demonstration of client harm on a case-by-case basis. This decision also upheld the constitutionality of the statute.[10]

III. The Supreme Court

The Third District Court of Appeal submitted its findings to the Florida Supreme Court and certified these cases to contain issues of "great public importance," which provided the Florida Supreme Court with the jurisdiction to decide this matter under Florida's Constitution.[11]

The appellate court requested that the Florida Supreme Court specifically decide two separate issues related to the statute prohibiting a trial court from granting motions for withdrawal to public defenders due to conflicts arising from 'underfunding, excessive caseload or prospective inability to represent a client.' Namely, the appellate court asked whether this statute is:

1. an unconstitutional violation of an indigent client's right to effective assistance of counsel and access to courts, and

2. a violation of separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Florida Supreme Court's exclusive control over the relevant ethical rules for attorneys?[12]

The Florida Supreme Court consolidated the two appellate cases as both cases addressed the same issues regarding defense attorneys withdrawing from criminal representation and "directly affect[ed] a class of constitutional officers, namely public defenders."[13]

The weight of the issues presented and the potential impact on the criminal justice system involved in this case resulted in a large number of *Amicus Curiae* briefs by influential parties including the American Bar Association, and the Criminal Law Section of The Florida Bar, among others.[14] Many of the *Amicus* briefs "contend[ed] that systemic or aggregate prospective relief is ethically required by the Florida Rules of Professional Conduct [e.g. competence, diligence, and communication] and by the Sixth Amendment rights of indigent defendants."[15]

A. Majority Decision

The Florida Supreme Court first stated that pursuant to the U.S. Supreme Court decision *Gideon v.*

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New Jersey Supreme Court Strikes Down Reorganization of the Council on Affordable Housing

*By Alida Kass**

In a highly anticipated decision, the New Jersey Supreme Court rejected Governor Chris Christie's attempt to reform the Council on Affordable Housing ("COAH"), holding that the Reorganization Act did not authorize the Governor "to abolish independent agencies that were created by legislative action."[1] Since its creation in 1984, COAH has governed the state's housing policy and set the criteria for municipal compliance with the Fair Housing Act.[2]

The Supreme Court overturned the Governor's attempt to dissolve the agency, holding that COAH, as a quasi-independent agency created "in but not of" the executive branch, was beyond the scope of his authority under the Reorganization Act. Justice Anne Patterson dissented, concluding that "the Act was and is intended to authorize the abolition and reorganization of COAH and other agencies that are similarly treated by our laws."[3]

I. Council on Affordable Housing

Beginning in 1975, a series of cases known as the *Mount Laurel* decisions established a municipal constitutional obligation to provide for a "realistic opportunity for the construction of [their] fair share" of affordable housing.[4] In 1985 the New Jersey Legislature responded by passing the Fair Housing Act, which codified COAH as the agency tasked with ensuring municipal compliance with the *Mount Laurel* doctrine.[5]

In February 2010, the Governor issued an executive order creating a task force to study "the continued existence of COAH" among other questions. The Legislature similarly embarked on an effort to abolish COAH. The legislative solution broke down after a bill that would have eliminated COAH was conditionally vetoed by the Governor and the Legislature failed to pass a bill incorporating the proposed amendments.[6] In January 2011, the Governor issued a second executive order, dissolving the agency and placing its powers and responsibilities under the authority of the Department

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of Community Affairs ("DCA"), according to the authority of the Reorganization Act.[7]

II. Appellate Court Decision

Following Governor Christie's executive order, the move to dissolve COAH was challenged by the Fair Share Housing Center, a housing advocacy group, which argued that because the agency was "in but not of" the executive branch, it was not subject to the Reorganization Act.[8]

The appellate court agreed with the Fair Share Housing Center, and held that the Reorganization Act did not apply to agencies which were "in but not of" the executive branch. The court considered the definition of "agency" under the Act, which includes: "[a]ny division, bureau, board, commission, agency, office, authority or institution of the executive branch created by law," and concluded that the absence of an express mention of "in but not of" agencies suggested an intent that they not be included.[9] The court also noted that COAH's enabling legislation as a whole represented "a carefully crafted statutory scheme" which, in the court's estimation, suggested that the Legislature would not likely have intended to subject the agency to the Reorganization Act.[10]

Finally, the court raised separation of powers concerns regarding the Reorganization Act. It noted that the initial decision upholding the constitutionality of the Act, *Brown v. Heymann*,[11] "relied primarily" on the fact that similar legislation had been upheld at the federal level. Interestingly, the court emphasized testimony by then-Assistant Attorney General Antonin Scalia, who had objected to the "legislative veto" in the federal law specifically because it would have allowed just one legislative house to block a reorganization plan. Since the New Jersey Act provided for a bicameral legislative veto, his concern presumably would not apply. Nevertheless, the court suggested that the subsequent amendments that excluded independent agencies from the federal law might call the application of the Reorganization Act to "in but not of" agencies into question.[12]

