover substantial compensatory damages. The Fourth Circuit Court of Appeals, in Burt v. Abel, 585 F.2d 613, 616 (4th Cir. 1978), held that the damages principle announced in Carey applies only to alleged deprivations of procedural due process. The court's decision in Burt does not mean that substantial damages will be awarded without proof of actual injury to plaintiffs whose substantive constitutional rights are violated. Instead, it is a recognition by the court of appeals that actual injury almost always exists if someone's substantive constitutional rights have been violated and that damages are easier to prove in a lawsuit to recover for substantive violation than in a suit for procedural violations.

12. E.g., Vercher v. Harrisburg Housing Authority, 454 F. Supp. 423 (M.D. Pa. 1978) (Section 1983 lawsuit against housing authority alleging that it ratified the dismissal of an employee in violation of his First Amendment rights states a claim for which damages may be granted).

13. 468 F. Supp. 201 (D. Del. 1979).

lawsuit to compensate someone whose constitutional rights have been violated by the board's official actions.¹⁴

Step 2. Was the violation of federal rights caused by the implementation of a decision by a lesser board, commission, or council that had been delegated final decision-making authority in the area involved? (If the answer is yes, the local government is liable under Monell; if not, go to the next step.)

At this stage of the analysis the issue is whether the action of a board or council beneath the local governing body constitutes official policy for which the unit may be held liable under Monell. The local government may be required to pay damages in a Section 1983 lawsuit if a board or department had the final authority to take a particular action that violated someone's constitutional rights. In Monell, for example, New York City's department of social services and board of education had written policies that forced pregnant employees to take an unpaid leave of absence at an arbitrary point in their pregnancy. A group of female employees brought a Section 1983 lawsuit against the two city agencies and the city to enjoin further application of the unconstitutional policies and to recover back pay for their forced absence from work. The United States Supreme Court, in Cleveland Board of Education v. LaFleur,¹⁵ declared such arbitrary pregnancy policies unconstitutional, and the two New York City agencies changed their policies. Even though the pregnancy policies had violated the constitutional rights of certain female employees, the lower federal courts refused to award any money damages to the plaintiffs because any award would ultimately come from city funds. The Supreme Court reversed, holding that a local government could be required to pay damages from the public treasury in a Section 1983 lawsuit if its official policy violated someone's federal rights. It also ruled that the adoption and application of unconstitutional policies by the two city agencies consti-

14. E.g., Kingsville Independent School District v. Cooper, 611 F.2d 1190 (5th Cir. 1980) (school district ordered to pay substantial damages because board of trustees failed to reappoint teacher in violation of her First Amendment rights); Stoddard v. School District No. 1, 590 F.2d 829 (10th Cir. 1979) (school district ordered to pay \$33,000 in compensatory damages because board of trustees failed to reappoint teacher in violation of her First Amendment rights); Atkinson v. Babcock School District, 410 F. Supp. 1190 (W.D. Pa. 1978) (schoolteacher granted judgment in Section 1983 action against school district because board policy unconstitutionally denied her the use of accumulated sick leave). See also Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979) (junior college considered "independent political subdivision" under Texas law and ordered to pay \$23,400 in back pay because board of regents voted not to renew teacher's contract in violation of her First Amendment rights).

15. 414 U.S. 632 (1974).

tuted official policy for which the city could be liable in a Section 1983 lawsuit.¹⁶

The local government may also be held liable in a Section 1983 lawsuit for the unconstitutional actions or policies of other local boards and commissions beneath the unit's official governing body. For example, a policy by the county health board that arbitrarily revokes all outstanding septic tank permits in violation of the constitutional due process rights of permit holders who have made substantial expenditures in reliance on the permits would satisfy the Monell requirement of official governmental policy and could make the county liable under Section 1983. The local government can regulate septic tanks only through the board of health because the board has been delegated final authority to decide whether an applicant is entitled to a permit. Board of health policy regarding permit applications therefore is automatically county policy. Thus the county may be liable for damages in a Section 1983 lawsuit if the health board implements an unconstitutional permit policy. A number of other local boards, such as a board of adjustment or a parks and recreation commission, also make official government policy that can violate federal rights and make the local government liable. The local government may be liable, for example, if the board of adjustment attaches an unconstitutional condition to a special-use permit or illegally discriminates in granting variances from the zoning ordinance.

Step 3. Was the violation of federal rights caused by the implementation of a decision by a high-ranking public officer who has been delegated final decision-making authority? (If the answer is yes, the local government is liable under Monell; if not, go to Step 4.)

The analysis of government liability at this stage is closely related to the stage just discussed except that here the final authority to make official government policy in a particular area has been delegated to an individual officer instead of a board or commission. In Himmelbrand v. Harrison,¹⁷ for example, a city police officer submitted his letter of resignation to the city manager and later requested

16. Although Monell involved a written department policy, a local government may be liable in a Section 1983 lawsuit if one of its unwritten policies violates someone's federal rights. In Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979), for example, the federal district court held that the city could be liable for the violation of an officer's constitutional rights caused by the police department's unwritten policy of dismissing any officer who refuses to answer questions about his personal life during an official investigation. The court found that the investigation policy was unconstitutional and, even though unwritten, was commonly recognized as the official department policy and therefore satisfied the Monell standard required to establish local government liability.

