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Chapter 34: Hitting Criminal Street Gangs Where It Hurts—Their Wallets

Philip Lee

Code Section Affected

Penal Code § 186.22a (amended).
SB 271 (Cedillo); 2007 STAT. Ch. 34.

I. INTRODUCTION

Imagine that you get into a car accident and your car needs auto-body work.¹ You look through the local advertisements and find a shop that appears to have a good reputation. The auto-body shop does a satisfactory job repairing your car, and you pay them for their services. Little did you know that your hard-earned money has just gone to support a criminal street gang's enterprise. This is the same street gang that has terrorized your neighborhood and has caused people to feel like "prisoners in their own homes."² This is the same street gang that has caused residents to remain indoors, to not allow their children to play outdoors, and has prevented relatives from visiting.³ How could a street gang masquerade itself as a legitimate business, and who can prevent this from happening?

II. LEGAL BACKGROUND

A. Leading the Fight Against Gangs

California has been a hotbed for gang activities and gang-related crimes since the 1980s.⁴ It is estimated that there are roughly 250,000 members in over 5,000 gangs in California alone.⁵ Criminal street gangs have been extremely problematic and crippling to the communities they operate in.⁶ "The cost to cities

1. This hypothetical is an entirely fictitious creation of the author.

2. See *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1100, 929 P.2d 596, 601-02 (1997) (explaining that criminal street gangs in Rocksprings made people feel like prisoners).

3. *Id.*

4. See CAL. PENAL CODE § 186.21 (West 1999) ("[T]he state of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."); see also Bart H. Rubin, *Hail, Hail, the Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute*, 66 *FORDHAM L. REV.* 2033, 2059 & n.203 (1998) (discussing the Street Terrorism Enforcement and Prevention Act).

5. Amanda S. Riley, *Beep! You're Guilty! The Constitutionality of Pager Ban Provisions in Gang Injunctions*, 31 *W. ST. U. L. REV.* 79, 81 (2003).

6. Letter from Thomas J. Orloff, Alameda County Dist. Attorney, to Senator Gil Cedillo, Cal. State Senate (Apr. 4, 2007) [hereinafter Orloff Letter] (on file with the *McGeorge Law Review*).

and victims who suffer from gang violence cost the State and County [two] billion dollars a year.”⁷ In response to this growing problem, California became a pioneer in developing new anti-gang tactics.⁸ In 1988, California enacted the Street Terrorism and Prevention (STEP) Act to eradicate gang violence.⁹ In addition to STEP, California developed a novel strategy in attacking gang violence: the civil gang injunction.¹⁰

B. *The Civil Gang Injunction*

Civil gang injunctions are rooted in public nuisance laws.¹¹ Whenever a public nuisance¹² is found to affect an entire neighborhood or community, prosecutors can file an injunction against the specific gang members responsible for the nuisance.¹³ After the court issues an injunction, gang members are prohibited from participating in public nuisance activities within a designated safety zone.¹⁴ The safety zone is usually the particular area where the gang has been operating its criminal enterprise.¹⁵

Prosecutors can obtain a gang injunction under three statutory provisions: Civil Code section 3479,¹⁶ Health and Safety Code section 11570,¹⁷ and Penal

7. Senator Gil Cedillo, Cal. State Senate, Statement to Senate Public Safety Committee (Apr. 10, 2007) (on file with the *McGeorge Law Review*).

8. See Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 411 (1999) (“California, the state with the largest and most entrenched urban gang problem, has been at the forefront of this effort to develop aggressive new anti-gang tactics.”).

9. Riley, *supra* note 5, at 82; see also CAL. PENAL CODE § 186.22 (West 1999 & Supp. 2007) (describing the punishment of participating in criminal street gang activity and listing offenses that are considered criminal gang activity).

10. Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 69, 69 (2002); see also BLACK’S LAW DICTIONARY 800 (8th ed. 2004) (defining an “injunction” as “[a] court order commanding or preventing an action”).

11. See Werdegar, *supra* note 8, at 409 (“California state courts are . . . using public nuisance laws to enjoin gang members from a range of activities within specified city zones.”).

12. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at 3 (June 18, 2007) (“[P]ublic nuisance activity include[s], but [is] not limited to, shootings, drug dealing, car-jackings, loitering, littering, vandalism, and graffiti.”).

