TASC Training & Advocacy Support Center

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Fact Sheet

Horne v. Flores: Implications for System Reform Litigation

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The Supreme Court's June 2009 decision in *Horne v. Flores*, 557 U.S. ___ (2009), 129 S. Ct. 2579 (2009), has potentially far-reaching implications for Protection and Advocacy programs with long-standing system reform cases involving either court orders or consent decrees.

Sections I and II of this Fact Sheet will address the holding of *Horne*, the previous Supreme Court precedent upon which the *Horne* decision was based, and the implications for Protection and Advocacy programs with pending or future litigation. Section III will address the strategic considerations that programs should make before entering into settlements and/or consent decrees and how a program should respond to a motion for relief pursuant to Federal Rules of Civil Procedure 60(b)(5).

I. The Opinion and Dissent. [1]

The *Horne* case involved a class action filed by a group of English Language-Learner (ELL) students and their parents. The plaintiff class alleged that Arizona, its State Board of Education, and the Superintendent of Public Instruction (defendants) were providing inadequate ELL instruction in the Nogales Unified School District (Nogales), in violation of the Equal Educational Opportunities Act of 1974 (EEOA), which requires States to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f).

In 2000, the federal district court found that Nogales was in violation of the EEOA because the amount of funding allocated for the special needs of ELL students (incremental funding) was arbitrary and not related to the actual cost of the

[1] We have summarized the facts and procedural history of *Horne* for this fact sheet. To see a full discussion of the facts and the history, *see*, *Horne*, 129 S.Ct. at 2588-2592.

program and entered a declaratory judgment with respect to Nogales. The district court extended the relief statewide in 2002. In the following years, the district court entered a series of other orders and injunctions, including a contempt order, none of which the defendants appealed. In 2006, the state legislature voted to increase incremental funding for ELL students, which required district court approval. This bill was opposed by the Governor and the State Board of Education. In light of this bill, the Speaker of the State House of Representatives and the President of the State Senate intervened, and with the superintendent, moved to purge the district court's contempt order, or, alternatively, to vacate the judgment pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. The district court denied the motion to purge the contempt order and did not consider the Rule 60(b)(5) claim. The Court of Appeals for the Ninth Circuit vacated and remanded for an evidentiary hearing on whether changed circumstances warranted vacating the judgment under Rule 60(b)(5). On remand, the district court denied the Rule 60(b)(5) motion based on the finding that the legislation did not create an adequate funding system. The Court of Appeals affirmed because it concluded that Nogales had not made sufficient progress in its ELL programming to warrant relief. The state's House Speaker, Senate President, and Superintendant appealed the Ninth Circuit's opinion to the U.S. Supreme Court.

In a 5-4 decision, the Supreme Court held that the lower courts did not engage in the proper analysis under Rule 60(b)(5). *Horne*, 129 S.Ct. at 2595). In its decision, which was written by Justice Alito, the Supreme Court cited to a string of cases that establish the test courts must apply when a party seeks relief from a judgment or order under Rule 60(b)(5), including *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), *Frew v. Hawkins*, 540 U.S. 431 (2004) and *Milliken v. Bradley*, 433 U.S. 267 (1977), and did not overrule this past precedent. *Horne*, 129 S.Ct at 2593-2595. After applying the standards established in these cases, the Supreme Court found that, as applied by the lower courts, the standard was too strict and the inquiry was too narrow. *Id*. at 2595-96. Specifically, the Supreme Court held that the lower courts focused solely on the amount of available incremental funding to the exclusion of other changed circumstances, both legal and administrative, that may have warranted relief from the judgment. *Id*. at 2596-2600. Ultimately, the Court reversed the judgment of the Court of Appeals and remanded the case to determine whether, in accordance with the standards set forth in its decision, petitioners should be granted relief. *Id*. at 2607

The dissent, written by Justice Breyer and joined by Justices Stevens, Souter and Ginsberg, questioned the Court's analysis and argued that the majority was able to reach its conclusion because it designated the case as "institutional reform litigation." *Id*. at 2608. Specifically, Justice Breyer contended that the majority set forth "special 'institutional reform litigation' standards applicable when courts are asked to modify judgments and decrees entered in such cases." *Id.* Additionally, the dissent criticized the majority for considering significant issues and factors that were not raised by the parties, either before the Supreme

Court or during earlier proceedings, *id.* at 2617, and for failing to require that the party seeking relief from judgment bear "the burden of establishing that a significant change in circumstances warrants' that relief," *id.* at 2618.

Although the Supreme Court did not overrule past precedent governing Rule 60(b)(5) motions to modify or vacate long-standing judgments or decrees, this decision should be watched closely for possible ramifications in cases that can be characterized fairly as "institutional reform cases," as is the case with so many class actions brought by Protection and Advocacy programs. There is particular cause for attention because a broad interpretation of the decision may provide additional grounds upon which state defendants may advance Rule 60(b)(5) motions. Since the Supreme Court released its decision in *Horne* in June 2009, it already has been cited by circuit and district courts in more than thirty decisions, some of which will be discussed in this Fact Sheet.[2]

II. The Implications of the Supreme Court's Decision in *Horne v. Flores*.

A. *Horne* Applied Rule 60(b)(5) Authority to a Remarkably Unusual Set of Facts.

Before considering the substantive holdings in *Horne*, it is important to note that the case involved an extraordinarily unusual confluence of factors — a kind of perfect storm for Rule 60(b)(5) purposes. Actions taken by the district court to enforce its judgment (not a consent decree) raised "sensitive federalism concerns," 129 S. Ct. at 2593, concerns that were "heightened when [the federal judgment had] the effect of dictating," *id.* at 2593-2594, a state's budget priorities. Finally, the Court expressed serious concerns about evidence of collusion between nominal adversaries.

