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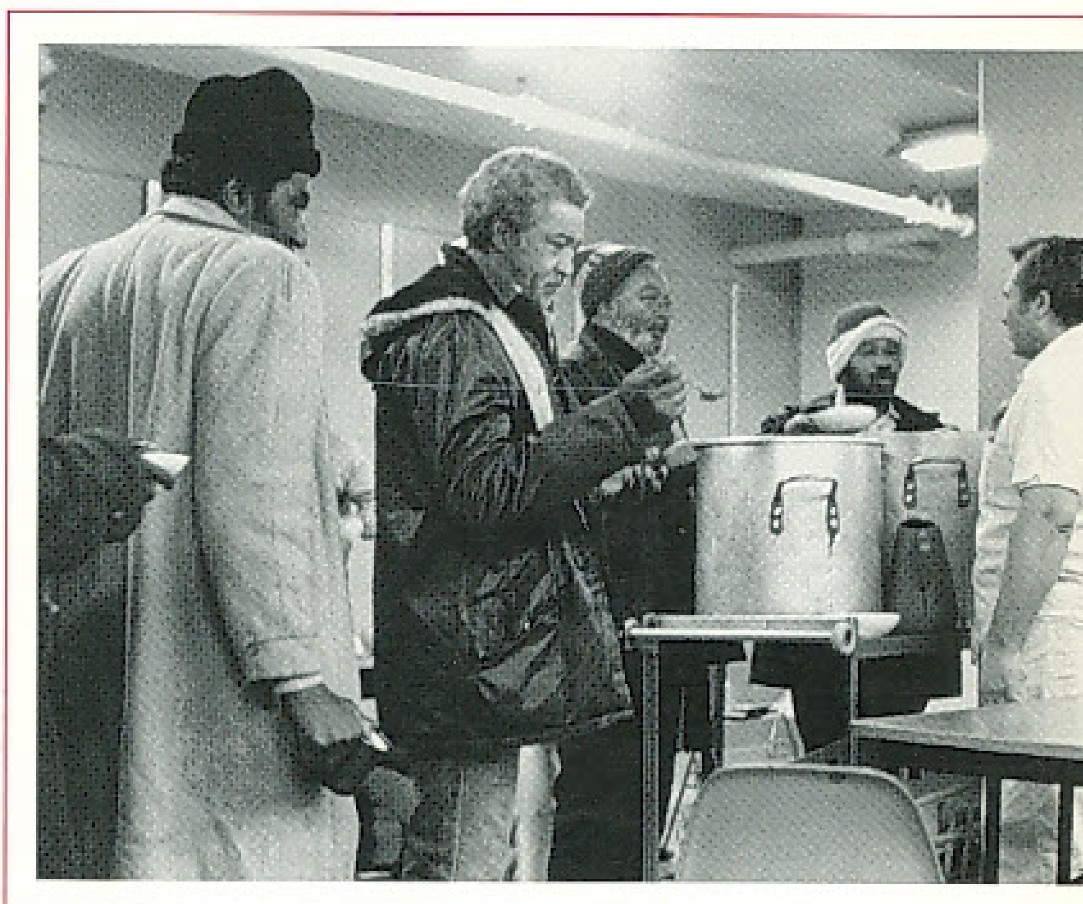

Block Grant Implementation Issues

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What Does It Mean When They Say They Can't Afford It?: Defining the Fiscal Defense

by Anson B. Levitan

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I. Introduction

The growth of the movement against "unfunded mandates" will likely heighten the debate about the significance and validity of many statutory mandates. /1/ To the extent that mandates do remain, and many states continue to have them, it will be all the more important to ensure that they are enforced. Absent vigilance in protecting existing, and any new, mandates, fiscally pressed states and localities may well seek to decrease or eliminate aid to the poor.

Under current law, the fiscal defense against a statutory mandate is the defense of fiscal impossibility. To meet the defense, the defendant must demonstrate a literal lack of available funds. It must also show that it would be unable or unreasonable for it to raise the needed funds.

This article reviews the current law governing when a fiscal defense against a statutory entitlement may be raised and what constitutes a valid defense. To illustrate the elements of the defense, the article also reviews the facts of a recent case, Washington v. Board of Supervisors of San Diego County, in which a local government was given the opportunity to present its fiscal defense at trial. /2/ While an appellate court eventually ruled against the county on other grounds, the underlying facts of the case remain relevant to an understanding of the fiscal defense.

