

Governor has few good options for punishing rebel counties

After the governor sent warning letters to three rural counties for reopening too quickly, other local governments are starting to move forward on their own ahead of the state's pace.

Gov. Gavin Newsom might have few options to punish small counties that have gone rogue and reopened their economies despite statewide shutdown orders.

However, the tools the governor does have might be so harsh as to not merit use given that these counties tend to be small, rural and have very few or no cases of coronavirus, experts say.

"Newsom has very broad authority under state law that preempts local governments," said Dean Erwin Chemerinsky of UC Berkeley School of Law. "However, if he cuts off federal money, counties have more basis to challenge that, rather than the shutdown itself."

It's uncertain how else Newsom could punish counties that disobey him and fully reopen, he added.

Last week, California Office of Emergency Services director Mark Ghilarducci sent letters on behalf of Newsom to three counties: Yuba, Sutter and Modoc. Ghilarducci warned their actions could jeopardize federal disaster funding. And the California Department of Alcohol Beverage Control went to businesses threatening to revoke liquor licenses.

But then the governor appeared to back off and the dispute appeared to cool. As of Thursday, he allowed several small counties, including Yuba and Sutter, to move to Stage 2 of his reopen plan, which allowed more businesses to resume operations.

Far more stringent rules remain in place in densely populated counties.

Chemerinsky said in a webcast last month that part of the problem has been orders by the governor and big city mayors have been too vague.

"We have seen the state flex its muscle through having state licenses threatened and threats of placing funding sources in jeopardy," according to Deborah J. Fox, chair of Meyers Nave's First Amendment and trial and litigation practice groups.

But, it's giving great momentum for figuring out a way for state and local jurisdictions to figure this out together as opposed to litigating the issues, she added.

Fox represents cities and counties in shelter-in-place litigation in courts across the state, including *Gish v. Newsom* 5:20-CV-00755 (C.D. Cal., filed April 13, 2020) and *Cross Culture Christian Center v. Newsom* 2:20-CV-00832 (E.D. Cal., filed April 27, 2020). She recently secured victories on behalf of San Bernardino and San Joaquin counties and the city of Lodi in challenges filed by religious groups.

Fox advises attorneys to return to precedents covering government authority to assess the scope of state versus local powers during an emergency.

Although the authorities provided by the State Emergency Services Act do exist, those powers are limited in time, scope and subject matter, according to Harmeet K. Dhillon, who has filed several challenges to the governor's orders. This concept could apply to Newsom's threats to withhold federal money as a punishment for reopening too quickly, or revoking licenses from beauticians and bars without due process, Dhillon contends.

"In normal times yes it's the ABC's role to inspect and suspend. But in these times, it's an extension of abuse of government power to strip properties rights under our Constitutional scheme," said the head of Dhillon Law Group in San Francisco. "It all began when these industries were deemed as non-essential with no due process."

Jim McManis, partner at McManis and Faulkner in San Jose, who has both represented and sued different public entities, said he doubts judges will be sympathetic to counties who lose federal money as punishment if they see the emergency conditions are caused by the counties' own negligence if the virus resurfaces.

"In some respect I suppose municipalities can argue Newsom can't withhold the money but this is a very different situation than the challenges against the federal government over sanctuary states because this is dealing with a public emergency," McManis said.

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