In 2001 the district court concluded, following a trial, that the defendants were in violation of a federal statute, a judgment the defendants elected not to appeal. The district court took a number of unusual steps, including applying the declaratory judgment order statewide,[3] granting broad injunctive relief,

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[2] In addition to its analysis related to Rule 60(b)(5) and modifying or vacating decrees or orders, Courts have cited *Horne* for a number of different propositions. These include cases that discuss the Equal Education Opportunity Act (EEOA), standing, intervention and consent decrees between private parties. Please see Attachment A for a summary of these cases.

[3] In a recent case, *Californians for Disability Rights, Inc. v. California Dept. of Transp.*, 2009 WL 2982845 (N.D.Cal. 2009), the district court discussed the *Horne* decision with respect to the permissible scope of a potential judgment or decree. In that case, a class of persons with mobility and vision impairments filed a class action alleging that they were denied access to sidewalks, cross-walks, pedestrian underpasses and other public rights of way in violation of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. *Id.* at 1. The defendants filed a motion challenging the plaintiffs' right to seek relief that would require the defendants to conduct a survey of all of its facilities to determine whether they are ADA-compliant. *Id.* In this motion, the defendants cited *Horne* for the proposition that plaintiffs

commanding the legislature to fund particular state programs within 15 days, and then imposing fines ranging from $500,000 to $2 million per day when the legislature failed to heed the order. Not only did the defendants not appeal the original findings, the trial court did not encounter any kind of opposition from the defendants along the way; to the contrary, "the record suggests that some state officials supported [the orders'] continued enforcement," 129 S. Ct. at 2590, and the state attorney general even "acquiesced in the state-wide extension of the declaratory judgment order." *Id.* The next attorney general went so far as to oppose the defendant Superintendent's request for a stay of the order imposing fines, and began assembling a distribution plan for the fines. Before the state legislature finally passed its statute, it had accrued more than $20 million in fines. *Id.*

Also unusual, the principal defendants, the State Board of Education and the State of Arizona, including the Governor, sided with the plaintiffs, provoking the Speaker of the House and the President of the Senate to intervene as representatives of the legislature. It was the legislators and the Superintendent who then moved to purge the district court's contempt order in light of the statute, moving in the alternative for relief under Rule 60(b)(5) based on changed circumstances.

The actions of the district court reflected the potential dangers of equitable judgments. While recognizing that "federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief," *id.* at 2594, the Supreme Court emphasized that a flexible approach is necessary to Rule 60(b)(5) inquiries in light of sensitive federalism concerns and the dynamics of institutional reform litigation, particularly when there is evidence of collusion between the defendants and the plaintiffs.

B. The *Horne* Rules Have Been Considered and Applied in Other Cases Including Cases on Behalf of Individuals With Disabilities.

Several recent cases have involved a consent decree or judgment that binds a governmental actor, and courts have cited *Horne* for the proposition that a court must apply a flexible approach in order to address concerns of federalism that are often implicated in such situations. For example, in *Basel v. Bielaczyz*, 2009 WL 2843906 (E.D.Mich. 2009), the district court reviewed a thirty-year-old consent judgment that required state defendants to provide a plaintiff class with final actions on requests for hearings related to their applications for federal public benefits that were administered by the state. The court noted that it must consider whether there was an ongoing violation of federal law that warranted the

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cannot seek statewide relief, such as a statewide survey of all of the defendants' facilities, when they have only demonstrated a number of specific incidents of discrimination. *Id.* The court rejected this argument and distinguished *Horne* because it found that the plaintiffs had not limited their allegations to specific facilities, but rather that the identified sites were presented for the purpose of illustrating the plaintiffs' substantive claims with respect to all of the defendant's facilities. *Id.* at 2.

continued enforcement of the consent judgment in light of several legal changes that had occurred since the judgment's entry. *Id.* at *8. In addition to the uncertainty regarding the viability of the federal claims, the court concluded that the state had complied with the consent judgment and that the purpose of the consent judgment had been achieved, all of which indicated that the "'responsibility for discharging the State's obligations' was long ago ripe to be returned to the State." *Id.* at *7.

Similarly, in *U.S. v. Board of Education of Chicago*, 663 F.Supp.2d 649 (N.D.Ill. 2009), the district court considered a motion to terminate a modified consent decree that resulted from an action filed by the United States in 1980. The original action alleged that school board operated a dual school system that segregated students on the basis of race and ethnic origin in violation of Equal Protection Clause and Titles IV and VI of Civil Rights Act. The U.S. opposed terminating the consent decree and alleged that there were deficiencies in the structure and implementation of the English Language Learning (ELL) program. *Id.* at 655. The Board argued that the court did not have federal jurisdiction upon which to continue the decree because the ELL provisions, which were included in the second amended consent decree, did not have constitutional or statutory protection. *Id.* at 656. The court considered the language of *Horne* and concluded that "levels of funding and allocation of resources are not within the province of federal courts to decide or within the powers of federal judges to decree." *Id.* at 661. Consequently, it vacated the consent decree. *Id.* at 662.

