# Update to the Pre-Suit Notice Requirement in Public Building Exception Cases: An Internal Incident Report May Now Suffice[1]

Administrative & Municipal Practice Group
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As quickly as the Michigan Supreme Court giveth, the Supreme Court taketh away. In the April 2009 edition of the Township Law News, we discussed the December 2008 Supreme Court decision in *Chambers v Wayne County Airport Authority*[2] that construed the duty to give a municipality notice before one sues the municipality for an injury in a public building. As we explained then, that *Chambers* decision potentially armed municipalities with defenses to get out of a suit very early if sued over an injury to a public building. This articles updates that issue – and explains that the Supreme Court has now taken a 180 degree turn on the meaning of that pre-suit notice requirement.

The pre-suit notice requirement relevantly has three requirements:

1. The injured person must, within 120 days from the time the injury occurred, serve a notice on the responsible agency of the occurrence of the injury and the defect.
2. The notice must specify the exact location and nature of the defect leading to the injury, the injury sustained, and the names of the witnesses known at the time by the injured person.
3. The notice may be served upon any individual, either personally or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible agency.

The Supreme Court's December 2008 decision in *Chambers* determined that an internal incident report that a municipality's employee prepares – without more – does not satisfy the plaintiff's duty to give notice of its upcoming lawsuit. The Court there determined that a plaintiff who verbally relays information does not meet the requirement to "serve" notice on the municipality of the injury and the defect.

The Supreme Court has now completely changed courses. After a change in the Supreme Court's composition, the Court reconsidered its decision in *Chambers* and just recently determined that an internal incident report may very well satisfy the pre-suit notice requirement. In a 3-sentence Order in *Chambers (On Reconsideration)*,[3] the Court reinstated a Court of Appeals ruling that held that a plaintiff can satisfy the pre-suit notice requirement merely by verbally relaying information to a municipality's employee about an incident regarding a public building.

Where does this now leave municipalities sued over an injury in a public building? Here are some thoughts:

- In light of the new ruling in *Chambers (On Reconsideration)*, municipalities should consider taking extra notice of every internal incident report its employees prepare. Although this may be a challenge given municipalities' ever-limited resources, they would do well to regard all internal incident reports as a potential lawsuit, given that they may not receive any other notice before the suit is filed.

- Municipalities still have certain avenues to challenge a pre-suit notice requirement. For example, *Chambers (On Reconsideration)* did not – nor could it – eliminate the statutory requirement that an injured person's pre-suit notice must "specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." *Chambers (On Reconsideration)* did not suggest that requirement will not be enforced as written.
- It is unclear what weight, if any, a court will give to municipalities who show that an injured person's purported pre-suit notice requirement gave insufficient detail to put them on notice, thereby prejudicing them. Depending on the facts of your case, this may be an avenue worth pursuing – particularly given that the reward if successful is that the municipality gets out of a lawsuit quickly and efficiently to minimize an its costs and preserve resources.

Municipalities now face tough decisions whenever an incident occurs. The principal purposes of the pre-suit notice requirement include providing the municipality with an opportunity to investigate the claim while the evidentiary trail is still fresh. A municipality may now have to investigate numerous other incidents to determine if the incident will lead to a lawsuit. A municipality may therefore have to decide whether to assume every internal incident report is notice of a potential suit and therefore investigate the incident immediately, or choose not to investigate at the time of a report thereby running the risk of being surprised with a suit later and with no evidence from post-incident investigation.

If you have questions about the public building exception of a municipality's immunity, the Foster Swift team is happy to help.

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[1]This article is based on an article that appears in the Summer 2009 edition of the Michigan Public Law Quarterly Newsletter, and is being reprinted here in a much-condensed version with permission from the Public Law Quarterly.
[2]MSC Docket No. 136900, dec'd 12/19/08.
[3]MSC Docket No. 136900, dec'd 6/12/09.