13. See Grogger, *supra* note 10, at 72 (“As an action in civil court, an injunction begins with a petition to the court for relief from the public nuisance caused by specific gang members.”).

14. See *id.* (“The prohibited activities vary somewhat, but they typically include a mix of activities already forbidden by law, such as selling drugs or committing vandalism, and otherwise legal activities, such as carrying a cell phone or associating in public view with other gang members named in the suit.”).

15. *Id.*

16. See CAL. CIV. CODE § 3479 (West 1997) (“Anything which is injurious to health, including . . . the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance.”).

17. See CAL. HEALTH & SAFETY CODE § 11570 (West 2007) (“Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented . . .”).

Code section 186.22a.¹⁸ Since Civil Code section 3479 has the broadest application,¹⁹ prosecutors most commonly seek gang injunctions under that provision.²⁰ Regardless of which provision is used, prosecutors must clearly establish the identity of the particular individuals responsible for creating the nuisance.²¹ In addition, prosecutors must clearly define the geographical scope of the public nuisance, and “courts must consider whether the district attorney has adequately proved that the gang is a public nuisance throughout the entire area.”²² “If an injunction’s area is drawn too widely, it should be struck down.”²³

C. Limitations on Gang Injunctions

A typical gang injunction consists of a list of prohibited acts, including otherwise legal acts.²⁴ In order to be valid, gang injunctions must provide fair notice of what constitutes a violation, and enforcement cannot be arbitrary or discriminatory.²⁵ In *City of Chicago v. Morales*, the U.S. Supreme Court invalidated a Chicago “gang ordinance” prohibiting loitering by gang members.²⁶ The Court held the ordinance void for vagueness because it did not provide adequate notice of what constitutes a violation of the ordinance, and it allowed arbitrary enforcement by police officers.²⁷

D. Existing Law

California law states that any building or place used by criminal street gang members in the furtherance of committing a criminal offense,²⁸ including

18. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 2 (Apr. 12, 2007); *see also* CAL. PENAL CODE § 186.22a(a) (West 1999 & Supp. 2007) (“Every building or place used by members of a criminal street gang for the purpose of the commission of the offenses listed in subdivision (e) of Section 186.22 or any offense involving dangerous or deadly weapons, burglary, or rape . . . is a nuisance which shall be enjoined, abated, and prevented . . .”); *id.* § 186.22(e) (listing a variety of criminal offenses).

19. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 2 (Apr. 12, 2007) (“It appears that prosecutors typically rely on Civil Code Section 3479 because that section has the broadest application. . . . Civil Code Section 3479 applies to any public nuisance, not limited to places or buildings.”). The Civil Code specifically refers to the “illegal sale of controlled substances.” CAL. CIV. CODE § 3479.

20. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 2 (Apr. 12, 2007).

21. Grogger, *supra* note 10, at 72.

22. Scott E. Atkinson, Note, *The Outer Limits of Gang Injunctions*, 59 VAND. L. REV. 1693, 1707 (2006).

23. *Id.*

24. Werdegar, *supra* note 8, at 417.

25. *See* Atkinson, *supra* note 22, at 1728 (“A law may be unconstitutionally vague for either of two reasons: (1) it may provide inadequate notice to enable ordinary people to understand what conduct it prohibits; or (2) it may authorize or encourage arbitrary and discriminatory enforcement.”).

26. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999); *see also* Atkinson, *supra* note 22, at 1728 (explaining the ordinance was struck down because it did not give adequate notice of prohibited conduct and it allowed arbitrary enforcement by the police).

27. *Morales*, 527 U.S. at 58-64.

