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Torts

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Torts

Torts; commercial blockade—interference with access to a health care facility

Civil Code §§ 3427, 3427.1, 3427.2, 3427.3, 3427.4 (new).
AB 600 (Speier); 1994 STAT. Ch. 1193

Existing federal law establishes criminal and civil penalties for persons who, through force, threat of force, or by physical obstruction, intentionally injure, intimidate, or interfere with another person or class of persons seeking or providing reproductive health care or exercising the right of religious freedom.¹ Existing state law provides criminal penalties for the intentional physical obstruction of passage to or from a health care facility, a place of worship, or a school.²

1. 18 U.S.C.A. § 248 (West Supp. Pamphlet 3 1994); *see id.* (enacting the Freedom of Access to Clinic Entrances Act of 1994 (FACE) and providing for criminal penalties, including both fines and imprisonment; providing for civil remedies, including injunctive relief, compensatory and punitive damages, statutory damages, costs of the suit, and reasonable fees for attorneys and expert witnesses; and allowing the U.S. Attorney General and state attorneys general to bring suit to enforce the provisions). Actions of a parent or guardian directed solely at their minor child are excluded. *Id.* § 248(a) (West Supp. Pamphlet 3 1994). *See also id.* § 248(e)(2)-(4) (West Supp. Pamphlet 3 1994) (defining the terms "interfere with" to mean restricting freedom of movement, "intimidate" as placing one in reasonable fear of physical harm to one's self or to another, and "physical obstruction" as making access either impossible or unreasonably difficult or hazardous). *See generally* Michael Stokes Paulsen & Michael W. McConnell, *The Doubtful Constitutionality of the Clinic Access Bill*, 1 VA. J. SOC. POL. & L. 261, 286-88 (1994) (copy on file with *Pacific Law Journal*) (criticizing FACE for definitions that remain vague and overbroad to some extent, rendering them constitutionally problematic; claiming FACE is not viewpoint-neutral because it treats demonstrations by pro-life and pro-choice groups differently, although both sides engage in unlawful activities; and pointing out that FACE makes non-violent civil disobedience a serious federal offense which brings down extremely heavy penalties); *Clinton Signs Abortion Protest Bill; He Says New Penalties Will Thwart Violence*, DALLAS MORNING NEWS, May 27, 1994, at 4A (reporting that those who block access to women's health clinics or use force or threat of force against patients and employees face penalties of six months to life imprisonment and steep fines); Ronald Smothers, *Clinic Killing Suspect Charged*, S.F. EXAMINER, July 31, 1994, at A2 (reporting abortion rights leader Eleanor Smeal's criticism of the federal law enforcement agencies for not taking advantage of FACE, which she states was constructed to give them jurisdiction, because of their failure to investigate Paul Hill, a man who openly advocated violence against abortion doctors and his links with other anti-abortion groups outside of Florida; Hill was arrested for the murder of two men, including the clinic's doctor, on July 29, 1994).

2. CAL. PENAL CODE § 602.11(a) (West Supp. 1994); *see id.* (punishing an offender with imprisonment in the county jail and/or a fine of \$250 upon a first offense, community service may be ordered in the alternative; upon a third or subsequent offense, the maximum penalty is imprisonment in county jail of 30 days and a fine of up to \$2000). Note that the definition of "physically obstruct" does not include the use of speech. *Id.* § 602.11(b)(1) (West Supp. 1994). *See also* MASS. GEN. LAWS ANN. ch. 266, § 120E (West Supp. 1994) (penalizing the obstruction of access to any medical facility with a fine of \$1000 for a first offense and/or six months in jail, the maximum fine and term of imprisonment being \$5000 and two and one-half years imprisonment, and granting a right to commence a civil action for relief, including equitable, compensatory, and punitive damages); *cf.* ARK. CODE ANN. § 5-71-226 (Michie Supp. 1993) (making it a criminal offense to obstruct any hallway or door of an on-campus building, or disrupt classes; a violation of the provision is a misdemeanor and punishable by a fine of not less than \$200 and/or a sentence of not less than six months in the county jail); COLO. REV. STAT. § 18-9-107 (1986) (making the obstruction of a road, sidewalk, building entrance, or passageway a misdemeanor); D.C. CODE ANN. § 22-1107 (1989) (providing that people who congregate in or around any public building or entrance to a private building, who engage in loud talking or

