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HOMEOWNER'S ASSOCIATION Q & A

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Section 1983 Claims Against Homeowner's Associations

Q: What is a Section 1983 cause of action?

A: Section 1983 creates a private cause of action for damages against state and local governments and officials for violations of the United States Constitution and laws. *Cf. Monell v. Dep't of Social Svcs.*, 436 U.S. 658, 683-90 (1978). Section 1983 also authorizes a court to grant relief when a party's federally protected rights have been violated by a person who acted "under color of state law."

Q: Will a plaintiff be successful in bringing a Section 1983 claim against a homeowner's association?

A: Not likely. Homeowner's associations are private associations, not state actors. *Hollman v. Mission Trace Homeowners Association*, 556 S.W.2d 632, 636 (Tex. App. – San Antonio 1977, no writ). A homeowner's association is not a municipality, government agency, or other state actor. Additionally, it is unlikely that a homeowner's association will be found to be acting under color of state law.

Q: What is a plaintiff making a Section 1983 claim against a homeowner's association required to prove?

A: A Section 1983 plaintiff bears the burden of pleading and proving two essential elements: 1) conduct that deprived the plaintiff of a right, privilege, or immunity protected by the Constitution or laws of the United States; and 2) the alleged deprivation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *see also Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008).

Q: What have plaintiffs' arguments been for why a homeowner's association should be considered a state actor?

A: Plaintiffs have tried to argue that a homeowner's association is a "de facto municipal government" for its residents when: 1) it collects each unit owner's prorata share of the expenses of the administration and maintenance, repair, upkeep, protection, replacement, and operation of the common elements and 2) uses this money to carry out the administration and maintenance, repair, upkeep, protection, replacement, and operation of the common elements including roads and providing security. There is no case law to support a finding that this is a successful argument for why a plaintiff should be able to sue a homeowner's association under Section 1983.

Q: Is there a recognized test for whether there is state action by a private actor sufficient to establish liability for a constitutional tort?

A: Yes, the Supreme Court has articulated a two-step analysis for determining whether or not there was state action by a private actor sufficient to establish liability for a constitutional tort. The test is: (1) "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority"; and (2) whether, under the facts of the case, "[the] private parties, may be appropriately characterized as 'state actors.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

Q: Are there any recognized tests for when a private party is appropriately "characterized as a 'state actor?'"

A: Yes, there are several recognized tests including: (1) the public function test, (2) the state compulsion test, (3) the close nexus test, (4) the pervasively entwined test, and (5) the joint action test. *See Lugar*, 457 U.S. at 939. The close nexus, pervasively entwined, and joint action tests overlap.

Q: Why are there multiple tests for determining if a private party is properly characterized as a state actor?

A: There are multiple tests for determining whether a private party is properly characterized as a state actor because the inquiry is a general one concerned primarily with whether the private action can be "fairly attributable" to the state. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). The multiple tests are a result of the fact that what is "fairly attributable" to the state is a "matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2000).

Q: Under the public function test, when does a private entity act under color of state law?

A: Under the public function test, a private entity acts under color of state law when the entity performs a function historically and traditionally governmental in nature and is a function that has been "exclusively reserved to the state." *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 158-159 (1978). A prime example of when this test is met is in the context of a privately owned and operated prison. In that case the private actors running the prison meet the test for acting under color of state law because operating a prison is governmental in nature. *Rosborough v. Managements & Training Corp.*, 350 F.3d 459, 459-460 (5th Cir. 2003). Based on the circumstances that the courts have found that a private entity was acting under color of state law according to the public function test, it is unlikely that a homeowner's association would qualify.

Q: Under the state compulsion test, who is being held responsible for the acts of a private entity?

A: Under the state compulsion test, the **state** may be responsible for private acts only where "coercive power…or significant encouragement, either covert or overt" is exercised by the state. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). As a result, a homeowner's association cannot be found to be acting under color of state law under the state compulsion test.

Q: How do the close nexus, joint action, and pervasively entwined tests overlap?

A: Under the close nexus and joint action tests, plaintiffs must show the state has "so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise." *Jackson*, 419 U.S. at 357-358. In *Brentwood*, the Supreme Court explained that a sufficiently close nexus could be found where there is "pervasive entwinement" of the state and a private actor. *Brentwood Acad.*, 531 U.S. at 295-300. The Court introduced a multi-factor test, stating a "close nexus" can be found where: (1) the organization is mostly comprised of state institutions; (2) state officials dominate decision making of the organization; (3) the organization's funds are largely generated by the state institutions; and (4) the organization is acting in lieu of a traditional state actor. *See Id*. at 295-299.

Q: In what context has a plaintiff tried to bring a Section 1983 claim against a homeowner's association?

A: Plaintiffs have tried to bring Section 1983 claims against homeowner's associations when the homeowner's association has passed a restrictive covenant prohibiting some use of the owner's property. The most controversial restrictive covenant as of recent that has provoked a Section 1983 claim is where a homeowner's association has prohibited residency in its community to registered sex offenders.

Q: Should a plaintiff's Section 1983 claim against a homeowner's association challenging a restrictive covenant prohibiting residency to registered sex offenders be successful?

A: No. A plaintiff's Section 1983 claim against a homeowner's association challenging a restrictive covenant prohibiting residency to a registered sex offender should not be successful, because aside from being unable to meet his burden on the question of state action, the plaintiff can also not meet his burden on the first element of his Section 1983 claim, because such a restrictive covenant does not violate substantive due process. *See Weems v. Little Rock Police Department*, 453 F.3d 1010, 1015 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005) *cert. denied* 546 U.S. 1034 (2005); *Iowa v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005).

Q: Why does a homeowner's association's restrictive covenant prohibiting residency to a registered sex offender not violate substantive due process?

A: A homeowner's association's restrictive covenant prohibiting residency to a registered sex offender does not violate substantive due process, because there is no fundamental

right to choose where one wants to live. *Weems*, 453 F.3d at 1015; *Miller*, 405 F.3d at 710; *Seering*, 701 N.W.2d at 665.

Q: What effect does there being no fundamental right to choose were one wants to live have on the analysis of whether a restrictive covenant prohibiting residency to a registered sex offender violates substantive due process?

A: Since the right to choose where one wants to live is not a fundamental right, it is not entitled to the highest constitutional protection of strict scrutiny analysis, but instead is only entitled to the application of a rational basis standard. *Weems*, 453 F.3d at 1016. Applying the rational basis standards the courts have found that residency restrictions are a reasonable means of promoting the government's interest of protecting its children and promoting the safety of its citizens. *Weems*, 453 F.3d at 1015; *Seering*, 701 N.W.2d at 665.