II. The Fiscal Defense Is the Defense of Impossibility

The most prominent use of the fiscal defense has not been in cases involving statutory obligations but rather in cases involving constitutional rights. The boilerplate reprise "[i]nadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights" or equivalent language, has been commonplace. /3/ However, the malleable nature of defining what a constitutional right requires has often led courts implicitly to consider cost factors in constitutional cases. /4/ It is far more difficult to fudge a statutory obligation than a constitutional right.

In the statutory context, defendants frequently have been small local entities with limited budgets. The judicial response to the fiscal defense has generally fallen into two categories: (1) the defense is not applicable; and (2) the defense requires a showing of fiscal impossibility. Where the defense

has been recognized, the defendant must show that it has no money available for the required use and further, in some cases, that it cannot raise the money it lacks. Defining "available" has often proven to be difficult.

A. The Summary Assertion of the Defense Results in Its Summary Rejection

The majority of courts evaluating a defendant's fiscal defense against a statutory obligation have summarily rejected it. Most of these cases, however, are short on facts. Defendants generally have not fully set forth their fiscal difficulties to the court.

In addition, the courts have been quick to deny fiscal defense arguments in cases involving benefits for the poor, regardless of the budgetary strains allegedly encountered by local governments. For example, in Boehm v. County of Merced, /5/ a case concerning the proper amount of general relief /6/ to be provided to single adults by the county, the court observed that it was "not unmindful of the fiscal constraints imposed by Proposition 13 and the consequent need for strict control of all county expenditures." Nevertheless, it concluded that such constraints could not negate a county's obligations to provide statutorily required aid. Similarly, in Cooke v. Superior Court, the court enforced a California county's obligation to provide needed medical care to the uninsured poor despite considerable costs. /7/

Neither of these cases, nor numerous similar cases involving county obligations to the indigent, included detailed presentation of county finances. /8/ In each, the court found that cost was not a defense and that fiscal concerns should be addressed to the legislature.

Such a direct, unequivocal response has appeared in other types of cases. In King v. Martin, the court upheld federal and state mandatory requirements that welfare fair hearing decisions be issued within 60 days of the fair hearing. /9/ A county's argument that it lacked funds to employ sufficient staff was not considered viable in the face of the statutory and regulatory mandates. The county had offered no details, and the court offered no analysis of the county's fiscal defense -- it simply rejected it. /10/

In Bellino v. Superior Court, County of Riverside, petitioners challenged the county's failure to initiate wardship petitions for developmentally disabled children who had been abandoned by their parents. /11/The county had been concerned about the potential expense of caring for children who were remanded to its custody rather than to a state facility. The court found that the governing law was unequivocal and that the county was responsible for initiating the petitions. Again, the county had apparently offered no specifics in support of its position, and the court roundly rejected it. "[S]uffice it to say that when a governmental entity has a mandatory duty to act, the excuse that it cannot afford to do so is unavailing." /12/

Similarly in Professional Engineers in California Government v. California State Personnel Board, the court upheld state engineers' statutory right to a fair determination of the "prevailing wage." /13/ Having determined that adjudicatory hearings were the only satisfactory way to meet the statutory mandate, the court concluded that the state could not cite the costs of such proceedings as a defense against its obligation to conduct them. /14/ The state did not appear to make any explicit

argument of fiscal impossibility in Professional Engineers. It was simply arguing that the costs of providing hearings were prohibitive. Such a fiscal complaint is not colorable.

B. Smaller Government Entities with More Limited Mandates Find It Easier to Make the Fiscal Defense

Initially, courts evaluating the application of a fiscal defense addressed cases involving small governmental entities responsible for narrowly defined statutory obligations.

In Sutro Heights Land Co. v. Merced Irrigation District, certain irrigation district landowners brought suit to compel the district to drain water that had accumulated under their lands. /15/ The court observed that if plaintiffs were eligible for relief, all residents of the district would be eligible for the same relief. Defendants presented evidence of the costs of properly draining district lands and of their fiscal situation. The court accepted the information supplied by the district and concluded that the costs of improvements would exceed the moneys available to the district and would thus result in its own destruction. Noting that the district had one of the highest tax rates in the state, the court concluded that no funds were "available" for the relief plaintiffs sought and denied the writ. /16/

Similarly, while the court in Ramey Borough v. Commonwealth of Pennsylvania acknowledged that a small mining community in central Pennsylvania could not be compelled to construct a sewage plant if funds were not available, the court upheld the locality's theoretical obligation to build it. /17/ The dissent, /18/ however, noted the community's extremely depressed economic condition, the limited number of properties and low assessment value of local real estate, the aging of the community's population, the few number of those employed who actually owned real estate, and the fact that even with federal and state grants the community's share of costs would exceed the community's assessed value. /19/

In both Sutro Heights Land Co. and Ramey Borough, the courts found that it was fiscally impossible for the defendants to fulfill their obligations without self-destructing. Both cases presented detailed facts that established literal impossibility.

