CIVIL RIGHTS

Looming First Amendment Challenges to Local Municipalities

By Cory Morris

In *Reed v. Town of Gilbert* ("Reed"), the Supreme Court held that provisions of a municipality's sign code that impose more stringent restrictions on directional signs than on signs conveying other messages are content-based regulations of speech that cannot survive strict scrutiny.[1]

Reed had to do with the use of signs for a transient religious church that relied on utilizing different locations to organize their congregations. This was accomplished by temporary directional signs that alerted members of the church when and where their congregation was to be held. They were called the Good News Community Church ("Church") and Pastor Reed was the petitioner before the Supreme Court. The problem was that if signs within the Town of Gilbert were not removed in a certain amount of time the owner would be subject to a citation. After suffering multiple citations from the "Town's Sign Code compliance manager," Pastor Reed sued, claiming his First Amendment rights were infringed.


Cory Morris

The Town of Gilbert ("Town") had in place, what at least one constitutional scholar coined an exercise in silliness; 17 pages of deciding what kind of sign could be erected under certain circumstances and having differing time limitations based on the type of sign. Rather than regulate the viewpoint, the Town regulated 23 types of signs including, but not limited to, temporary directional, political, garage sale and ideological Signs. Each was subject to different restrictions, such as time and size restrictions. The Supreme Court noted that "[t]he restrictions in the [Town's] Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." Accordingly, "the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas." Although the church's signs were treated differently, the lower court did not apply strict scrutiny, but instead evaluated why the Sign Code was adopted and the Town's justifications for the regulation.

Did the Town do this with a discriminatory motive? No. Before *Reed* reached the Supreme Court, the Court of Appeals evaluated the motives for the Town of Gilbert's Sign Code. They found that all types of directional signs were subject to the same limited duration under the Sign Code. Glossing over the vital consideration of what the regulation does (treat one type of sign different than another based on content), the Court of Appeals erred in holding that the Town's Sign Code was content neutral. Reversing the Ninth Circuit Court of Appeals, the Supreme Court reiterated that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." [2]

Practitioners should take note of this because content-based laws —those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.[3] That means strict scrutiny applies to these sign regulations. "[A] speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message

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Summary Judgment in Matrimonials *(Continued from page 17)*

fatal defect to a summary judgment motion). CPLR 3212(b) mandates that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit."

Thus an affirmation by an attorney lacks probative value and is not properly considered on a summary judgment motion, since by definition, the attorney has no personal knowledge of the underlying facts. An attorney affirmation can, however, serve as the appropriate "vehicle" in presenting to the court evidence that the court can consider, such as citing to pertinent portions of EBT testimony, or to documentary evidence, like a deed, or to a written admission (an affidavit by the partie(s) or their signatures on the P.C. order, for proving the date of the marriage.

CPLR 3212(b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

The litany of standard defenses to a summary judgment motion including the truism that it is a drastic remedy that is only appropriate where there is no doubt that there are no triable issues of fact, as it deprives a litigant of their day in court, should be expected to be on full display, especially in a matrimonial. Two other standards: that the court's role is limited to issue finding, not issue determination, and that credibility is not appropriately determined (except in some limited circumstances) on a motion for summary judgment, will also presumably be trotted out in opposition.

Nonetheless, a cut and dry issue like whether or not property, titled in both parties' names, acquired during the marriage, and improved upon by the parties is marital property subject to equitable distribution can and should be determined on summary judgment. The proofs are not subject to interpretation, and disproving plaintiff's contention that the property is her separate property should be mathematical: a deed is prima facie best evidence of property ownership, the date on the deed post-dates the marriage, the deed lists the parties as owning the property as husband and wife (or tenants by the entirety), the mortgage upon the premises is in both parties' names, and the mortgage is paid out of a joint banking account are all issues that can be determined without the need of trial testimony.

One statutory exception is that under subdivision (e), the court may not grant summary judgment to the non-moving party in a matrimonial, even if said party merely requests it in opposition. Thus the best defense in a matrimonial summary judgment case is to simply oppose, by affidavit and supporting proof, the relief sought.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

[1] Or in New York, in the exact opposite fashion
[2] *Hougie v. Hougie,* 261 A.D.2d 161 (1st Dept.1999)
[3] *DeMille v DeMille*, 5 Misc 3d 355, 360 [Sup Ct 2004] affd as mod, 32 AD3d 411 [2d Dept 2006]

Pro Bono Attorney *(Continued from page 6)*

groups about the student loan process and ways to prevent crippling student debt. In addition, Ms. Tayne serves as Vice Chair of Nassau Suffolk Law Services' Advisory Council.

