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The Potential Liabilities for Cities, Insurers from Florida’s New ‘Anti-Riot’ Law

The right to protest in America is a fundamental right guaranteed by the First Amendment to the United States Constitution, which protects both the “freedom of speech” and the “right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The right to protest is, however, limited – “peaceable” being the operative word.

In response to recent demonstrations across the United States, Florida Governor DeSantis signed the “Combating Public Disorder Act” on April 19, 2021. The most reported result of the new law is the creation of new criminal offenses and the enhancement of criminal penalties for applicable existing offenses. The potential chilling of First Amendment rights has already resulted in a judicial challenge.

Far less reported, however, is the potential impact of a separate provision in the Act that could have a significant financial effect on local governments and the insurance companies that insure them: namely, the waiver of sovereign immunity and establishment of a new cause of action for unlimited damages against local governments by any person who is killed, injured or suffers property damage as a result of the local government’s failure to provide reasonable law enforcement protection during a riot or unlawful assembly.

Specifically, the Act creates a duty on municipalities to allow its municipal law enforcement agency to respond “appropriately” to protect persons and property during a riot or an unlawful assembly based on the availability of adequate equipment to its municipal law enforcement officers. If the governing body of a municipality or a person authorized by the governing body of the municipality breaches that duty, the municipality is civilly liable for any damages, including damages arising from personal injury, wrongful death or property damage proximately caused by the municipality’s breach of duty.

Sovereign immunity for the municipality is specifically waived – the damages recoverable under the Act by a person who is killed, injured or suffers property damage is not barred by sovereign immunity, nor is any recovery limited by sovereign immunity caps of \$200,000 per person and \$300,000 per incident contained in Florida Law (Section 768.28).

And, as discussed below, there is a possibility these types of losses may be limited and/or excluded by insurance policies.

This new cause of action represents a major expansion of potential liability for municipalities. Historically, municipal decisions as to how to allocate police resources could not be challenged and second-guessed by courts.

The leading precedent on the issue is the 1970 decision of the Florida Supreme Court in *Wong v. City of Miami*. In that case, several merchants sued the City of Miami claiming that they had suffered over \$100,000 in property damage because the city decided to withdraw police officers that had been stationed in their vicinity during public protests at the 1968 Republican National Convention in Miami Beach.

The Court rejected the claim, saying, “The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence. Here officials thought it best to withdraw their officers. Who can say whether or not the damage sustained by petitioners would have been more widespread if the officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand?”

As the result of the passage of the Combating Public Disorder Act, such decisions during stressful times will potentially expose municipalities to unlimited liability. What may seem reasonable to the local decision makers may be interpreted differently by plaintiffs seeking recompense for their damages. Even worse, because the Act became effective immediately, an affected municipality may in the short-term face potentially uninsured liabilities due to limitations and exclusions (such as riot or intentional act exclusions) in its existing insurance policies.

Just as the portions of the Act regarding criminal penalties potentially violates the U.S. Constitution, this aspect of the Act creating a new unlimited cause of action against municipalities may violate multiple sections of the Florida Constitution.

Article VII, Section 18 of the Florida Constitution generally provides that any law that requires a local government to expend funds must contain a specific legislative finding that the law fulfills an “important state interest.” The Florida Legislature must either provide sufficient funds or the legislation must be approved by two-thirds of the members of both the House of Representatives and the Senate.

The Act did not contain the legislative finding of an “important state interest” and did not obtain a two-thirds vote in either the House of Representatives (76 of the 120 voting yes) or the Senate (23 of the 40 voting yes). Instead, the staff analysis of the bill merely concluded that it “does not appear to require cities and counties to expend funds.” IT later conceded that it “may have an indeterminate impact on municipalities.”

It is, of course, difficult to determine the cost of this measure to municipalities because it is not known how many protests will take place in a given municipality, whether they will be “peaceful” and whether anyone will be injured or killed. However, given the new risk, municipalities that self-insure will need to set aside more funds to cover potential impacts, and those that purchase insurance could pay higher liability insurance premiums (or excess insurance). Municipalities would also incur additional training costs to implement the Act. Thus, a strong argument can be made that the enactment of the Act violated Article VII, Section 19 of the Florida Constitution.

In addition, Florida municipalities have historically been protected by governmental function immunity for planning level decisions, such as deciding how to allocate police resources. This immunity is premised upon the Separation of Powers provision of the Florida Constitution (Article II, Section 3), because, without it, the courts would be second guessing the police power and political decisions of other branches of the government. Given the constitutional foundation of governmental function immunity, municipalities could contend that it cannot be waived by the Florida Legislature and governor and thus the Act’s new cause of action is invalid.

Municipalities and insurance companies that insure local governments should carefully review the details of the new law and plan for the potential financial consequences of this new cause of action.

Insurance companies will need to evaluate the new risk in underwriting policies for local governments, and local government will need to either ensure that they have adequate coverage or otherwise budget accordingly.

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