17. 484 F. Supp. 803 (W.D. Va. 1980).

a hearing under a statutory post-termination grievance procedure. The city manager claimed that the procedure was not intended to govern voluntary resignations and denied the officer's request for a grievance hearing. The officer sued the city for damages under Section 1983, alleging that his constitutional right to a due process hearing had been violated. The federal district court held that municipal liability in a Section 1983 lawsuit "may be predicated upon the conduct of a single city official, so long as his conduct actually represents the official position of the city in a given matter."¹⁸ The city's motion for judgment before trial was denied in Himmelbrand because the jury had to resolve the factual issue of whether the city manager's refusal to grant the hearing represented official policy: The official's action in Himmelbrand (the city manager's refusal to grant the hearing) must be found to represent official policy of the local government under Monell if it is the final authorized action taken by the unit in the matter.¹⁹

The principle that public officers with final authority to act for the local unit in a given matter may violate someone's constitutional rights and cause government liability under Section 1983 is not limited to improper dismissals of employees. In North America Cold Storage Co. v. Cook County²⁰ the plaintiff sued the county for damages under Section 1983 alleging that the county tax assessor had intentionally and unconstitutionally assessed its property at substantially higher rates than a local ordinance required. The plaintiff also alleged that the county board of tax appeals knew of the discriminatory assessments but failed to review the plaintiff's complaints and order corrected assessments. Cook County argued that the lawsuit against it should be dismissed without a trial because it had not caused the unconstitutional assessment and under Monell governments are not liable for the independent, wrongful acts of their employees. The federal district court denied the county's motion to dismiss before trial and ruled that the county could be liable under Monell because the assessor and board of tax appeals were statutorily authorized to set county policy regarding property assessment. In this case the trial court combined a Step 2 (board of tax appeals) analysis and a Step 3 (tax assessor) analysis in order to

18. Id. at 810.

19. The United States Supreme Court apparently decided this issue in Owen v. City of Independence, 48 U.S.L.W. 4389 (1980). The Court in Owen held that the City of Independence could be required to pay money damages in a Section 1983 lawsuit when the discharge of an employee by the city manager was accompanied by false statements at a city council meeting that injured the employee's reputation. E.g., Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980) (summary judgment should not have been granted city in Section 1983 action alleging that the mayor violated an employee's constitutional rights by directing a scheme to stigmatize because the mayor is a city official whose acts represent municipal policy).

20. 468 F. Supp. 424 (N.D. Ill. 1979).

find official government action and the possibility of county liability under Section 1983.²¹

Other lower federal courts have used the same analysis to find that the actions of a particular public officer did not constitute official policy for which the local government could be held responsible. For example, in Tyler v. Woodson²² the Eighth Circuit Court of Appeals held that St. Louis County could not be found liable in a Section 1983 lawsuit for the alleged confiscation of a prisoner's legal papers by a social worker at the jail. The social worker had not been delegated authority to confiscate the papers and the confiscation was not made pursuant to any prevailing local custom. Instead, it was an independent, wrongful act by the social worker for which the county could not be held liable. Similarly, in Stewart v. City of Pontotoc,²³ the plaintiff was denied damages in a Section 1983 lawsuit against the city alleging that her rights were violated by a city clerk who failed to tell the mayor that she was interested in a job. The district court decided that there was no official government action for which the city could be liable under Monell because the clerk had not been delegated the authority to hire or take job applications. At least one federal court has also decided that a city or county will not be liable in a Section 1983 lawsuit if the unconstitutional actions of a high-level officer authorized to make policy in a certain area are corrupt and taken for his own personal gain.²⁴

A few general observations can be made about potential government liability at this stage in the analytical framework. A public officer's unconstitutional action can result in government liability in a Section 1983 lawsuit only if the officer has final authority to act in the particular area. A public officer may receive such final authority to act for

21. "[A]ction need not be taken pursuant to a specific legislative enactment to be considered the action of the government unit. . . . [A]n allegation that policy-making officials have engaged in a systematic, widespread discriminatory practice is sufficient to state a cause of action against the governmental unit under Section 1983. . . . Only the Assessor and the Board of Appeals. . . can be said to act for the county on any particular assessment. Under these circumstances, their actions may be said to be those of the County." Id. at 427.

22. 597 F.2d 643 (8th Cir. 1979).

23. 461 F. Supp. 767 (N.D. Miss. 1978).

24. In Hoopes v. City of Chester, 473 F. Supp. 1214 (E.D. Pa. 1979), the former police chief sued the City of Chester under Section 1983 alleging that he was discharged by the mayor in violation of his First Amendment rights because he testified as a prosecution witness at the mayor's criminal trial. The former police chief argued that the mayor's arbitrary control over the police department for his personal gain constituted an unconstitutional "custom" of the city. The federal district court decided that unconstitutional action taken for personal gain by an officer authorized to make city policy may not result in governmental liability.

the local government by statute²⁵ or through a proper administrative delegation. A local government may be liable for an unconstitutional action taken against a single individual by such a public officer acting within the scope of his authority if the action is the final action taken by the government in the matter. But the local government will not be liable if the action is taken for the officer's personal gain and not in furtherance of a legitimate governmental purpose.

Step 4. Was the violation of federal rights caused or encouraged by the deliberate failure of high-ranking public officers (1) to train new public officers or (2) to take remedial action after specific incidents of similar misconduct by public officers or employees have occurred within a sufficiently short period of time? (If the answer to either part of Step 4 is yes, the local government is liable under Monell; if not, go to Step 5.)

