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SOLID WASTE MANAGEMENT: RECENT CASES UPHOLDING AN EXCLUSIVE HAULING CONTRACT AND DESIGNATION OF A DISPOSAL FACILITY

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Three 1999 cases decided by United States Courts of Appeals upheld three different arrangements by which local governments required that municipal solid waste must be collected by a single hauler or disposed of in a designated facility, despite contentions that the arrangements violated the Commerce Clause of the United States Constitution.[1] *Houlton Citizens' Coalition v. Town of Houlton*[2] dealt with a Maine town's exclusive contract with a firm for the collection of solid waste. *United Waste Systems v. Wilson*[3] considered an Iowa statute pursuant to which local governments were required to designate disposal facilities in their waste management plans. *Village of Rockville Centre v. Town of Hempstead*[4] dealt with contracts among several local governments that required disposal of all waste generated within those units to be in a designated incinerator. The three cases show the continuing ingenuity of state and local governments in avoiding the *C & A Carbone, Inc. v. Town of Clarkstown*[5] prohibition against flow control ordinances and the willingness of the federal courts of appeals to uphold these arrangements.

1. For discussions of earlier cases that have approved similar arrangements, *see* "Solid Waste Management: The Second Circuit Again Approves a Contract for Waste Collection that Designates a Disposal Facility," **Local Government Law Bulletin No. 87** (June 1998) and "Solid Waste Management: Recent Developments in Flow Control," **Local Government Law Bulletin No. 71** (Nov. 1995).

2. 175 F.3d 178 (1st Cir. 1999).

3. 189 F.3d 762 (8th Cir. 1999).

4. No. 98-9571 (2nd Cir. Nov. 18, 1999).

5. 511 U.S. 383 (1994),

Houlton Citizens' Coalition v. Town of Houlton

The Town of Houlton adopted a two-part scheme for the collection and disposal of solid waste generated in the town. In the first part, it issued a request for proposals and conducted a competitive bidding process that resulted in a contract with Andino, Inc., a local firm, to be the exclusive hauler of solid waste in the town. Pursuant to the seven-year contract, Andino could dispose of the waste at any facility it chose. In the second part of the scheme, the town required by ordinance that residents who elected not to contract with Andino for collection must transport their waste to a town transfer station operated by Andino. Two local waste haulers who lost business because of these arrangements and a local citizens group challenged the town's waste management scheme on the ground that it violated the Commerce Clause as applied in *C & A Carbone*.

The Court of Appeals for the First Circuit found nothing in the town's arrangements that offended the Commerce Clause. Neither the contract nor the ordinance, on its face, discriminated against interstate commerce. The bidding process by which Andino was awarded the exclusive hauling contract was widely publicized and open to all haulers wherever located, and Andino was the lowest bidder. Moreover, Andino is free to dispose of the waste it collects in any facility, in Maine or in any other state. "Consequently, the Town's garbage disposal scheme does not constitute a per se violation of the dormant Commerce Clause, but instead regulates commerce evenhandedly, with no more than incidental effects on interstate trade."[6] When a regulatory or contractual scheme does not directly discriminate against interstate commerce, courts apply what has come to be known as the balancing test from *Pike v. Bruce Church, Inc.*,[7] which holds that such a scheme is constitutional unless the burden on interstate commerce clearly outweighs the local benefits. When the court of appeals applied this test, it found that the town's arrangements furthered the local interest in effective and environmentally sound waste disposal, and that by contrast the effect on interstate commerce was "virtually invisible."

The court did not discuss separately the constitutionality of the second part of the town's scheme, the requirement that self-haulers bring their waste to a designated transfer station. Perhaps it saw no Commerce Clause issue because of the choice made available to all residents of either self-hauling or contracting with Andino. Or perhaps it implicitly approved this part of the scheme when it applied the *Pike* balancing test. Certainly, the arrangements upheld in this case were less restrictive than those approved in *Sal Tinnerello & Sons, Inc. v. Town of Stonington*,[8] where the terms of the exclusive hauling contract required the hauler to dispose of the waste at a town-owned incinerator.

The federal district court in this case had also held that the town's scheme did not violate the Commerce Clause, but it based its decision on the finding that the Town of Houlton was a participant in the solid waste market and as such was not subject to the dormant Commerce Clause.[9] The court of appeals declined to rest its decision on the market participant exception because of uncertainty about how this line of reasoning would be received by the Supreme Court—should the case be appealed—although it conceded that the Court of Appeals for the Second Circuit has employed the market participant exception in reviewing local government solid waste arrangements.[10] This refusal led the court to place a misleading emphasis on the bidding process used by the town. In applying the *Pike* balancing test, the court placed strong emphasis on the fact that the town used a bidding process open to all interested parties and accepted the lowest bid. By emphasizing this aspect of the town's arrangements, the court has made available to future challengers the possible argument that if a local government with an arrangement similar to Houlton's has not used a competitive bidding process, it is in violation of the Commerce Clause. This would be sobering news for local governments in many states, including North Carolina. A contract for solid waste collection is a contract for services, and in North Carolina such a contract is not subject to the bidding statutes.[11] Surely the court did not mean to imply that all such contracts must be bid or risk invalidation under the Commerce Clause.

