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Talking Trash – Can Local Governments Force Haulers to Dispose the Trash They Collect at Government-owned Facilities?

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Introduction to Flow Control

In 1976, Congress enacted the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. (RCRA). While RCRA is perhaps best known for creating a "cradle to grave" regulatory system governing the transportation, treatment and disposal of hazardous waste, it also fostered new and more stringent regulations governing the disposal of municipal solid waste (MSW). The regulations, finalized in 1983 and known as the "RCRA Subtitle D" regulations, see 42 C.F.R. Part 258, established new criteria for, and imposed new requirements on, municipal solid waste landfills. These requirements include groundwater monitoring, leachate and landfill gas collection and control systems, and closure/post-closure obligations.

Many of these new requirements necessitated substantial capital investments or ongoing increased operating costs. As a result, thousands of local municipal "dumps" began closing during the 1980s and early 1990s.[1] In response, private solid waste companies began to recognize that waste disposal provided a significant economic opportunity for them, and began to site, construct and operate new transfer stations and landfills throughout the United States. These landfills, constructed in strict compliance with RCRA Subtitle D's regulations, were often substantially larger than the municipal dumps they replaced, and were sited to receive MSW from a broader geographic area, including MSW generated in other states. As the same time, some local governments also became interested in developing their own new disposal facilities, including transfer stations, landfills and waste-to-energy incinerators. However, to assure that these new disposal facilities would be economically viable, local governments needed to assure the long-term receipt of MSW to generate sufficient revenue to pay off facility debt service, operating expenses, and other costs. If a local government did not provide MSW collection service, it did not possess a legal mechanism to force local haulers to use their new disposal facility. As a result, a majority of states and numerous local governments enacted "flow control" laws – laws that designate where MSW must be taken for processing and/or disposal.

Other lesser factors also encouraged the enactment of flow control laws. Some local governments were wary about sending MSW to private sector landfills. Many local governments were named as potentially responsible parties (PRP's) in Superfund cost-recovery actions during the 1980s, and the joint, several and retroactive liability scheme imposed by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA) was of great concern. Also, many states were establishing recycling goals or the diversion of waste from landfills, and flow control created a funding mechanism that could pay for the development and operation of local recycling programs. By the 1990s, 35 states, the District of Columbia and the Virgin Islands, had authorized flow control.[2]

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[1] The number of landfills in the United States declined from 7,924 in 1988 to 3,197 in 1995. Waste News (Nov. 20, 2006) (citing U.S. Environmental Protection Agency data). See also http://www.epa.gov/epaoswer/non-hw/muncpl/facts.htm. The number of landfills in the United States has continued to decline, and there are currently about 1,654 landfills in the nation. *Id.*

[2] U.S. Environmental Protection Agency, Report to Congress on Flow Control and Municipal Solid Waste (March 1995) at ES-3.

The U.S. Supreme Court's *Carbone* Decision

By the early 1990s, solid waste companies and waste generators were engaged in litigation throughout the United States over the legality of flow control laws. Several courts commented that their dockets were "clogged by of all things, garbage."[3] This set the stage for the United States Supreme Court to address whether flow control laws were legal.

In 1994, the Court ruled in *C&A Carbone, Inc. v. Town of Clarkstown* on the validity of Clarkstown, New York's flow control law, which required all MSW generated in the town or that was transported through the town, be delivered to a specific transfer station.[3] The transfer station was constructed by a private company, at Clarkstown's insistence, and was to be sold to Clarkstown for one dollar after five years.[4] Clarkstown guaranteed that the facility would receive a minimum of 120,000 tons of MSW annually, and authorized the contractor to charge a tipping rate of $81.00 per ton, which was substantially higher than prevailing disposal rates.[5] The Court ruled that "well-settled principles of our Commerce Clause jurisprudence" required that Clarkstown's flow control law be declared unconstitutional. The Court explained that the flow control law was "just one more instance of local processing requirements that we long have held invalid."[6] Concluding that the flow control law discriminated against interstate commerce, the Court then reviewed whether it could satisfy the stringent standard applicable to discriminatory measures. The Court explained that Clarkstown's flow control law would only be upheld if it was among "the narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest."[7] The Court rejected Clarkstown's argument that flow control is "necessary" to ensure the safe handling and proper disposal of MSW, identifying several non-discriminatory alternatives, including general taxes and uniform safety regulations. Although the Court recognized Clarkstown's need to fund the transfer station via flow control, it explained "revenue generation is not a local interest that can justify discrimination against interstate commerce."[8]

The Court's decision was a 5-1-3 split. Four Justices joined Justice Kennedy's majority opinion declaring Clarkstown's flow control law unconstitutional under the dormant Commerce Clause. Justice O'Connor wrote a concurring opinion in which she found that the appropriate legal standard for invalidating Clarkstown's flow control law was the balancing test articulated in *Pike v. Bruce Church, Inc.*[9] applicable to local or state laws that have an impact on interstate commerce. Justice Souter wrote a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Blackmun.