Many Section 1983 lawsuits brought against local governments since Monell have alleged that a person's federal rights were violated because high-ranking public officers failed to take action that could have prevented the violation. For example, many have alleged that constitutional deprivations suffered at the hands of police officers occurred because police supervisors did not discipline officers for past misconduct. Local governments may be held liable in such Section 1983 lawsuits only when it has been established that a reckless (not negligent) failure to take preventive action by supervisory officers caused a violation of federal rights. Moreover, a single incident of misconduct by a public officer must usually be connected with a pattern of similar misconduct before the failure of supervisory officers to take remedial action will be considered sufficiently reckless to hold a local government liable in such a suit.²⁶

25. N.C. Gen. Stat. § 153A-82, for example, grants a North Carolina county manager exclusive authority to remove employees appointed by him in accordance with general personnel rules or ordinances adopted by the board of county commissioners. The county could be required to pay damages in a Section 1983 lawsuit if a county manager fired an appointee in violation of his First Amendment rights. Comparably, N.C. Gen. Stat. § 160A-148 grants a city manager exclusive authority to remove certain employees and could lead to city liability in a Section 1983 lawsuit.

26. The United States Supreme Court has never decided as a general principle whether simple negligence can give rise to Section 1983 liability [Baker v. McCollan, 25 Crim. L. Rep. 3221, 3222 (1979)], though the Court has held that more than a negligent denial of prison medical care must be established before a person may recover under Section 1983 for a violation of his Eighth Amendment rights. Estelle v. Gamble, 97 S. Ct. 285 (1976). The Fourth Circuit Court of Appeals has suggested, however, that under certain circumstances a person may recover under Section 1983 for the negligent violation of his rights by public officers. Withers v. Levine, 615 F.2d 158 (4th Cir. 1980) (dicta). Apparently, the Fourth Circuit would require a pervasive and unreasonable risk of

A plaintiff must recite specific acts of past misconduct in order to succeed in a Section 1983 lawsuit against a local government alleging that the failure of responsible supervisors to take remedial action in the face of a known pattern of similar violations constitutes an official policy or custom that encourages further violations of federal rights. In a leading case, Smith v. Ambrogio,²⁷ the plaintiff sought to recover damages against the town because he was unconstitutionally arrested by town police officers without a warrant and without probable cause on charges that were later dismissed. The plaintiff argued that the town should be liable under Section 1983 because it failed to discipline officers who frequently violated the constitutional rights of citizens. To establish that the failure of high-level supervisors to prevent constitutional violations amounts to official policy for which the government should be liable, according to the federal district court, a plaintiff must "present such extreme facts that inaction by a supervisor with knowledge of a pattern of unconstitutional actions by his subordinates is the equivalent of approval of the pattern as a policy of the supervisor and hence tacit encouragement that the pattern continue."²⁸ The plaintiff's lawsuit in Smith was dismissed before trial because he made only conclusory allegations of past violations and did not allege

a constitutional violation before a negligent failure to prevent the violation by public officers could result in Section 1983 liability. However, because a failure by supervisory officers to take preventive action under such circumstances probably constitutes recklessness, the Fourth Circuit apparently would follow those courts that have required a past pattern of misconduct before the local government can be held liable under Section 1983 for failure of supervisory officers to take remedial action.

27. 456 F. Supp. 1130 (D. Conn. 1978).

28. Id. at 1136. The district court in Smith suggested that government liability for supervisory inaction may be easier to establish if a supervisor fails to respond to a specific condition for which he has been delegated ultimate responsibility. For example, a local government might be liable under Monell for an unconstitutional official policy created by supervisor inaction if a sheriff ignored the statute that requires him to care for the jail by failing to remedy substandard and unconstitutional jail conditions. The standard of government liability proposed by Smith would not require evidence of a past pattern of similar misconduct to prove the existence of an official government policy because the statute creates a positive duty always to maintain the jail free of constitutional violations. However, the proposed standard of government liability for supervisor inaction would probably be limited to the failure to remedy fixed constitutional violations related to structural or physical conditions; if the unconstitutional condition consisted of a series of independent acts by public officers, such as beating of prisoners by guards, a past pattern of misconduct would still be needed to establish that the violations were caused by supervisory inaction. See also Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979) (single incident of misconduct may establish county liability under Section 1983 because a pattern of underfunding the jail amounts to government policy of refusing to enforce mandatory statutory duties to maintain jail).

specific incidents of past misconduct to support his claim that official inaction constituted a town policy.²⁹

Conclusory allegations that supervisors ignored past misconduct and encouraged the present violation are not sufficient to put a town to the expense of trial in a Section 1983 lawsuit; a plaintiff's lawsuit must recite specific episodes of past misconduct and must identify the supervisors whose inaction supposedly reflects the town's policy of encouraging future violations. However, a later decision by the same federal district court that dismissed Smith also dismissed another 1983 lawsuit against a city before trial even though the plaintiff listed seven specific incidents of police misconduct over the previous eleven years. The federal district court held that so few violations over such a long period were not sufficient to permit the inference of a governmental policy or custom.³⁰ But in Ellis v. City of Chicago³¹ the federal district court held that the plaintiff's Section 1983 lawsuit against the city based on supervisory inaction listed enough specific incidents of past misconduct to avoid dismissal before trial. The plaintiff in Ellis alleged that his constitutional rights were violated when a city police officer broke into his home unannounced, searched the entire house without a warrant, shot and killed the family dog, assaulted him, and pushed him into public with a gun pointed at his head. He also listed three specific instances of constitutional violations committed by city police officers against the plaintiff and his family within the preceding two years. Those specific rather than conclusory allegations by the plaintiff were sufficient to permit the case to go to a jury for a determination of whether the combined incidents amounted to a pattern of misconduct and, if so, whether supervisory inaction in the face of that pattern represented an official policy or custom that encouraged the instant police misconduct. The court found it significant that the earlier incidents of misconduct had been directed against the plaintiff and his family.