28. *See* CAL. PENAL CODE § 186.22(e) (West 1999 & Supp. 2007) (listing criminal activities that are

burglary and rape, “is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or [a] private nuisance.”²⁹ Existing law states that whenever a court issues an injunction pursuant to one of the statutory provisions listed above, the Attorney General may bring suit for monetary damages “on behalf of the community or neighborhood injured by that nuisance.”³⁰ Any monetary damages shall be paid by the criminal street gang or its members, including any assets owned by the gang that were used to further the nuisance activities.³¹ Only those “who knew or should have known” of the criminal activity “shall be personally liable for the payment of the damages awarded.”³² Any damages recovered shall be deposited into a separate fund to be used solely for the benefit of the community that was harmed by the nuisance.³³

III. CHAPTER 34

Chapter 34 amends section 186.22a(c) of the Penal Code by expanding the group of individuals who may bring suit under this section and allowing local prosecutors to pursue an action for damages due to gang-related activities.³⁴ Specifically, it authorizes any district attorney or prosecuting city attorney to sue for damages on behalf of a community injured by a gang-created nuisance when an injunction has been issued.³⁵

IV. ANALYSIS

A. *Necessity*

Criminal street gangs have attained financial success similar to that of organized crime groups.³⁶ The large amount of revenue brought in through their illegal activities has allowed them to acquire real estate and make business investments.³⁷ These gangs have placed a financial strain on the communities they operate in by “stifling legitimate business interests, driving real estate prices down and creating a haven for

considered offenses).

29. *Id.* § 186.22a(a).

30. *Id.* § 186.22a(c).

31. *Id.*

32. *Id.*

33. *Id.*

34. CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at I (Apr. 9, 2007).

35. CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at I (Apr. 9, 2007).

36. Orloff Letter, *supra* note 6.

37. *Id.*

illegal activities.’³⁸ Even if a prosecuting attorney is able to shut down the headquarters of a gang within a given community, the reality is that many members of the gang still own property or live within the community.³⁹ Before the enactment of Chapter 34, only the Attorney General’s office was authorized to bring a suit for damages on behalf of a community injured by a gang nuisance.⁴⁰ Unfortunately, due to a lack of resources, the Attorney General’s office has yet to bring any action for damages against an enjoined gang.⁴¹ Chapter 34 remedies that problem by giving this authority to those who are better equipped and have intimate knowledge of the gang’s operation: district attorneys and prosecuting city attorneys.⁴²

These local prosecuting attorneys live and work in the communities that harbor such undesirable crime.⁴³ They have the most familiarity with gang injunctions issued by the court⁴⁴ and are able to reduce any delays in enforcement.⁴⁵ Giving local prosecuting attorneys the authority to seek damages from gangs responsible for a public nuisance attacks the root of the criminal activity and stifles the economic choke-hold that gangs have on a community.⁴⁶ It gives local prosecutors a tool they need to go after a gang’s assets, eliminate their source of funding, and return any monies recovered to the injured community.⁴⁷

Supporters of Chapter 34 believe it is imperative that prosecuting attorneys have sufficient resources to determine the particular gang members and locations listed in the injunction.⁴⁸ Chapter 34 provides those resources, in conjunction with a recent amendment to an existing statute, by giving prosecutors access to the criminal database of the California Department of Justice.⁴⁹ According to the sponsor of the bill, “[c]riminal history information provides the city attorney with a view of the

38. *Id.*

39. See Patrick McGreevy, *City Seals off House It Says is Base for Gang*, L.A. TIMES, Jan. 26, 2007, at B3 (“[T]wo young men who . . . said they were Avenues gang members scoffed at the notion that closing one house would eradicate the gang. . . . ‘We live in this neighborhood. Our families live here. Many of us own property here.’”).

40. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 271, at 3 (Apr. 12, 2007).

41. *Id.*

42. *Id.* at 3-4.

43. *Id.* at 3.

44. See *id.* (“They are the attorneys responsible for obtaining and enforcing the injunctions mentioned in the code section.”).

45. Letter from Michael A. Bolden, Political & Legislative Advocate, Am. Fed’n of State County Mun. Employees, to Assembly Member Jose Solorio, Cal. State Assembly (June 14, 2007) (on file with the *McGeorge Law Review*).

46. See Orloff Letter, *supra* note 6 (“Permitting district attorneys and prosecuting city attorneys to sue the gangs that create these conditions attacks the economics of the criminal activity, strips the criminal gangs of their economic power and remedies much of the harm caused to the community.”).

47. Letter from Rockard J. Delgadillo, City Attorney, Office of the City Attorney, L.A., to Assembly Member Jose Solorio, Cal. State Assembly (May 8, 2007) (on file with the *McGeorge Law Review*).

48. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at 4 (June 18, 2007).

49. *Id.* at 4-5; see also CAL. PENAL CODE § 11105(b)(5) (amended by 2007 Chapter 34) (requiring the Attorney General to furnish state summary criminal history information to “[c]ity attorneys pursuing civil gang injunctions”).

gang crime committed in certain geographical areas and assists in identifying the gang members responsible for committing those crimes.”⁵⁰ Such a provision is important to avoid the constitutional concerns that were present in *Morales*.⁵¹

B. Notice and Representation

Sponsors of Chapter 34 note that gang injunction cases are complicated and require specificity in identifying the particular gang that created the nuisance and identifying the harmed community.⁵² Typically, gangs are not very organized, and it may be difficult to determine the leaders of a gang.⁵³ In cases where it is difficult to identify the gang leader, California law allows members to be served generally.⁵⁴ In such instances, “if a group of gang members are served on behalf of the gang but are not individually named in the complaint, a collective action problem arises: each member has an incentive to do nothing and to let other members respond to the nuisance suit.”⁵⁵

Furthermore, California precedent establishes that gang members are not entitled to appointed counsel on matters of injunctions.⁵⁶ “[A]ny gang members served on behalf of the gang cannot represent the [entire] gang as an unincorporated association,” meaning gang members must fend for themselves.⁵⁷ Since gang members usually come from low socio-economic backgrounds, it is nearly impossible for them to afford counsel and defend their suits individually.⁵⁸

C. Standard of Proof

There is concern over Chapter 34’s damage provision because it does not state the standard of proof the prosecution must meet in bringing a civil action.⁵⁹ In a civil nuisance suit for damages, the prosecution need only prove its case by a

50. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at 5 (June 18, 2007).

51. See *City of Chicago v. Morales*, 527 U.S. 41, 58-64 (1999) (explaining that an ordinance must provide fair notice of what constitutes a violation and that enforcement cannot be arbitrary or discriminatory).

52. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at K (Apr. 9, 2007).

53. See Atkinson, *supra* note 22, at 1720-21 (“In a 1990 study of Los Angeles gangs, one sociologist concluded that Mexican American gangs are ‘informally organized, without acknowledged leadership.’”).

54. *Id.* at 1720-21 (citing CAL. CORP. CODE § 18220 (West 2006)).

55. *Id.* at 1721-22 (“If Member A does nothing, but Members B and C successfully argue . . . the gang’s conduct is not a public nuisance, Member A gets the benefit of B’s and C’s action . . . without having to pay any of the costs of defense. Because Members B and C have the same incentives as Member A, they will also do nothing, and the nuisance suit will probably end up unopposed in court.” (footnote omitted)).

56. *Id.* at 1722 (citing *Iraheta v. Superior Court*, 70 Cal. App. 4th 1500, 83 Cal. Rptr. 2d 471, 478 (1999)).

57. *Id.* at 1722-23; see also Hudson Sangree, *Yolo County DA Seeks New West Sacramento Anti-Gang Injunction*, SACRAMENTO BEE, July 31, 2007, available at <http://www.sacbee.com/101/v-print/story/301519.html> (“While agreeing there was significant gang activity in West Sacramento, the appeal court said it was not enough to serve the injunction on only one low-level gang member.”).

58. Atkinson, *supra* note 22, at 1722-23.

59. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at K-L (Apr. 9, 2007).

preponderance of the evidence.⁶⁰ However, Chapter 34 provides that a civil action for damages is based on the “criminal activity being abated or enjoined.”⁶¹ One could argue “criminal activity” means a crime, particularly considering section 186.22(e)’s description of specific gang crimes that can be enjoined.⁶² In such a case, the prosecution would be required to prove its case beyond a reasonable doubt.⁶³ However, the subdivision allowing an action for damages does not refer to the subdivision describing specific gang crimes worthy of injunction.⁶⁴