Most recently in *Consumer Advisory Board v. Brenda Harvey*, Case2:91-cv-003210-GZS, Doc 398 (3/19/2010), a thirty-year old Maine case involving a class of individuals with intellectual disabilities previously confined at the Pineland Center, the Court granted the defendants' motion for relief from judgment. The court conducted a two part analysis: (1) whether defendants met the 1994 Consent Decree standard for termination and (2) whether defendants have met the *Horne* standard for relief from judgment. *Id*. at 7. The Court found that the defendants satisfied their Consent Decree obligations, with two minor exceptions, *id*., and that applying *Horne*, "leads to the conclusion that Defendants are entitled to have the Decree terminated as applying it prospectively is no longer equitable." *Id*. at 10. The Court rejected the plaintiffs' claim that the consent decree was intended to bind the state in perpetuity, since there was no provision to that effect in the consent decree. *Id*. In reaching this finding, the Court emphasized that "…*Horne* explicitly advises federal courts that perpetual oversight of state government programs is improper absent a record of ongoing violations of federal law." *Id*.

Two other district courts also cited *Horne* in their analysis of concerns related to depriving governmental officials of their executive and legislative powers, although not in the context of a Rule 60(b)(5) motion. In *E.T. v. George*, 2010 WL 121018 (E.D.Cal. 2010), the district court dismissed the plaintiffs' claims that caseloads in the dependency courts in Sacramento County were so excessive

that they violated federal and state constitutional and statutory provisions. In the decision, the court cited *Horne* for the proposition that federalism concerns are heightened when a federal court decree would have an impact on state and local budgets, and ultimately concluded that it would be inappropriate for the court to "adjudicate state budgetary and policy matters." *Id.* at *7 and *12.

In *U.S. v. Tennessee*, 2009 WL 3614614 (W.D.Tenn. 2009), the district court reviewed the state's request to terminate a contract with a non-profit agency. Tennessee had been ordered to enter into the contract by the court after the state was found to be in contempt of a previous court order requiring Tennessee to use state funding to provide certain health services to class members. Although the court ultimately considered the state's proposal in light of standards established in previous court orders, rather than analyze it pursuant to Rule 60(b)(5), the court discussed the flexible approach described in *Horne* because it found that there were important federalism concerns related to the state responsibilities at issue. The court also noted that consent decrees in institutional reform cases "are particularly amenable to 'revisions under Rule 60(b)(5) because circumstances are likely to change in ways that make the continued application of the consent decree unworkable.'" *Id.* at 8 (citing *Horne* at 2593-94). In its analysis, the court considered a budgetary crisis that forced the state to reduce expenditures and the potential to access federal money through a different program that would allow the state to serve class members more effectively. In addition to finding that the state's proposed alteration was appropriate, the court also found that it was suitably tailored to achieving the objective of the original order. *Id.* at 8.

C. *Horne* Did Not Announce a New Rule for Determining When to Modify Judgments or Decrees Under Rule 60(b)(5).

When faced with *Horne* motions, P&As defending consent judgments should emphasize that *Horne* did not announce a new rule for modifying judgments under Rule 60(b)(5), despite the sometimes sweeping language of the opinion. To the contrary, the Court reaffirmed by application the cases that had previously set forth the standards and procedures for a Rule 60(b)(5) inquiry. It cited with approval and extensively relied upon *Milliken* and *Rufo* to reach its result. Because the Court approved, rather than limited or overruled, these controlling authorities, the standards governing Rule 60(b)(5) inquiries remain the same as they did before the issuance of *Horne*. This section will describe the standards that a court must apply to determine whether a party is entitled to relief from a judgment or decree pursuant to Rule 60(b)(5), which were not altered by the *Horne* decision. Therefore, to understand *Horne,* it is necessary to understand the cases on which the Court relied, particularly *Milliken* and *Rufo.*

Rule 60(b)(5) authorizes modification of an institutional injunction when the party seeking modification demonstrates "a significant change either in factual conditions or the law." *Rufo*, 502 U.S. at 384; *see Agostini v. Felton*, 521

U.S. 203, 215 (1997). Modification may be warranted when changed factual conditions "make compliance . . . substantially more onerous" or "prove[] [the decree] to be unworkable"; compliance would be "detrimental to the public interest," or the court's remedial order has "become impermissible under federal law." *Rufo*, 502 U.S. at 384, 388.

In assessing requests for modification of an institutional injunction, courts should utilize a "flexible approach." *Rufo* at 381; *see also Frew v. Hawkins,* 540 U.S.at 441. *Horne* re-emphasizes the need for flexibility in enforcing judgments in institutional reform litigation and explains the factors justifying such flexibility in specific cases. But it does not suggest that modification is appropriate simply because some conditions may have changed, and certainly not when a court finds that violations of federal law and core provisions of its remedial orders continue. As the Court noted in *Rufo,* "it does not follow that a modification will be warranted in all circumstances." 502 U.S. at 383; *see also Frew*, 540 U.S. at 441. For example, in *Basel v. Bielaczyz*, because the purpose of the consent judgment had been satisfied by the defendant's compliance, the court relied on *Horne* for its conclusion that the consent judgment should be vacated, and that the responsibility for timely processing hearing requests should be returned to the state.[4] 2009 WL 2843906 at *8.