United Haulers

In 1988, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority (Authority). The following year, the Authority began entering into contracts to purchase, operate, construct and develop facilities for solid-waste management. The two counties that comprise the Authority passed flow control laws in December 1989 and February 1990. The Authority required all MSW generated in the two counties, with the exception of recyclables and waste incinerated at the Authority's incinerator, to be delivered to the Utica Transfer Station, a facility built

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[3] *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 505 (2nd Cir. 1995).
[4] *Id*. at 387.
[5] *Id*.
[6] *Id*. at 391.
[7] *Id*. at 392.
[8] *Id*. at 393.
[9] 397 U.S. 137 (1970).

under contract with the Authority. The solid waste was then ultimately disposed of in a landfill, also under contract with the Authority.

Following the U.S. Supreme Court's ruling in the *Carbone* case, six solid-waste haulers and a local trade group, the United Haulers Association, Inc., filed a lawsuit in federal district court against both counties and the Authority. The suit alleged that the Authority's flow-control laws violated the Dormant Commerce Clause under *Carbone*. The district court agreed, finding for the plaintiffs in their motion for summary judgment that:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both Carbone and SSC Corp. … As the Second Circuit recently summarized those holdings, "the ordinances in Carbone and SSC Corp., were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors." Gary D. Peake, 93 F.3d at 75. Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. . . . Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

On appeal, the Second Circuit reversed the district court's grant of summary judgment in favor of the haulers.[10] The appellate court concluded the "district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility."[11] The court held, "[A] municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the District Court should have analyzed the Counties' flow control laws under the *Pike* test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits."[12] The Second Circuit based its conclusion, in part, on its reading of the concurring and dissenting opinions from *Carbone* and what it described as the Supreme Court's silence on the public/private distinction. The Second Circuit also analyzed other U.S. Supreme Court local processing cases as well as flow-control cases decided by lower courts. The court concluded that it found precedent for making the public/private distinction in: (1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed *Carbone*, and (2) several of the Supreme Court's Justice's opinions in *Carbone*, all of whom characterized the facility in *Carbone* as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient *Pike* test.

The Second Circuit admitted that it was tempted to apply the balancing test from *Pike* to the facts before it, but instead remanded the case to the district court to conduct the analysis. After extensive discovery and an initial pro-flow control ruling by a Magistrate, the district court ruled the challenged laws do not treat similarly situated in-state and out-of-state business interests differently and did not impose any cognizable burden on interstate commerce. The district court granted the Authority's motion for summary judgment and found the ordinances constitutional without even applying the *Pike* balancing test.

On appeal, the Second Circuit first noted a distinction between a state's actions in regulating commercial activity, which are limited by the dormant Commerce Clause, and its actions as a participant in the marketplace, which are not.[13] With regard to the flow control laws being an export

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[10] *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2nd Cir. 2001).
[11] *Id*. at 257.
[12] *Id*.
[13] *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150, 157 (2nd Cir.

barrier because they prohibit articles of commerce generated within the Counties from crossing intrastate or interstate lines, the appeals court affirmed its earlier decision, holding that:

> The Counties' flow control ordinances do not discriminate against interstate commerce because no private entity, whether local or non-local, has been disadvantaged vis-a-vis any other by the creation of the Authority's monopoly in waste processing.[14]

The Second Circuit then applied the balancing test from *Pike*. The court reiterated its earlier holding that a municipality may impose a public monopoly on the activities of waste collection, processing and disposal. When doing so, the Second Circuit found that a local government imposes only a limited burden on interstate commerce. Applying the *Pike* test, the Second Circuit concluded that "the local benefits of the flow control measures substantially outweigh whatever modest differential burden they may place on interstate commerce."[15]

While the *United Haulers* case was winding its way through the federal courts, another flow control law was challenged under *Carbone*. In January 2006, the U.S. Court of Appeals for the Sixth Circuit affirmed a federal district court ruling that a Kentucky county's flow-control law was unconstitutional under the Commerce Clause, specifically rejecting the public/private distinction recognized by the Second Circuit's "surprising decision" in *United Haulers*.[16] In *NSWMA*, the Sixth Circuit firmly stated it "respectfully disagrees with the Second Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court." This split between the Circuits likely compelled the U.S. Supreme Court to grant United Haulers' Petition for Certiorari.

