

## Sex offender law challenges grow

Contributed by Pamela A. Maclean, National Law Journal

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The creation of complex sex offender registration systems and increasingly stringent limits on where offenders may live has spawned hundreds of legal challenges in state and federal courts throughout the nation.

The actions range from how long electronic tracking devices must be worn to whether juvenile records must be part of public registrations.

Challenges to the new laws—often hastily passed in the wake of a brutal crime—generally center on battles over who must comply, making retroactivity and prospective treatment crucial.

Takings claims under the Fifth Amendment of the U.S. Constitution also weigh heavily when a sex offender is forced from a long-time home by newly imposed bans on living near playgrounds or video arcades.

So far, 20 states have laws restricting where sex offenders can live, and hundreds of cities have their own limits, according to Wayne Logan, a criminal law professor at Florida State University College of Law in Tallahassee.

The most common laws banish offenders from zones within 2,000 feet of schools and parks.

The Georgia Supreme Court recently struck down a residency restriction on Fifth Amendment grounds, but upheld a portion that barred sex offenders from working in the restricted zones, Logan said. *Mann v. Georgia Dept. of Corrections*, 282 Ga. 754 (2007).

The California Supreme Court must choose from a raft of theories on how to apply a 2006 voter-approved residency law prospectively. So far, the plaintiffs, the state attorney general, local district attorneys, the governor and state prison officials have all weighed in with different positions. *In re E.J. habeas corpus*, No. S156933 (Calif.).

### Ohio's legal meltdown

But it is Ohio that finds itself in the midst of a legal meltdown because of a shift in sex offender registration law. Ohio rushed to switch from a long-standing state offender registration program to the 2006 federal Adam Walsh Child Protection and Safety Act registration system.

More than 26,000 people, including juveniles, were reclassified as sex offenders and ordered to register for a public list for up to 25 years. This spawned a federal class action challenge over timing of public notification, and a limited restraining order issued in *Doe v. Dann*, No. 8-cv-220PAG (N.D. Ohio). Also, thousands of individual state challenges to reclassifications are pending.

Many of those reclassified are indigent or in prison. Local counties won't pick up the tab for lawyers in what is considered a civil dispute, said Jay Macke, who leads the efforts for the Ohio Public Defenders Office.

On May 9, a Cuyahoga County judge found that the Adam Walsh Act's retroactive reclassification violated both the Ohio Constitution's retroactivity clause and ex post facto protections. *Evans v. Ohio*, No. cv-08-646797. Several other appeals are pending, but ultimately the issue will go to the Ohio Supreme Court, the judge said.

The Adam Walsh Act, among other things, creates a national sex offender registry. It also restricts where an offender may live and allows civil psychiatric commitment of offenders.

The act also compels states to enact similar laws by mid-2009 or face loss of federal law enforcement funds. For states that quickly adopt the law, there is promise of a 10 percent bonus on federal funds.

The financial incentives amount to an "imaginary carrot and an imaginary stick," Macke said. Ohio received no reward for acting early, and now it appears that the money will be slashed from the budget anyway, he said.

Most courts have permitted laws restricting where sex offenders may live, according to Corey Yung, an assistant professor of criminal law at The John Marshall Law School in Chicago, who has written extensively on sex offender law. Battles now center on whom they apply to and under what conditions.

The 8th U.S. Circuit Court of Appeals approved residency restriction laws in Arkansas and Iowa, but the Iowa law was so onerous that most sex offenders were forced to live in cars, cemeteries or abandoned houses. Once homeless, they stopped registering. This prompted the Iowa County Attorneys Association and Iowa sheriffs in 2007 to petition the

legislature to repeal the law as "counterproductive." The legislature refused.

"Legislators did such a good job of selling the idea that the restrictions on residency was a safety measure, people have the false idea it provides safety and politicians fear going against that," said Corwin Ritchie, of the Iowa County Attorneys Association.

Florida had 60 cities in one year adopt restrictions and in 2005 some banned sex offenders from public hurricane shelters, forcing them to go to local prisons during storms.

"A lot of these people are becoming homeless—it is becoming a real problem where they can live," said Ronald Chapman, a criminal defense lawyer of West Palm Beach, Fla.'s Chapman Law Firm. Registration now includes putting the sex law violation on the driver's license.

California's voter-approved law also has conflicts with a sweeping legislative reform of sex offender residence limits that the state Supreme Court will have to sort out.

The voters' version, Proposition 83, bars sex criminals from living within 2,000 feet of a park or school, and offenders who complete prison terms must also wear global positioning devices for the rest of their lives.

In two federal court challenges to the same state initiative, one held the California residence restrictions could not be applied to a prisoner released before the law's passage. *Doe v. Schwarzenegger*, No. C06-2521LKK (E.D. Calif.). The other held that it did not apply to a sex offender who served 12 years' probation before the act's adoption. *Doe v. Schwarzenegger*, No. C06-6968JSW (N.D. Calif.).

But those federal rulings are not binding on the state court, said Janet Neeley, deputy attorney general in charge of the sex offender registry in California.

"Nothing is cleared up," she said. "There are no California cases published on the point, and we don't even know who the law applies to," she said. So far the law has not been enforced because of the questions about who is covered under the "prospective" application. The initiative also failed to create a misdemeanor crime for violation, Neeley said. "There is no way to punish anyone, unless they are violating parole or probation."

And the Adam Walsh Act faces federal constitutional challenges. Two federal circuit courts, the 4th Circuit and the 11th Circuit, are now considering whether Congress violated the Constitution's commerce clause in passing the Adam Walsh Act because challengers allege it has no nexus with interstate commerce. *U.S. v. Comstock*, No. 06-hc-2195BR, and *U.S. v. Powers*, 07-cr-221KRS.

Pamela A. Maclean writes for *The National Law Journal*, a Daily Report affiliate.