The 9th Circuit Should Reconsider the Rule on Loss of Relationship Claims

Blair Schlecter is a partner with Hurrell Cantrall. His practice emphasizes municipal liability and appellate practice, including the defense of civil rights claims against law enforcement officers and officials.

When should family members of a person injured by government officials be able to file suit under the Constitution? The answer to this question has important implications for individuals and government entities.

State law allows relatives of injured persons to file a lawsuit for loss of consortium, which means loss or disruption of their relationship with a person who was injured by a wrongdoer. For example, the spouse of someone injured in a car accident can often seek damages from the person responsible for loss of companionship and support they endured as a result.

The federal statute, 42 U.S.C. Section 1983, provides a vehicle for citizens to file suit against government officials for violation of their rights under the U.S. Constitution. Courts in some circumstances also allow family members (generally parents, children or spouses) to file constitutional claims against government officials for disruption of a relationship with an injured relative. These claims are often called loss of relationship or familial association claims.

Most federal courts allow relatives to file familial association claims only where a government official intended to interfere with a family relationship, such as when a parent is wrongfully deprived of custody of a child. However, the rule in the 9th U.S. Circuit Court of Appeals is different. In the 9th Circuit, a parent or child may file a familial association claim even if the government official did not intend to interfere with any family relationship.

The nearly unanimous view of the federal Courts of Appeals is that family members may pursue familial association claims, if at all, only if a government actor intended to interfere with the family relationship. *Ortiz v. Burgos*, 807 F.2d 6, 9-10 (1st Cir. 1986); *Spencer v. Casavilla*, 44 F.3d 74, 79 (2d Cir. 1994)(conspiracy claim under Section 1985(3)); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 192 (3d Cir. 2009); *Shaw v. Stroud*, 13 F.3d 791, 805 (4th Cir. 1994); *De Fuentes v. Gonzales*, 462 F.3d 498, 506 (5th Cir. 2006); *Barber v. Overton*, 496 F.3d 449, 457-458 (6th Cir. 2007); *Russ v. Watts*, 414 F.3d 783, 791 (7th Cir. 2005); *Reasonover v. St. Louis County*, 447 F.3d 569, 585 (8th Cir. 2006); *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985); *Robertson v. Hecksel*, 420 F.3d 1254, 1260 (11th Cir. 2005); *Butera v. District of Columbia*, 235 F.3d 637, 656, fn. 23 (D.C. Cir. 2001).

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In *Ortiz v. Burgos*, a stepfather and brother filed suit for loss of their relationship with Jose Ortiz, who was allegedly killed by guards while imprisoned. The 1st U.S. Circuit Court of Appeals rejected the family members' claim that they had a constitutionally protected interest with Ortiz. Among other reasons, the court found that the deprivation of the relationship was only incidental, as the guards did not intend to violate their rights. It reasoned: "We think it significant that the Supreme Court has protected the parent only when the government directly acts to sever or otherwise affect his or her legal relationship with a child." The court found that the cases where such a right was recognized involved a state's attempt to change or affect the parent-child relationship or intrude in private family decisions, neither of which occurred here. It also found that allowing such a cause of action would constitutionalize such claims in a variety of inappropriate situations, would be difficult to limit, and would be duplicative of equivalent causes of action already provided under state law.

Monday, January 31, 2011

Criminal
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On The Move
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Law Practice
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The time was right for the Northern California office of Murchison & Cumming LLP to relocate from San Ramon into a prime San Francisco location, according to Managing Partner Jean M. Lawler.

Litigation
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A heated wage-and-hour class action against Wal-Mart continues to spurt allegations - this time not about the merits of the case but the legal players involved.

Law Practice
Listserv Off-Limits in Discovery Battle
Online comments and disparaging remarks posted by a plaintiffs' attorney to a private listserv were declared off-limits by a judge last week in a discovery dispute that has captured the attention of the trial bar.

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Roman Silberfeld will be honored this week by the Beverly Hills Bar Association with its"excellence in advocacy" award for the $319 million verdict he won for Celador over "Who Wants to Be a Millionaire."