C. If Funds Are Available from an Unrestricted Source or Reasonably Can Be Raised, There Is No Fiscal Defense

Applying a strict literal analysis of the concept of availability in Taylor v. Wentz /20/ and Gushwa v. State ex rel. Oster, /21/ localities were held to their statutory obligations to make certain improvements. In each case, the court found that money was either legally available or readily could be made available to meet those obligations. In Taylor, suit was brought to compel the local highway commissioner to make improvements on a local road. The defendant conceded that money that could be used to make the necessary repairs was available. The court held that "[w]here there are sufficient funds which can be applied to the purpose . . . and there is an entire neglect to make repairs, they can be compelled to proceed . . . ." /22/ In Gushwa, residents sued to compel the town government to establish and maintain a local high school. Plaintiffs alleged that they had met all the

requisites to require the government to proceed with creating the school. The court agreed, finding that there were sufficient funds on
hand, and that could be raised, for the purpose of building the school. /23/

The ability to raise monies, standing alone, has constituted a basis for concluding that funds are available to meet a statutory obligation. In May v. Board of Directors, the court found fiscal difficulties not to be a defense against an irrigation district's statutory obligation to levy assessments to repay its bonds. /24/ "It is unfortunate that the district is in financial difficulties, and in effect, insolvent, but that furnishes insufficient reason . . . for its refusal to levy the assessment." /25/ The court observed that if the district chose not to proceed with the assessments, it could file for bankruptcy and allow the bankruptcy court to address payment of bondholders and other creditors. /26/

The mandatory school construction statute in Gushwa clearly contemplated the need to borrow money to meet the obligation and the water code statute discussed in May required assessments. However, other courts have found that borrowing or other forms of revenue raising are appropriate to meet mandated obligations even when the statute at issue does not clearly envisage the need for raising money.

In City of Vernon v. Superior Court, a contempt action, the city had agreed to meet its statutory obligation concerning proper sewage disposal by sharing the obligation with other counties. /27/ When it failed to meet its share of the obligation, the city argued fiscal difficulties in its defense. Rejecting the defense, the court observed that the city had failed to make the effort to raise the needed revenues. /28/

D. Larger Entities with More Significant Mandates Find It More Difficult to Make the Fiscal Defense

In Ross v. Superior Court, California's Plumas County of Supervisors, in defending a contempt action for failure to pay court-ordered retroactive welfare benefits, argued that the county had not budgeted for payments of such benefits. /29/ Upholding the contempt finding, the court observed that money was indisputably legally available for paying the retroactive benefits from the county's contingency fund. /30/ The court further observed that the contempt finding would have been upheld even if funds had not been on hand and that the county had then failed to take reasonable steps to raise the needed funds. /31/

Addressing the fiscal defense becomes increasingly difficult when it is applied to the requirements of large, expensive programs or when the budgets and ability to raise money of large county or city governments become an issue. In those situations, the questions of whether money on hand can be used and whether money should or can be raised become complex.

For example, in State ex. rel. Brown v. Board of Commissioners /32/ the state brought suit to recover public assistance funding due from, but not paid by, a county. /33/

Under Ohio law, the state had the duty to bring suit to obtain the monies due. The county asserted fiscal impossibility. In support of its defense, the county filed an elaborate stipulation describing its fiscal situation: "The agreed statement of facts disclosed that, if the writ were allowed, the operation of the commissioners', auditor's, treasurer's, recorder's, sheriff's, and engineer's offices, would be curtailed to such an extent that it would be impossible for them to perform their statutory duties." /34/

The court observed that it could issue the writ compelling the county to exercise its discretion by making cuts in other programs. /35/ However, the court accepted the stipulation and decided that it would not compel the county to curtail the mandated operation of the affected county offices. (The decision left unanswered what would happen if there were no third parties to challenge the fiscal and legal conclusions of the parties' stipulation.) Although the county's fiscal situation was obviously pivotal to the court, the court made no finding of fiscal impossibility. The court simply concluded that, although it had discretion to issue a writ, it would not do so in the circumstances presented. /36/ In addition, the court made no attempt to establish a hierarchy of mandated functions, which might have given public assistance priority over other governmental services. /37/

Board of Supervisors v. McMahon set forth a fuller presentation of the facts and issues involved in the fiscal defense than that offered by the prior case law. /38/ In McMahon, a local measure required that plaintiff county refuse to pay its mandated share of expenses for the Aid to Families with Dependent Children (AFDC) program. The county board of supervisors affirmatively brought suit against the state seeking an injunction affirming the validity of the ordinance and compelling the state to pay the county's share of AFDC costs. The appellate court reversed the trial court's entry of a preliminary injunction against the state and found that the county had failed to establish a fiscal defense. In so doing, the court gave the most extensive discussion of a government's attempt to make the fiscal impossibility defense.

