The Buck Stops Here!
Harry, Can You Please Come Home!

Who is the Final Policymaker?

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Bill aggressively brings cases to conclusion with effective and efficient results. He is passionate about his work in the government sector and how his efforts provide important resolution to communities around the state. While he often wins lawsuits on pre-trial motions, he has an extraordinary record of success at mediation and in the courtroom as well.

Honors and Distinctions:
WHO IS A FINAL POLICYMAKER?

I. INTRODUCTION

On the front edge of Harry Truman’s presidential desk in the Oval Office sat a small wooden sign declaring “The Buck Stops Here.” It was placed there to remind himself and those around him that being accountable and having authority to make decisions goes hand in hand. It was a catch phrase in response to another common phrase still around today, “passing the buck”. It’s not surprising that individuals in authority are generally quick to take credit and even share in the successful and popular decisions that are made. But, when it comes around to decisions that are controversial, the question of who is the final policymaker can often be debated as much as the decision itself. Who is in charge? Who gets the final say? And where does the buck stop?

The legal questions surrounding who is a final policymaker are not just about the power play in politics and government. It is historically grounded in addressing the abuse of power by governmental officials and establishing accountability.

In 1883, long before the days of Harry Truman, the Congress enacted 42 U.S.C. § 1983. 42 U.S.C. § 1983 gives private persons civil recourse when their constitutional rights are violated by the actions of “persons” who act under the color of state law.1 Section 1983, which is nearly 131 years old, was created to enforce the provisions of the Fourteenth Amendment of the U.S. Constitution. Living up to its popularly known designation, the Ku Klux Klan Act, the law was a legislative enactment used to suppress post-Civil War violence in the South. 90 Harv. L. Rev. 1133 (1977). The law was rarely used for almost ninety years due to the restrictive judicial interpretation of the Fourteenth Amendment itself. The Slaughterhouse Cases, 83 U.S. 36 (1873).

However, eighty years later, the Supreme Court adjusted its interpretation of the Fourteenth Amendment’s Due Process clause to guarantee many individual liberties, including those incorporated into the clause via the Bill of Rights. Specifically, the Supreme Court allowed a plaintiff to prosecute a § 1983 claim to enforce the Fourth Amendment against thirteen Chicago policemen who burst into the plaintiff’s home without a warrant. Monroe v. Pape, 365 U.S. 167 (1961). The question arose: should a municipality or other governmental entity be considered a “person” under § 1983? In Monroe, the Supreme Court did not allow the plaintiff’s § 1983 claim to proceed against the

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1 Quoting 42 U.S.C. § 1983: “Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress...."
City of Chicago, answering the question “No”.

Seventeen years after Monroe was handed down, the Supreme Court overruled its limited interpretation and abolished the exclusion of municipalities from liability under Section 1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In reaching its holding, Justice Brennan looked to the legislative history of the act and concluded that the legislative intent of the bill was for municipalities to be considered a “person” for purposes of Section 1983 liability. Id at 691. Thus, under Monell, municipalities are considered “persons” who may be sued directly if a policy, practice or custom causes a constitutional violation. Id. However, Monell did not specify what constitutes municipal policy and, more specifically, who is responsible for establishing a policy attributed to the entity.

In 1988, the United States Supreme Court revisited the Monell decision. In City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), the High Court clarified that municipal policy resulted from the decisions of those have “final policymaking” authority. Despite the direction of Praprotnik, courts continue to struggle with identification of a final policymaker. In Piotrowski v. City of Houston, 237 F. 3d 567, 578 (5th Cir. 2001), relying on Monell and Praprotnik, the Fifth Circuit confirmed the three elements a plaintiff must prove to establish municipal liability.

First, the plaintiff must prove that a policy/custom was made (or allowed) by a “final policymaker.” Id. at 567. Second, the plaintiff must show that the contested decision/action was based on an “official policy or custom.” Id. Finally, the plaintiff must prove that the decision/action was a constitutional violation whose “motivating force” was the governmental entity’s policy or custom, as established by the final policymaker. Id. These elements negate subjecting the municipality/government entity to liability through respondeat superior. City of Canton, Ohio v. Harris, 489 U.S. 378, 392 (1989). Instead, the elements require a deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation. Id at 391-392.

The focus of this paper will be on the first element of a Section 1983 claim against a governmental entity—identifying the “final policymaker.” As noted by the Supreme Court, identifying the final policymaker is key to deciding if the municipality/governmental entity can be held responsible under Section 1983. Second, the paper will consider evolving issues with regard to the final policymaker determination looking at recent cases on the issue. Finally, the paper will consider practical suggestions for applying the policymaker doctrine in defense of governmental entities.

II. BRIEF HISTORY OF THE POLICYMAKER DOCTRINE

The term “policymaker” first appeared in the 1985 United States Supreme Court case of City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). However, it was not until 1986 when the “policymaker” doctrine was defined in its current form. Specifically, in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) the Supreme Court held that, “[m]unicipal liability attaches only where the decisionmaker possesses final authority to
establish municipal policy with respect to the action ordered.” (emphasis added). This holding was further clarified in McMillian v. Monroe County, when the Supreme Court identified a two part test for deciding who is a final policymaker. McMillian v. Monroe County, 520 U.S. 781 (1997). To determine the identity of the final policymaker, a court must ask: (1) what is the relevant municipal function at issue; and (2) upon which official or collective body does state or local law confer final responsibility to set policy in that relevant area? Id at 785-86.