Intellectual Property
Bratz Trial Focuses on Toy Designer
Lawyers for Mattel Inc. honed in on a tattered three-ring binder Friday in a trial in which the toy company is trying to prove that rival MGA Entertainment Inc. pirated its idea for the billion-dollar Bratz doll brand.

Labor/Employment
Unions Lose Second Picketing Appeal
A Ralphs grocery store in Fresno can boot unions from picketing on its property, a California Court of Appeal ruled Thursday - the second such appellate decision favoring businesses.

Real Estate
Union Opposes State Building Sale

In the 7th U.S. Circuit Court of Appeals, the case of *Russ v. Watts* reversed years of precedent and has important implications for the law in the 9th Circuit. In *Russ*, the court revisited its decision in *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), which had held that a parent could pursue a familial association claim even for an incidental deprivation of their rights. Robert Russ' parents had filed suit for violation of their constitutional rights to society and companionship after their son was shot by the police. As in *Bell*, the police had no interaction with Russ' parents and did not intend to violate their rights. The court stated that "[m]ost courts that have considered the issue have expressly declined to find a violation of the familial liberty interest where the state action at issue was not aimed specifically at interfering with the relationship." The court went on to find that *Bell* was wrongly decided and overruled it. Because the police did not intend to interfere in the Russ' family relationship, the parents had no constitutional claim for loss of society and companionship.

One of the first 9th Circuit cases to discuss this issue was *Kelson v. Springfield*, 767 F.2d 651, 655 (9th Cir. 1985). In *Kelson*, a student's parents claimed violation of their right to association with their son, who committed suicide after being confronted by a policeman at school. The court, reversing the dismissal of this claim by a District Court, held that a "parent has a constitutionally protected liberty interest in the companionship and society of his or her child." The court cited Supreme Court cases recognizing such a right in the context of direct interference with the parent-child relationship, but it did not address the distinction between intentional and incidental deprivation of rights.

Over time, the law on family association claims has become more expansive in the 9th Circuit, while the other federal circuits have restricted such claims. In *Ward v. San Jose*, 967 F.2d 280, 283-284 (9th Cir. 1992), the 9th Circuit, relying on the now overruled 7th Circuit case of *Bell v. Milwaukee*, rejected a requirement that a party must establish an intent to interfere in a parental or child relationship in order to pursue familial association claims. The Court stated that neither *Bell* nor prior 9th Circuit cases imposed any such limitation. Rather, a relative could file suit for constitutional deprivations that incidentally affected a family relationship. Subsequent 9th Circuit decisions have followed this rule without much further debate.

Although *Bell v. Milwaukee* has been overruled and the other circuits maintain a different rule, the 9th Circuit has not reconsidered its precedent. In fact, there has been little discussion of the justification for having a different rule in this circuit. As recently stated by a federal district court, the development of 9th Circuit precedent "has, to say the least, not come about directly and explicitly, nor has it been supported by any extensive and rigorous analysis." *Rentz v. Spokane County*, 438 F.Supp.2d 1252, 1264 (E.D. Wash. 2006).

There are good grounds for the 9th Circuit to reconsider its precedent. First, the rule in the 9th Circuit expands liability beyond the proper limits of the Constitution. The Constitution is not designed to protect against every conceivable violation of a citizen's rights, and negligent conduct is not a constitutional violation. Rather, the "guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). However, a familial association claim consists in most cases of a government official's *inadvertent* interference in a family relationship. Therefore, allowing such claims results in an unwarranted expansion of constitutional protections to third parties who were not directly injured.

Second, the rule creates an expansive class of persons who can seek constitutional relief, as any parent, child, or spouse can claim a violation of their constitutional rights for a wrong committed against someone else (such as a close relative). Continued application of this rule will cause unfair expense and burden to government entities, since the rule multiplies the number of people who can sue for a single wrongful act by the government.

A change in law in the 9th Circuit would likely save government entities millions of dollars incurred over time in defending and paying for such claims. Other federal courts have recognized the importance of limitations on familial association claims to intentional conduct directed at the family relationship. The 9th Circuit should do the same.

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