The Rule 60(b)(5) determination is entrusted to the sound discretion of the district court. *Agostini*, 521 U.S. at 238. As Justice O'Connor observed in her concurrence in *Rufo*, "[d]etermining what is 'equitable' is necessarily a task that entails substantial equitable discretion, particularly in a case like this one, where the District Court must make complex decisions about a host of factors," concluding that deference to the district court's exercise of discretion is heightened where the district court is intimately familiar with the factual dimension of an extraordinarily fact-bound inquiry. 502 U.S. at 393-94. "[A]n appellate court should examine primarily the *method* in which the District Court exercises its discretion, not the substantive outcome the District Court reaches. If the District Court takes into account the relevant considerations (all of which

[4] Likewise, the *Horne* decision has been cited for the delineation of circumstances that would warrant modifying or vacating a consent decree. In *Salazar v. District of Columbia*, 2010 WL 547834, 3-6 (D.D.C. 2010), the district court considered a motion by the defendant to vacate an order granting injunctive relief to enforce a settlement order concerning dental services in a class action filed on behalf of Medicaid recipients. The court cited *Horne* for the proposition that the Supreme Court had reaffirmed *Rufo* and its "standards for modifying a final judgment under Rule 60(b)(5) in institutional reform cases." *Id.* at 3. In its analysis of the circumstances that would warrant modifying a consent decree, the court discussed the "the three conditions under which modification of a consent decree under Rule 60(b)(5) may be appropriate: (1) 'when changed factual conditions [or law] make compliance with the decree substantially more onerous,' (2) 'when a decree proves to be unworkable because of unforeseen obstacles,' or (3) 'when enforcement of the decree without modification would be detrimental to the public interest.'" *Id.* at 4 (citing *Rufo* at 384). The court found that the District could not establish any of these conditions, nor could it demonstrate that the proposed modification was suitably tailored to the changed circumstance. *Id.* at 4-5.

are not likely to suggest the same result) and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of discretion, regardless of whether an appellate court would have reached the same outcome in the first instance." (emphasis in original). *Id.* at 394. The exercise of a court's "flexible equity powers" in what is a necessarily fact-bound inquiry, is to be afforded substantial deference. *Id.*

As the Court reiterated in *Horne*, it is the party seeking modification who bears the burden of establishing that modification is warranted in light of particular changes of fact or law. 129 S.Ct. at 2593 (*citing Rufo*, 502 U.S. at 384). For example, when a party seeks partial withdrawal of supervision, one factor which must inform the "sound discretion of the court" is "whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," and "a court should give particular attention to [the defendant's] record of compliance." *Freeman v. Pitts,* 503 U.S. 467, 491 (1992). In *Berne Corp. v. Government of the Virgin Islands*, 2010 WL 597166, *6 (D.Virgin Islands 2010), the government of the Virgin Islands sought to vacate or modify a decree and order entered by the district court in 2003 that enjoined the collection of real property taxes at rates above the rates resulting from 1998 assessments. When applying Rule 60(b)(5), the court cited to *Horne* that an important inquiry is "whether the objective of the ....[underlying] order ... has been achieved ." *Id.* at *6 (quoting *Horne*, 129 S.Ct. at 2595). The court found that the government was still failing to comply with the order and to afford tax payers constitutional due process, and therefore declined to vacate the decree, although it did modify parts relating to laws that had been repealed. *Id.* at *10-11.

Additionally, even if a party proves entitlement to a modification, it bears the additional responsibility of proving that the modification it seeks is congruent with the change in fact or law that it has established. *See, e.g.*, *Rufo*, 502 U.S. at 391 ("Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district should determine whether the proposed modification is suitably tailored to the changed circumstance.").

Moreover, since complete dissolution of an injunction ordinarily is warranted only when the moving party has "operated in compliance with it for a reasonable period of time," *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991), the party seeking complete dissolution effectively bears a higher burden. As *Dowell* made clear, the movant's burden is not merely to prove that constitutional violations have been cured, but also that they will not recur. *Id*. at 247 (noting that in order to demonstrate that the purposes of litigation have been achieved there must be a finding by the district court that the movants were in compliance with constitutional requirements "*and* that it was unlikely that [they] would return to [their] former ways.") (emphasis added).

For example, in *U.S. v. Washington*, 573 F.3d 701, 709-11 (9th Cir. 2009), the

Ninth Circuit affirmed the dismissal of a request by one Native American tribe for an equitable apportionment of a shared fishery. The case was related to an action filed in 1970 by the United States against the state to enforce a treaty created in the 1850s, which resulted in a decision adjudicating the rights of various tribes. The circuit court cited *Horne* for the proposition that it is improper to enforce an order "[i]f a durable remedy has been implemented," and held that the dismissal was appropriate in light of the fact that there were no allegations that the state continued to violate the Indian tribes' rights under the treaty. *Id.* at 710.

While *Horne* emphasized the flexibility district courts should exercise in conducting the "changed-circumstances inquiry prescribed by [*Rufo*]," 129 S. Ct. at 2596 n.5, full compliance with the law must nevertheless be demonstrated before courts can or should relinquish their oversight. Thus, to be entitled to this dramatic result, a defendant must bear the heavy burden of demonstrating that it has fully cured all violations of federal law, that it has eliminated all of the conditions that flow from such violations, and that it has established a durable remedy for a reasonable period of time that will prevent the recurrence of such violations and conditions. Plaintiffs' attorneys should scrutinize such claims carefully given the high standard a defendant must meet.

D. *Horne* Did Not Modify the Fundamental Principle That Parties to Consent Decrees Must Fulfill Their Obligations in Those Decrees.