A trial judge is to determine who the final policymaker is by “[r]eviewing the relevant legal materials, including state and local positive law, as well as ‘custom or usage’ having the force of law.” Robinson v. City of Ark. City, 896 F. Supp. 2d 1020, 1043 (D. Kan. 2012); Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989). Under this application, a final policymaker is typically a governing body, an official lawmaker, or an individual who has been delegated final policymaking authority. Bowden v. Jefferson Cnty., 676 F. App’x 251, 254 (5th Cir. 2017); Bennett v. City of Slidell, 728 F.2d 762, 768-69 (5th Cir. 1984).

### III. Governing Body as a Final Policymaker

Generally, a governing body is identifiable as the city council, commissioners’ court, school board or the like. Identification of the governing body is not overly complex. However, one consideration is whether a single member, or even a minority, of the governing body sets policy, or whether the body must act through its legislative acts—those acts confirmed by a majority vote in a properly noticed and conducted meeting.

From the perspective of the practitioner representing governmental entities, counsel should argue that in order for a governing body to be a final policymaker, the governing body must have acted through a majority of its governing body on the challenged issue. See Church v. City of Huntsville, 30 F.3d 1332, 1343-44 (11th Cir. 1994) (City of Huntsville not liable because less than majority had acted with discriminatory intent); Holt Cargo Sys., Inc. v. Delaware River Port Auth., 20 F. Supp. 2d 803, 841 (E.D. Pa. 1998) (plaintiffs must show that a majority of the board knew of the improper motives and ratified them), aff’d 165 F.3d 242 (3d Cir. 1999); Tranter v. Crescent Twp., 625 F. Supp. 2d 298, 302 (W.D. Pa. 2007) (“More importantly, there is no evidence of discriminatory intent by any of the decision-makers, let alone a majority.”); Laverdure v. County of Montgomery, 2002 U.S. Dist. LEXIS 11264, *6 (E.D. Pa. June 13, 2002) (a single commissioner cannot make policy or decisions for county’s governing body).

To the contrary, from the plaintiff’s perspective, counsel should argue that imposing the burden to show specific intent or action by a majority of the governing body (often three or more voting members) is unrealistic and unpractical. Some courts hold that establishing improper action by even a minority of the governing body is sufficient to impose governmental liability and establish policy. See Scott-Harris v. City of Fall River, 134 F.3d 427, 436 (1st Cir. 1997), rev’d on other grounds, 523 U.S. 44, 140 L. Ed. 2d 79, 118 S. Ct. 966 (1998) (plaintiff requires “evidence of both (a) bad motive on the part of at least a significant bloc of
legislators, and (b) circumstances suggesting the probable complicity of others”) and United States v. Birmingham, 538 F. Supp. 819, 830 (E.D. Mich. 1982), aff’d, 727 F.2d 560 (6th Cir. 1984) (a “significant percentage” of the governing body had a bad motive).

The only identified case within the Fifth Circuit to address this issue is Esperanza Peace & Justice Ctr. v. City of San Antonio, 316 F. Supp. 2d 433, 452-453 (W.D. Tex. 2001). In Esperanza, District Judge Orlando Garcia held: “The Court believes the Scott-Harris approach is preferable because it strikes the proper balance between difficulty of proving a legislative body's motivation and the fact that a municipal ordinance can only become law by majority vote of council.” Judge Garcia’s opinion is probably within the “minority” view on this point.

Even so, there is at least some authority in the Fifth Circuit that a plaintiff need not show improper action by a majority of the governing body to impose municipal liability through the acts of the governing body. It appears this issue remains to be addressed by the Fifth Circuit.

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**IV. DELEGATION OF FINAL POLICYMAKING AUTHORITY**

![An Express Statement](image1)

![Conduct in a Policymaking Role](image2)

While there is typically only one key consideration when deciding whether a governing body acts as a final policymaker, the issue of whether an individual has been delegated final policymaking authority is often a complex determination taking into account a number of considerations. This section of the paper will focus on the delegation of final policymaker authority by exploring a number of recent cases.

Final policymaking authority is delegated in one of two ways. Zarnow v. City of Wichita Falls, Texas, 614 F.3d 161, 167 (5th Cir. 2010). First, the governing body may delegate authority by an “express statement or formal action.” Id. at 167. Second, the governing body may delegate policymaking authority to an individual by “conduct or practice that encourages or acknowledges the agent in a policymaking role.” Id.

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**a. Delegation of Final Policymaking Authority Through an Express Statement**

Delegation of authority by an express statement establishes final policymaking authority. The express statement can come in the form of an ordinance, statute, or other governmental writing or document. A recent case, Hobart v. City of Stafford, 784 F. Supp. 2d 732 (S.D. Tex. 2011) evaluated delegation of final policymaking authority through express statement. In Hobart, a mother sought recovery from the City of Stafford after her son was shot and killed by a police officer. The plaintiff’s son had a
long history of mental illness which resulted in delusions and erratic violent behavior. On the day in question, plaintiff became fearful for her son’s safety, as well as her own, and called police.

Upon arrival, plaintiff’s son attacked an officer. The officer ultimately shot and killed the suspect. The plaintiff alleged that the chief of police was a final policymaker, as the City of Stafford’s ordinance expressly delegated the authority to the chief. The Southern District agreed, noting that the plaintiff pled that through the City of Stafford’s ordinance, the chief was “delegated all policymaking authority for the police department.” The plaintiff alleged that the City of Stafford’s city council did not review the actions and general orders set by the chief. The court noted that the ordinance, as alleged by the plaintiff, was clear and unambiguous in its grant of authority to the chief, and therefore found the chief to be a final policymaker for police decisions.