"Leslie is always willing to help our agency and our clients," said Maria Dosso, Nassau Suffolk Law Services' Director of Communications and Volunteer Services adding, "She cares deeply about our mission and eagerly accepts our referrals. She truly stands out among our many volunteers."

Things are no less busy for Leslie Tayne on the home front. She is the single mother of three children, Lindsey (a high school senior) and twins, Brandon and Gabrielle (high school sophomores). Home is also where you'll find the six dogs she has taken in from the Long Island Guide Dog Foundation, some of them guide dog puppies-in-training.

The Pro Bono Project greatly appreciates the enthusiasm and skills that Leslie Tayne brings to her pro bono work. We look forward to our continued association with her. It is with great pleasure that we honor her as Pro Bono Attorney of the Month.

CONSUMER BANKRUPTCY

Some Lessons From Reading an Interesting Bankruptcy Opinion

By Craig D. Robins

A recent Bankruptcy Court decision was fairly remarkable — not for the legal issues in the decision itself, but instead, for some rather important common sense concepts that one can glean from reading it.

Sometimes a judicial opinion can remind us of how bankruptcy attorneys should practice, highlight what mistakes we should avoid, and demonstrate why consumers can get into trouble by representing themselves.

Here are some salient insights from this one recent case. An attorney should wear several hats; debtors should not reaffirm car loans unless they absolutely have to; and consumers representing themselves *pro se* can sometimes do themselves a great disservice.

So let's look at this recent decision from Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court – *In re Galloway-O'Connor*, Case No. 15-70981-ast (Bankr EDNY September 29, 2015).

The debtor, who filed *pro-se*, was earning about $58,000 a year. She owned a 2012 Audi Q5 automobile that was worth about $30,000. She sought to reaffirm the car loan with the lender, Santander Consumer USA, which had a balance of about $28,000.

It carried interest at about 18 percent per year, and the monthly payments were $646 a month, with six years remaining. The debtor, in the budget schedules to her petition, indicated that she had a negative cash flow of over $7,000 a month.

The reaffirmation was filed with the court on May 27, 2015. Since counsel in negotiating the reaffirmation agreement did not represent the debtor, Judge Trust, as per his chamber's rules, required the debtor to appear at a hearing on her request to approve it. At the hearing, which was held on July 7, 2015, the judge expressed his concern about the amount and duration of payments, as well as the high interest rate.

Judge Trust questioned the debtor about her decision to enter into the agreement, her ability to make the payments, and her understanding that, if the agreement were approved, she would remain liable for any deficiency on the car debt in spite of receiving a discharge. The debtor indicated that she expected to receive a raise, and that despite the negative cash flow she reported, she believed that as a result of changes to her budget, she could easily afford the car payments. Since the debtor appeared to fully understand the implications of the reaffirmation agreement and her firm belief that she could afford it, Judge Trust approved it.

The debtor received a discharge on July 8, 2015 and the court routinely closed her case. However, it soon turned out that the debtor's financial woes were far from over. Less than 60 days later, on August 26, 2015, the debtor filed a letter seeking to reopen her case on an emergency basis to rescind the reaffirmation agreement.

Craig Robins

"To the Court's surprise," stated Judge Trust, the debtor advised him at the hearing on her application that the car had been repossessed, as she was not able to make the required payments. Judge Trust instructed the debtor to consider obtaining counsel, adjourned the hearing, and directed her to file a post-hearing brief. The debtor never retained counsel, nor did she file the brief.

In his decision, Judge Trust denied the relief the debtor was seeking. That meant that she not only lost her car; she would likely be facing a deficiency judgment, too. Judge Trust stated that the court could not rescind the agreement because the debtor's application was untimely, as a debtor can only do so within 60 days of the date that the agreement is filed, or at any time before the date of discharge, whichever occurs later. See Bankruptcy Code section 524. After 60 days, debtors are bound by their agreement and the court is powerless to provide a remedy.

However, the focus of this article is not so much the law behind rescinding reaffirmation agreements, but instead, some thought-provoking ideas that one can glean from the decision.