There is a well-settled difference between a consent decree and a court-adjudicated judgment. As the Supreme Court made clear in *Firefighters v. City of Cleveland*, 478 U.S. 501, 517 (1986), "it is the agreement of the parties, rather than the force of law upon which the complaint was originally based, that creates obligations embodied in a consent decree." The Court reasoned that while "a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction" and "come within the general scope of the case made by the pleadings," a federal court "is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial." *Id.* at 525-26.

The Court's holding in *Firefighters* turned on the unique properties of consent decrees in our adversarial system of justice. *See id.* at 522 ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.") (internal quotation omitted).

The Court strongly reaffirmed this principle in *Rufo*. 502 U.S. at 389. Consistent with its recognition of the importance of respecting a carefully struck bargain, the Court observed that "to hold that a clarification in the law automatically opens the door to relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Id*. Therefore, before a consent order will be disturbed, the party seeking modification or dissolution must show far more than simply that "it is no longer convenient to live with the terms of the decree." *Id.* at 383.

The reasoning of *Firefighters* was embraced again more recently in *Frew*, 540 U.S. at 439. The petitioners in *Frew* alleged that a Texas Medicaid program did not satisfy the requirements of federal law.[5] Following extensive settlement negotiations, petitioners and the state officials agreed to resolve the suit by entering into a consent decree, which was a "detailed document about 80 pages long that order[ed] a comprehensive plan for implementing the federal statute…" *Id.* at 435. When defendants challenged enforcement of the consent decree because it exceeded federal law requirements, the Supreme Court held that a consent decree "is a federal-court order that springs from a federal dispute and furthers the objectives of federal law." *Id*. at 438 (citing *Firefighters*, 478 U.S. at 525). It confirmed that federal courts can compel States to comply with the purpose and provisions of a consent decree, rather than simply the federal floor on which it is based.

In *Frew*, the Court recognized the argument that the Texas decree did "implement the Medicaid statute in a highly detailed way," but, echoing *Rufo,* explained that the same could be said of "*any* effort to implement [federal law] in a particular way." *Frew,* 540 U.S. at 439 (emphasis added). The Court concluded that the decree simply reflected a choice among various ways that a State could implement the Medicaid statute and, as a result, "enforcing the decree vindicates an agreement that the state officials reached to comply with federal law." *Id.*; *see also id.* at 432 (noting that consent decrees have elements of both contracts and judicial decrees).

Horne involved a litigated judgment and not a consent decree. Nevertheless, it reaffirmed two of the leading consent decrees cases – *Rufo* and *Frew* – and left undisturbed the special role of consent decrees set forth in *Firefighters.* Consent still matters.

For example, in *Johnson v. Sheldon*, 2009 WL 3231226 (M.D.Fla. 2009), the

[5] As mothers of children eligible for an Early and Periodic Screening, Diagnosis, and Treatment program, they asserted that the Texas program did not ensure that eligible children would receive health, dental, vision, and hearing screens; failed to meet annual participation goals; gave eligible recipients inadequate notice of available services; lacked proper case management and corrective services; and did not provide uniform services throughout Texas.

defendant made a motion to the district court to be released from a consent decree based upon substantial compliance with community compliance exit criteria for patients who had been discharged from a hospital to a community treatment setting. The defendant argued that the district court should apply the "flexible approach" described in *Horne* and terminate the consent decree because the defendant had substantially complied with the community compliance exit criteria. *Id.* at *6. The district court discussed the standard for modifying or vacating a judgment or order under Rule 60(b)(5) that was articulated in *Horne*, as well as the importance of using a flexible approach in institutional reform litigation. *Id.* Although the district court recognized that the defendant had made significant improvements in the community mental health system, it ultimately held that the defendant had not satisfied the terms of the consent decree. *Id.* at *7. Additionally, the court found that "the application of the flexible approach delineated in *Horne* does not change the Court's conclusion that the objective of the Consent Decree has not yet been achieved." *Id*. Consequently, the court refused to terminate the consent decree.

E. When Orders or Decrees Prescribe Actions Necessary to Comply with Federal Law or to Address Conditions That Flow From Federal Law Violations, *Horne* and *Milliken* Require Compliance With the Provisions of These Orders.

"[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or…flow from such a violation." *Horne*, 129 S. Ct. at 2595 (quoting *Milliken,* 433 U.S. at 282). The petitioners in *Milliken* argued that since the constitutional violation found by the district court was the unlawful segregation of students by race, the court's decree must be limited to remedying "unlawful pupil assignments" and could not encompass remedial education. 433 U.S. at 281. The Supreme Court concluded that "[t]his contention misconceives the principle petitioners invoke," *id.*, and rejected it.

The Court in *Milliken* went on to explain its reasoning:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the unconstitutional violation itself. Because of this inherent limitation on federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . . But where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the "condition that offends the Constitution."

Id. at 281-82. Although the Court found that the condition offending the

Constitution was Detroit's *de jure* segregated school system, it upheld the district court's finding that "the need for the educational components flowed directly from constitutional violations by both state and local officials." *Id.* at 282. Specifically, the Court held that "assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences can linger and can be dealt with only by independent measures." *Id.* at 287

While the Supreme Court observed that normally special education remedies are left to the discretion of the elected school board members and professional educators, it recognized that the district court, in its discretion, properly had deemed these compensatory measures necessary "to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education" absent the constitutional violation. *Id.* Similarly, the Court upheld decrees in *Rufo* and *Frew* that included a number of specific requirements, all of which reflected a choice—made jointly by the parties—as to how to redress these conditions and secure the federal rights of class members.

