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CIVIL RIGHTS LITIGATION

Weighing Whether to Plead 'Monell'

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It is many New Yorkers' dream to own a townhouse. The space, the privacy, 'living the life of Riley.' But as a recent New York Times article noted, the burdens of townhouse living may outweigh the benefits: skyrocketing property taxes, leaky roofs, homeowners' insurance, the duties of serving as your own doorperson and garbage collector.

Monell claims are a bit like townhouses: they're big, there are many good reasons to have them, but frequently they're more trouble than they're worth. Here is why.

What Is 'Monell'?

Under 42 U.S.C. §1983, 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable.' In Monell v. Dept. of Soc. Servs. of the City of New York, 436 U.S. 658 (1978), the Supreme Court held that municipalities are 'persons' within the meaning of §1983. For a municipality to 'subject[]' a person to a constitutional violation, however, there must be causation between a 'municipal' act and the unconstitutional deprivation. Not every municipal employee can speak or act on behalf of the municipality; there is no municipal respondeat superior liability under §1983. Rather, the 'municipality' acts either where a high-ranking policy maker (e.g., the mayor) acts, or where a lower employee's unconstitutional act is part of a municipal custom, policy, pattern or practice of unconstitutional violations.

Why 'Monell'?

There are many reasons why a plaintiff may wish to assert a Monell claim. For example:

• Deep Pockets. If a plaintiff prevails on a Monell claim, there is little question that the judgment can and will be collected. But before asserting Monell

claims to ensure a deep pocket, plaintiff's counsel should consider how often it is actually necessary to prevail on a Monell claim in order to get the judgment paid.

First, the vast majority of federal civil rights cases also involve New York common-law intentional torts, for which the municipality is usually liable under respondeat superior. Common-law claims for false arrest and false imprisonment contain essentially the same elements as Fourth Amendment false arrest and imprisonment claims. Common-law assault and battery claims exist whenever a plaintiff has excessive force claims under the Fourth Amendment (in the police context), or under the Eighth Amendment (in the prison context).

Assuming (1) the defendant acted within the scope of employment; (2) the plaintiff filed a timely notice of claim against the municipality; and (3) the plaintiff filed the lawsuit against the municipality within the statute of limitations (usually one year and 90 days), the city is liable, with or without a Monell claim. [FN1]

Assume, however, that the plaintiff missed the one-year, 90-day statute of limitations. The plaintiff (in New York State) still has three years to assert §1983 claims against individual defendants. And as a practical matter, New York City, notwithstanding the clear command of N.Y. Gen. Mun. L. §50-k(3), will almost always indemnify city employees, whether or not they violated a rule or regulation of their agency, and whether or not they engaged in intentional wrongdoing or recklessness. [FN2] It is the rare, extremely egregious case where the city will not indemnify, and therefore the rare case where plaintiff will need to prove a Monell claim to ensure a deep pocket.

• Discovery. In a typical stand-alone police misconduct case, a case involving a single false arrest by the NYPD, for example, the plaintiff will be entitled to discover any and all documents concerning the arrest and the underlying incident. The plaintiff will likely be entitled to police department policies concerning arrests (which may be relevant, inter alia, to punitive damages). But the plaintiff will plainly not be entitled to any and all records of police department arrests throughout New York City.

If the same plaintiff, however, asserts that she was the victim of a pattern and practice by the NYPD of stopping and arresting African-Americans without probable cause, it is an entirely different case. Plaintiff will be entitled, at a minimum, to citywide data concerning arrest practices, and probably to a substantial number of underlying arrest records. The sheer volume of discovery will dwarf anything the non-Monell plaintiff would have received. And within that production, there may be any number of damaging documents helpful to plaintiff's case.

The assertion of Monell claims may also facilitate production of the individual defendants' personnel records. To be sure, this information should be discoverable

even in a non-Monell case. Evidence of prior acts is admissible under Rule 404(b) of the Federal Rules of Evidence to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' Personnel records of defendants are also relevant to a New York common-law claim against the municipality for negligent hiring, supervision, discipline, and/or retention of the defendant officer, if plaintiff asserts such a claim.

In a Monell case, the discoverability of personnel records is at its zenith. In Fiacco v. City of Rensselaer, 783 F.2d 319, 328 (2d Cir. 1986), the U.S. Court of Appeals for the Second Circuit held that prior complaints against defendants and other police officers were discoverable and admissible, whether or not they were valid, in a Monell case challenging the city's policy of deliberate indifference to the proper investigation and supervision of police officers in the use of force:

[T]he evidence that a number of claims of police brutality had been made by other persons against the City, together with evidence as to the City's treatment of these claims, was relevant. Whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force. The City's knowledge of these allegations and the nature and extent of its efforts to investigate and record the claims were pertinent to Fiacco's contention that the City had a policy of nonsupervision of its policemen that reflected a deliberate indifference to their use of excessive force.'