The court observed that the county had conceded that it was not literally impossible for it to pay its AFDC share. /39/ The county's impossibility argument rested on the purported inadequacies of county revenues to pay for both state-mandated programs, including AFDC, and local programs. According to the county, this inadequacy excused it from funding state-mandated programs. The court ruled that, to the extent that this dispute involved a conflict between statewide priorities and local priorities, the statewide priorities must prevail. /40/

Unlike the court in Brown, the McMahon court did not address whether the local programs at issue were arguably locally mandated. The court was clear that state mandates took precedence. Nevertheless, the McMahon court proceeded to note that, even if the county's testimony were accurate, local programs could continue for five years without cuts, and this would allow the county time to seek aid from the legislature. In addition, noting that the county had not sought to raise special taxes as authorized by state law and that it had not sought to assess any countywide or local user fees for certain functions such as library construction or roads, the court concluded that the county had failed to exhaust its ability to raise new revenues or to deliver services more efficiently. /41/ Accordingly, the court found that the county had not established a reasonable probability of success on its claim of fiscal impossibility. /42/ However, the court failed to articulate what would suffice to prove fiscal impossibility.

The decisions in both Brown and McMahon hinge upon the effect of the disputed mandated expense on other mandates. In Brown, the court was given and accepted a stipulation that other mandates would be affected by requiring the fulfillment of the mandate at issue. The threatened outcome was sufficient for the court to accept the county's fiscal defense that no money was available to meet the mandate. The court did not ask whether the money to meet the mandate might have come from some nonmandated function. Nor did it ask whether the county could have raised the needed funds. The court simply left too many questions unanswered or unasked to formulate a standard for establishing fiscal impossibility.

Although the McMahon court came closer to articulating such a standard, it failed to address a more key question. What if the county lacked the revenues to administer all its desired local programs despite having tried to pass a special tax /43/ and despite having assessed "reasonable" fees? If the funds were insufficient, would not the precedence of state mandates continue to govern? The court did not negate that logical conclusion; it simply left the question open, while suggesting that the county had not done what it could to raise revenues to meet overall county needs. The court's initial recognition of the primacy of state mandates, however, would appear to leave the court's subsequent discussion as little more than dicta.

III. Washington v. Board of Supervisors of San Diego County

Seeking to jettison a large portion of an unpopular aid program, San Diego County raised the fiscal defense in Washington v. Board of Supervisors of San Diego County. /44/ Contrary to the clear provisions of a statute /45/ and governing case law, /46/ the county sought to prove that it was fiscally impossible for it to provide certain general relief benefits. The county could have saved between $3.5 million and $3.9 million through its planned cut in general relief, /47/ which it sought to use for programs that it asserted were of equal or greater importance. /48/

Failing to rule summarily for the plaintiffs challenging the cut, the California Court of Appeal permitted a trial to proceed at which the county could raise its fiscal argument. /49/

The trial court found that the defense had been made. /50/ The court found that the county's $2 billion budget was $19 million less than the previous year's and included cuts in all areas except the sheriff and the courts. /51/ The court also found that approximately 70 percent of the county's budget consisted of funds received to conduct various mandated programs, such as welfare programs and road construction, and that the rest of the budget consisted of funds from general revenues and that were largely used to conduct mandated services properly. /52/ The court concluded that only 1.6 percent of the budget consisted of discretionary expenditures. /53/

The trial court accepted the county's argument that Proposition 13, which limited California counties' ability to raise money from property taxes, was largely to blame for the county's fiscal problems. /54/ Citing available evidence, the court concluded that Proposition 13 resulted in a loss to the county of between $87 million and $94 million in revenues each year. The trial court also concluded that the state had cut back on funds to the county to operate state-mandated programs. /55/

The trial court accepted the county's contention that it was amidst a serious fiscal crisis and agreed with the county that it had taken appropriate steps to address the crisis. The court found that the county had made cuts in nearly all county departments; that it had instituted a hiring freeze and voluntary time-off program; that it had deferred needed maintenance; that it had established a policy of regularly conducting audits designed to promote cost saving to the extent possible; and that it had sought new revenue by establishing a property tax administration fee, a jail booking fee, and a business license fee. The trial court observed that the county had also instituted various suits against the state seeking a greater portion of certain funds. /56/ The trial court concluded that the county faced an unprecedented fiscal crisis and that the steps the county had taken to save and raise money were "appropriate and reasonable." /57/