Chapter 1193 creates the tort of commercial blockade, establishing a civil cause of action against one who intentionally prevents passage to or from a health care facility by physical obstruction or by disruption of a health care facility's normal operations.³ Under Chapter 1193, an aggrieved⁴ party may bring a civil action seeking damages against the tortfeasor and those acting in concert with the tortfeasor who commit such acts of obstruction or disruption.⁵ Courts are required to protect the privacy of plaintiffs and witnesses in such an action and to shield them from harassment insofar as is reasonably necessary.⁶

INTERPRETIVE COMMENT

Chapter 1193 was enacted subsequent to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE), which supplies plaintiffs and law enforcement officials with a powerful legal tool to impose higher criminal penalties and to seek civil remedies, including an award of attorney's fees and costs against those who violate its provisions.⁷ FACE was enacted in the wake

disorderly conduct, who insult or make rude comments, or who obstruct or make free passage difficult, are guilty of disturbing the peace and subject to a maximum penalty for each offense of \$250 and/or 90 days imprisonment). *See generally* MICH. COMP. LAWS ANN. § 752.525 (West 1991) (making it a crime to disturb a religious meeting and prohibiting certain business activities within two miles of a place of worship, including the racing of animals or gaming, as well as the obstruction of any roads leading to a place of public worship).

3. CAL. CIV. CODE § 3427.1 (enacted by Chapter 1193).

4. *See id.* § 3427(a) (enacted by Chapter 1193) (defining an "aggrieved" party to include a person physically present when a commercial blockade occurs whose access is impeded or prevented or whose health care is disrupted, as well as the facility where the blockade occurs, its owner, employees, volunteers, or contractors).

5. *Id.* § 3427.2 (enacted by Chapter 1193); *see id.* (allowing plaintiffs to seek an unspecified amount in civil damages). *See generally* CAL. CONST. art. I, § 28(b), 'Victims' Bill of Rights, (setting forth the State of California's intent to provide a right of restitution to those who suffer loss as a result of criminal activity).

6. CAL. CIV. CODE § 3427.3 (enacted by Chapter 1193); *see id.* (requiring courts to take steps to protect plaintiffs and witnesses, which may include the use of pseudonyms).

7. 18 U.S.C.A. § 248(b)(1)-(2) (West Supp. Pamphlet 3 1994); *see id.* (providing either a prison sentence of six months or a fine of \$10,000, or both, for a non-violent first offense; subsequent offenses carry steeper penalties, as do violent offenses); *id.* § 248(c)(1)-(2) (West Supp. Pamphlet 3 1994) (giving a private right of action as well as enabling the Attorney General of the United States to bring an action). Civil relief includes an award of both compensatory and punitive damages, as well as costs and fees, and provides for the election of statutory damages in the amount of \$5000 (per violation) in lieu of actual damages. *Id.* § 248(c)(1)(B) (West Supp. Pamphlet 3 1994). *See also* 42 U.S.C.A. § 1988(b) (West Supp. 1994) (allowing a court, at its discretion, to award a prevailing party, other than the United States, reasonable attorney's fees as part of the costs of any action to enforce a provision of 42 U.S.C.A. § 1985, *inter alia*); *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 170-73, 17 Cal. Rptr. 2d 510, 514 (1993) (finding that all three requirements of California Code of Civil Procedure § 1021.5 were met by the prevailing party, these being: (1) The enforcement of the constitutional right to abortion, (2) the enforcement of the constitutional right benefited the entire public, and (3) the cost of the enforcement outweighed the party's personal interest), *review denied*, 1993 Cal. LEXIS 3060 (1993). *Compare* CAL. CIV. CODE §§ 3427.1-3427.3 (enacted by Chapter 1193) (providing no explicit statement for the award of costs and fees) *and* CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1994) (allowing attorney's fees to a party successfully enforcing an important right that provides a significant benefit to a large class of persons, and where the financial burden of such private enforcement for the greater good makes an award of attorney's fees appropriate) *with* 18 U.S.C.A. § 248(c)(1)(B) (West Supp. Pamphlet 3 1994) (allowing a court to award costs of the suit and reasonable fees for attorneys and expert witnesses in a civil action for the obstruction of access to a health care clinic). *But see* *Bray v. Alexandria Women's Health Clinic*,