The court noted that a Monell plaintiff was not only entitled to inquire about prior incidents, but required to do so to prove the Monell claim:

Since the existence of a policy of nonsupervision amounting to deliberate indifference to constitutional rights cannot be established by inference solely from evidence of the occurrence of the incident in question...a plaintiff cannot prevail on a §1983 claim against a municipality without introducing other evidence. Proof that other claims were met with indifference for their truth may be one way of satisfying the plaintiffs' burden.

• Overcoming Immunities. In §1983 cases, police officers, investigators, prosecutors, and other individual government actors enjoy qualified immunity, i.e., immunity 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' [FN3]

Municipalities, however, do not enjoy qualified immunity. In a case where municipal employees violated federal law that was not clearly established, a plaintiff must prove Monell to prevail on the federal claim.

Monell claims can also be used to overcome absolute immunity. Prosecutors, for example, enjoy absolute immunity for their initiation and prosecution of a crimin-

al case, even for suborning perjury, deliberately failing to turn over Brady material, and other prosecutorial misconduct. But, in the Second Circuit, counties are liable where the district attorney (1) acting in a 'managerial' capacity, (2) as part of a custom, practice, or policy within the district attorney's office, (3) violates the Constitution or other federal law, (4) where such violation proximately causes injury. For example, if a district attorney customarily fails to supervise or train assistants on Brady issues, or customarily ignores evidence of police wrongdoing, the county may be liable for any wrongful prosecution or conviction proximately caused by such custom or policy. [FN4] In many cases, Monell may be the only avenue to relief in wrongful conviction cases asserting prosecutorial misconduct.

Why Not 'Monell'?

Why not plead a Monell claim in every civil rights case? The first reason is obvious: plaintiffs should not plead the claim unless they have a good faith basis to bring the claim. But assuming there is a good faith basis, there are many tactical reasons not to assert Monell as well.

First, the plaintiff will be overwhelmed with discovery she does not need in order to prove her case. Why review a million documents when a hundred documents will do? Second, plaintiff will likely be involved in unnecessary motion practice concerning voluminous discovery that corporation counsel generally does not like to produce. Again, why engage in motion practice over discovery the plaintiff does not even need? Third, plaintiff may face a time-consuming and unnecessary summary judgment motion to dismiss the Monell claim. Fourth, even if the claim does survive to trial, the court may bifurcate the Monell claim from plaintiffs' other claims, so that the jury will not hear prejudicial evidence (e.g., evidence of prior complaints against the defendant officers) potentially relevant only to the Monell claim. The court may bifurcate, and hold a Monell trial second, for another reason: if the plaintiff cannot prove in the first trial that the individual defendants violated her constitutional rights, then plaintiff cannot prove that the municipality's policy, custom, or practice caused any unconstitutional violation, eliminating the need for a second, Monell trial against the municipality. [FN5]

Needless discovery and motion practice and an extended, bifurcated trial will substantially delay the case, delay that may not be in the plaintiff's interest. Delay may prove particularly galling given this key point: damages for Monell claims are no greater than damages for non-Monell claims. The plaintiff who is falsely arrested by an errant police officer receives the same damages as the plaintiff who is falsely arrested pursuant to a municipal policy of falsely arresting people. If the damages are to be the same, most plaintiffs would rather get their judgment one to two years after filing, not three to four, or more, years after they brought the case.

Conclusion

Many plaintiffs' lawyers plead Monell claims in every single §1983 case. This is a mistake. In most individual civil rights cases, Monell claims are not only pointless, but also potentially prejudicial to the efficient prosecution of plaintiff's case.

Before moving to the Monell townhouse across the street, consider staying in your apartment. The view may be just as good, and the value, much better.

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FN1. Of course, there is no fee shifting for common-law tort claims.

FN2. For an alternative approach to indemnification of police officers, see Richard Emery & Ilann Margalit Maazel, 'Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution,' 28 Fordham Urb. L.J. 587, 600 (2000).

FN3. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

FN4. Myers v. County of Orange, 157 F.3d 66, 77 (2d Cir. 1998) (collecting cases). In New York City, where counties are constituent parts of city government, the claim is against the city. See, e.g., Jovanovic, 2006 WL 2411541, at *17-18.

FN5. See, e.g., Amato v. City of Saratoga Springs, 170 F.3d 311, 316 (2d Cir. 1999).

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