Plaintiffs countered that while the county certainly confronted severe fiscal constraints, it had available alternatives to save or raise money other than cutting general relief. Plaintiffs deduced from past budgets and actual expenditures that budgeted personnel costs were significantly higher than necessary. /58/ Plaintiffs argued that, by the county's own admission, millions of dollars could have been saved if a salaried office were created to handle criminal defense cases in which one of the defendants is already represented by the county's public defender. /59/ By aggressively recouping county dollars spent on indigent health care from individuals found eligible for federal/state funded Medi-Cal, plaintiffs noted that significant amounts could be gained. /60/ And, plaintiffs argued, the county had acknowledged that it could provide for the administration of its general relief program more inexpensively. /61/

Plaintiffs also presented evidence of feasible ways the county could raise revenues rather than cut general relief. Plaintiffs asserted that the county could have sought recoupment from enterprise funds it had earlier created for an airport and a solid waste disposal system, /62/ that the county could have increased its business license fee to an amount commensurate with that of other localities, /63/ and that it could have created a utility users' fee as other California counties and cities had done. /64/

As a general matter, plaintiffs also observed that the county had the authority to cut salaries and to limit capital expenditures. /65/ Most significantly, plaintiffs stated that the county had millions of dollars in legally discretionary expenditures that it could cut in lieu of cutting mandated general relief benefits. /66/

The trial court evaluated none of plaintiffs' contentions in its findings. Although the trial court had before it extensive evidence and the opportunity to give further shape to the standard of fiscal impossibility, it adopted a standard wholly favorable to the needs of the county:

Thus, in this Court's opinion, the defense of fiscal impossibility is one premised on reasonableness: money must be available from other sources without violating the law or causing substantial harm to programs of equal importance and significance to the overall health, welfare, and safety of this County and its residents.

Applying that criteria, it becomes a factual question as to whether the County in this case has presented sufficient evidence to prove the fiscal impossibility defense . . . . the evidence shows the County is facing a fiscal crisis; extraordinary efforts have been made and must continue to be made

to save revenues in all areas and money cannot be taken from other programs without manifestly injuring the health, safety, and welfare of this County.

Accordingly, the court finds that the Ordinance is lawful, the County having established the defense of fiscal impossibility. /67/

The trial court's conclusion did not build upon the prior case law. Unlike the Brown court, the Washington trial court made no finding that specific local mandates would be undermined if the county's general relief cut was enjoined. Unlike the McMahon court, the Washington trial court offered no analysis of the relationship of state-mandated programs to local programs. Although the trial court stated in its findings that the county's efforts to raise funds were "appropriate and reasonable," it did not define what criteria it used to make such a finding, nor did it include the need for such a finding as part of its definition of the fiscal impossibility defense. The court made no attempt to distinguish why San Diego County's claim of fiscal hardship was any more valid than the claim of hardship asserted by Butte County, California, in McMahon.

The appellate opinion in Washington did not address the fiscal defense. The appellate court ruled for the plaintiffs simply on the basis of the language of the governing statute.

One concurring justice, Charles Froehlich, sought to guide the parties by further elaborating on the trial court's fiscal impossibility ruling. The justice dismissed the idea that any hierarchy of county obligations existed. He insisted that all county programs were of great importance. /68/ With this assumption as his guiding point, the justice concluded that when a county has exhausted all realistic means of raising funds; when it experiences severe budgetary shortfalls by reason of uncontrollably expanding demands of vital programs; when it has no recourse but to cut all or even most of vital programs, reducing the funding across the board; then and in such circumstances the county is not obligated to provide full funding for the General Relief program, in the manner and to the extent which would be required were the county not facing fiscal crisis. /69/

What constitutes a "realistic means" of raising funds and what in the record had established that such realistic means had been exhausted? If those disputing a claim of fiscal impossibility present evidence that a county can save money by making nonprogrammatic cuts, such as program reorganizations, staff funding cuts, and reductions of capital expenditures, how is the ability to make such savings to be considered? Assuming it were permissible for a county to meet less than its minimally statutorily required obligation, how much less would be okay? The concurring opinion failed to answer these questions.

Despite creating an extensive record in Washington, San Diego County's effort to define a broadly applicable fiscal defense failed. The appellate court declined to answer the hard questions such a defense raises.