However, general language in an ordinance may not always establish who a final policymaker is. In *Kincheloe v. Caudle*, 2010 U.S. Dist. LEXIS 28110 (W.D. Tex. 2010), plaintiffs alleged that the City of Bertram was responsible for the alleged unconstitutional acts of the police chief. *Id.* According to the plaintiffs, the chief enacted polices which led to a violation of their Fourth Amendment rights when they were illegally searched and seized by one of the town’s deputy officers. *Id.*

The City of Bertram’s ordinance read: “The mayor shall give to the governing body [the Council of Alderman] any information, and shall recommend to the governing body any measure, that relates to improving the finances, *police*, health, security, cleanliness, comfort, ornament, or good government of the municipality.” *Id.* at *26. The City of Bertram argued that final policymaking for law enforcement issues was delegated by an express statement to the alderman, not the chief of police.

Despite the language in the ordinance, the court found that the police chief was a final policymaker on the issues presented in the case. In reaching its decision, the court focused its attention on the fact that the underlying issue was an unconstitutional search and seizure. The court noted that how officers conduct searches is a “day to day” policy, and not something the alderman would control. The court further reasoned that the applicable ordinance simply granted the alderman the power to “improve” law enforcement. The court considered the word “improve” to focus on long-term goals and policies, not day to day operations. Thus, the court held that the ordinance did not, through express statement, make the alderman the final policymaker for day to day law enforcement practices.

The outcome of the case might have been different depending on the unconstitutional act of the police department. Had the department engaged in unconstitutional employment discrimination, or something else of a non-“day to day” nature, the court might have looked at the “improve” language differently. Furthermore, if the ordinance had been written more clearly, such as the council being “delegated all policymaking authority for the police department,” the policymaker determination might have been different as well. Clear and unambiguous language in the grant of authority is necessary to establish where final policymaking lies. General terms such as “improve” or general grants of authority not necessarily applicable to “day to day” operations allow the court to consider application and factors outside the language of the ordinance. The more ambiguous the language, the more uncertain the court’s application and conclusion may be.
b. Delegation of Policymaking Authority through Conduct or Practice That Encourages or Acknowledges the Agent in a Policymaking Role

The second approach to how an individual can be delegated final policymaking authority is through conduct or practice that encourages or acknowledges the agent in a policymaking role. Bowden v. Jefferson Cnty., 676 F. App’x 251, 254 (5th Cir. 2017); Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). Determining whether an individual is a final policymaker in this capacity hinges on level of “constraint” that their decision and discretion is subjected to. Id. Specifically, if the official’s discretionary decision is “constrained by policies not of that official’s making,” he or she likely is not a final policymaker. Praprotnik, 485 U.S. at 127. On the other hand, if the individual’s decision is not constrained by any official policy or guidelines, he or she is more likely to be identified as a final policymaker. Id. From a practical standpoint, the more restricted the official’s decision and discretion is, the less likely it is that he or she has final policymaking authority.

The position of the governmental employee or official is not determinative. Governmental employees or officials, even high level, may not be final policymakers when their respective authority is otherwise limited. For example, a city attorney was employed only to give legal advice, and despite his influence on city functions, did not have final policymaking authority. Bennett v. City of Slidell, 728 F.2d 762, 768-69 (5th Cir. 1984), cert. denied, 472 U.S. 1016 (1985). Despite his control of day to day permitting issues, a building inspector was not a final policymaker for inspections, as his discretion was limited by his employer city’s chief administrative officer. Id. To the contrary, a city manager was a final policymaker for employment matters when he could act in lieu of the city council in employment matters, he could decide the long-term employment goals for the city, and he could devise means of achieving those goals, such as creating disciplinary procedures to maintain an efficient work force. Brown v. Wichita County, 2011 U.S. Dist. LEXIS 44676, *21 (N.D. Tex., Apr. 26, 2011), citing Mattix v. Hightower, 1998 U.S. Dist. LEXIS 11464 *13 (N.D. Tex. 1998). However, as the cases below discuss, even a city manager’s policymaking authority may be limited such that he or she is not classified as the final policymaker.

i. Constraint Coming From Official Policy, Ordinances, and Applicable Codes.

Some of the most common forms of constraint are official policy, local ordinances, and applicable codes which may limit the discretion or authority of a government actor. The question that must be answered is how much discretion is left to the actor, and how much is controlled by the language of the policy, ordinance or code.

In Gelin v. Housing Authority of New Orleans (HANO), 456 F.3d 525 (5th Cir. 2006), the Fifth Circuit evaluated whether a supervisor, who had decision making authority, was restricted by the policy manual such that his authority did not arise to the level of final policymaking. The plaintiff, a lawyer who served in various positions in the HANO office, was discharged by his supervisor after he reported an alleged bribe to federal authorities. The plaintiff alleged that his supervisor was delegated
policymaking authority through HANO’s policy manual, and thus subjected HANO to municipal liability. HANO argued that while the supervisor had decision making authority, the HANO policy manual provided the “Executive Director” with the policymaking authority to “modify personnel procedures.” Id. [emphasis added] at 528. HANO also noted that, under the policy manual, even the Executive Director’s decisions required final approval by HANO’s Board of Commissioners. Considering this high level of restraint on the supervisor’s discretion under the policy, the Fifth Circuit affirmed summary judgment for HANO finding no action by a final policymaker. The Fifth Circuit noted “Lamberg may have wielded decision making authority; her position alone, however, did not bestow any final policymaking authority.” Id., at 528, citing Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1305 (5th Cir. 1995) (noting that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the decision-maker's departure from them, are the act of the municipality.") [Emphasis added].