“If the criminal activity supporting a claim for damages” does not require a criminal conviction, then it does not need to be proved beyond a reasonable doubt.⁶⁵ However, a lesser standard of proof would conflict with current asset forfeiture law regarding organized crime and drug asset forfeiture.⁶⁶ Under drug asset forfeiture law, a criminal conviction is required to seize a person’s assets.⁶⁷ But if drug dealing is considered to be a nuisance, then prosecutors could seize the assets of a gang member without a criminal conviction by bringing suit for damages under Chapter 34.⁶⁸ Critics may argue that seizing one’s assets by a preponderance of the evidence “punishes a person with less than sufficient proof.”⁶⁹ However, as a preventative measure, “seizing the profits of drug dealing could reduce the motivation for and benefits of drug dealing.”⁷⁰

Since the Attorney General has yet to bring an action for damages regarding a gang injunction, it is difficult to say what standard of proof the courts would require for a claim brought under the damage provision of section 186.22a.⁷¹ “It is likely that the application of the law will be decided in the appellate courts.”⁷²

60. *Id.* at L.

61. CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34).

62. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at K-L (Apr. 9, 2007).

63. *Id.* at L.

64. *Id.*; *see also* CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34) (failing to provide that a conviction under Penal Code section 186.22 is required).

65. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at L (Apr. 9, 2007).

66. *Id.*; *see also* CAL. HEALTH & SAFETY CODE § 11488.4(i) (West 2007) (explaining that when forfeiture is sought under Health and Safety Code section 11470, the state or local government must prove a violation of the listed offenses beyond a reasonable doubt).

67. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at L (Apr. 9, 2007); *see also* CAL. HEALTH & SAFETY CODE § 11470.2 (explaining that a prosecutor may, upon conviction of the underlying crime, recover from those who manufacture or cultivate a controlled substance).

68. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 271, at L (Apr. 9, 2007).

69. *Id.*

70. *Id.* at M.

71. *See id.* at K (“Because damages have apparently not been sought pursuant to subdivision (c) of Penal Code Section 186.22a in a gang injunction case, one cannot say how courts would implement the damages provisions.”).

72. *Id.*

V. CONCLUSION

Cities across America have taken notice of what California has done in combating gang violence.⁷³ Fort Worth, Texas, is the latest city outside of California to file an injunction against gang members.⁷⁴ “It is another tool” and “more of a proactive approach,” claimed Kevin Rousseau, a Tarrant County assistant prosecutor in Fort Worth.⁷⁵ Last summer in Wichita Falls, fifteen members of the Varrio Carnales gang were sued in response to escalating violence in the city.⁷⁶ Crime has since dropped by thirteen percent in the safety zone, and real estate value has been on the rise.⁷⁷ Although these cities have successfully filed gang injunctions, none have brought a suit for damages similar to that authorized by Chapter 34.⁷⁸ Pursuing the assets of a criminal street gang allows law enforcement to attack the root of the problem by reducing any economic control gangs have on their neighborhoods.⁷⁹ In addition, Chapter 34 compensates the neighborhood or community that was injured by the gang-created nuisance.⁸⁰ Looking towards the future, Chapter 34 will be a useful tool in preventing the furtherance of a criminal street gang’s enterprise by eradicating a gang’s business and source of funding, such as an auto-body shop.⁸¹

73. See Angela K. Brown, *Cities Sue Gangs in Bid to Stop Violence*, WASH. POST, July 30, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900527.html> (on file with the *McGeorge Law Review*) (“Civil injunctions were first filed against gang members in the 1980s in the Los Angeles area Since then, cities have used injunctions to target specific gangs or gang members”).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See Brown, *supra* note 73 (discussing how cities such as Fort Worth and Wichita Falls have brought injunctions against criminal gangs, but failing to mention that a suit for damages has been brought); see also CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34) (authorizing a suit for damages when an injunction has been issued).

79. Orloff Letter, *supra* note 6.

80. See CAL. PENAL CODE § 186.22a(c) (amended by Chapter 34) (“The damages recovered . . . shall be deposited into a separate segregated fund for payment to the governing body . . . and that governing body shall use those assets solely for the benefit of the community or neighborhood that has been injured by the nuisance.”); Orloff Letter, *supra* note 6 (discussing how SB 271 (Chapter 34) will compensate communities).

81. See Orloff Letter, *supra* note 6 (“Permitting district attorneys and prosecuting city attorneys to sue the gangs that create these conditions attacks the economics of the criminal activity, strips the criminal gangs of their economic power and remedies much of the harm caused to the community.”).