IV. Conclusion

While courts in a number of individual cases have concluded that there is no fiscal defense against a statutory mandate, many courts have also recognized that a claim of fiscal impossibility may be valid. The few courts that have faced difficult cases have avoided articulating a clear standard.

When the function of a government entity is narrow, and there is overwhelming evidence that requiring a mandated expenditure is literally impossible, the defense prevails. /70/ When a governing law clearly limits what constitutes "available" funds to fulfill a statutory mandate, the defense can readily be applied. /71/ When the parties concur or the court finds that monies are not available for mandated services but plaintiff nevertheless seeks certain expenditures, the defense can be used to negate the government's obligation. /72/ When monies admittedly could be available for a mandated service but only with severe budgetary strain, the fiscal impossibility defense would not be controlling. /73/

When money may not be "available" under either party's definition, but arguably could be raised, efforts must generally be made to raise it before the defense of fiscal impossibility can be asserted. /74/ The adequacy of efforts to raise funds becomes an issue only when it is determined that existing funds are insufficient to fulfill a mandated obligation.

The case law has not plainly addressed what happens when the available funding for a mandated obligation is not statutorily defined and the parties dispute whether funds are available. The McMahon court offered a sound basic rule: by stating that state mandates must take precedence over local programs, it recognized a fundamental rule of law. /75/ Every court that has found no fiscal defense against statutory obligations has recognized that fundamental rule. Mandates established by a state take precedence over local obligations, just as obligations established by the federal government take precedence over state-mandated obligations. To hold otherwise would permit localities routinely to ignore governing higher law. If counties were free to cut state-mandated programs simply because they lacked monies to fund both local programs to the extent they wished and state-mandated programs, state-mandated programs would likely routinely be cut and such cuts would be justified by fiscal impossibility. This would be particularly so of politically unpopular welfare programs or costly health care obligations.

Attempts to fashion a complex rule for determining fiscal impossibility might seek to determine, for example, the good faith of counties in making cuts, the degree to which cuts would effectively destroy local programs, and the ability of the locality to raise funds. Such a rule would result in elaborate proceedings for which workable criteria could not easily be defined. A simple rule of literal availability should apply. If funds are available or can be raised for programs or services that are not mandated, they must be considered available for mandated obligations.

To the extent that local entities do not believe that they can fund mandated obligations and local programs, they can, as the court in May suggested, seek to file for bankruptcy, /76/ and have all their debts and obligations reorganized by a federal bankruptcy court. /77/ Ultimately, the simplest avenue for relief from mandated obligations is that suggested by many courts: to seek relief from the legislature or other applicable governing body.

In summary, fiscal impossibility is a recognized defense against statutorily mandated obligations. /78/ However, in most cases mandates for basic services and benefits can be protected against the fiscal defense.

Footnotes

/1/ The federal unfunded mandates bill was signed into law, the Unfunded Mandates Reform Act of 1995, Pub. L. No.104-4, 104th Cong., 2d Sess. (1995). Its significance, however, was subject to debate. See, e.g., H.R. Rep. No. 1, pt. 1, 104th Cong., 2d Sess. (1995) (minority view).

/2/ Washington v. Board of Supervisors of San Diego County, 18 Cal. App. 4th 981, 22 Cal. Rptr. 852 (1993) (Clearinghouse No. 47,789). The author wishes to thank Robert D. Newman of the Western Center on Law and Poverty. As lead trial attorney in Washington, he was primarily responsible for developing the facts upon which this article is based. The author also thanks cocounsel Rosemary Bishop, Carol Ratsamy Bracy, and Richard A. Rothschild, and law clerks Sarah Ecker and Lisa Ecks, for their work on Washington.

/3/ See, e.g., Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass.), aff'd, 494 F.2d 1196 (1st Cir. 1973), cert. denied sub nom. Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974) (Clearinghouse No. 16,121), and Welsch v. Likins, 373 F. Supp. 487, 498 (D. Minn. 1974) (Clearinghouse No. 8988).

/4/ See, e.g., Gerald E. Frug The Judicial Power of the Purse, 126 U. Penn. L.R. 715 (1976).

/5/ Boehm v. County of Merced (Boehm II), 178 Cal. App. 3d 494, 503 (1986).

/6/ General relief is the basic California aid program for individuals who have no other form of aid or assistance. It is called general assistance or home aid in some states. Not all states provide it. See Douglas Besharov, Selected Characteristics of State General Assistance Programs (1992). In California, general relief is wholly funded by individual counties.

/7/ Cooke v. Superior Court, 213 Cal. App. 3d 401, 414 (1989) (Clearinghouse No. 44,985).