In Brown v. Wichita County, Texas, 2011 U.S. Dist. LEXIS 44676 (N.D. Tex., Apr. 26, 2011), a district court addressed “delegation” as applicable to the death of an inmate while in the Wichita County jail. After the inmate began throwing up blood, the nurse remotely diagnosed the condition and ordered liquid antacids and suppositories. Allegedly, despite the inmate’s worsening condition, the nurse commented that the jail doctor would be unhappy if the inmate were sent to the hospital. Eventually, the inmate died from a massive gastrointestinal hemorrhage. Id.

The inmate’s family brought suit, arguing that the jail doctor was a final policymaker. The plaintiffs argued that the jail doctor, by contract with Wichita County, served as the policymaker for the jail with regard to supervision and training of medical staff. The district court noted that while the doctor may have made discretionary and ministerial decisions regarding medical care of inmates, he lacked final policymaking authority on this issue. The court noted that because Texas Local Government Code § 351.041(a), stated that the sheriff supervised the jail, the jail doctor could not be a final policy maker. Notably, the court rejected the plaintiffs’ argument that the Sheriff had denied responsibility for overseeing the nursing staff, as well as a contract requiring the doctor to supervise medical staff. The Wichita County Sheriff did not “delegate” final policymaking authority to the jail doctor by the contract.

In Saenz v. Dallas County Community College District, 2011 U.S. Dist. LEXIS 52023 (N.D. Tex., May 16, 2011) the Northern District of Texas evaluated whether a college’s President was a final policymaker with regard to employment decisions. The plaintiff, a vice president of a community college, alleged that she was discharged after submitting a memo to the president voicing a number of concerns. The plaintiff alleged that the Dallas County Community College District Board (DCCCD) delegated policymaking authority for employment decisions to the college’s president, and thus the DCCCD was liable for the president’s actions. The court disagreed. The court noted that the DCCCD’s Board of Director’s had established several regulations that the president was required to abide by. While not specifying the content of the regulations, the court noted that the college’s supervisors and officers, including the president, were required to follow the written policies as stated. The court found that the Board of Directors’ regulations limited the DCCCD’s officers and president. Consequently, the president was not a final policymaker.
In *Scott v. Cleveland City of Texas*, 2010 U.S. Dist. LEXIS 18030 (E.D. Tex. 2010) a police officer brought suit after the city manager terminated the officer for “conducting personal business” while on the job. District Judge Ron Clark looked at the City of Cleveland’s Personnel Handbook, which contained provisions for hiring and firing employees. While the discretion to hire and fire employees was left to the city manager, he was still bound by these official provisions. *Id.* Judge Clark provided the following review of the policies, noting that the following restrictions limited delegation of full and final policymaking authority:

Cleveland ("the City") is a Texas home rule municipality, operating under a home rule charter. Under the City's charter, "all powers of the city shall be vested in . . . the 'city council,' which shall enact local legislation, . . . determine policies and appoint the city manager, who in turn shall execute the laws and administer the government of the city." Under City policy, all hiring decisions are made by the department head, with approval by the city manager. The decision to dismiss an employee is also made by the department head with approval from the city manager. After an employee has been terminated, the employee can appeal the decision to the city manager, who has the final decision. All employment by the City is in the form of "at will" employment. An employee may be dismissed "at any time, for any reason ascertained after careful and factual consideration." [citations omitted]

These limitations, limited final policymaking to the city council. Although the city manager had significant discretion, the language in City of Cleveland’s policies sufficiently limited the city manager’s policymaking authority. The city council did not delegate its final policymaking authority to the city manager. *Id.*

### ii. Actions Outside the Scope of Delegated Authority

Official policies, ordinances, charters, and applicable codes can confer final policymaking authority. However, the delegation must be specific in an express statement. Thus, the next question is what results when an official is delegated authority, but he/she acts outside the scope of that authority.

The Fifth Circuit addressed this issue in *Bolton v. City of Dallas*, 541 F.3d 545 (5th Cir. 2008). In *Bolton*, former Dallas Police Chief Terrell Bolton filed suit after former Dallas City Manager Ted Benavides terminated the Bolton’s employment with the City of Dallas. There was no dispute that the city manager held authority to terminate the chief. However, the City of Dallas’ charter provided that if a police chief were terminated, the chief returned to his or her prior rank and maintained employment with the City of Dallas. City Manager Benavides, however, terminated Bolton from all employment. Bolton brought suit, alleging that Benavides was the final policymaker for employment decisions.

The City of Dallas argued that although the city manager had policymaking authority, his actions were prohibited by the charter, and therefore his actions could not be imputed back to the City of Dallas as official
policy. The district court agreed and dismissed Bolton’s claims. The Fifth Circuit affirmed, noting that because Benavides’ actions were outside his delegated scope of authority, it “clearly does not represent final policy with respect to the removal of city officials like Bolton.” Id. at 551. Benavides’ actions beyond the constraint set forth by the charter negated final policymaking liability. Under Bolton, it is important to evaluate the actions of an alleged final policymaker, as even a “final policymaker” can act outside the delegated authority to negate municipal liability by unauthorized acts.