of *Bray v. Alexandria Women's Health Clinic*,⁸ in which the Supreme Court ruled that a health clinic did not have a cause of action under federal civil rights law against abortion protesters blocking access to the clinic.⁹ FACE is the congressional response to increasingly violent anti-abortion protests against which states and individuals were unable to take effective action.¹⁰

Chapter 1193 provides a statutory scheme similar to FACE at the state level. Chapter 1193 supplements California Penal Code section 602.11 by creating a civil right of action which allows private individuals and entities injured by conduct already deemed criminal under section 602.11 to seek civil relief.¹¹ Prior to the enactment of Chapter 1193, an aggrieved party could bring an action in trespass against those persons who intentionally blocked a clinic entrance; however, the damages available usually rendered the lawsuit economically infeasible.¹²

Although Chapter 1193 states that it is not intended to infringe on any constitutional rights nor on any activities protected by labor laws, the state law

113 S. Ct. 753, 767 (1993) (vacating the award of attorney's fees under 42 U.S.C. § 1988 because respondent health clinics were not entitled to relief under 42 U.S.C. § 1985 against abortion protesters who trespassed on the premises of the clinics and attempted to obstruct access).

8. 113 S. Ct. 753 (1993).

9. *Bray*, 113 S. Ct. at 758; *see id.* (finding that the plaintiff failed to establish a conspiracy to interfere with civil rights in violation of 42 U.S.C. § 1985(3) because no showing of invidious discriminatory intent based on race or class was made and the rights interfered with are not protected against both private and official interference); *id.* at 759-60 (stating that the protesters' demonstrations were not directed specifically at women by reason of their sex and that opposition to abortion does not equate to discrimination against women); *id.* at 763-64 (declaring that petitioners failed to show the intentional interference with the right to interstate travel, and that the right to abortion is not among those rights protected against a private conspiracy by 42 U.S.C. § 1985(3), unlike the right to be free from involuntary servitude and the right to travel interstate); *see also* Kevin Merida, *Abortion Clinic Bill Approved; Legislation Seeking to End Harassment Sent to White House*, WASH. POST, May 13, 1994, at A1 (stating that Congress began working on FACE after the Supreme Court's decision in January 1993 (*Bray v. Alexandria Women's Health Clinic*), in which abortion protesters successfully challenged a lower court's use of civil rights law (42 U.S.C. § 1985(3)) to halt anti-abortion protests); *cf.* N.O.W. v. Scheidler, 114 S. Ct. 798, 806 (1994) (holding that no economic motivation is required to bring an action under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968, and thus allowing health care clinics to state a cause of action under RICO against abortion protesters). However, the Court noted that the question of whether the application of RICO to anti-abortion protesters would trample free-speech rights under the First Amendment was not raised, and therefore would not be addressed. *Id.* at n. 6.

10. S. REP. NO. 117, 103d Cong., 1st Sess., pt. 2, 4, at 2-3 (1993); *see id.* (reporting on Congress' extensive findings regarding S. 636, the Freedom of Access to Clinic Entrances Act of 1993; the report describes the purpose of the legislation and the need for it, which was based on the inadequacy of state and local law enforcement to handle the more than 6000 clinic blockades and the more than 1000 acts of violence—including bombings, arson, assaults, kidnapping, and murder—that have occurred since 1977); *see also* Congress OKs Protections for Abortion Clinics, DALLAS MORNING NEWS, May 13, 1994 at 1A (stating that Congress was answering a decade of violence against abortion clinics with FACE); Bill Kaczor, *Two Killed at Abortion Clinic*, S.F. CHRON., July 30, 1994, at 1A (reporting the murder of a clinic doctor and his escort, and describing other precautions taken against violent protesters, including routine security provided by an off-duty police officer and a bullet-proof vest worn by the clinic doctor).

11. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 600, at 3 (June 29, 1994); *see id.* (discussing the purpose and intent of the bill, which is to make civil remedies more attractive, and discussing the lack of economic incentive to bring a civil action solely for the tort of trespass).

12. *Id.*

may be attacked by anti-abortion protesters as a violation of their First Amendment right to freedom of speech.¹³ Under *R.A.V. v. St. Paul*,¹⁴ the government may not regulate speech based on the content of the message expressed. However, in *Madsen v. Women's Health Center, Inc.*,¹⁵ the Supreme Court found that an injunction imposed by a Florida judge was content-neutral and therefore constitutional.¹⁶ The Court applied a standard of review that asked whether the injunction burdened more speech than was necessary to serve a significant government interest.¹⁷ The Court upheld noise restrictions and a thirty-six-foot buffer zone that touched on a public street and encircled the clinic's entrances and driveways.¹⁸ However, the Court struck, *inter alia*, the provision of the injunction that prohibited protesters from making peaceful, uninvited approaches of persons seeking access to the clinic because such an injunction would burden more speech than was necessary.¹⁹

Thus, in *Madsen*, the women's health clinic was able to obtain a permanent injunction against abortion protesters' activities in a public forum that withstood a constitutional attack.²⁰ Similarly, the actions taken by a court pursuant to Chapter 1193 to protect privacy and prevent harassment should withstand any constitutional challenge insofar as they meet the test set forth in *Madsen*.²¹

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13. CAL. CIVIL CODE § 3427.4 (enacted by Chapter 1193); see U.S. CONST. amend. I (guaranteeing the right to free speech); Merida, *supra* note 9 at A1 (stating that anti-abortion groups have vowed to fight the federal law, claiming that it has a chilling effect on protesters who peacefully distribute leaflets outside of abortion clinics and that the law amounts to viewpoint discrimination; however, proponents of the federal bill claim that it will not inhibit free speech and note that pregnancy counseling centers that advise against abortion receive the same federal protections).

14. 112 S. Ct. 2538 (1992).

15. 114 S. Ct. 2516 (1994).

16. *Madsen*, 114 S. Ct. at 2523-24 (refusing to accept the argument that the injunction was necessarily content-based).

17. See *id.* at 2525 (setting forth the standard of review and reasons for it); see also *id.* at 2526 (agreeing with the Florida Supreme Court that significant government interests were involved and that their protection was justified; the governmental interests deemed significant included the protection of a woman's freedom to seek legal medical services, public safety, the free flow of traffic, and the protection of property and privacy).

18. *Id.* at 2521-22 (reviewing the specific provisions of the injunction); see also *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 7 Cal. 4th 860, 878, 873 P.2d 1224, 1235, 30 Cal. Rptr. 2d 629, 640 (1994) (upholding a modified injunction against abortion protesters that required protesters to stay off the public sidewalk directly in front of the clinic). The court applied a three-part test similar to the test used in *R.A.V.* to determine whether the restriction (1) is content-neutral, (2) is narrowly tailored to serve a significant government interest, and (3) permits sufficient alternative avenues of communication. *Id.* at 869, 873 P.2d at 1229, 30 Cal. Rptr. 2d at 634.

19. *Madsen*, 114 S. Ct. at 2529; see also *Boos v. Barry*, 485 U.S. 312, 322 (1988) (stating that in public debate, insulting speech must be tolerated in order to give breathing room to First Amendment rights).

20. *Madsen*, 114 S. Ct. at 2523-24.

21. - See CAL. CIV. CODE § 3427.3 (enacted by Chapter 1193) (empowering a court to take all action reasonably necessary to protect individual privacy and prevent harassment).