United Waste Systems v. Wilson

Iowa statutes, similar to North Carolina's, require each unit of local government to file a comprehensive waste management plan with the state. In that plan, the local government must identify a disposal site or sites for its

6. 175 F.3d 178 at 189.

7. 397 U.S. 137 (1970).

8. 141 F. 3d 46 (2d Cir. 1998).

9. The market participant exception is discussed below with regard to Village of Rockville v. Town of Hempstead.

10. *See* the bulletins cited in note 1 and Village of Rockville v. Town of Hempstead, discussed below.

11. *See* N.C. Gen. Stat. § 143-129.

solid waste. It may designate an out-of-state facility or an in-state facility, or both. However, once it designates an in-state disposal facility, it may not dispose of waste in any other Iowa facility, unless it amends its plan and renegotiates a contract with a different facility. In other words, once an in-state facility is designated in a plan, only that facility may accept waste from the local government making the designation, and all haulers collecting waste in that jurisdiction are bound by the exclusive designation. An Iowa hauler and an Iowa landfill operator challenged this statutory scheme as violating the Commerce Clause.

The Court of Appeals for the Eighth Circuit made short work of this challenge. The court could find no reasonable basis for the appellants' Commerce Clause argument. "[W]e must conclude that the regulation's effect on interstate commerce is, at most, extremely attentuated, remote, incidental, and highly speculative."[12] Having said that, the court went on to apply the balancing test from *Pike*, and held that the Iowa program easily passed that test. When the incidental effects on interstate commerce were weighed against the state's interest in tracking and controlling in-state disposal of waste, there was no contest.

Village of Rockville Centre v. Town of Hempstead

In 1985, the Town of Hempstead, on Long Island, entered into an agreement with American Ref-Fuel Company to operate a resource recovery facility that would dispose of waste from six villages in the town. The Town of Hempstead Industrial Development Agency underwrote the project by issuing bonds. In 1986, the town entered into twenty-year inter-municipal agreements with the villages pursuant to which each village would deliver all waste generated in its jurisdiction to the town for disposal in the town's facility, and the town would be obligated to accept and dispose of all such waste. The villages were required to pay fees to help finance the cost of the facility. In 1996, the six villages filed suit seeking a declaration that the inter-municipal agreements were invalid because they were in violation of the Commerce Clause.

The town responded that because it was operating a resource recovery facility under contract, it was a participant in the market for solid waste, rather than a regulator of that market, and that as a market participant it was not subject to dormant Commerce Clause strictures.[13] The villages did not dispute the validity of the market participant exception as a general matter, but they contended that the town was a participant only in the waste *disposal* market, not in the waste *collection* market. And through the inter-municipal agreements the town was unlawfully regulating the waste collection market by forcing the participants in that market—the haulers—to transport all waste to a designated facility. The villages relied on *South-Central Timber Dev., Inc. v. Wunnicke*[14] for this argument. In *South-Central Timber*, the Supreme Court declared invalid as a violation of the Commerce Clause an Alaska statute requiring that timber purchased from state lands be processed in Alaska. The state contended that its requirement was exempt from Commerce Clause scrutiny because it was acting as a participant in the timber market. The Supreme Court rejected this contention and held that Alaska was impermissibly using its leverage as a participant in the timber market to attempt to regulate the processing market. The Court, in that case, took care to identify the separate markets in which a unit of government must participate to avail itself of the exemption.

The Court of Appeals for the Second Circuit distinguished *South-Central Timber* from the present case. The court said that in *South-Central Timber* the Supreme Court merely limited the availability of the market participant exception to those situations in which a government behaves like a private firm. The market participant exception is inapplicable when a government acts as a regulator, as Alaska tried to do with regard to the processing market. The court found that what the town was doing in this situation was no different from what a private firm operating a disposal facility could do: entering into contracts to process waste but requiring, as part of the contracts, that all waste be brought to its facility. That haulers are secondarily bound by the inter-municipal contracts is not unique to this situation but would occur if a private firm were involved. The town was not attempting to regulate the haulers directly. Thus, the market participant exception operated to validate the town's arrangements with the villages.

This case makes an implicit assumption that a contractor of a local government, in this case the private operator of the resource recovery facility, is—for purposes of constitutional analysis—the alter ego of the government. Since a local government operating its own disposal facility could have entered into the contracts at issue here, it made no difference that the local

12. 189 F.3d 762 at 767.

13. The market participant exception is discussed in the bulletins cited in note 1.

14. 467 U.S. 82 (1984).

government had contracted with a private firm for the disposal services. The court apparently saw no need to discuss this assumption because it had done so at length in its earlier decision in *USA Recycling, Inc. v. Town of Babylon.*[15] The assumption is based on two early twentieth century Supreme Court cases, *California Reduction Co. v. Sanitary Reduction Works*[16] and *Gardner v. Michigan,*[17] whose continued validity was questioned in one of the *C & A Carbone* opinions. They have not, however, been overruled.

15. 66 F.3d 1272 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996). This case is discussed in "Solid Waste Management: Recent Developments in Flow Control," **Local Government Law Bulletin No. 71** (Nov. 1995).

16. 199 U.S. 306 (1905).

17. 199 U.S. 325 (1905).

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