**iii. Administrative Oversight of the Official’s Decision**

Clearly, as noted above, oversight or limitation by a governing body or limited delegation may negate final policymaking authority. However, the mere existence of some administrative review process, or the lack thereof, does not conclusively answer the final policymaker question. Thus, the question, what amount of oversight negates final policymaking authority?

In **Zarnow v. City of Wichita Falls Texas**, 614 F.3d 161, 168 (5th Cir. 2010) the Fifth Circuit noted that “the subject matter of administrative review must be precise in order to attach the presumption against policymaking.” In **Zarnow**, a doctor became the subject of a police investigation when his employees notified police that they found a gun, an ammunition magazine, several boxes of shells, blasting caps, and fuses in the doctor’s clinic office. Police obtained a search warrant to search the doctor’s home. However, during the search, the officer’s obtained items that were outside the scope of their warrant. The “other” items included currency, bonds, silver, band-aids, books, prescription medicines, and over the counter medications. Though not covered by the warrant, the officers contended the other items were covered by the “plain view” doctrine. The physician filed suit against the deputies and the City of Wichita Falls, arguing that the police chief was an official policymaker and that his policy and interpretation of the “plain view” doctrine led to a constitutional violations.

The City of Wichita Falls’ charter provided:

The police department shall be under the direction of a chief of police, who shall be appointed by the city manager and who, subject to the supervision of the city manager and to such rules regulations and orders prescribed by the city manager not inconsistent with the City Charter and ordinances, shall have immediate control and direction of such department.

In light of the charter, the City of Wichita Falls argued that the city manager was the police chief’s supervisor and the City of Wichita Falls had an administrative review process, therefore the police chief was not a final policymaker. The district court disagreed, concluding that the police chief was a final policymaker for law enforcement purposes. The Fifth Circuit affirmed, noting “an official may be a policymaker even if a separate governing body retains some powers.” Id., at 168, citing **Bennett v. City of Sidell**, 728 F.2d 762, 769 (5th Cir. 1984) (en banc). The Fifth Circuit explained that an official may be a final policymaker, “even if the municipality retains ‘the prerogative of
the purse and final legal control by which it may limit or revoke the authority of the official.”’’ Id.

The Fifth Circuit found that the record was void of the city council ever commenting or taking action on internal police procedures. The Fifth Circuit therefore found that, although the charter provided for oversight by the city council, the police chief was the final policymaker for purposes of the police department. The failure of the council to ever exercise their constraint on the chief was determinative. Interestingly, the Fifth Circuit found that the errored approach to the plain view doctrine did not arise to the level of a constitutional violation, affirming dismissal of the doctor’s claims.

Similarly, in Kincheloe v. Caudle, 2010 U.S. Dist. LEXIS 28110 (W.D. Tex. 2010), discussed supra, the Western District of Texas suggested that a mayor’s refusal to exert retained power over the police chief and affairs of the police department suggested that the chief was the official policymaker despite the mayor’s alleged supervisory authority.

These cases raise the question of whether a plaintiff can successfully avoid dismissal on the pleadings, by requesting discovery on whether the stated oversight is actually implemented. In Hobart v. City of Stafford, 2010 U.S. Dist. LEXIS 89441 (S.D. Tex. Aug. 26, 2010) (subsequent procedural history discussed supra) the Southern District of Texas evaluated whether a city charter’s regulations on who held final policymaking oversight precluded depositions to determine otherwise. As noted supra, Hobart involved a police shooting case. The plaintiffs sought the depositions of the city council members to determine who the policymaker was. The city opposed the depositions, arguing that the city’s charter dictated policymaking, and thus, the depositions were not only protected by privilege, but unnecessary for the final policymaking determination.

The district court noted that in evaluating the final policymaker issue, the court is not bound by a city’s written laws and regulations. Rather, the court noted that it “must consider evidence of custom or usage to determine whether it rises to the point of establishing another official as the final policymaking authority in a particular realm.” Id. at *6. Thus, the court determined that the plaintiffs should be able to depose the council members to see if the oversight set forth in the charter was the “custom or usage” within the city. Thus the court allowed the depositions to proceed. The district court eventually ordered the plaintiffs to re-plead their claims against the City of Stafford, and ultimately found that the following allegations sufficed to survive a dispositive motion: “[The chief] had policymaking authority both explicitly through the City’s written ordinances and implicitly as a result of the delegation of authority and the customs and practices of the City of Stafford City Council.” Hobart v. City of Stafford, 784 F. Supp. 2d 732, 750 (S.D. Tex. 2011).

iv. County Sherriff’s—Final Policymakers for Jails and “Law Enforcement Activities”

Some final policymakers, are clearly defined as to function. For example, by statute sheriffs have final policymaking authority in all matters on county jails. TEXAS LOCAL GOVERNMENT CODE § 351.041—“Sheriffs” provides:
(a) The sheriff of each county is the keeper of the county jail. The sheriff shall safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court. (b) The sheriff may appoint a jailer to operate the jail and meet the needs of the prisoners, but the sheriff shall continue to exercise supervision and control over the jail.