Bankruptcy attorneys must wear several hats

The situation in this case reminds us that one of the hats we consumer bankruptcy attorneys should wear is that of a financial advisor.

Consumer debtors often get into bad debt situations because of their inability to be realistic when it comes to managing their finances. Some debtors simply do not budget properly. Others purchase homes and cars that are way above their means.

This debtor was seeking to keep a car that carried a relatively high monthly payment and a very high rate of interest. It certainly was not in her best interest to keep it. As Judge Trust stated, the debtor later realized that entering into the reaffirmation agreement was improvident.

A bankruptcy attorney's role in representing a client should be more than just grinding out bankruptcy petitions. It is important to spend additional time to explore how the client got into debt in the first place and offer advice for remaining debt-free thereafter – especially when some financial behavior like wanting to maintain an imprudent car loan, stands out like a sore thumb. After all, a bankruptcy attorney will be intimately familiar with his or her client's financial situation, and can make a real difference in urging a client to change their financial conduct.

Counsel should learn about auto lenders

This debtor did not have the benefit of an attorney to give her such financial management advice. Nor did she have the benefit of having an experienced consumer bankruptcy practitioner who would have known that the auto lender, Santander, does not require debtors to reaffirm their car loans in order to keep their vehicles. Santander is a "retain and pay" lender. Some auto lenders, most notoriously Ford Motor Credit, will repossess a vehicle if the debtor does not reaffirm the car loan; however, Santander does not, merely because that is their policy.

There was absolutely no reason to reaffirm this debt. Counsel should learn which lenders have "retain and pay" policies, and which do not. "Retain and pay" lenders will still send unsolicited proposed reaffirmation agreements to debtor's counsel. Counsel should file such agreements in the circular file bin.

Finally, this poor debtor's plight illustrates how consumers can underestimate the complexities and subtleties of the bankruptcy process and how they can sometimes make their financial situation worse by filing without the benefit of counsel.

The debtor in the above case probably received an unsolicited reaffirmation agreement and thought she had to sign it. However, it is not the judge's responsibility to counsel a debtor that they may not need to enter into a reaffirmation agreement. Only the debtor's attorney can do that.

Later, Judge Trust gave the debtor an opportunity to retain counsel. Although having an attorney might not have ultimately made any difference with the judge's determination, experienced counsel could have recognized that, and instead of proceeding with the application, approached the lender to negotiate a resolution, while utilizing the pending application for leverage.

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President's Message *(Continued from page 1)*

lawyers do for the community?

The Bench & Bar Committee has formed a sub-committee to consider this issue. Over the past few weeks, the Academy of Law hosted a Moot Court competition together with Touro Law School for college students from states along the eastern seaboard. Lawyers and judges alike gave up their personal time on a Friday evening and Saturday to participate and judge college students in a trial competition. Again, lawyers went out of their way to give of their time, sharing with young college students the joy of our profession.

The legal profession polices its own members through the Grievance Committee of our bar association and the Tenth Judicial District. These committees insure that the public's complaints are investigated and in the event there is wrongdoing, that the public will be protected.

Lawyers take care of their own colleagues. This is not only done through the Lawyers Assistance Foundation, but also through individuals who help each other with a case or personal problems without anyone knowing of the kind deed.

We are considering starting a Speakers' Bureau as we did many years ago when lawyers would go to the libraries or schools and tell the public about the law. Perhaps we'd focus on legal issues for young married couples and/or senior citizens. I have been told that years ago attorneys would speak about why one needs a Last Will and Testament, and then the attorneys who were local would prepare simple wills for a nominal cost. This action would spread good will and would hopefully bring new work to the attorney.

So I ask, over the holidays think about all the good things we do as lawyers and how to let the public know about it to strengthen and improve our reputation.

And please let us know your ideas and thoughts.

Have a wonderful holiday!

AMERICAN PERSPECTIVES

Considering a New Option for the Highest Law Office in the Land

By Justin Giordano

The Chief Law Enforcer

The office of the United States Attorney General is the nation's highest law office. The office has a wide array of powers including over the Federal Bureau of Investigation (FBI). The Attorney General (A.G.) is the head of the United States Department of Justice. The governing act being 28 U.S.C. S 503. As the country's chief law enforcement officer the attorney general is considered to be the chief lawyer of the American government.