Another theory of governmental liability under Section 1983 at this stage in the analytical framework is that the failure of supervisory officers to train new police officers

29. E.g., Bready v. Geist, 83 F.R.D. 432 (E.D. Pa. 1979) (Section 1983 lawsuit against township based on supervisory inaction dismissed before trial because plaintiff did not plead specific incidents of past misconduct); Schramm v. Krischell, 84 F.R.D. 294 (D. Conn. 1979) (Section 1983 lawsuit against city based on failure to supervise dismissed before trial because allegations of past misconduct not supported "by detailed reference to specific incidents"); Lodermeier v. City of Sioux Falls, 458 F. Supp. 1202 (D.S.D. 1978) (city granted judgment before trial because Section 1983 lawsuit based on supervisory inaction did not state specific and persistent practices of past misconduct that would amount to governmental custom).

30. Penzerro v. Marchionni, Civil No. B-77-387 (D. Conn. April 18, 1978).

31. 478 F. Supp. 333 (N.D. Ill. 1979).

adequately causes the inevitable violation of someone's federal rights. Many lower federal courts have held that negligent training of police officers that causes police misconduct is not sufficient by itself to impose governmental liability in a Section 1983 lawsuit;³² the failure to train must amount to gross negligence or deliberate indifference to police misconduct before the local government becomes liable for constitutional violations. Unlike government liability under Section 1983 for supervisory inaction in the face of past violations, however, government liability that results from an official policy of failure to train may be based on a single incident not related to a pattern of past misconduct. In Owen v. Haas,³³ for example, a prisoner refused to leave his jail cell after being ordered out by a guard. The guard left and returned with six other guards who severely beat the prisoner and inflicted injuries that caused him to suffer repeated blackouts. The federal district court dismissed the prisoner's Section 1983 lawsuit against the county before trial because he had not alleged that the incident was connected with a similar pattern of incidents that could establish the official policy necessary for government liability after Monell. The Second Circuit Court of Appeals reversed, holding that a county could be liable in a Section 1983 lawsuit if its failure to train the jail staff was so grossly negligent as to constitute deliberate indifference to the deprivation of a prisoner's constitutional rights. Significantly, the court of appeals ruled that a "single brutal incident" could provide the necessary causal link between the county's policy of deliberate indifference to training and the violation of a person's constitutional rights.³⁴ Gross negligence in training that constitutes deliberate indifference to constitutional violations is suggested if the incident of misconduct is especially brutal or if a significant number of officers are involved.³⁵

32. E.g., Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979); Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979); Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978).

33. 601 F.2d 1242 (2d Cir. 1979).

34. E.g., Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980); Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978). The federal district court in Leite noted: "Although a city cannot be held liable for simple negligent training of its police force, the city's citizens do not have to endure a 'pattern' of past police misconduct before they can sue the city under section 1983. . . . [A] municipality is fairly considered to have actual or imputed knowledge of the almost inevitable consequences that arise from the nonexistent or grossly inadequate training and supervising of a police force." Id. at 590-91.

Step 5. Was the violation of federal rights caused by the independent, isolated act of a public officer or employee who lacked the authority to make final policy for the local government? (If Step 5 is reached and answered yes, the local government is not liable under Monell.)

The local government is not liable if the analysis has proceeded to this stage because getting this far means that the facts of the case do not fall within one of the generally recognized theories of governmental liability. A local government may not be held liable in a Section 1983 lawsuit after Monell just because it employs someone who violates another's federal rights. In Reimer v. Short,³⁶ for example, the Fifth Circuit Court of Appeals held that the City of Houston could not be liable in a Section 1983 lawsuit simply because two police officers harassed a salvage dealer by conducting illegal warrantless searches and wrongfully seizing his pickup truck. Similarly, the Seventh Circuit Court of Appeals held that the Village of Maywood was not liable under Section 1983 for wrongfully refusing to reinstate a tenant's water service when her landlord's water bill was unpaid since there was no allegation that the "ordinary employees" involved were acting pursuant to a departmental policy or custom.³⁷ Several other lower federal courts have also found that governments will not be liable under Section 1983 for the independent actions of government employees who lack the authority to make official policy but violate someone's rights.³⁸

35. In Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1978), a city police officer chased a fleeing kidnapper into a residential area and shot to death an innocent man who stepped outside his home to investigate the commotion. The man's wife brought a Section 1983 lawsuit against the city claiming that her husband's death was caused by the city's failure to train its police officers. The federal district court refused the city's motion for judgment before trial because there was a genuine issue as to whether the city's failure to train was grossly negligent and amounted to official acquiescence in the unconstitutional conduct. The court considered the following factors before deciding that a jury might find the city's level of training grossly inadequate: city police officers received only general firearms training when they first joined the force; additional shooting instruction was given no more than every six months; officers received no instruction in shooting at a moving target, night shooting, or shooting in a residential area; and the city's shooting regulation was explained only once and not in much detail. The court in Popow emphasized that a single brutal incident would not alone be sufficient to impose government liability for failure to train but suggested that a single incident may be used to establish local government liability if the incident was caused by an official policy of deliberate indifference to adequate training.

36. 578 F.2d 621 (5th Cir. 1978).