United Haulers and its amici, including NSWMA, the American Trucking Associations, National Association of Manufacturers and two Virginia counties, view the Second Circuit's decision as an attempt to roll back the Court's opinion in *Carbone*. In particular, United Haulers argues that simply because public entities hold title to a facility, it should not be able to avoid the holding in *Carbone* that ordinances discriminatory against interstate commerce are *per se* invalid. United Haulers argues that there is no distinction between the Authority's ordinances and those at issue in *Carbone*, and at oral argument, argued the Authority's flow control laws were even worse than Clarkstown's because they completely isolated MSW generated in the two counties from the interstate market for waste disposal. United Haulers also argues the flow control laws have the same protectionist effect: forcing commercial haulers to purchase high-priced processing and disposal services from favored in-state facilities rather than less costly out-of-state facilities. At the time of the lawsuit, the disposal fee at the Authority's transfer station was $86.00 per ton, while the market rate at landfills in Pennsylvania was less than $30.00 per ton.[17]

With respect to the public-private distinction, the petitioners argue that finding such a distinction in *Carbone* was meaningless in that the facility at issue was publicly owned in all but the most formal sense. In addition, United Haulers believes that state and local laws have been repeatedly found to be

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2006).

[14] *Id*. at 159-160.

[15] *Id*. at 163.

[16] *NSWMA v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). Daviess County filed a Petition for Certiorari in the case in June 2006. See 75 U.S.L.W. 3106 (June 28, 2006). As of January 31, 2007, the Supreme Court has not ruled on that Petition.

[17] According to the Authority's recent filings with the U.S. Supreme Court and statements to the media, the current disposal rate at the Authority's new landfill, which opened in December 2006, is somewhat lower than $86.00 per ton.

protectionist and local governments should not be allowed to shield their activities in the marketplace from interstate competition.

Finally, United Haulers argues that even if the Court were to find that a public-private distinction makes the ordinances non-discriminatory, the ordinances still fail the *Pike* balancing test. Relying in part on Justice O'Connor's concurrence in *Carbone*, United Haulers contends the burden on interstate commerce is clearly excessive in comparison to local interest.

Oneida-Herkimer, backed by a lengthy list of amici, including many regional solid waste authorities, 26 states, groups representing all levels of local government, a few local solid waste haulers and an environmental group, argues that its flow-control scheme is a public system in which local government has assumed all responsibility for waste management. The Authority argues that discrimination under the dormant Commerce Clause only occurs if there is differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. In this case, Oneida-Herkimer maintains, there is no discrimination because the flow control laws treat in-state and out-of-state waste providers equally and do not favor local private business interests. In particular, Oneida-Herkimer draws a distinction from *Carbone* by arguing that the ordinances at issue in that case designated a private facility. In this case, the Authority posits that no local enterprise is favored because the designated facility is municipally owned.

Even if the Court finds the flow control laws have some incidental effect on interstate commerce, Oneida-Herkimer argues that they pass the *Pike* balancing test based on its substantial local benefits. The Authority maintains three public purposes are served by the flow control laws: First, they place the disposal decisions in public hands, ensuring environmental compliance. Second, they allow the Authority to reduce waste and maximize recycling. Third, they allow the Authority to manage waste in an integrated fashion. Citing historical roots to the public management of waste, Oneida-Herkimer draws a distinction between the regulations at issue in this case and those in *Carbone*, arguing that the flow control laws adopted by Clarkstown in the *Carbone* case had solely a monetary goal.

Oral Argument – U.S. Supreme Court

Oral argument occurred in the *United Haulers* case on January 8, 2007. The Justices were well-prepared for the argument and almost immediately peppered both sides with difficult and probing questions and hypotheticals. Several Justices, including Justices Breyer and Souter, expressed a concern about the impact of the case on government-owned electric and gas utilities, and whether these services would be vulnerable to challenge under the dormant Commerce Clause if the Court struck down the Authority's flow control laws. Several Justices stated that the *Carbone* decision did not address the public-private distinction at the heart of the case. United Haulers' counsel responded that while the *Carbone* Court did not affirmatively decide the issue, the focus in that case was the barriers to interstate commerce, and that creating such a distinction would be formalistic and unworkable.

Justice Alito, who was not on the Court when it decided *Carbone*, asked whether the Court's local processing decisions would have come out differently if the facilities at issue in those cases had been government-owned.[18] Justice Alito expressed concern over the Authority's broad interpretation of local police power, noting that under the Authority's logic a city or county could create a monopoly for hamburgers or renting videos. Justice Kennedy observed that the Authority has "built this trash utopia where everybody sends wonderful trash and you enforce use of that by the criminal law."[19]

[18] See, e.g., *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

[19] See http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1345.pdf at 30-31 (transcript

Justice Scalia, perhaps not surprisingly, had several "zingers," including a suggestion that instead of calling the Authority's disposal cost a "user fee, it should be called "a tax ripoff."[20] Both sides had trouble answering a hypothetical posed by one of the Justices over what happens if a local government and a private company each own a fifty percent interest in a designated disposal facility.