The Attorney General serves as a member of the President of the United States' cabinet, and along with the Secretary of State, Secretary of Defense and the Secretary of the Treasury are historically regarded as the key officials in the cabinet given the importance of the departments they respectively head. The Attorney General is also the sole department head without the secretary title. The A.G. position is thus a unique position in that he or she, through the Department of Justice, represents the enforcement of the American legal system and by extension American justice. It is by no coincidence that the department that the Attorney General heads is named the Department of Justice, key word of course being "justice." By way of contrast each state in the union does not use the name "justice" for their highest law office.

The office of Attorney General is foundational to the American constitutional legal system and dates back to the nation's very early days. Congress established the office through the Judiciary Act of 1789. It was only some eight decades later, 1970, that the Department of Justice was created to support the attorney general in conducting the office's designated functions. The attorney general serves at the pleasure of the President of the United States and like the president may be removed whenever the president wishes and can be impeached by the U.S. House of Representatives. Furthermore, the A.G. is also subject to trial for treason, bribery and other high crimes and misdemeanors by the U.S. Senate," same as the president.

The procedure for filling the post is the same as for all members of the President's cabinet. A prospective attorney general is nominated by the President of the United States and is subject to confirmation by the U.S. Senate. The original duties of the attorney general were and still include prosecuting and conducting all suits to be heard by the U.S. Supreme Court in which the government of the United States is a party in dispute. Additionally the attorney general is charged with providing advice and opinion upon any legal issues as and when required by the president of the United States, or the other department heads.

Justin Giordano

The Appointment of a New A.G.

The 83rd attorney general in the nation's history was sworn in on April 27, 2015 by the president of the U.S. Senate, who is also the vice-president of the United States, Joe Biden. Loretta Lynch, the Brooklyn based U.S. Attorney for the Eastern District of New York, in her ascension to the chief law enforcer position is indeed historical in that she will be the first African-American female to hold the post. This appointment is also historical in that there was a time lapse of 166 days between Ms. Lynch's nomination by President Obama and when the Senate actually confirmed her by a vote of 53 to 46 on April 23, 2015. This constituted the longest period of time between the nomination and confirmation for any of Ms. Lynch's eighty-two predecessors. In part this can be attributed to the lame duck period given that Ms. Lynch was nominated in early November 2014, very shortly after the November 3, 2015 mid-term elections.

President Obama's nominee now faced a new senate controlled by the opposition party as a result of the aforementioned mid-term election in which the Republican party gained a majority in the senate and increased their already substantial control of the U.S. House of Representatives. However in addition to the time consumed by the lame duck session there was also strong opposition to Ms. Lynch's confirmation in light of her proclaimed support, in her senate confirmation hearing, of President Obama's executive order legalizing the illegal immigration status of some four million people. Most of the republicans in the Senate, supported by many constitutional scholars, considered this action to be unconstitutional and as such viewed Ms. Lynch's support for the president's executive order as biased in favor of the president who had nominated her.

This type of bias would seem perfectly natural to the common observer. After all it is only normal that a president would nominate someone who espouses not only his political slant but his views on issues of law as well. And as it happens the two often intersect in the issue in controversy here. However the principle that is presumed to be inextricable to the attorney general is the unbiased pursuit of justice. Naturally this seems a lofty principle, more aspirational than realistic, it could easily be argued. Nevertheless to reiterate the department that the attorney general heads does have the name "justice" prominently attached to it. Words, it is said, have meaning.

Historically person that elects its representatives to lead them is quite different from a society that has rulers rather than elected leaders. Justice is of course essential for those governed to allow themselves to be governed, no matter which political system they live under. In fact history has taught that even authoritarian or dictatorial forms of government have ultimately been brought down by the people over which they rule, even if it took decades or even centuries for that to transpire. One need only turn to the former Soviet Union as a recent example. Examples from prior centuries include the French revolution or even the American Revolutionary War against Great Britain. Popular revolts provoked by justice denied or at the very least justice not evenly applied proliferate the annals of history.

The Other Option: Electing the A.G.