37. Sterling v. Village of Maywood, 579 F.2d 1350 (7th Cir. 1978).

38. E.g., Myers v. Davis, 467 F. Supp. 8 (E.D. Tenn. 1978).

Local Governments Sued Under Section 1983
Not Entitled to Qualified Good-Faith Immunity--
Owen v. City of Independence

The United States Supreme Court decision in Monell held that local governments were not entitled to absolute immunity from liability for damages in lawsuits brought under Section 1983. It did not decide whether local governments were entitled to any lesser form of immunity, such as the qualified good-faith immunity accorded public officers. Public officers who violate someone's federal rights have qualified good-faith immunity and are not required to pay damages if they acted without malice and in accord with settled, undisputed law.³⁹ A number of lower federal courts decided after Monell that local governments were also entitled to qualified immunity from liability for damages under Section 1983 if the public officers responsible for the unconstitutional official policy acted without malice and in accord with settled law. In Owen v. City of Independence,⁴⁰ however, the United States Supreme Court rejected this approach and held that local governments sued under Section 1983 are not entitled to good-faith immunity from liability for damages. Its decision also provides an interesting example of conduct that will be considered official policy sufficient to establish government liability under Section 1983. To assess the impact of the decision, it is necessary to understand the complicated facts of Owen.

The city manager had appointed Owen to an indefinite term as police chief. An investigation into the management of the police department's property room several years later revealed serious administrative irregularities but no criminal violations. The city manager reviewed the investigative report and asked Owen to accept a lower position in the department or be dismissed. He also issued a public statement addressed to the mayor and the city council that summarized the results of the investigation without reference to Owen. Owen consulted an attorney and sent the city manager a letter demanding written notice of the charges against him and an opportunity to respond to the charges at a public hearing.

Councilman Roberts requested and received a copy of the investigative report. He read a prepared statement at the next regularly scheduled city council meeting that included the following allegations: (1) Owen had taken police department property (TV sets) for his own use; (2) narcotics had "mysteriously disappeared" from Owen's office; and (3) traffic tickets had been manipulated. At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor

39. Wood v. Strickland, 420 U.S. 308 (1975).

40. 48 U.S.L.W. 4389, 63 L.Ed. 2d 673 (1980).

for presentation to the grand jury. The motion also directed the city manager to take "appropriate action against those persons involved in illegal, wrongful, or grossly inefficient activities brought out in the investigative reports." The council passed the motion.

The following day the manager dismissed Owen without any statement of reasons. The media gave prominent coverage to the council's action and linked Owen's discharge to the property room investigation. The prosecutor presented the investigative reports to the grand jury, which did not return an indictment. These reports were never released to the public, and no other action was taken by the city council or the city manager. Owen sued the City of Independence, the manager, and the council members in their official capacities and alleged that his discharge deprived him of liberty and property without due process of law. He requested a hearing on the reasons for his discharge.

The Fourteenth Amendment of the Constitution provides that no person may be deprived of life, liberty, or property without due process of law, which requires prior notice of the reasons for the deprivation and an opportunity for a hearing to consider those reasons. The trial court found in favor of the local government for two reasons: (1) Owen had no property interest in his job--no continued right to public employment--and was not entitled to notice and a hearing before his discharge; and (2) his discharge did not deprive him of a liberty interest in his professional reputation--no stigma of illegal or immoral conduct was created--and he was not entitled to a name-clearing hearing. The Eighth Circuit Court of Appeals disagreed in part, holding that the city council's official action in releasing "false charges" against Owen at the same time the city manager discharged him blackened his reputation and deprived him of liberty without due process of law. Nevertheless, it affirmed the trial court's judgment and held that the city was entitled to immunity from damage liability because its officers acted in good faith and without malice.

The aspect of the Owen decision that has received the most attention is its holding that a local government may not rely on the good faith of its officers as a defense to liability under Section 1983. The issue of whether the city was entitled to qualified good-faith immunity, however, was not reached until after Owen had established that the official policy of the city caused a violation of his constitutional rights.⁴¹ We will consider the interpretation of the Monell

41. Last term the United States Supreme Court, in Gomez v. Toledo, 48 U.S.L.W. 4600 (1980), held that the plaintiff in a Section 1983 lawsuit is not required to allege that the defendant acted in bad faith in order to avoid having his lawsuit dismissed before trial; but instead the burden is on the defendant specifically to raise good faith as an affirmative defense to the lawsuit.

standard of governmental liability in the Owen case before assessing the significance of the Court's decision to deny qualified immunity to local governments sued under Section 1983.

The Supreme Court in Monell held that a local government could be liable in a Section 1983 lawsuit only if official government policy caused the violation of federal rights, but the local government is not liable for violations caused solely by the independent acts of its employees or officers. While the Eighth Circuit ultimately decided for the defendant in Owen, it also found that the city's official actions had violated Owen's constitutional rights by harming his reputation and depriving him of liberty without due process of law. The Supreme Court agreed.⁴² Justice Brennan's majority opinion stated that the "city--through the unanimous resolution of the City Council--released to the public an allegedly false statement impugning [Owen's] honesty and integrity."⁴³ The facts of the case, though, do not appear to support that conclusion.