As the Court noted in *Rufo*, "almost any affirmative decree beyond a directive to obey the Constitution necessarily [undertakes more than the Constitution requires.]"). 502 U.S. at 389. Limiting decrees to the minimal constitutional standard would result in precisely what the Court concluded could not occur, namely "rewrit[ing] a consent decree so that it conform[ed] to the constitutional floor." *Id*. at 391.

III. Important Considerations for Protection and Advocacy Agencies to Enforce Consent Decrees and Judgments – A Hypothetical

Even the most expansive interpretation of *Horne* does not require dismissal of a case where the court has found ongoing and current violations of its orders and federal law and where there is no durable remedy in sight to cure those violations. The majority opinion in *Horne* points out: "It goes without saying that federal courts must vigilantly enforce federal law and not hesitate in awarding necessary relief." 129 S. Ct. at 2594. It is precisely this vigilant enforcement of federal and constitutional law, and of the Court's orders that are designed to remedy the violations of these laws, that plaintiffs should invoke to defeat motions to vacate and dismiss, brought pursuant to *Horne*.

Consider the following hypothetical: a Protection and Advocacy agency is monitoring the implementation of a consent decree that was entered ten years ago that requires community placements for residents of a state institution. Since entry of the decree, there has been a substantial change in the service delivery system. Additionally, the state defendants have a record of uneven compliance with the terms of the consent decree. Although they have not satisfied the terms of the consent decree, the defendants have filed a motion to vacate the consent decree pursuant to Rule 60(b)(5) and cite *Horne* in support of their argument that changed circumstances warrant relief from the consent decree. What should the Protection and Advocacy agency do in response?

A. Advocates Should Establish Ongoing Violations of Constitutional and Federal Law and the Court's Orders.

The Supreme Court in *Horne* determined that the Court of Appeals "needed to ascertain whether ongoing enforcement of the original order was supported by an ongoing violation of federal law." *Id.* at 2595 (citing *Milliken,* 433 U.S. at 282). To the extent that Protection and Advocacy Programs anticipate that defendants are likely to file Rule 60(b)(5) motions, they would do well to consider filing preemptive motions for non-compliance, assuming, of course, that there is strong evidence to support such a motion. Where there are ongoing violations of federal law or of court orders that flow from such violations, it should be possible to defeat motions to dismiss, even under an expansive interpretation of the Supreme Court's decision in *Horne.*

Therefore, in the hypothetical above, the P&A should seek to establish that the defendants' failures to implement portions of the settlement agreement are also violations of federal law and the constitution. It is unlikely that the defendants will have admitted to such violations in a settlement agreement, so there may need to be discovery and an evidentiary hearing.

B. Advocates Should Establish How Defendants Have Not Satisfied the Standards for Modifying or Vacating a Court Order Under Fed. R. Civ. P. 60(b)(5).

"[A] party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo,* 502 U.S. at 393. Courts have consistently understood and applied *Rufo* in exactly this way, requiring a party seeking a modification of a consent decree to show an unanticipated burden or obstacle that significantly impedes its ability to perform its obligations under that decree. *See, e.g. Pigford v. Veneman,* 292 F.3d 918, 927 (D.C. Cir. 2002) (finding that plaintiffs' dereliction amounted to "unforeseeable obstacle" that made decree "unworkable", warranting modification); *State of New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 171 (D.D.C. 2008) (finding that difficulties in implementing certain provisions were "entirely incongruous with the original expectations of the parties and the Court" and so constituted "significant change in circumstances," warranting modification); *Cooper v. Noble*, 33 F.3d 540, 544 (5th Cir. 1994) ("[T]he Supreme Court [in *Rufo*] never suggested that changed factual circumstances in and of themselves were sufficient grounds for relief from judgment . . . [O]fficials must also: (1) show that those changes affect compliance with, or the workability or enforcement of, the final judgment, and (2) show that those changes occurred despite the county officials' reasonable efforts to comply with the judgment") (citations omitted; quoting *Rufo*, 502 U.S. at 385); *Hadix v. Johnson*, 896 F.

Supp. 697 (E.D. Mich. 1995) (declining to modify a prison conditions consent decree where defendant failed to show that proffered changed circumstances made compliance more onerous or decree less workable); *cf*. *David C. v. Leavitt*, 242 F.3d 1206 (10th Cir. 2001) (on plaintiffs' motion in suit seeking reform of Utah's child-welfare system, finding defendants' significant non-compliance constituted changed circumstances that made decree as formulated unworkable and so warranted extension); *Small v. Hunt*, 98 F.3d 789 (4th Cir. 1996) (affirming decision to modify consent decree based on changed circumstances where increase in prison population was much larger than defendant had anticipated, making compliance more onerous); *Vanguards of Cleveland v. Cleveland,*, 23 F.3d 1013 (6th Cir. 1994) (affirming decision to extend consent decree where smaller-than-anticipated number of minority candidate passing qualifying exam constituted changed circumstance, making compliance with decree mandating hiring of minority supervisors more onerous); *Escalera v. New York City Hous. Auth*., 924 F. Supp. 1323, 1340-41 (S.D.N.Y. 1996) (granting defendants' motion to simplify procedures for eviction of public-housing tenants associated with drug trafficking because crack cocaine "epidemic" had made compliance with more lengthy procedures mandated by decree substantially more onerous).