Based on the aforementioned aspiration principle that the U.S. Attorney General should pursue justice wherever that may lead and whomever it might involve and given that bias may be unavoidable, based on the current and traditional approach of the president nominating the attorney general, electing the attorney general may actually be an option worth considering. Needless to say that the issue of the A.G. impartiality is not a new one and in the past attempts to overcome this situation were made. This was done through the appointment of an "independent counsel" and even the enactment of the independent counsel law and related acts (now expired and not renewed). However none of these measures addressed the heart of the matter, namely how to eliminate the inherent bias. The current A.G.'s predecessor, Eric Holder, was by many accounts (particularly those opposing him) a controversial figure as his own words and actions quite often distinctly favored one side over the other on issues of law and policy, which were often freely intermingled.

As previously stated, the attorney general position is unique in its role. It is not a secretary position as is the case with the rest of the president's cabinet. More importantly whereas the other department heads are there to assist the president in executing his various domestic and foreign duties and responsibilities as charged by the constitution and Congress in a manner consistent with his philosophical approach, the attorney general's primary responsibility is to uphold the law. Justice for all and no one is above the law, regardless of their station or position. That is imbedded in the American constitutional legal system.

Will electing the U.S. Attorney General eradicate or even alleviate any of the issues associated with bias, favoritism or political leanings? The answer is most likely not. However it will certainly make the process more transparent since it would require candidates for the U.S. attorney general to make their case directly to the electorate presenting their views and opinions on a wide variety of legal issues that he or she is likely to face in office.

Currently, and traditionally, state attorney generals are elected by their constituents with full knowledge of each candidate's party affiliation along with the positions that they hold, endorse and champion. There is overwhelming reason for not utilizing the same approach for the nation's chief law enforcer. Naturally this would not be the end of all solutions and the law of unintended consequences can never be discounted, but as the old adage goes "nothing ventured, nothing gained."

Note: Justin A. Giordano, Esq., is a Professor of Business & Law at SUNY Empire State College and an attorney in Huntington.

'Out of Network' Physician Billing (Continued from page 16)

duct or how it was injured by such conduct (*citation omitted*).

To the extent plaintiff is claiming that defendants misrepresented the charges to the United member by charging excessive rates in order to maximize the reimbursement they received from United, such allegedly deceptive acts were not directed at the consumer but rather to a large institutional provider of health insurance or, even more indirectly to the plan sponsors who might see their premiums increase. Such conduct cannot be viewed as consumer related …

The court had one last thing to say about the absence of a likelihood of success:

> Further, United has not shown it is likely to succeed in establishing that it suffered any damages as result of any misleading billing by defendants. United has refused to pay the allegedly excessive portion of the charges. The patient has not paid them either. And, even if she did, United has not shown how that would cause it to suffer any concrete loss and it would not confer standing on United in any event because standing does not exist "when the claimed loss arises solely as a result of injuries sustained by another party'" (*citation omitted*) … [United] has not provided any evidence that it has actually sustained any such loss to date or that it will sustain such losses absent a preliminary injunction.
> Nor has United shown that it is likely to succeed in showing that the bills sent to [the member-patient] were, in fact, misleading … It is not uncommon for some medical providers to refuse to accept a patient's insurance and to require the patient to pay the charges and for the patient to pursue an insurance claim. Absent presentation of an agreement with [the member-patient] (or any other insured) whereby defendants agreed to limit the patient's obligation to the proceeds of insurance, or a statutory restriction, there is no reason why defendants would be *(sic)* free to seek the balance of their fees from the patient in question.

...While it appears that United is relying on the FAIR Health[1] database to support its contention that [the surgeon's] charges are excessive, that database has not been shown to be the sole authoritative standard and, in any event, as defendants point out, United has failed to show how it applied the information in the database to the charges imposed by [the surgeon] for the complex surgical procedure performed on [the member-patient]. While it is clearly United's position that [the surgeon's] charges are excessive, United has not offered any evidence in support of that position.

The court made fast work of the remaining arguments. Because the harm alleged is entirely speculative it found that there was no showing of irreparable injury. Similarly, the plaintiff failed to show that the equities of the case balanced in its favor:

> [Plaintiff] has offered no evidence as to how it determined what portion of defendants' bill was reasonable and what portion was excessive. Further, it has not shown that its refusal to pay any more than what has been paid will result in any savings to its insured or to any insured … United has not offered any evidence as to the extent, and causes, of any distrust of insurers and medical professionals. And it is has not explained its use of the FAIR Health database or the reasons for United's reliance on that database alone.

