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Dormant Commerce Clause Update – 4th Circuit Panel Talks Trash

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On December 3, 2013, a Fourth Circuit panel issued an opinion situated at the familiar intersection of **Dormant Commerce Clause** jurisprudence and trash. Affirming a trial court's grant of summary judgment, the Court turned away a Dormant Commerce Clause challenge to a so-called "flow control" ordinance enacted by Horry County, South Carolina. Sandlands C&D LLC v. Horry County, 2013 U.S. App. LEXIS 24040 (4th Cir.). A copy of the decision is available here.

Despite determined advocacy by the plaintiffs, the constitutionality of Horry County's local solid waste law presented a relatively easy case for the appellate court in several respects. Most importantly, the ordinance restricts the transportation, processing and disposal of locally-generated solid waste in ways that quite closely resemble the waste management system upheld by the United States Supreme Court in its 2007 opinion in United Haulers.[1] Indeed, the Fourth Circuit panel described that precedent as "largely dispositive," viewing the earlier New York flow control ordinances as "remarkably similar" to the challenged Horry County law.

As a first similarity, plaintiffs did not challenge on appeal the trial court's finding that the three Horry County "designated" facilities benefitting from the receipt of flow-controlled solid waste were "owned and operated" by a public entity. Thus, by concession, the new exception carved out in United Haulers applied – local laws favoring "clearly public" facilities are per se not discriminatory for purposes of Dormant Commerce Clause analysis.

Notably, the private vs. "clearly public" facility issue was contested before the district court. Plaintiffs had argued below that the Horry County Solid Waste Authority, Inc., a nonprofit corporation, was a private entity. Had that argument prevailed, Horry County's flow control law almost certainly would have been struck down under clear Supreme Court precedent. C&A Carbone v. Clarkstown, 511 U.S. 383 (1994) (declaring unconstitutional local flow control ordinances directing all solid waste to a private facility).

Second, at the level of evidence, the Fourth Circuit agreed with the district court that plaintiffs had been unable to show that Horry County's flow control ordinance imposed any real world impacts on out-of-state businesses. As the Court put it, the law "has only an arguable effect on interstate commerce, even if it does affect intrastate commerce to some degree." That absence of hard proof echoed the Supreme Court's similar finding in United Haulers ("After years of discovery, both the Magistrate Judge and the District Court could not detect any disparate impact on out-of-state as opposed to in-state businesses.")

Third, characteristic of most solid waste flow control laws, including the ordinance upheld in United Haulers, the scope of Horry County's ordinance carefully excludes "recoverable" materials; i.e., commercially valuable recyclables. By restricting the ambit, and therefore impact, of its law solely to municipal solid waste, Horry County took advantage of a view repeatedly expressed by reviewing courts – that managing trash is a traditional responsibility of local government, a core police power activity.

Apart from these similarities, the Fourth Circuit arguably gave short shrift to the plaintiffs' strongest argument on appeal – that Horry County's ordinance discriminated against one of the plaintiffs' out-of-county facilities by

prohibiting the delivery of Horry county-generated construction and demolition (C&D) waste, which the challenger wanted to separate into "recoverables" and municipal solid waste ("MSW"), with the latter returned to Horry County for disposal at the designated public landfills. The plaintiffs pointed out that there were two in-county private facilities conducting that exact operation, with the similar out-of-county facility denied the same opportunity solely on the basis of its location.

If the plaintiffs could satisfy the Court that Dormant Commerce Clause scrutiny is triggered by differential treatment of comparable business located in two in-state counties (as opposed to similar businesses located in two different states), then the plaintiffs' argument would seem to have real weight. However, the Fourth Circuit panel rejected that argument with little discussion, reasoning that the burdened plaintiff could choose to process its C&D waste stream within Horry County "just as other companies have done," thereby eliminating any "discrimination."

In that respect, the appellate court's logic seems directly at odds with a long line of Supreme Court precedent striking down local processing laws as violative of Dormant Commerce Clause principles. For example, analogizing to the Supreme Court's seminal 1951 decision inDean Milk, [2] the municipal ordinance struck down there – which forbade the sale of milk unless it was pasteurized within five miles of the city center – seemingly would be upheld today by this Fourth Circuit panel, because out-of-state facilities wanting to process the locally-generated milk could "solve" the discrimination problem merely by opening their own new facilities within the favored five mile zone.

Summary and Takeaways

The Fourth Circuit's new opinion in Sandlands C&D was in most respects an "easy case," given the close resemblance between Horry County's flow control ordinance and the "clearly public" solid waste management system upheld in United Haulers.

But each of those similarities points out a corresponding uncertainty remaining at the intersection of Dormant Commerce Clause jurisprudence and trash:

What about the private vs. "clearly public" facility tension framed by the Supreme Court in its C&A Carbone and United Haulers decisions? For example, how will courts treat a flow control law mandating delivery of all locally-generated solid waste to a facility nominally "owned" by a public entity, but operated by a private, profit-seeking company?

What about a case where – unlike the situations in United Haulers and Sandlands C&D – amassed evidence conclusively demonstrates that a flow control ordinance is directly and significantly burdening actual interstate commerce? Even assuming the involvement of "clearly public" facilities, how will courts square that with hard proof of discriminatory purposes or effects?

What about flow control ordinances that purport to monopolize not just ordinary trash, but also commercially valuable recyclables? The United Haulers Court was "particularly hesitant to interfere with the Counties' efforts under the guise of the Commerce Clause because waste disposal is both typically and traditionally a local government function." According to the Institute of Scrap Recycling Industries, U.S. sales of recovered materials in 2012 exceeded $90 billion, including nearly $28 billion in export sales. Is that commerce within the scope of traditional local government police power?

Finally, it is important to note that Dormant Commerce Clause concerns and challenges are by no means limited to issues of trash and recycling. Cases like Sandlands C&D decided in one substantive context may carry important ramifications for other industries and commerce. Some of the areas in which Dormant Commerce Clause challenges have recently been litigated are renewable energy credits and fuel standards, pharmaceutical "take back" programs, port operations, state "Bottle Bill" laws, taxation of municipal bonds, toll highway pricing, the licensing and sale of alcoholic beverages, mine reclamation programs, and various "Buy Local" laws. This list is not exhaustive, and, as this case shows, there are enough still-unanswered questions about the Dormant Commerce Clause that we are likely to see such questions litigated for the foreseeable future.

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[1] *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007) (copy available here).

[2] *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).