Furthermore, in addition to jail oversight, sheriffs are final policymakers for claims relating to county “law enforcement” activities. In James v. Harris County, 577 F.3d 612 (5th Cir. Tex. 2009) the Fifth Circuit noted “[u]nder Texas law, sheriffs are ‘final policymakers’ in the area of law enforcement for the purposes of holding a county liable under § 1983.” Id., citing Williams v. Kaufman County, 352 F.3d 994, 1013 (5th Cir. 2003).

v. Summary

As the above cases illustrate, determination of the final policymaker may require deep investigation into the facts and circumstances peculiar to the specific contested action or the implementation of written constraints, regulations and/or oversight.

First, remember that constraint is dispositive. The more constraint, the less likely the official has final policymaking authority. Constraint can come in the form of official policy, ordinances or codes. The more direct and restrictive the language, the more unlikely the official has final policymaking authority. Furthermore, if an official acts outside the scope of his delegated authority, he loses final policymaking authority for that unauthorized action.

Restraint can also come in the form of administrative review. While the presence or absence of administrative review is not dispositive, it does weigh on the court’s determination. For the administrative review to effectively disqualify the official from having official policymaking authority, it must speak precisely to the decision and be put into practice by the governmental entity. Mere language in a charter or governing document of where final policymaking lies is not necessarily determinative. The governmental entity’s failure to implement or exercise its retained constraint can negate the otherwise established policymaker.
V. PRACTICE SUGGESTIONS

The foregoing principles identify recent cases involving the final policymaker questions. However, these issues raise the ultimate question of what actions defense counsel should take when encountering a Section 1983 claim against a governmental entity. Forcing the plaintiff to properly identify the final policymaker begins with pleading issues, and ends with the proper treatment by the court through voir dire and in the charge to the jury.

- Do Pleadings Establish a Final Policymaker Sufficient to Impose Monell Liability?
- Challenging the Pleadings - FRCP 12
- Summary Judgment Motions

Trial

a. Do the Pleadings Establish a Final Policymaker Sufficient to Impose Monell Liability on the Governmental Entity?

Generally, there are no overly specific pleading requirements imposed on plaintiffs when bringing Monell claims against a governmental entity. However, the United States Supreme Court’s decisions in Twombly and Iqbal apply equally to municipalities. Thus, a plaintiff should be required to plead who is the final policymaker, and facts to support that conclusion. Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). The plaintiff should be required to do more than simply allege the “city” or the “county” is liable for an alleged unconstitutional policy, practice or custom.

Notably, the Fifth Circuit affirmed dismissal of a plaintiff’s suit against a municipality for alleged “actions of its policymaker -- the police chief -- and for knowingly permitting the individual defendants to retaliate against, threaten, punish, and intimidate [plaintiff].” Henrise v. Horvath, 2002 U.S. App. LEXIS 28192 (5th Cir. 2002). In Henrise, the Fifth Circuit noted that
plaintiff’s allegations did not give the city sufficient notice of: (1) what policy or custom existed; 2) what the governmental policymakers actually or constructively knew of its existence; 3) what constitutional violation occurred; and 4) what custom or policy served as the motivating force behind the violation. Without more specificity in the pleadings, the litigation was dismissed by the district court and affirmed on appeal.

Defense counsel should require that the plaintiff meet the pleading burden of identifying the elements, along with the factual support under Twombly and Iqbal.

b. Challenging the Pleadings—FRCP 12.

If the plaintiff has not met his or her pleading burden, defense counsel should attack the pleadings under Fed. R. Civ. P. 12. If the plaintiff fails to identify a final policymaker, the issue may be raised under Rule 12. It is even possible to attack a misidentification of a final policymaker through Rule 12, even if the defense requires the use of evidence.

Courts often require Federal Rule of Civil Procedure 12 motions to be made without citation to outside evidence. However, consider that a court may take judicial notice of certain facts outside the pleadings, specifically public records. Therefore, it is possible to seek dismissal under FRCP 12(b)(6) or 12(c) while using the extrinsic evidence of a city’s charter, or perhaps a policy manual and the like. See Overton v. City of Austin, 748 F.2d 941, 954-55 (5th Cir. 1984) and Clancey v. City of College Station, 2011 U.S. Dist. LEXIS 9051 (S.D. Tex. 2011) (taking judicial notice of city charters) and see Jefferson v. Lead Industries Ass’n, Inc., 106 F.3d 1245, 1250 (5th Cir.1997).

By way of example, suppose a plaintiff pleads that, pursuant to Section 1983, a city water department supervisor violated his or her first amendment rights by terminating the employee. However, the city’s charter establishes that the city council has ultimate authority and oversight. Defense counsel may seek dismissal under Rule 12(b)(6) or 12(c), citing the authority of the city’s charter, asking the court to take judicial notice of same. This can be an effective argument.

i. Home Rule Charters

Several cases cited herein have referenced city charters. Often, a municipality argues that the charter identifies who serves as the municipality’s final policymaker. Note that home rule cities’ powers given in a charter are limited only by the Constitution, state statutes, and the charter itself. See Tex. Const. Art. XI § 5; Tex. Loc. Gov’t Code § 51.072, and see City of Galveston v. Giles, 902 S.W.2d 167, 170 (Tex. App.—Houston [1st Dist.] 1995).