On the important question of the fair and reasonable value of the surgeon's bill, the court observed that:

> [I]n an action against the patient, a determination as to whether a fee is reasonable will be determined by a neutral judge or jury on an open record in an open courtroom, based on deliberate consideration of a number of factors, such as the nature and difficulty of the case, the value considered by the physician and by other doctors as an ordinary or reasonable charge for the particular services, and the value of the services as measured by the value in the community where they were rendered. This determination will not be made solely, as United seemingly did here, by having someone, in secret, apply some unknown codes to a database.

So, the court denied the health plan's application, and the case goes to trial. Whether it ever sees an open courtroom is questionable, however; given the clear and legally sound findings of the court some kind of settlement is more likely.

One troublesome issue (besides the obvious question of why a health plan would ever bring a case like this in the first place) is the failure of the court, and apparently the parties as well, to consider the question of whether the patient gave the surgeon an assignment of benefits (or, more correctly, an assignment of payment). The court's decision may have gone the other way had there been any evidence submitted. If the surgeon had taken an assignment, thus creating some degree of contract privity between him and the plaintiff health plan, then the court may have found that there was a sufficient likelihood of an eventual determination of liability in favor of the plaintiff, and that the equities tilted against the defendants just enough to support the granting of the preliminary injunction. Yet how could there not have been an assignment? The plan tendered payment not to the patient but directly to the hospital on behalf of the surgeon. Medical records and information presumably were exchanged between the hospital (acting on the surgeon's behalf) and the health plan. Practitioners familiar with these processes know that there must be some documentary predicate for these activities, yet the court must presume that there was none because nothing was introduced into evidence.

So, then, just why *would* a health plan even bring a case like this? Two possibilities present themselves. First, the simpler and more obvious reason — health plans appreciate that in an out of network situation the patient is the provider's best ally. When a member receives that big balance bill the first impression isn't that the provider overbilled; it's that the insurance "that I pay plenty for didn't pay all of my bill and left me holding the bag." Unlike busy providers dealing with hundreds of claims, the individual member has the time and motivation to keep after the plan to pay more. Complaints are filed with the plan, and then with the Departments of Health and Financial Services and the Better Business Bureau. Members call their representatives in Congress and the state legislature asking for help; this often generates "legislative inquiries" that get the plan's attention. Members bad mouth their health plan to their friends and neighbors and, more and more often nowadays, on different blogs. In situations involving employer sponsored health plans governed by ERISA[2] a member seeking a larger plan payment (the "beneficiary") can sue the plan administrator directly, and in some cases even assign the right to sue to the provider (who almost always is in a better position to litigate than is the individual member). One very good way for plans to deflect a lot of this heat is to tell the member that the provider had no legal right to bill so much in the first place. If a case like this is a winner it would go a long way in helping plans do just that.

The more subtle and complex reason requires the reader to appreciate that, as we move forward into the brave new world of health care reform, legislatures and regulators are putting more pressure on health plans and health care providers to take patients out of the payment mix. New York's recently enacted Emergency and Surprise Billing Law (discussed *supra*) is only one example of the kinds of political responses being advocated more and more often. These kinds of laws are designed to discourage health plans from paying too little on an out of network claim, and discouraging providers from billing too much on an out of network claim. The resolution mechanisms, either some form of arbitration (as in the case of the New York law), judicial fiat, or other process that a patient can elect in the event he or she receives a balance billing, effectively may render the balance billing of the patient irrelevant. Appreciating this subtlety, and the direction in which this policy issue is moving, what better way to avoid the consequences of cases going against it than for the health plan industry to start pushing back on what the plans perceive to be the unfettered right of health care providers to balance bill for whatever "retail" charges the providers arbitrarily establish?

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[1] "FAIR Health is a national independent, not-for-profit corporation whose mission is to bring transparency to healthcare costs and health insurance information through comprehensive data products and consumer resources. FAIR Health uses its database of billions of billed medical and dental services to power a free website that enables consumers to estimate and plan their medical and dental expenditures. The website also offers clear, unbiased educational articles and videos about the healthcare insurance reimbursement system." http://fairhealthconsumer.org/.

[2] *Employee Retirement and Income Security Act*, 29 USC 1001, *et seq*., 29 CFR 2509 *et seq*.