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Maryland Court of Appeals Limits Asbestos Liability

*By Michael J. Ellis**

For decades, asbestos cases have wound their way through state and federal courts. The first wave of cases, starting in the 1970s, was brought by construction workers and other plaintiffs who were directly exposed to asbestos.[1] Thousands of direct-exposure cases led to the bankruptcy of major asbestos-producing companies, including Johns-Mansville.[2] Thirty years later, most direct-exposure plaintiffs have obtained relief or died. That, you might think, would mean an end to asbestos lawsuits. And yet, litigation is alive and well, thanks to a second wave of lawsuits.[3] Many plaintiffs in this second wave allege that they were exposed to asbestos through the contaminated work clothing of spouses or family members.[4]

Georgia Pacific LLC v. Farrar was part of that second wave of "take-home" asbestos cases.[5] The plaintiff, Joyce Farrar, lived with her grandparents in Maryland in the 1960s. Her grandfather, a construction worker at a federal building in Washington, DC, in 1968 and 1969, did not use any asbestos products himself, but he spent time near drywall workers who used an asbestos-based Georgia-Pacific joint compound. As a teenager, Ms. Farrar shook out her grandfather's dust-covered work clothes, washed the clothes, and swept the dust from the laundry room floor. Forty years after laundering her grandfather's clothes, in 2008, Farrar was diagnosed with mesothelioma. She sued thirty defendants, including Georgia-Pacific, in Maryland state court, and a jury awarded her nearly $20 million.

Farrar presented the Maryland Court of Appeals, the Free State's highest court, with two questions: (1) whether Georgia-Pacific owed a duty to warn the family members of workers who came into contact with its products about the dangers of asbestos and (2) whether Farrar presented sufficient evidence that Georgia-Pacific's products caused her mesothelioma. Unanimously finding the answer to the first question to be no, the court did not answer the second.

The Maryland court's holding was in some respects unremarkable. Based on the Second Restatement of Torts, *Farrar* reasoned that "[a] manufacturer cannot warn of dangers that were not known to it or knowable in light of the generally recognized and prevailing scientific and

New Jersey Supreme Court Strikes Down Reorganization of COAH

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III. Supreme Court Opinion

The New Jersey Supreme Court upheld the appellate court's decision primarily on statutory grounds: "At the heart of this case is a question of statutory interpretation: whether an independent agency like COAH is subject to the Reorganization Act." And in analyzing the scope of "agency" as defined under the Act, the court focused specifically on the choice of pronoun. Emphasizing that the Act covers "any . . . agency . . . *of* the executive branch," the court deemed "of" to be a "term of art" to which the court was "required to give meaning."[13]

The court also focused considerable attention on the question of whether the Reorganization Act had ever been applied to an "in but not of" agency. The court seemed to acknowledge the prior application of the Act to independent agencies, but emphasized that there has been no cited example "of a Chief Executive relying on the Reorganization Act to *abolish* an independent agency."[14] Though the Court did not cite anything from the statute itself that would suggest the scope of the Act would differ according to the function being authorized, it appeared to draw a line between the application of the Reorganization Act to transfer or modify an "in but not of" agency, and abolishing such an agency.

Although the court wrote that it was deciding the case on statutory grounds, that line-drawing was likely informed by the court's concerns over separation of powers doctrine and the Presentment Clause. The court noted that it had previously upheld the constitutionality of the Reorganization Act in reliance on the constitutionality of existing federal law, and "did not anticipate or address the changes to federal law made years later in response to constitutional concerns." To that point, the court cited the appellate opinion invoking of then-Assistant Attorney General Antonin Scalia's concerns regarding the legislative veto and the subsequent amendments to the federal law which limited its application to independent agencies. It also emphasized that *Brown* upheld the application of the Reorganization act to the rearranging and not to the abolition of an "in but not of" agency.[15]

Justice Anne Patterson dissented, joined by Justice Helen Hoens. Justice Patterson disputed the majority's reliance on the simple use of the preposition "of" to carry the burden of legislative intent, and argued it was unlikely the Legislature would seek to express itself in such "oblique" fashion rather than simply exempting the class of agencies explicitly in the definition section."[16] Justice Patterson also argued that the history of the Reorganization Act included numerous instances of the Act being applied to agencies that were "in but not of" the executive branch. She noted that the first case brought under the Act involved the reorganization of the Public Employment Relations Commission ("PERC"), an "in but not of" agency, and yet there was no indication either from legislative history of the Act or from the opinion in *Brown* that the Reorganization Act did not apply due to PERC's status.[17] Justice Patterson further argued that the Act has since been used on numerous occasions to abolish or reorganize "in but not of" agencies without having been challenged by the Legislature and without suggestion that its application to that special class of agency exceeded the authority of the Act.[18]

IV. Significance of the Case

Most immediately, the decision seems to clear the way for a return to *Mount Laurel*-based methodologies. In a decision issued just two months after *In re Plan for Abolition of COAH*, the New Jersey Supreme Court rejected the latest round of COAH regulations and ordered the agency to issue new guidelines within the next five months based on previous COAH methodologies. Not only has COAH been reinstated, this most recent decision seems to confirm that any significant change in the way COAH regulates municipal housing policy must begin in the legislature.[19]

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Endnotes

1 *In re* Plan for Abolition of Council on Affordable Housing, No. 070426, 2013 WL 3717751, at *1 (N.J. Jul. 10, 2013).