Often, charters of Texas cities vest final policymaking authority in the city council. In addition to the charter provisions cited above, the City of Bryan Charter provides: “All legislative and executive powers of the city shall be vested in the city council.” See Bryan Charter, § 4. The City of Crockett’s Charter provides, “[E]xcept as otherwise provided by this charter, all powers of
the city and all matters of policy shall be vested in the City Council.” Crockett Charter, Art. III § 3,11. Where a charter mandates that the council has final policymaking power in a given area, the argument can and should be made that the council legally cannot divest itself of this authority. This may be made under Rule 12, and early in the litigation.

ii. **Other Organic Laws**

General law cities have only those powers expressly given to them by the legislature or those powers necessarily or fairly implied by such grant. *West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 683 (Tex. Civ. App. Waco 1980); *Bizios v. Town of Lakewood Vill.*, 453 S.W.2d 598, 605 (Tex. App. 2014). In the case of general law cities, the enabling legislation must be the starting point for the policymaking analysis. The same rule of law applies to general law districts. *Franklin County Water District v. Majors*, 476 S.W.2d 371, 373 (Tex. Civ. App. Texarkana 1972). Arguments as to statutorily identified policymakers for general law cities are also properly asserted through Rule 12.

iii. **Local Law and Policy**

City code, policy manuals, and other governmental documents or regulations should be consulted in evaluating dispositive issues on the final policymaker issue. Cities will often delegate powers or otherwise clarify the charter’s allocation of power. Frequently, a council will review, approve and/or adopt a policy manual initially promulgated by a city manager or department head. In such cases, the council’s exercise of its approval power demonstrates its role as final policymaker.

c. **Summary Judgment Motions—FRCP 56**

As discussed above, the court may desire evidence that the provisions in the charter or governing local law are actually put into practice and not simply stated law. Again, as noted above, some courts may allow a plaintiff to proceed on discovery to determine if in fact the charter or written policy was actually followed in practice. See discussion of *Hobart v. City of Stafford*, 2010 U.S. Dist. LEXIS 89441 (S.D. Tex. Aug. 26, 2010)

If discovery must commence, generally the governmental entity is left to proceed with summary judgment under FED. R. CIV. P. 56. In this situation, like under Rule 12, defense counsel should be prepared to identify what local law (policy manual, charter, etc.) controls and identifies the final policymaker. Further, the governmental entity should assume the burden to offer affirmative evidence of how the written provision or policy is implemented, and how any retained constraint/oversight is put into practice. The official the plaintiff alleges to be the policymaker should be prepared to concede the oversight he or she is subjected to under the provision or policy. In addition, the alleged policymaker should explain the limitations on the discretion, explaining the oversight he or she is subjected to. It is preferable that the challenged policymaker provide the evidence establishing the oversight of the city council or other governing body. Keeping the members of the governing body from providing affidavits or testimony, aids in preserving any
testimonial privileges that the members may have. *See Cunningham v. Chapel Hill, ISD*, 438 F.Supp.2d 718 (E.D. Tex. 2006).

The governmental entity should also evaluate whether any of the complained of actions were outside the scope of delegated authority. *See Bolton v. City of Dallas*, 541 F.3d 545, 549 (5th Cir. 2008); *Hunter v. Town of Mocksville*, 897 F.3d 538, 555 (4th Cir. 2018). The entity should also note that stray remarks by individual officers or employees, even by members of the governing body, do not necessarily bind the entity. *King v. Guerra*, 1 S.W.2d 373, 374 (Tex. Civ. App. 1927).

i. **Proof of Claims Against Governing Bodies.**

Under Texas law, “proof of the governing body’s acts may only be supplied by the authenticated minutes of the meeting at which the action occurred, unless the minutes have been lost or destroyed.” *City of Bonham v. Southwest Sanitation*, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994); *Wood v. City of Flatonia*, No. 03-09-00495-CV, 2010 Tex. App. LEXIS 8470, at *8–9 (App. Oct. 21, 2010). Thus, if the action is not legally reflected in the official minutes of a publicly noticed and lawful meeting, it follows that the entity may argue that it did not act as alleged by pointing to the absence of a minute entry reflecting such alleged action. *See* Fed. R. Evid. 803(7) (hearsay exception for absence of public record as proof or non-existence of public act).

As discussed above, if the governing body’s action is being challenged, counsel should closely evaluate whether an argument can be made that the plaintiff does not allege, or cannot prove, that a majority of the governing body acted wrongfully.

For example, in *Lilly v. Rychlik, et. al.*, No. A:09-CA-766 (W.D. Tex. 2010), the City of Caldwell’s former police chief brought wrongful termination claims against the city and its aldermen. The former chief contended that the defendants terminated him due to his membership in the law enforcement entity “CLEAT.” The City of Caldwell argued that the evidence conclusively established that four of the five voting members had no knowledge that the former chief was a CLEAT member at the time the council voted to terminate him. The plaintiff conceded these facts in his deposition. In support of its argument, the City of Caldwell cited several cases noted above. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-81 (1986); *Church v. City of Huntsville*, 30 F.3d 1332, 1343-44 (11th Cir. 1994); *Holt Cargo Sys., Inc. v. Delaware River Port Auth.*, 20 F. Supp. 2d 803, 841 (E.D. Pa. 1998), aff’d *165 F.3d 242* (3d Cir. 1999); *Tranter v. Crescent Twp.*, 625 F. Supp. 2d 298, 302 (W.D. Pa. 2007); and *Laverdure v. County of Montgomery*, 2002 U.S. Dist. LEXIS 11264, *6 (E.D. Pa. June 13, 2002).