Vigilante Justice or Legal Re-Entry? (Continued from page 10)

authorize the officer to restore the occupant to the premises. Nonetheless, as most criminal defense practitioners will attest, to stand on ceremony and recite SCPD protocol to the responding officer at the time of the self-help eviction is not a warranty against the arrest or resulting time in lock-up, despite the breach of police protocol and, potentially, violation of civil rights. Again, more potential litigation ensues as a result of self-help, as opposed to a guaranteed warrant of eviction and judgment of possession, which would be more easily and swiftly achieved by the commencement of the summary proceeding at the outset.

Should a landlord choose to proceed in self-help against or without the sage advice of counsel and should the occupant be restored to the premises with police assistance, a question to the practitioner is whether the occupant should now be deemed a holdover tenant under the existing lease or a squatter. Counsel in this case deemed the restored occupants as squatters. Having deemed it so, the Second Department held that new predicate statutory notice would be required in order to succeed on a new summary proceeding pursuant to RPAPL § 713(4) and that, in any event, the action could not be brought by counterclaim. Had counsel argued that the restored occupant was a holdover tenant, it is likely that, at a minimum, no new predicate notice would have been required in order to commence a summary holdover proceeding.

While upholding the commercial landlord's noble contractual right to "self-help," the court majority focuses on the "element of uncertainty associated with resort to self-help" and also mildly chides: "[w]hile the landlord may now be faced with additional litigation, this was brought about by landlord's resort to self-help." The wise practitioner might make note of this recent Second Department decision when warning the commercial landlord of the dangers of otherwise perfectly legal self-help.

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First Amendment Challenges to Local Municipalities (Continued from page 21)

expressed." [4] The Supreme Court determined that once the Town's Sign Code was challenged by Pastor Reed, it became the "Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end." The Town claimed that the compelling interest was the aesthetic appeal of the Town and that traffic safety was involved. The Supreme Court wholly rejected the Town's stated reasons and held that the Town's Sign Code was not narrowly tailored to meet this interest.

This decision, written by Justice Thomas, threw a major curveball to constitutional scholars. "Characterizing a distinction as speaker based is only the beginning — not the end — of the [First Amendment] inquiry."

Of the four First Amendment cases decided this Supreme Court term, *Reed* will likely have a major impact on Long Island. The Town of Gilbert is a relatively small town in Arizona and never thought of a Good News Community Church when it enforced its Sign Code. Indeed, this case made clear that **"**a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." Therefore, if a municipality, whether it is a local town or the entire county, "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter," heightened constitutional scrutiny will apply if challenged. While in *Reed* this took the form of directional signs, throughout Long Island this may be the start of many constitutional challenges to the glut of local ordinances and municipal restrictions that are usually placed on, *inter alia*, political signs. Whether the speaker is a community church, a new candidate, the Girl Scouts or a preexisting political party, a content-based speech regulation is subject to strict scrutiny if appropriately challenged.

So what about political sign regulations and elections? "That obvious content-based inquiry does not evade strict scrutiny review simply because an event (i.e., an election) is involved." Justice Thomas made clear that "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."[5]

This decision, in time, will likely impact smaller towns and villages having similar regulations. It is likely, as was the case in *Reed*, "that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not,"[6] such as real estate, construction and municipal signs, including but not limited to the firehouses, schools, police departments and other municipal agencies. This means that the local town code that treats a garage sale sign differently than an ideological sign should have a compelling state interest to do so and that interest must be narrowly tailored to meet that need, as the constitution requires.

This is big news for small political factions. "For example, a law banning the use of sound trucks for political speech — and only political speech — would be a content based regulation, even if it imposed no limits on the political viewpoints that could be expressed." As Justice Alito's concurrence reminds us, "Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo." Although towns and villages do not have ordinances that favor one political party over another, there are usually municipal ordinances restricting political signs and political candidates as opposed to the local real estate agent or construction site manager. Whether running for county executive or local school board, this decision should be taken into account when it comes to sign regulation. "Such regulations may interfere with democratic self-government and the search for truth."[7] And even if Election Day has passed, regulations limiting the duration of how long those signs can linger may very well be unconstitutional if challenged. Why is it that the real estate agent's sign, even when the property is sold or in contract, allowed to linger, but political signs are encumbered by applications, fees, and regulations limiting their duration requiring prompt removal?