Equity calls for a remedy proportionate to the harm. Since orders and consent decrees, in institutional reform cases, are designed to cure the defendants' violation of class members' constitutional and/or federal law rights, defendants may not later argue that the orders exceed a constitutional minimum. Such an argument is inconsistent with the very purpose of the orders that they helped draft and to which they consented.

Should Protection and Advocacy programs negotiate settlements and/or consent decrees in the future, care should be taken to include clear statements that the order or settlement is designed to cure constitutional or federal law violations or the conditions that flow from such violations. If the hypothetical agreement does not include such language, the P&A should argue that the circumstances have not significantly changed to make compliance such an obstacle that modification is warranted. Expert witnesses or the court monitor, if there is one, may be helpful in that regard.

C. Advocates Should Establish that Defendants Have Not Demonstrated That There is a Durable Remedy.

The Court in *Horne* stated that "[i]f a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." 129 S. Ct. at 2595 (citing *Milliken,* 433 U.S. at 282).[6]

Defendants must produce the requisite outcomes to demonstrate compliance. A

[6] Although the majority in *Horne* cites *Milliken* to support their position, there is no reference to durable remedy in the *Milliken* decision cited by the Court.

remedy fixes a problem. In system reform litigation, a remedy must cure the violations of the Constitution or federal law and court orders (or the conditions which flow from such violations) by ensuring class members receive the long-awaited supports and services to which they are entitled. A durable remedy has a proven track record that demonstrates the capability and the capacity of the system to provide those services. Protection and Advocacy programs will need to analyze carefully whether the defendants have not only cured constitutional or federal law violations, but whether they have established a remedy that can endure and that has been in place for a sufficient period of time to warrant such a determination.

In the hypothetical case, the P&A would try to demonstrate that if the court amends or vacates the settlement, the defendants are very likely to dismantle the remedy. For example, if the settlement has protected the remedial scheme from state budget cuts, and the remedy has not been securely built into the state's service delivery systems, or has not been in place very long, it may be possible to argue that it is highly likely that the remedy will be quickly dismantled and therefore not be durable.

III. Conclusion

Unlike in *Horne*, most disability rights cases do not boil down to a single, non-negotiable prescription for complying with federal law, like *Horne*'s incremental funding mandate. Courts crafting orders or plaintiffs negotiating consent decrees or settlements should ensure that such orders embody a "flexible approach" that makes outcomes for class members and the systems designed to support them explicit and mandatory, while leaving state or local governments with the flexibility for determining how to achieve these outcomes. This approach recognizes that there are many ways to achieve these outcomes, and affords defendants considerable discretion in designing the most effective methods for doing so. While sanctioning flexibility, there must also be a concomitant command that these outcomes must be achieved in order to cure the ongoing constitutional and federal law violations.

In several other cases, courts have cited to *Horne* for its discussion of the Equal Education Opportunity Act (EEOA). In *Jackson v. Waller Independent School Dist.*, 2009 WL 3078489 (S.D.Tex. 2009), the plaintiffs alleged that an elementary school lacked adequate funding and had dilapidated facilities that were a vestige of the racial segregation in the school district. In its decision, the district court discussed the *Horne* opinion in detail, but limited its attention to the parts of the majority and dissent that relate to the scope of the EEOA. *Id.* at 10-12. The district court granted the WISD's motion for summary judgment on the EEOA, equal protection, and declaratory judgment claims. In *School Dist. of City of Pontiac v. Secretary of U.S. Dept. of Educ.*, 584 F.3d 253 (6th Cir. 2009), the Court of Appeals for the Sixth Circuit considered a challenge to the No Child Left Behind Act (NCLB) filed by several school districts and education associations and discussed the *Horne* decision for its substantive analysis of the NLCB. *Id.* at 285-90.

In *Lopez v. Bay Shore Union Free School Dist.*, 668 F.Supp.2d 406 (E.D.N.Y. 2009), the plaintiffs, a student and his guardian, alleged that a school district violated the EEOA by failing to communicate with them in Spanish about alleged incidents that ultimately led to the student's suspension, which they claimed resulted in the students improper "exclusion from instructional programs." *Id.* at 415. The district court cited *Horne* for the proposition that "[c]ourts have almost universally interpreted Section 1703(f) to apply to school districts' and states' efforts to overcome language barriers in the classroom." *Id.* (citing *Horne*, 129 S.Ct. 2579). The district court found that the plaintiffs' claim was "too attenuated from the purpose of the statute to survive a motion to dismiss," and consequently dismissed the claim. *Id.* at 415-16.

Several courts also cited *Horne* for the proposition that a party must establish standing by alleging a personal stake in the outcome of a case that is sufficient to warrant federal court jurisdiction. See *Ramirez-Lebron v. International Shipping Agency, Inc.*, 593 F.3d 124, 130 (1st Cir. 2010) (quoting *Horne* for the proposition that "[t]o establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling," and finding that the plaintiff satisfied these requirements); *Clyma v. Sunoco, Inc.*, 594 F.3d 777, 780 (10th Cir. 2010) (finding that a group of plaintiffs attorneys had standing, as a non-party, to appeal the district court's denial of its application to interview jurors because it asserted an "actual, particularized injury as a result of an alleged constitutional violation traceable to the district court's order and redressable by a favorable ruling here"); *Coalition for an Airline Passengers' Bill of Rights v. Delta Air Lines, Inc.*, 2010 WL 420023, 10 (S.D.Tex. 2010) (citing *Horne* for the elements required to establish standing and finding that the plaintiff's allegation entitled him to standing); *Bernard v. Roal*, 2010 WL 93160, 2 (S.D.N.Y. 2010) (finding that an inmate had standing to challenge the decision

