STATE COURT

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Same-Sex Marriage in the State Courts

By John Shu

Gay marriage litigation continues to occur in several states. In the first half of 2006, state courts in Washington, New York, and Georgia, and the U.S. Court of Appeals for the 8th Circuit decided controversial gay-marriage-related cases. This article, the second in a series, will update, overview and summarize those cases.

I. Washington

Andersen v. King County

In 1998, Washington state adopted its Defense of Marriage Act ("DOMA"), which amended Revised Code of Washington ("RCW") 26.04.010 to read "Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable;" RCW 26.04.020(1)(c) prohibits marriage "when the parties are persons other than a male and a female;" and RCW 26.04.020(3) "[a] marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section."

In 2004, same-sex couples from various cities in Washington sued after being denied marriage licenses. The plaintiffs claimed that the Washington State Defense of Marriage Act of 1998 was unconstitutional under the Washington State Constitution on the following grounds: equal protection, the equal rights amendment, that marriage is a fundamental right, and the privileges and immunities clause. On July 26, 2006, the Supreme Court of the State of Washington issued its ruling declaring no constitutional right to same-sex marriage. *Andersen* is particularly interesting because unlike the other gay marriage cases, plaintiffs argued a privileges and immunities violation.

The court was fractured, with six opinions from the justices. Justice Barbara Madsen wrote the lead opinion, with Chief Justice Gerry Alexander and Justice

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A FOCUS ON:

FDA Labeling and State Liability

By Da...

Were state and federal courts to defer sufficiently to FDA determinations of drug safety, the negative consequences of the current liability regime would be much less pronounced. Yet this has often not been the case. In recent years, FDA's legal authority and scientific expertise over drug labeling and advertising have been implicitly, although repeatedly, questioned in state and federal courts. In response, FDA has intervened in select cases where its authority and expertise may be undermined

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to authorize Norwood to enter into an agreement with the developers to build the proposed commercial development in the appellants' neighborhood and (3) to appropriate the appellants' properties. Norwood then filed complaints against the appellants to seize their properties.[9]

Following a hearing, the trial court found that the City Council had abused its discretion in finding that the neighborhood was a "slum, blighted or deteriorated area." The court found but a paucity of evidence that the majority of structures in the area were conducive to ill health and crime, detrimental to the public's welfare, or meeting otherwise the criteria of a "slum, blighted, or deteriorated area." Nevertheless, the court upheld the City Council's determination that the neighborhood was in a "deteriorating area."

After juries rendered verdicts on the value of the appellants' properties, Norwood deposited with the court the full amount awarded and obtained titles to the properties. Norwood then transferred the properties to the developers, which began demolishing the houses in the area immediately.[10] The trial court refused to enjoin the developers from destroying the properties pending appeal, and the court of appeals denied a stay of the trial court's judgment. Upon appeal of those rulings, the Ohio Supreme Court accepted the cases and issued orders preventing the appellees from destroying the properties pending review of the takings.[11]

Court's Overview of Private Property Rights and Eminent Domain Authority

Justice Maureen O'Connor began her analysis for a unanimous Ohio Supreme Court by pointing out that the "rights related to property, i.e., to acquire, use, enjoy, and dispose of property" are among the "most revered in our law and traditions."[12] Citing Richard A. Epstein's book *Takings: Private Property and the Power of Eminent Domain*, the court referred to the "Lockean notions of property rights" which the founders of Ohio expressly incorporated into the Ohio Constitution.[13]

The court also acknowledged the "state's great power to seize private property"[14] creates an "inherent tension between the individual's right to possess and preserve property and the state's competing interests in taking it for the common good."[15]

The court noted that James Madison was "[m]indful of that friction and the potential for misuse

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Michigan Supreme Court Takes Step to Address Asbestos Litigation Problems

By Mark A. Behrens

Asbestos-related lawsuits filed by claimants who are not sick have occupied the courts in Michigan and across the nation for years. Nationally, up to 90% of recent asbestos-related lawsuits have been filed by people who have no present impairment and may never become sick from asbestos exposure. These filings are consuming resources that also are needed to compensate cancer victims and have pushed an estimated eighty-five companies into bankruptcy. As the longtime manager of the federal asbestos multi-district litigation docket explained, "Only a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle" with other claimants who are not sick.[1] In an effort to address this, the Michigan Supreme Court issued an administrative order on August 9, 2006 that immediately outlawed the "bundling" of asbestos cases for settlement or trial.[2] The court's order will eliminate some of the non-injury cases historically filed in Michigan.

In the past, some courts allowed—even encouraged—the consolidation of asbestos cases at trial because the judges thought that joining dissimilar cases could resolve the litigation more quickly. Sick plaintiffs were used to "leverage" settlements for the non-sick. Several years ago, former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described how trial judges inundated with asbestos claims might feel compelled to adopt such procedural shortcuts:

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and