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The Erosion of Judicial Immunity

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THE EROSION OF JUDICIAL IMMUNITY

The following statement was prepared by the Committee on Judicial Immunity, Judicial Administration Division, American Bar Association, and is reprinted here for the benefit of the members of NAALJ. Members are invited to complete the questionnaire, p. 103, and return it, with any discussion, to the Honorable Phillip J. Roth, Committee Chairman, 536 Multnomah County Courthouse, 1021 S.W. Fourth Avenue, Portland, OR 97204 as soon as practicable.

COMMITTEE STATEMENT

There is a mounting concern among members of the judiciary that the centuries old doctrine of judicial immunity no longer adequately protects judges from personal liability for their official acts. This concern is well founded: recent Supreme Court authority approves judicial exposure to injunctive relief, strongly suggests attorney fee liability in civil rights cases and arguably implies damages liability for wrongful executive action.

The accelerating erosion of judicial immunity is the product of the Courts' emerging "functional" analysis of governmental immunity. This analysis distinguishes among a judge's acts according to the governmental function being discharged — legislative, executive, or judicial — and employs differing liability principles for conduct of each kind. Thus, judicial immunity, long thought to apply to all acts by a judge, now applies only to those acts of a strictly judicial nature. Cf, Stump v. Sparkman, 435 US 349 (1978) and Supreme Court of Virginia v. Consumer's Union, 446 US 719 (1980). In short, no longer are all acts by judges "judicial acts"; rather, much of what judges do is now considered legislative or executive action. While still immunizing judges from money damages for wrongful judicial acts, this new and more narrow form of judicial immunity has itself been qualified in several Circuits to exclude protection from injunctive or declaratory relief. Eg., Morrison v. Ayoob; 627 F2d 669 (3rd Cir. 1980), cert. denied, 449 US 1102 (1981); see, also, Consumer's Union, supra, n.13, at 735. As discussed below, exposure to non-monetary relief nonetheless may involve serious financial risk in the form of attorney fee liability under the Civil Rights Attorney Fee Award Act of 1976 (42 USC 1988).

The most striking change wrought by the functional analysis is the qualification of immunity for judges' executive wrongs. Consumer's Union, supra, expressly holds judges subject to prospective injunctive relief for abuses of "enforcement power." The only guidance offered by the Consumer's Union Court as to the nature of enforcement power in the judicial setting is to observe that the inherent and statutory power of the Virginia Court to discipline attorneys goes "beyond that of adjudicating complaints filed by

others and beyond the normal authority of the courts to punish attorneys for contempt." 446 US 724. The opinion fails to further define "enforcement" or to limit its holding to the relatively unique context of professional discipline. Indeed, the Court impliedly expands the notion of judicial enforcement beyond disciplinary matters with its analogy to the liability of prosecutors and law enforcement officers. 446 US 736-7.

A disturbing possibility also should be noted. Consumer's Union and an earlier opinion by Justice White, Butz v. Economou, 438 US 478 (1978), signify a commitment by the Supreme Court to a uniform analysis of governmental immunity, one applicable to all governmental agents regardless of their location in one of the three branches. Accordingly, there looms the possibility of damages liability for a judge's executive misconduct. Under Scheuer v. Rhodes, 416 US 232 (1974), executive officials are liable for money damages where bad faith deprivation of civil rights are proven. Consumer's Union reveals no principle which would restrict the qualified Scheuer immunity to members of the executive branch. To the contrary, the analysis expounded by Consumer's Union and Economou irresistibly leads one to expect monetary liability for functionally similar (executive) acts. Cf, Nixon v. Fitzgerald, 102 S.Ct. 2690 (1980).

It is also worth noting that if the Scheuer standard is applied to the judiciary's executive wrongs, pretrial dismissal of such actions will be extremely difficult to obtain. Under Scheuer, the liability of an executive official is a question of good faith and reasonable belief, a matter of subjective and objective fact. Complaints raising factual issues regarding a defendant's state of mind are simply not susceptible to dismissal. See, C. Wright, Law of Federal Courts, at 493 (3rd ed., 1976).