The city manager, not the council, had exclusive statutory authority to fire Owen and had in fact dismissed him without a public statement of reasons. The city council passed a neutral resolution without specific reference to Owen that called for the release of the investigative reports to the prosecutor and directed the city manager to take appropriate action against the persons involved in the alleged wrongful activities.⁴⁴ Each of these actions may represent official policy, but none of them harmed Owen's reputation. The only action that clearly injured Owen's reputation was the independent action of Councilman Roberts in accusing Owen by name of certain gross improprieties. Councilman Roberts had absolutely no authority to participate in the dismissal of Owen, and his unauthorized comments at the council meeting seem to be the type of independent acts by a government officer for which the local government should not be held liable. However, it was critical to the Court's decision that the press gave prominent coverage to Roberts' accusations and linked them with Owen's dismissal the next day. It was equally important to the Court's finding of official government action that the council's resolution--even though neutral on its face--was adopted in response to Roberts' comments and that the council therefore appeared to adopt the accusations by not renouncing them. Even though the statements that damaged Owen's reputation were not technically

42. "[W]e have no doubt that the Court of Appeals correctly concluded that the city's actions deprive [Owen] of liberty without due process of law." 48 U.S.L.W. at 4392, n. 13.

43. Id.

44. The council action also directed that the investigative reports be released to the news media. They were not released to the press, and the grand jury did not return an indictment.

made in the course of the official discharge, the Court found that Roberts' highly publicized statements at the council meeting and the council's resolution roughly contemporaneous with Owen's discharge amounted to official government action that harmed Owen's reputation and deprived him of liberty without due process of law.

Notwithstanding its confused reasoning, the Owen decision contains some lessons for local government attorneys concerning the dismissal of public officers and employees. Council members, board members, and department heads should be warned not to make statements at official meetings of the governing body that might damage an employee's reputation. Discussions about an employee's performance that might harm his reputation should take place only in executive session.⁴⁵ The fact that stigmatizing charges were made during the governing body's official deliberations does not protect a local government against liability in a Section 1983 lawsuit.⁴⁶ It is unclear, however, whether the local government may be held liable for defamatory statements about a dismissed employee made by a city officer at some place other than a meeting of the governing body. For example, would the result in Owen have been the same if Councilman Roberts had called a press conference to accuse Owen of gross improprieties? Probably not. In its decision the Court suggested that the council's passage of Roberts' motion after his defamatory preamble had the effect of officially adopting his statements that injured Owen's reputation; it would have probably reached a different result if Roberts had made his statements away from the council meeting. If a public officer does make a defamatory statement about an employee at a meeting of the governing body, the remaining members should take some official action to indicate that the individual officer does not speak for the board. (In Owen the council seemed to endorse Roberts' allegations by adopting his neutral motion without denying responsibility for his earlier defamatory statements.) Another possible course of action would be to grant the defamed employee a name-clearing hearing and then dismiss him without fear of liability.

By far the most significant aspect of the Owen decision is its holding that a local government is strictly liable for violations of federal rights caused by its employees or officers in executing official government policy. The fact that its employees acted in good faith and could not have predicted when they acted that their actions would violate someone's rights does not by itself protect a local government against

45. See generally, D. Lawrence, Open Meetings and Local Governments in North Carolina 11-13 (Chapel Hill, N.C.: Institute of Government, 1979).

46. Under Monell a government is liable in a Section 1983 action only if the violation of constitutional rights resulted from official policy, and no policy is more official than one made at a formal meeting of the governing body.

liability for damages in a Section 1983 lawsuit. In Owen, for example, a United States Supreme Court case decided ten weeks after Owen was dismissed by the city manager first announced the principle that a discharged public employee is constitutionally entitled to a name-clearing hearing if his employer makes a public statement that might seriously damage his standing and reputation in the community.⁴⁷ City officials had no reason to believe that public statements at the time of Owen's dismissal that harmed his reputation would violate his constitutional rights and entitle him to a name-clearing hearing.

The basic rationale for the Court's decision in Owen was that any immunity granted to local governments would leave persons whose federal rights were violated because of government policy without the broad Section 1983 remedy intended by Congress. Moreover, the Court found that local governments would not be deterred from enacting unconstitutional policies if they were entitled to the same qualified good-faith immunity from damages accorded public officers. It predicted that the threat of strict municipal liability for constitutional violations will not chill the decisiveness of public officials nor make them afraid to respond to the needs of local government. Although the Court's arguments in support of its Owen decision may be criticized,⁴⁸ the effect of the decision is to increase significantly the potential for local government liability under Section 1983.⁴⁹

One consequence of the Owen decision is that the entire risk of loss arising out of violations of federal rights caused by governmental action is allocated to the local government. Implicit in the Court's decision is a clear message to local governments that one prudent means of protecting the local treasury from potentially crippling judgments in Section 1983 lawsuits is to purchase liability insurance. Each local government's attorney should examine the unit's liability insurance policy, if there is one, to

47. Board of Regents v. Roth, 408 U.S. 564 (1972).

48. The Court gave little credence to the argument that the threat of strict municipal liability could inhibit decisions by public officers. In fact, it stated that public officers should become more responsible and that each public decision-maker should carry the burden of determining "whether his decision comports with constitutional mandates." 48 U.S.L.W. at 4398. It is interesting to note that the decision-maker in Owen, however, could not possibly have predicted that his decision would be declared unconstitutional (see text at note 44).