In dismissing *Lilly*, District Judge Sam Sparks dismissed all claims without specifically addressing this argument. However, the argument is worth pursuing from a final policymaker context in a situation wherein discovery establishes that a majority of the governing body either did not know of the protected status or did not act with the requisite culpability.

However, as indicated above, defense counsel should be aware that there are two views on this issue, and at least one Fifth Circuit district court case accepted the less desired approach (at least from defense counsel’s perspective) that a plaintiff need not show improper motive/action by

d. Trial

Should the case proceed to trial, it is important to ensure that the jury is properly instructed, and not unduly influenced, with the distinction of those who are final policymakers from those who are simply employees, officers, and officials with no policymaking authority. In other words, the jury must learn and keep in mind that the governmental entity is not liable on a respondeat superior theory.

i. Motions in Limine and Voir Dire

By the time the case reaches trial, the court should have identified who the final policymaker is. Note that the identification of the final policymaker is a question of law for the court, not the jury. McMillian v. Monroe Cnty., 520 U.S. 781, 785, 117 S. Ct. 1734, 1736 (1997); Bowden v. Jefferson Cnty., 66 F. App’x 251, 253–54 (5th Cir. 2017). Defense counsel should consider filing a motion in limine to prevent the plaintiff from suggesting that the respondeat superior doctrine is applicable to municipal liability. Defense counsel should seek to exclude plaintiff from asking question as to what “the city” or “the county” or “the employer” did or did not do the needed or requested act.

During voir dire, defense counsel should inquire as to whether the potential jurors can separate non-policymaker actions from those of the identified final policymaker. It may be worthwhile to establish that the judge has established who the final policymaker is. If possible, it may be advantageous to have the final policymaker present during voir dire and trial, allowing the focus of the case to be put on the final policymaker’s actions from the outset. Counsel should further inquire whether the potential jurors can accept evidence showing that a policymaker acted outside his or her delegated authority, or can accept that even a high level official’s actions may be subject to further oversight and review, and thus not binding on the governmental entity.
ii. **Jury Charge**

The 2006 version of the Fifth Circuit Pattern Jury Instructions (Section 10.03) provides the following instructions on municipal liability under Section 1983 and policymaker issues:

**10.3 CIVIL RIGHTS—42 USC SECTION 1983 (SUPERIOR OFFICERS AND MUNICIPALITIES)**

In addition to his claims against [police officers/officials of the municipal department] whom the plaintiff claims violated his constitutional rights, the plaintiff is suing superior officials, in this case [chief of police] [municipality]. To recover against a superior official, the plaintiff must show that the [chief of police] [supervisor of municipal department] [mayor of the municipality] had a legal duty to act to prevent the misdeeds of [police officers/officials of municipal department] and the [chief of police] [municipality]’s failure to act amounted to gross negligence or deliberate indifference of plaintiff’s rights.

The plaintiff claims that the City of _______, a municipality, is liable for the alleged constitutional deprivations. A city is liable for the deprivation of a constitutional right if the deprivation was pursuant to governmental custom, policy, ordinance, regulation or decision. Therefore, if you find that the plaintiff was injured as the proximate or legal result of [name of municipality]’s policy, custom, ordinance, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the city itself will be responsible.

The [mayor/city council] is an official whose acts constitute final official policy of the City of _______. Therefore, if you find that the acts of the [mayor/city council] deprived the plaintiff of constitutional rights, the City of _______ is liable for such deprivations.

It is practical to offer additional suggestions to the pattern charge, for often the judge will accept, and plaintiff’s counsel may even agree, to additional instructions and law. For example, if applicable to your case, it is likely beneficial to cite cases indicating that a governing body only acts through a majority of its voting members, that policymakers acting outside delegated authority may not bind the municipality, that even high level officials may be subjected to higher level constraints. These arguments can be helpful at trial and in the charge.
VI. CONCLUSION

There have been suggestions that Monell and the final policymaker requirement is on borrowed time. In Bryan County v. Brown, 520 U.S. 397, 430 (1997) three dissenting justices stated that the policymaker requirement “has generated a body of interpretative law that… has become difficult to apply.” The dissent suggested that the difficulty called for abolishing Monell and its policy, practice or custom requirements, and implementing a respondeat superior theory of recovery against governmental entities under Section 1983.

However, Monell and its progeny are alive and well, and there does not appear to be any present serious threat to its application. The Fifth Circuit speaks clearly that vicarious liability is insufficient and Monell is controlling. “It is well-established that a city is not liable under § 1983 on the theory of respondeat superior. A municipality is almost never liable for an isolated unconstitutional act on the part of an employee; it is liable only for acts directly attributable to it ‘through some official action or imprimatur.’” [citations omitted] Peterson v. City of Fort Worth, 588 F.3d 838, 847 (5th Cir. Tex. 2009), citing Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).

Thus, it is imperative to recognize how courts are treating the final policymaker analysis. Identifying the final policymaker is essential to defending a governmental entity from a Section 1983 claim. In certain circumstances, the final policymaker is clearly defined. For example, as noted above, statute dictates the policymaker for jails and law enforcement actions of a county. Further, city charters, policy manuals, and other local laws may identify who the policymaker is. Nonetheless, even when local law identifies the policymaker, it is important to ensure that the municipality is following the stated delegation, the checks and balances the written rule or practice sets forth. Otherwise, governmental entities may be left with the ramifications of an “unofficial” final policymaker.