/8/ See, e.g., City & County of San Francisco v. Superior Court, 57 Cal. App. 3d 44, 47 (1989) (general relief); Boehm v. County of Merced (Boehm I), 163 Cal. App. 3d 447, 451 (1985) (general relief); and Madera County Hosp. v. County of Madera, 155 Cal. App. 3d 136, 151 (1984) (medical care to the indigent).

/9/ King v. Martin, 21 Cal. App. 3d 791 (1971).

/10/ Id. at 796.

/11/ Bellino v. Superior Court, Riverside County, 137 Cal. Rptr. 523 (Ct. App. 1977).

/12/ Id. at 527.

/13/ Professional Engineers in Cal. Gov't v. California State Personnel Bd., 114 Cal. App. 3d 101 (1980).

/14/ Id. at 108.

/15/ Sutro Heights Land Co. v. Merced Irrigation Dist., 211 Cal. 670 (1931).

/16/ Id. at 703 -- 4.

/17/ Ramey Borough v. Commonwealth of Pa., 327 A.2d 647, 650 (Pa. Commw. Ct. 1974).

/18/ Id. at 650 et seq. The dissent's readiness to address the fiscal defense as part of the mandamus action and not wait for any contempt action distinguished its approach from the majority's. The extent to which this distinction between mandamus and contempt may reflect the view of other courts that have found no fiscal defense to mandated obligations is unclear. Most of the cases on the issue involved writs of mandate.

/19/ Id. at 652. The dissent contrasted the facts of the case with those in Pennsylvania ex rel. Alessandroni v. Borough of Confluence, 234 A.2d 853 (Pa. 1966). In Borough of Confluence, the Pennsylvania Supreme Court held that the borough's fiscal defense to mandamus was not sufficient because the borough could well have received federal and state grants, which would have permitted it to build the sewage plant. Id.

/20/ Taylor v. Wentz, 153 N.E. 2d 812 (Ill. 1958).

/21/ Gushwa v. State ex rel. Oster, 189 N.E. 129 (Ind. 1934).

/22/ Taylor, 153 N.E. 2d at 817.

/23/ Gushwa, 189 N.E. at 130.

/24/ May v. Board of Directors, 34 Cal. 2d 125 (1949).

/25/ Id. at 134.

/26/ Id. at 134 -- 35.

/27/ City of Vernon v. Superior Court, 38 Cal. 2d 509 (1952).

/28/ Id. at 518.

/29/ Ross v. Superior Court, 19 Cal. 3d 899 (1977).

/30/ Id. at 904, 916.

/31/ Id. at 916 n.15.

/32/ State ex. rel. Brown v. Board of Commissioners, 255 N.E. 2d 244 (Ohio 1970).

/33/ The court did not indicate which type of public assistance (Aid for Families with Dependent Children, general relief or assistance, medical benefits, or all or some of them) was unpaid.

/34/ Brown, 255 N.E. 2d at 245.

/35/ It appears that in Ohio aid not paid by a county was covered by the state; individual recipients did not suffer. See, e.g., Robinson v. Rhodes, 424 F. Supp. 1183 (N.D. Ohio 1976).

/36/ Id. The Ohio Supreme Court repeated this analysis in its similar decision, State ex rel. Johns. v. Board of County Commissioners, 278 N.E. 2d 19 (Ohio 1972), holding that an undisputed lack of county funds constituted a valid defense against the state's action in mandamus to compel construction of a statutorily mandated juvenile detention home. Id. at 20.

/37/ That apparently no one's benefits were actually cut may well have aided the court.

/38/ Board of Supervisors v. McMahon, 219 Cal. App. 3d 286 (1990) (Clearinghouse No. 42,175).

/39/ Id. at 300.

/40/ Id.

/41/ Id. at 301.

/42/ Id. at 303.

/43/ Despite Proposition 13 to the California Constitution, which severely limited the counties' ability to raise revenues, California allows for special taxes to be assessed by the voters; Proposition 13 does not preclude the imposition of user fees.

/44/ Washington v. Board of Supervisors of San Diego County, 18 Cal. App. 4th 981, 22 Cal. Rptr. 852 (1993) (Clearinghouse No. 47,789).

/45/ Cal. Welfare & Inst. Code Sec. 17000.

/46/ Mooney v. Pickett, 4 Cal. 3d 669 (1971) (Clearinghouse No. 4872).

/47/ Washington v. Board of Supervisors of San Diego County, No. 647805, slip op. at 11 (Oct. 28, 1992) (Clearinghouse No. 47,789P).