not to place him in a community corrections placement because he alleged an injury that was concrete, particularized, actual, and fairly traceable to the actions of the defendants); *U.S. v. Real Property and Residence Located at 4816 Chaffey Lane*, 2010 WL 147211, 5 (E.D.Ky. 2010) (denying claimants' motion to dismiss without prejudice because they had not established a personal stake in the relevant property or an injury that they would suffer); *Prison Legal News v. Livingston*, 2009 WL 5170229, 9 (S.D.Tex. 2009) (citing *Horne* for the elements required to establish standing and finding that the plaintiff's allegation entitled him to standing); *New York v. Salazar*, 2009 WL 3165591, 10 (N.D.N.Y. 2009) (citing *Horne* for the proposition that standing is "an essential and unchanging part of the case-or-controversy requirement of Article III."); *JWJ Industries, Inc. v. Oswego County*, 2009 WL 2163097, 2 (N.D.N.Y. 2009) (quoting *Horne* for the proposition that "[t]o establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling," and finding that the plaintiffs had satisfied these requirements); *McGee v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 2132439, 3 (E.D.N.Y. 2009) (citing *Horne* for the elements required to establish standing and finding that the plaintiff's allegation entitled him to standing).

The Seventh Circuit also considered the impact of the *Horne* decision on the standing of intervenors. In *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009), the Court of Appeals for the Seventh Circuit reviewed the decision of the district court to grant an independent journalist's request to intervene in an § 1983 action against eight Chicago police officers and supervisors and the City of Chicago after the parties had settled the case. In its analysis of whether an intervenor has standing, the court cited *Horne* for the proposition that "[i]n the typical permissive-intervention case, a third party wants to join a lawsuit to advocate for the same outcome as one of the existing parties." *Id.* at 1070 (citing *Horne*, 129 S.Ct. at 2591). The court noted that the Supreme Court did not require the intervenors to establish independent standing to request relief from the contempt order, and the court concluded that this was because the intervenors' request was aligned with the position of one of the defendants who originally requested relief and who clearly had standing. *Id.* at 1071-72. The court ultimately held that the journalist was required to meet article III standing requirements, but found that he was unable to do so.

Although the *Horne* decision was made in the context of an institutional reform case, several courts have cited the decision when reviewing a consent decree or judgment that is limited to individual parties. In *U.S. v. Jupiter Aluminum Corp*, 2009 WL 2970385 (N.D.Ind. 2009), an aluminum company, Jupiter Aluminum, entered into a consent decree with federal, state and local environmental agencies to settle claims that one of its facilities was in violation of federal emissions standards. *Id.* at 1. Due to economic pressures, Jupiter sought a modification of the consent decree and argued that economic hardship was sufficient justification for modifying the consent decree. *Id.* at 9. Jupiter

cited *Evans v. Williams*, 206 F.3d 1292 (D.C.Cir. 2000), to argue that there must be flexibility in consent decrees because of the potential for changed circumstances, such as economic hardship. *Id.* The court also discussed the *Horne* case and described it as a reiteration by the U.S. Supreme Court that there is a "need for flexibility in institutional reform cases." *Id.* However, after this discussion, the court held that *Evans* was not relevant based on the facts of the case, and distinguished the concerns that are raised in an institutional reform case, such as *Horne*, from the consent decree that bound only one company. Specifically, the court noted that the consent decree "doesn't impose highly supervised injunctive relief over the course of several years[,]" and that there are fewer public policy concerns, specifically with respect to state and local budget. *Id.* at 10.

In *Chao v. Current Development Corp.*, 2009 WL 4799145 (N.D.Ill. 2009), the defendants asked the district court to vacate a consent order and judgment that had been negotiated between the parties in order to resolve an action filed by the Secretary of Labor against the Current Development Corporation and George P. Klein, Jr., individually and as trustee of various ERISA plans. The defendants argued that the court should vacate the consent order and judgment for two reasons: the consent decree had been satisfied and, in the alternative, it would be inequitable to enforce the consent decree prospectively because of the adverse impact it had on their credit ratings. *Id.* at 1. The court cited *Horne* for the proposition that Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Id.* at 2 (citing *Horne*, 129 S.Ct. at 2593). The court found that the consent decree had not been satisfied because it contained a permanent injunction preventing the defendants from violating specific sections of ERISA in the future. *Id.* at 3. With respect to the defendants' second argument regarding prospective enforcement, the court cited *Horne* for the proposition that there needed to have been "a significant change ... in factual conditions." *Id.* (citing *Horne*, 129 S.Ct. at 2593). The court concluded that any alleged negative impact on the defendants' credit was not such a change and did not warrant relief from the consent order and judgment. *Id.*

In *Orient Mineral Co. v. Bank of China*, 2010 WL 624868, 17-18 (D.Utah 2010), the district court also cited *Horne* for the proposition that a significant change in the factual condition or law may warrant the modification or vacation of a judgment or order. However, in its decision, the court noted that the moving party had not established any such change. Rather, the party's motion was based on its disagreement with a jurisdictional ruling that supported the previous judgment and order dismissing the plaintiffs' claims. As the Supreme Court held in *Horne*, the district court denied the plaintiffs' motion because "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." *Id.* at 18 (quoting *Horne*, 129 S.Ct. at 2593).