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Clarence E. Anthony

March 30, 2020

Dear Secretary Mnuchin,

On behalf of the National League of Cities (NLC) and the 19,000 cities, towns, and villages we represent, we write this letter to seek urgent clarification regarding the CARES Act (H.R. 748), which Congress passed last week.

The provisions of Section 601 of the CARES Act, the Coronavirus Relief Fund, provides for the distribution to funds to states and political subdivisions of states.

One provision on which we want interpretive advice on is Section 601(d), which provides:

*“A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—
(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);*

It is possible that local governments with a population under 500,000 may not receive distributions under Section 601, and even if the local government does receive distributions, they may not be sufficient.

Since the Coronavirus knows no boundaries and since a hotspot imposes dangers and costs not just to the area of the local government but also to the State, the public health emergency is not just the individual local government’s, but it is the State’s. Any distinction between a local Coronavirus public health emergency and a state’s Coronavirus public health emergency is entirely artificial. Accordingly, the language “only those costs of the State” should be interpreted to allow local costs to be funded by the State.

A second issue we want interpretive advice on is Section 601(g)(2) of the CARES Act.

An interpretative issue has risen with respect to Section 601(g)(2) of the CARES Act, the issue involving the definition of “local government.” The definition is as follows:

“LOCAL GOVERNMENT.—The term ‘unit of local government’ means a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level with a population that exceeds 500,000.”

The particular issue is whether the prepositional phrase “with a population that exceeds 500,000” modifies all the political subdivisions listed (a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level) or modifies only the political subdivision immediately preceding it, “other unit of general government below the State level”. The issue is important because it determines which political subdivisions are entitled to receive direct funding under the Coronavirus Relief Fund in Section 601. If the language “with a population that exceeds 500,000” is applied to all of the listed entities, then:

- (i) No town, township, or village will directly receive distribution from the Coronavirus Relief Fund for the simple reason that, according to the Census Bureau, there are no towns, townships, or villages with a population in excess of 500,000.
- (ii) No city (which are municipalities) with a population of under 500,000 will receive a direct distribution from the Coronavirus Relief Fund and only the 36 cities that have populations above 500,000 will receive such distributions directly from Treasury.
- (iii) Cities under 500,000 that are coronavirus hotspots (New Rochelle, New York (80,000 population) and Kirkland, Washington (88,000 population)) that have been extremely disrupted and stressed and in obvious need of relief will get none unless it comes from the States.
- (iv) The New Jersey smaller cities and towns a mile across the Hudson River from Manhattan that have dangerous levels of infections as a result of the spread of coronavirus out of Manhattan will get no relief funds directly from the Treasury while New York City will.

Could Congress actually have intended any of these results? The answer is no.

In any case, we are able to firmly establish that the proper reading of the term local government is that the phrase “with a population that exceeds 500,000” applies only to the last political subdivision in the list, not to all of the political subdivisions in the list.

Supreme Court Authority

The authority for this conclusion is a 2016 U.S. Supreme Court case, *Lockhart v. United States*. Quoting from the majority’s opinion:

“The question before us is whether the phrase “involving a minor or ward” modifies all items in the list of predicate crimes (“aggravated sexual abuse,” “sexual abuse,” and “abusive sexual conduct”) or only the one item that immediately precedes it (“abusive sexual conduct”).

The Court affirmed that the Second Circuit’s holding that the phrase “involving a minor or ward” in §2252(b)(2) modifies only “abusive sexual conduct.”

Citing from the majority’s opinion,

“When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the “rule of the last antecedent.” See *Barnhart v. Thomas*, 540 U. S. 20, 26 (2003). The rule provides that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Ibid.*,” “The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it. That is particularly true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all.”

The Court said that it is possible to overcome the default rule—the rule of the last antecedent—if the internal logic of the statutory provision or the context of the statutory provision indicate that rule of the last antecedent should not apply. It is clear here that neither the internal logic nor the context suggests that the rule of the last antecedent should not apply.

The Lockhart Case.

In the Lockhart case, the question before the Court involved the following Federal criminal statute.

“Whoever violates. . . [18 U. S. C. §2252(a)(4)] shall be . . . imprisoned not more than 10 years . . . but . . . if such person has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, . . . such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.”

The issue involved the words “prior conviction. . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor.” The defendant had a prior conviction for sexual abuse involving an adult. He argued that the words “involving a minor” applied to all three terms preceding it; that is, it applied to each of the terms “aggravated sexual abuse, sexual abuse, and sexual conduct.” If the defendant Lockhart was correct, he could be imprisoned for no more than 10 years. If Lockhart was incorrect, he could be imprisoned for 10 to 20 years.

Note that the question the court was asked to decide was essentially the same as the issue involved here: does qualifying language apply to all of the items in the list preceding it or only to the last item. The Court held that the words “involving a minor” applied only to the last item in the list. As a result, his prior conviction of sexual abuse with an adult was sufficient to send Lockhart to prison for more than 10 years.

Overcoming the Rule of the Last Antecedent

In its opinion in the Lockhart case, the Court went on to note that while the rule of last antecedent is the default rule, it is not absolute and can be overcome by contrary evidence, based on the internal logic of the provision or the overall statutory scheme. The court said:

“Of course, as with any canon of statutory interpretation, the rule of the last antecedent is not an absolute and can assuredly be overcome by other indicia of meaning.”...“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

The Court said in deciding whether the rule of the last antecedent can be overridden “our inquiry into...context begins with the internal logic of that provision.”

An examination of the internal logic of the definition of local government clearly indicates that the rule of the last antecedent should be applied. If it were not, certain terms in the definition of local government would be rendered meaningless and a canon of statutory construction is that all of the words should be given meaning. The definition of local government includes towns, townships, and villages. But those terms would be rendered meaningless if the phrase “with a population exceeding 500,000” were deemed to modify those terms because according to the Census Bureau, there are no towns, townships or villages with a population exceeding 500,000. However, the terms “towns, townships and villages” will have meaning if they are not modified by the phrase “with a population in excess of 500,000.”

A third issue we want interpretive advice on is Section 601(c)(6).

The law says: *DATA.—For purposes of this subsection, the population of States and units of local governments shall be determined based on the most recent year for which data are available from the Bureau of the Census.*

We seek clarification whether the Secretary shall use data from 2018 or 2019.

We are ready to assist your efforts in any capacity, but especially as a means for establishing communications and coordination between federal authorities and local leaders. If NLC can be of further help to you in this crisis, please contact Irma Esparza Diggs, NLC Senior Executive and Director of Federal Advocacy, at 202-626-3176 or diggs@nlc.org.

Sincerely,



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Executive Director and CEO
National League of Cities