/48/ Id. at 15 -- 16.

/49/ Washington v. Board of Supervisors of San Diego County, No. 016346, slip op. at 10 (Cal. Ct. App. Mar. 17, 1992) (Clearinghouse No. 47,789-I).

/50/ Washington, Sup. Ct. No. 647805, slip op. at 15 -- 16 (Oct. 28, 1992) (Clearinghouse No. 47,789P).

/51/ Id. at 10.

/52/ Mandated services fall into two categories -- those that must be provided and must be provided at a certain service level ("mandated/mandated" services) and those that must be provided but are not set at a certain service level ("mandated/discretionary") services. The mandated/discretionary category may be somewhat illusory in that, while no service level is set, a certain minimal level of expenditure is necessary to provide the service. Justice Charles Froehlich in his concurrence in Washington extensively discussed his belief that the categorical distinctions are of limited significance. Washington 18 Cal. App. 4th at 988 et seq.

/53/ Washington, No. 647805, slip op. at 9 (Oct. 28, 1992) (Clearinghouse No. 47,789P).

/54/ Proposition 13 is codified as Article XIIIA of the California Constitution. It was added by the adoption of Proposition 13 on the ballot of the direct primary election held on June, 6, 1978.

/55/ Washington, No. 647805, slip op. at 10 -- 11 (Oct. 28, 1992) (Clearinghouse No. 47,789P).

/56/ Id.

/57/ Id. at p. 11.

/58/ See the summary of plaintiffs' trial presentation in Plaintiffs' Petition for Writ of Supersedeas or Other Appropriate Stay Order and for Immediate Stay; Memorandum of Points and Authorities in Support Thereof, Washington, No. 647805, at 17 (Clearinghouse No. 47,789-E). Plaintiffs employed an expert on county budgeting to evaluate San Diego County's budget and an expert on county tax policy to determine how and to what extent San Diego County could raise revenues to meet its obligations.

/59/ Id. at 18.

/60/ Id. at 19.

/61/ Id.

/62/ Id. at 20.

/63/ Id.

/64/ Id. at 21.

/65/ Id. at 21 -- 22.

/66/ Id. at 22.

/67/ Id.

/68/ Washington, 4 Cal. App. 4th 989 et seq. The concurring opinion suggested that even programs that used wholly discretionary funds could not be distinguished from mandatory programs. Id. at 989 n.3.

/69/ Id. at 994 -- 95.

/70/ See, e.g., Sutro Heights, 211 Cal. 670, and the dissent in Ramey Borough, 327 A.2d 647.

/71/ See, e.g., Johns, 278 N.E. 2d 19.

/72/ See, e.g., Brown, 255 N.E. 2d 244, and Johns, 278 N.E. 2d 19.

/73/ See, e.g., Taylor, 153 N.E. 2d 812, and Ross, 19 Cal. 3d 899

/74/ See, e.g., Gushwa, 189 N.E. 129, May, 34 Cal. 2d 125, City of Vernon, 38 Cal.2d 509, and McMahon, 219 Cal. App. 3d 286. The Washington trial court and concurring opinion suggested that what it called "reasonable and sufficient" efforts to raise money sufficed. Washington, No. 647805, slip op. at 11 (Oct. 28, 1992) (Clearinghouse No. 47,789P). However, it offered no definition of how it defined the term. At best, it suggested that the county had already acted in good faith to raise money but it did not define "good faith" as the standard. The McMahon court recognized that in the case of California counties they might seek to place state mandates behind the funding of local programs. McMahon, 219 Cal. App. 3d 300. The court stated that localities must seek to raise monies through the procedure allowed in law and should act to impose user fees for local functions (libraries, roads, etc.) to the extent permitted in law before they could raise a claim of fiscal impossibility. Id. at 301. Consistent with the basic obligation set forth in the case law, at the very least, government entities could be required to raise revenues to the same extent as such revenues are raised by entities of comparable size within the applicable corresponding jurisdiction (e.g., counties of comparable size within the county's state) before a fiscal defense could hold.

/75/ McMahon, 219 Cal. App. 3d 300.

/76/ May, 34 Cal. 2d at 135.

/77/ See 11 U.S.C. Secs. 901 et seq. The procedure and hierarchy of obligations that would apply in bankruptcy are not the subject of this piece. However, suffice to say, bankruptcy is an option a disgruntled locality can seek for possible relief from its mandatory obligations.

/78/ It should be remembered that the defense can be asserted only when it has been shown that, at the very least, "reasonable" efforts have been made to raise revenues to address the claimed fiscal problems.