2 *Id.* at *3.

3 *Id.* at *20 (Patterson, J., dissenting).

4 *Id.* at *2.

5 *Id.*

6 *Id.* at *1.

7 *Id.*

8 The "in but not of" language has been used by New Jersey courts to reconcile the requirement under the New Jersey Constitution that

all agencies be housed within one of the 20 executive departments with the attempt to give some agencies quasi-independent status. New Jersey Turnpike Authority v. Parsons, 3 N.J. 235 (1949).

9 N.J. Stat. Ann. § 52:14C-3(a).

10 *In re* Plan for Abolition of Council on Affordable Housing, 424 N.J.Super. 419, 425 (N.J. App. Div. 2012).

11 62 N.J. 1, 297 A.2d 572 (1972).

12 424 N.J. Super at 430.

13 *In re* Plan for Abolition of Council on Affordable Housing, No. 070426, 2013 WL 3717751, at *14 (N.J. Jul. 10, 2013) (emphasis added).

14 *Id.* at *16 (emphasis added).

15 *Id.* at *19.

16 *Id.* at *23 (Patterson, J., dissenting).

17 *Id.* at *29 (Patterson, J., dissenting).

18 *Id. at* *27 (Patterson, J. dissenting).

19 *In re* Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, No. 067126, 2013 WL 53568707 (N.J. Sept. 26, 2013).

New Mexico Supreme Court: *Elane Photography v. Willock*

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another email, asking whether Elane Photography offers its "services to same-sex couples." Elaine responded that the Company does "not photograph same-sex weddings" and thanked Willock for her interest.

Although Willock and her partner found another photographer at a lower price than what Elane Photography would have charged, Willock filed a complaint with the State, claiming Elane Photography violated the state public accommodations law by engaging in sexual orientation discrimination. The State found probable cause, and accordingly subjected Elane Photography to a one day trial before a hearing examiner. Based on the hearing examiner's report, the New Mexico Commission on Human Rights found Elane Photography guilty of sexual orientation discrimination by a public accommodation, and ordered it to pay $6,637.94 in attorneys' fees. Elane Photography appealed, and lost at both the state district court and the New Mexico Court of Appeals. The New Mexico Supreme Court granted review and heard oral arguments in March 2013. On August 22, 2013, the New Mexico Supreme Court unanimously ruled against Elane Photography.

II. Decision

A. Public Accommodation

The New Mexico Supreme Court found that Elane Photography was a public accommodation subject to New Mexico's Human Rights Act. By way of background, a public accommodation in general is a commercial enterprise that provides goods or services to the public. The New Mexico Human Rights Act prohibits "public accommodations" from discriminating against its customers based on "sexual orientation," among other characteristics. Elane Photography did not appeal the issue of whether it was a "public accommodation" under state law to the New Mexico Supreme Court, but did appeal the issue of whether it had engaged in "sexual orientation" discrimination under New Mexico law. Elane argued that it turned down the request because of the ceremony's message it would have to communicate via its photography, not the sexual orientation of the participants. Elane argued that it would photograph homosexuals in other contexts (e.g., shooting head shots for business advertising), but would not photograph stills of heterosexual actors depicting a same-sex wedding in a play. The high court disagreed, and upheld the lower court rulings that Elane had engaged in sexual orientation discrimination.

The New Mexico Supreme Court then addressed the various free speech and religious liberty defenses Elane raised in the case.

B. Compelled Speech

Elane first argued that the public accommodations statute, as applied to this situation, violated the company's First Amendment rights protecting it from compelled speech. The United States Supreme Court has ruled that the government may not force people to say the government's own message, in *West Virginia Board of Education v. Barnette*[2] (prohibiting public schools from forcing unwilling students to recite the Pledge of Allegiance) and *Wooley v. Maynard*[3] (New Hampshire cannot fine drivers who cover the state motto, "Live Free or Die" on their auto license plates, because of their opposition to that message).

Also, the U.S. Supreme Court has ruled that the First Amendment protects corporations from governmental compelled speech, even if the speech comes from private individuals and not the state actors.[4] Elane Photography also relied on the *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), in which a unanimous Supreme Court reversed