49. The impact of the Owen decision will be especially severe in the field of local government regulation. For example, a zoning regulation that is found to constitute a taking in an inverse condemnation action brought under Section 1983 could result in a damage award against the local government. After Owen the local government will not be entitled to qualified immunity from liability for damages by showing that the regulation was adopted in good faith and without knowing that it was unconstitutional. Instead, the unconstitutional regulation will be invalidated and the government will be liable for damages to the injured landowner.

determine whether it sufficiently protects the unit against the expanded potential for liability for damages under Section 1983 after Monell and Owen. For example, he should decide whether the liability insurance contract covers damages caused by violations of federal civil rights. Also, he should make sure that the local government is protected in a Section 1983 suit against the unit in which a specific public officer or employee is not named as a defendant. If the unit has decided not to purchase liability insurance in the past, now may be a good time to survey the market and reconsider that decision in light of Owen. Unfortunately, comprehensive and affordable liability insurance is not readily available to protect local governments against liability for all activities.⁵⁰ As a result, attorneys for local governments might also consider implementing a rational self-insurance plan to provide protection against liability for those activities not protected by private insurance.

The Owen decision places a premium on having local officials consult with the government attorney before taking action that is not clearly constitutional--a matter that governing board members and department heads cannot always predict. The need to take a particular government action may outweigh the risk that it will be declared unconstitutional and that the local government will be liable for damages, but the action should not be taken in ignorance of its possible legal consequences.

Section 1983 Permits Lawsuits to Recover for Violations of Federal Statutory Rights--Maine v. Thiboutot

Section 1983 is a remedial statute that creates the right to bring a lawsuit to recover damages under certain circumstances. It provides that a person may bring such a lawsuit if he has been deprived of rights secured by "the Constitution and laws." Most courts had assumed that the language of Section 1983 authorized only lawsuits to recover for the violation of a federal constitutional right. As a result of the restrictive interpretation formerly given Section 1983, a person deprived of rights conferred by a federal statute could not sue and recover solely for the statutory

50. The North Carolina Public Officers and Employees Liability Insurance Commission has contracted with James F. Jackson and Associates, Inc., of Woodbine, Maryland, to provide a group plan of liability insurance for local governments that offers comprehensive coverage for law enforcement personnel. Coverage options are also available to include elected or appointed public officers and employees in most other government departments, but not for liability arising out of the operation of a local school, hospital, or airport. The available insurance protects local governments against liability in Section 1983 lawsuits alleging that the government's official policy violated someone's civil rights. See Smith, "Liability Insurance for Law Enforcement Officers," 45 Popular Government 50 (Winter 1980).

violation unless the statute expressly or implicitly authorized such a lawsuit. In Maine v. Thiboutot,⁵¹ however, the United States Supreme Court held that Section 1983 authorizes a person whose rights under a federal statute have been violated to sue for and recover damages.

The plaintiffs in Thiboutot were Lionel and Joline Thiboutot--a married couple with eight children, three of whom were Lionel's from a previous marriage. The Maine Department of Human Services informed Lionel that in computing the AFDC (Aid to Families with Dependent Children) benefits to which he was entitled for these three children, it would no longer make allowance for the money spent to support his other children. The Thiboutots sued under Section 1983, claiming that they were deprived of welfare benefits because of the state's incorrect interpretation of the Social Security Act. The lower courts agreed and ordered the state to pay the Thiboutots benefits that had been improperly denied. The Supreme Court affirmed and ruled that Section 1983 authorizes lawsuits to enforce rights guaranteed under a federal statute; its authorization is not limited to lawsuits to recover for violations of federal civil rights statutes, but Section 1983 probably does not permit a lawsuit if the federal statute provides an exclusive remedy.⁵²

Several points need to be made about Thiboutot's potential impact on the liability of local governments. The combined effect of this case and the Owen decision that local governments are strictly liable for damages in Section 1983 lawsuits will be to encourage persons harmed by the administration of a federal-state-local cooperative program to sue the local government. A local government's improper administration of a federal grant program--such as the Food Stamp Act of 1964, the Comprehensive Employment and Training Act of 1978 (CETA), or the Housing Act of 1937--could result in a recovery under Section 1983 against the local treasury. A local government might also be liable under Section 1983 if its official policy deprives a person of rights secured by other federal statutes not connected with such a program. The Thiboutot decision has increased the potential liability of local governments under Section 1983 and should increase the number of lawsuits filed against them.

Still, one limitation on Section 1983 lawsuits against local governments solely for the violation of a federal statute may restrict the local treasury's liability. Unless the plaintiff establishes that a federal statute authorizes the federal courts to entertain his type of lawsuit, the case will be dismissed before trial. The federal jurisdictional statute that empowers the federal courts to consider most

51. 48 U.S.L.W. 4859. 65 L.Ed. 2d 555 (1980).

52. Id. at 4865, n. 11 (dissenting opinion).

Section 1983 claims is 28 U.S.C. § 1343(3), but it permits only lawsuits to recover for the deprivation of rights "secured by the Constitution of the United States or by any act of Congress providing for equal rights. . . ."53 A plaintiff who is deprived of rights in violation of a federal statute that does not involve equal or civil rights therefore must show that a different jurisdictional statute authorizes the federal courts to consider his Section 1983 lawsuit. The federal statute 28 U.S.C. § 1331(a) permits district courts to consider lawsuits involving a federal statute--including Section 1983--if the amount in controversy exceeds \$10,000. Thus a plaintiff must claim damages of over \$10,000 in order to recover in federal court for the violation of a federal statute that does not involve equal or civil rights.