What are the municipal entities to do? All is not lost, as "[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers — such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses — well might survive strict scrutiny."[8] To all the local town and village attorneys, the concurring opinion should alleviate some of your concerns because "[t]his does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations."[9] Just to prove it, Justice Alito provided a non-exhaustive list as an example and, perhaps, an instruction to the local municipal entities that may not be getting it right. Whether a local practitioner or the village attorney, the inquiry should focus on whether local municipal entities are continuing to enforce a content-based sign code scheme. It's *Reed v. Town of Gilbert*; have you checked your town code lately?

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[1] *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. ___ (June 18, 2015).
[2] *Id*. at 8 (quoting *Cincinnati v. Discovery Network, Inc*., 507 U. S. 410, 429 (1993)).
[3] *R. A. V. v. St. Paul*, 505 U. S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd*., 502 U. S. 105, 115, 118 (1991); *see Reed* at P. 6.
[4] *Reed*. 135 S.Ct. ___ at P. 14.
[5] *Id*. at 10 (see also, *Otterson v. City of Springfield*, No. 13-3581 (7th Cir., Aug. 7, 2015) (prohibition on panhandling struck down as content discrimination).
[6] *Reed*. 135 S.Ct. ___ at P. 16.
[7] *Reed*, 135 S.Ct. ___ (J. Alito Concurring at P. 1) (citing *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980))
[8] *Reed*. 135 S.Ct. ___ at P. 17.
[9] *Reed*, 135 S.Ct. ___ (J. Alito Concurring at P. 1).

"Compelling" Expert Testimony (Continued from page 3)

dismissed the complaint. The Appellate Division agreed with that finding, but not the Court of Appeals.

It noted in the well settled rule that a party to a civil action, including a doctor in a medical malpractice action, may be called upon to testify at trial by the opposing party.[5] While some jurisdictions limited questioning to the particular facts within that party's knowledge, the court found that the "more enlightened" approach was to permit the plaintiff to examine the opponent doctor "as freely and fully as he could any other qualified witness… [because] by allowing the plaintiff to examine the defendant doctor with regard to the standard of skill and care ordinarily exercised by physicians in the community under like circumstances and with regard to whether his conduct conformed thereto, even though such questions call for the expression of an expert opinion, the courts" it would promote the production "of all pertinent and relevant evidence that is available from the parties to the action." In rendering this determination, the court expressly distinguished *People v Kraushaar*, because the expert called to testify in that case was an independent, disinterested witness — not a party to the action. Indeed, the court went so far as to say that it is "not inconsistent to permit the plaintiff to question the defendant as an expert even though we would not accord him the same right with respect to an unwilling witness who is in no way connected with the action."

McDermott seems to create a narrow exception to involuntary expert opinion rule: a plaintiff in a malpractice action could call a defendant doctor to testify as to the facts and, if qualified, as an expert for establishing the generally accepted medical practice in the community. However, since *McDermott,* this exception has been modified and applied beyond the medical malpractice context. In *Gilly v City of New York*,[6] a personal injury action, the defendant retained a physician to examine the plaintiff. That doctor then formulated his findings in a report furnished to both parties in the litigation. The Court of Appeals found that said doctor could be called by the plaintiff to testify at trial as to the substance of his report. According to the court, that determination balanced the "truth-seeking objectives" expressed in *McDermott* with the concern in *Kraushaar* that a disinterested witness could not be compelled to testify against his will. Thus, the exception now is that where a doctor voluntarily participates in the litigation and discloses his findings to all parties, he could be compelled by the non-retaining party to relay conclusions already disclosed.

The Family Court applied his principle in *Matter of Olivia S*. The expert retained by the Commissioner of Social Services had formulated written opinions on which the agency relied and which were shared openly with the respondent. Given those circumstances, the court applied the exception and held that the respondent could call the expert to testify on her case-in-chief.

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[1] *Matter of Olivia S*., NYLJ 1202736349865, at *1.
[2] 296 NY 223 (1947)
[3] *Id*. at 224.
[4] 15 NY2d 20 (1964).
[5] *Id*. at 26, citing CPLR §§ 4501, 4512, 8 Wignore on Evidence (McNaughton's rev. 1961), § 2218 Richardson, Evidence (9th ed.).
[6] 69 NY2d 509 (1987).