In addition to these new and potential forms of liability for judicial and executive acts, an overarching exposure to attorney fees in civil rights cases is fast developing. 42 USC 1988, the Civil Rights Attorney Fee Award Act of 1976, authorizes fees for prevailing parties where federal constitutional or civil rights have been vindicated. Recent federal holdings make it clear that unsuccessful judicial defendants will be liable for fees under the Act. Consumer's Union, supra, at 739; Ayoob, supra, at 672. Moreover, Section 1988 awards can be substantial: the amount is determined by multiplying counsel's normal billing rate times whatever factor the court deems appropriate.

A pervasive background issue in assessing judicial liability exposure is the willingness of state governments to stand behind their judges with indemnification for plaintiff recoveries and the provision of legal representation. A survey of the law in the fifty states reveals considerable variation in the kind and degree of assistance provided. See, Memorandum No. RIS 83.001, National Center for State Courts. In fact, only eighteen states currently provide across the board indemnification for fees, costs and recoveries. Id., at 2. Furthermore, the obligation of nearly all states to indemnify or represent is qualified by exclusions for "wrongful", "deliberate", "malicious", "fraudulent", or similar 'bad' acts. These legal characterizations significantly reduce the certainty of state support by introducing considerable executive discretion.

An additional source of judicial concern is the cost of defending against administrative complaints. Nearly all states have judicial fitness commissions or the like which are empowered to censure, fine, suspend or even remove a sitting judge. Contending with these administrative actions can be expensive and is generally not recoverable by state indemnification.

New and developing forms of exposure have generated increasing interest among judges in a comprehensive plan of liability insurance. Adequate coverage must respond to several judicial concerns: First, policy exclusions for conduct alleged to be 'malicious', 'wanton', 'deliberate', etc., are plainly undesirable. These words focus on the state of mind of the insured, not the insured's actual conduct, and therefore create unwanted ambiguity as to the policy's coverage.

Second, full provision must be made for the costs of defending against both civil and administrative actions. While legal or political considerations may prohibit coverage for judgments or fines based on purposeful wrongdoing, insurance for defense costs is clearly needed and justified.

Third, the inevitable tradeoffs between a policy's price, deductibles and coverage limits must be resolved in favor of low deductibles regardless of increased price or lower limits. Although personal financial protection is of obvious concern to judges, the public's interest in an independent and impartial judiciary also must be protected. Smaller but more frequent liabilities present a greater danger of inhibiting judicial decision-making than the rare large award.

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QUESTIONNAIRE

1. (a) Would you favor at this time a national plan of liability insurance coverage available to judges on a voluntary basis which would cover damage awards arising out of one's official duties and caused by error, omission, act, neglect or breach of duty, misstatement or misleading statement?

   (b) Additionally, should the policy cover "malicious" or "deliberate" acts?

(a) _____ Yes _____ No

(b) _____ Yes _____ No

2. Assuming you would favor such a plan, what other coverage do you think is desirable? (a) Defense costs (fees, court costs, investigatory and appeal costs)? (b) Attorney fee judgments, particularly those awarded under 42 USC 1988? (c) Private defense costs in disciplinary proceedings? (d) Coverage for the liability of those under your supervision? (e) coverage for punitive damages?

(a) _____ Yes _____ No

(b) _____ Yes _____ No

(c) _____ Yes _____ No

(d) _____ Yes _____ No

(e) _____ Yes _____ No

3. (a) Assuming further that adequate coverage can be obtained, what would you consider a reasonable upper limit on premium costs per year?

   (b) Would you favor a policy without a deductible?

(a) _____ $200 _____ $300 _____ $400 _____ $500 _____ $

(b) _____ Yes _____ No