The \$10,000 amount-in-controversy requirement is a jurisdictional hurdle that will be cleared in most Section 1983 lawsuits. Unless it appears to a legal certainty that the plaintiff cannot recover the amount demanded in excess of \$10,000, a federal court must find that the jurisdictional amount requirement has been satisfied.⁵⁴ It is important to scrutinize the allegations, however, because many frivolous lawsuits have been brought under Section 1983. Also, suppose a person alleges that an incorrect interpretation of the Social Security Act has improperly reduced his AFDC benefits and claims in a Section 1983 lawsuit that his damages exceed \$10,000. Since the loss of a specific sum over a definite period is alleged, it may be possible to establish to a legal certainty that the actual damages do not exceed \$10,000. Under these circumstances a plaintiff's Section 1983 lawsuit may be dismissed for lack of jurisdiction.⁵⁵

The Eleventh Amendment prohibits lawsuits in federal court to recover damages against a state and its agencies,⁵⁶ but it does not extend this protection to cities and

53. 28 U.S.C. § 1343(3) (1976).

54. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). See generally, C. Wright, Handbook on the Law of Federal Courts §§ 32-37 (3d ed. 1976).

55. A plaintiff could avoid the \$10,000 jurisdictional amount requirement by bringing his Section 1983 lawsuit against the local government in state court. Lionel and Joline Thiboutot, for example, brought their Section 1983 lawsuit in a Maine superior court rather than a federal district court. State courts are authorized to consider lawsuits brought under Section 1983, although the United States Supreme Court has not decided whether they must do so. *Martinez v. California*, 48 U.S.L.W. 4076, 4077, n. 7 (1980).

56. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." It has been interpreted to forbid suits against a state by its own citizens. A plaintiff may avoid the prohibition of the Eleventh Amendment by bringing his Section 1983 lawsuit against the local government in a state court. *Maine v. Thiboutot*, 48 U.S.L.W. 4859, 4861-62, n. 7 (1980).

counties.⁵⁷ Many local entities have tried to avoid Section 1983 liability in federal court by claiming to be an arm of the state and therefore protected by the Eleventh Amendment. Most of them have failed.⁵⁸ The Supreme Court, in Mt. Healthy City Board of Education v. Doyle,⁵⁹ held that a local school board with extensive powers to issue bonds and levy taxes was more like a city or county than it was like an arm of the state, even though the board received some guidance and a significant amount of money from the state. In Mackey v. Stanton,⁶⁰ for example, the Seventh Circuit Court of Appeals found that a local welfare department was like a political subdivision and not protected from liability in federal court by the Eleventh Amendment. The most significant factor in the court's decision was that under state law the county department had the power to raise funds and could pay court judgments against it without resort to the state treasury. Notwithstanding this failure rate by local units seeking Eleventh Amendment immunity, an attorney for a local government sued in federal court for the actions of a local department could claim that the department is an arm of the state and entitled to Eleventh Amendment protection if the department is subject to significant state control.⁶¹

57. See Moor v. County of Alameda, 411 U.S. 693, 717-21 (1973).

58. See, e.g., Moore v. Tangipahoa Parish School Board, 594 F.2d 489 (5th Cir. 1979) (Louisiana school boards are independent political subdivisions not entitled to Eleventh Amendment immunity); Lenoir v. Porters Creek Watershed District, 586 F.2d 1081 (6th Cir. 1978) (county watershed and drainage district are independent political units); Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979) (junior college is independent political subdivision and not entitled to Eleventh Amendment immunity). But see Skehan v. Board of Trustees, 590 F.2d 470 (3d Cir. 1978) (college is an agent of the state and entitled to immunity under the Eleventh Amendment).

59. 429 U.S. 274, 280 (1977).

60. 586 F.2d 1126 (7th Cir. 1978).

61. Local entities sued in federal court under Section 1983 might be granted Eleventh Amendment protection if they emphasized that federal statutory violations are caused by state statute or regulation. The United States Supreme Court, in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), held that a bi-state regional planning agency was not an arm of the state entitled to Eleventh Amendment protection. The regional agency's funding came exclusively from local governments and its authority to make rules was not subject to veto by the state. The Supreme Court considered whether the local entity was subject to state control--not only whether it could raise funds independently of the state treasury--and found that it clearly was not an arm of the state entitled to Eleventh Amendment protection. However, a federal court might conclude that a local department is an arm of the state and protected by the Eleventh Amendment if the state participates significantly in funding the local department and has extensive rather than limited control over the department's policies. See generally Vaughn v. North Carolina Department of Human Resources, 296 N.C. 683 (1979) (Durham County Department of Social Services is agent of state under North Carolina law when placing children in foster homes because North Carolina Department of Human Resources standards control manner in which county department is to supervise placement of children in foster homes and substantial percentage of foster care program funding is not provided by state unless its standards are followed.)

Conclusion

The three United States Supreme Court cases discussed--Monell, Owen, and Thiboutot--are a signal to local governments that the federal courts intend to hold them strictly accountable for official violations of federal rights. These decisions should make local governing boards and high-level administrators more cautious before taking action that might infringe federal constitutional or statutory rights. Local governments should also consider how to protect the public treasury in view of this increased risk of civil liability. Some governments may find a comprehensive liability insurance policy to be the most prudent course; others may decide to self-insure or even to take no action. The decision, whatever it is, should result from informed analysis and careful deliberation.

A FINAL THOUGHT about the practical effect of these important Supreme Court decisions. The immediate tendency may be to take less official action in order to reduce the risk of civil liability. To follow that impulse too closely may help the local government avoid civil liability, but it also means that important government responsibilities will not be met. It must be remembered that the Supreme Court still requires plaintiffs to clear complicated hurdles in order to succeed in a Section 1983 lawsuit against a local government. Local governments should continue to make the reasoned decisions necessary to function efficiently without being intimidated by the fear of federal civil liability.

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