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

dictate case consolidation even where the rules may not allow joinder.[3]

Now, however, there is a better understanding that bending procedural rules to put pressure on defendants to settle cases does not make cases go away; the practice invites new filings. As Duke Law School Professor Francis McGovern has explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."[4] One West Virginia trial judge involved in that state's asbestos litigation acknowledged that, "we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. . . . [I]t drew more cases."[5] Some also believe consolidations raise serious due process issues because defendants lack a meaningful opportunity to defend against individual claims.

The Michigan order is the latest sign that judges are taking a fresh look at this practice. Courts are beginning to believe that, in addition to fundamental fairness and due process problems, consolidating cases to force defendants to settle is a bit like using a lawn mower to cut down weeds in a garden—the practice may provide a temporary fix to a clogged docket, but ultimately the approach is likely to create more problems than it solves. Recently, the Mississippi Supreme Court has severed several multi-plaintiff asbestos-related cases. In one of the cases,[6] the court called the joinder of 264 plaintiffs who alleged asbestos exposure over a seventy-five year period to products associated with 137 defendants a "perversion of the judicial system. . . ." In July 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions. In 2005 and 2006, Georgia, Kansas, and Texas enacted laws that generally preclude the joinder of asbestos cases at trial.

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Colorado's Immigration Reform

By Gwen Benevento

On June 12, 2006, the Colorado Supreme Court refused to allow a ballot initiative that would have denied most state services to illegal immigrants in *Manolo Gonzalez-Estay v. Lamm, et al.* The ballot initiative, known as Initiative 55, was the culmination of a three-year effort to address the problem of illegal immigration in Colorado.

Initiative 55 sought to prohibit the State of Colorado and all cities, counties, and political subdivisions within from providing any non-emergency services to persons not lawfully in the United States. The question before the Colorado Supreme Court was whether Initiative 55 contained multiple subjects in violation of the single subject rule of the Colorado Constitution (Article V, Section 1(5.5)). The majority determined that Initiative 55 only appeared to have a single subject, and it considered the purposes and possible effects of the Initiative to determine whether there was a single subject. The majority primarily held that the single subject rule was violated because the Initiative had at least two incongruous purposes: (1) decreasing taxpayer expenditures to the welfare of individuals not lawfully present in Colorado; and (2) restricting access to administrative services. The justices ruled 4-2, with one abstention, that Initiative 55 violated the single subject rule.

The dissent objected to the majority's characterization of the "straightforward provision." It argued, Initiative 55 contained a single concise mandate, which, on its face, contained only one subject: the government must restrict non-emergency services to those lawfully present in the United States. The dissent questioned the majority's inquiry into the purposes and practical effects of the Initiative. While the majority equated multiple purposes with multiple subjects, the dissenting opinion reasoned that "the constitutional limitation itself . . . does not purport to examine the hearts of those advancing an initiative but merely prescribes the form an initiative must take for it to be considered by the electorate."

Initiative 55 proponents blamed the court's decision on judicial activism and politics, calling the ruling arbitrary and unfair. The proponents of the Initiative had three main criticisms with the court's ruling. First, the court appeared to broaden precedent by using an expansive interpretation of the term "subject," thus giving the court significant discretion in single subject cases. Second, only the narrow

Update from the New Jersey State Courts Project:

In *Lewis v. Harris*, decided on October 25, the seven justices of the New Jersey Supreme Court unanimously ruled that the state constitution's guarantee of equal treatment entitles same-sex couples to all of the rights and benefits heterosexual couples obtain through civil marriage. Three of the justices dissented, however, arguing that the state constitution includes a fundamental right to same-sex marriage.

The court ordered the New Jersey Legislature to revise within 180 days the state's 1912 marriage laws in one of two ways: (1) the Legislature can make New Jersey the first state to recognize same-sex marriage through legislative action; or (2) lawmakers can follow the leads of Connecticut and Vermont and give same-sex couples all of the benefits of marriage, but by another name, such as "civil union."

Although the court stopped short of mandating recognition of a fundamental right to same-sex marriage, the decision nonetheless is a departure from recent rulings in Washington State and New York that rejected gay couples' claims to marriage and the benefits it confers.

Michigan, (Cont'd. from page 6)

The Michigan Supreme Court's order, a 4-3 decision, comes after three years of study as to how to respond to asbestos litigation problems in that state. In August 2003, the court was petitioned by scores of defendant companies and numerous *amici* seeking the adoption of a statewide inactive asbestos docket to prioritize cases for trial utilizing objective medical criteria. Some have argued that the court should give additional consideration to this proposal in addition to its anti-bundling order. Although, many see the new order as a step in the right direction.

The Staff Comment to the new order notes that the purpose of bundling was "to maximize the number of cases settled." The order further explains, "Bundling can result in seriously ill plaintiffs receiving less for their claim in settlement than they might otherwise have received in their case was not joined with another case or other cases."

In his concurring opinion, Justice Markman also said that the order would "advance the interests of the most seriously ill plaintiffs whose interests have not always been well served by the present system." Chief Justice Taylor and Justices Corrigan and Young joined in the concurrence.

Justices Cavanagh, Weaver, and Kelly dissented. Their main complaint was that the new order will clog the court system since each asbestos case must now be tried individually. The argument is that bundling is necessary for court efficiency.

The Michigan Supreme Court has invited public comment on the new order until December 1. If the new rule remains intact and is effective, Michigan may well see fewer cases by persons whose claims are either premature (because the individual is not sick) or actually meritless(because the person will never develop an asbestos-related impairment).

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Endnotes

[1] *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E.D. Pa. Sept. 16, 1996) (Weiner, J.).

[2] *See* Admin. Order No. 2006-6, Prohibition on "Bundling" Cases (Mich. Aug. 9, 2006), *available at* 2006 WLNR 14601437.

[3] The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 6 (1999) (statement of the Hon. Conrad L. Mallett, Jr.).

[4] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

[5] *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000) (statement of Judge A. Andrew MacQueen.

[6] Harold's Auto Parts v. Mangialardi, 889 So. 2d 493, 495 , 495 (Miss. 2004).