Potential Impact of Decision

The U.S. Supreme Court's decision in the *United Haulers* case will likely have a significant impact on certain solid waste haulers, landfill and transfer station owners, and local governments. In the wake of the initial Second Circuit decision in *United Haulers* in 2001, several local governments, including a number of upstate New York counties, have enacted flow control laws that seek to take advantage of the "public-private distinction" invented by that appeals court.[21] Other local governments are likely waiting for the U.S. Supreme Court to clarify whether the public-private distinction exists before enacting a new flow control law, or in some instances, enforcing an existing law. The stakes are high, as flow control allows local governments to charge above-market disposal rates at government-owned transfer stations, landfills and incinerators. For example, after New Jersey's flow control laws were struck down by the Third Circuit,[22] MSW disposal costs declined significantly at New Jersey disposal facilities in response to New Jersey MSW being trucked to out-of-state landfills. Before the U.S. Supreme Court ruled in *Carbone*, government-owned disposal facilities often charged more than $100.00 per ton to dispose of MSW. By comparison, the current national average landfill disposal fee is about $35.00 per ton.[23]

The decision could also adversely impact many of the larger private sector landfills opened in recent years in response to the widespread closure of municipal dumps in the 1980s and 1990s, and the communities in which they operate. These landfills often receive waste from many locations in multiple states. If local governments enact flow control laws in response to a Supreme Court decision upholding the Authority's flow control laws, some of the MSW received at these landfills will be forced instead to local, government-owned disposal facilities. Equally important, local government that host modern landfills frequently receive a substantial portion of their annual revenue from "host fees" based on the amount of MSW disposed at the facility. Some landfills pay a host fee as high as $4.50 for each ton received.[24] These fees often exceed one million dollars annually, and in some communities, this revenue is a significant percentage of the local government's annual revenue.[25] Indeed, two Virginia counties are so concerned about this issue that they filed an amicus brief in support of the United Haulers group.

The decision could also adversely affect a little-known federal program that encourages landfills to capture methane emissions instead of flaring them to the atmosphere. At nearly 400 landfills in the United States, methane is collected and sold to local utilities or businesses, reducing landfills' contributions to greenhouse gases and global warming.[26] A typical MSW landfill can power

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of *United Haulers'* oral argument before the U.S. Supreme Court).

[20] *Id. at 28.*

[21] See, e.g., *NSWMA v. Daviess County*, 434 F.3d 898 (6th Cir. 2006); *NSWMA v. Pine Belt Solid Waste Mgmt. Authority*, 261 F. Supp. 2d 644 (S.D. Miss. 2003), rev'd in part, dismissed in part, 389 F.3d 491 (5th Cir. 2004); *Lebanon Farms Disposal Inc. v. County of Lebanon*, No. 03-00682 (M.D. Pa. 2006).

[22] See *Atlantic Coast Demolition + Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995).

[23] E. Repa, NSWMA 2005 Tip Fee Survey (March 2005) (available at www.nswma.org).

[24] See Rick Hampson, *Trash Provides "Horn O' Plenty For Towns*, USA Today (Sept. 29, 2003) at 15A.

[25] *Id.* For example, host fees paid by one Pennsylvania landfill comprise 24 percent of the receiving municipality's budget. Douglas Brill, *Less Trash Means Less Cash*, Easton Express-Times (Oct. 23, 2006).

[26] See generally Landfill Methane Outreach Program (LMOP) at www.epa.gov/lmop. The U.S. Environmental

thousands of homes.[27]

In general, this case highlights the tension between whether solid waste collection, processing and disposal are properly viewed as governmental functions or as functions of the marketplace. At its core, flow control decisions reflect an effort to balance the dormant Commerce Clause and the police powers of local and state governments in our federal system. Proponents of flow control portray all solid waste activities as purely a governmental function and allege that the public health and environmental benefits if the government controls the waste stream outweigh any possible burden on interstate commerce. Critics of flow control point to the use of the term "Balkanization" of the economy in many of the Commerce Clause cases and believe that the Constitution prohibits local governments from interfering with interstate commerce in solid waste. Critics further argue that the national marketplace for solid waste disposal will be upended if the Second Circuit's public-private distinction is upheld by the Supreme Court.

Regardless of how the Court rules, there are other tools that local governments can use to ensure the delivery of MSW to designated disposal facilities. For example, many cities and counties have created exclusive or non-exclusive waste collection franchises for residential and/or commercial MSW collection, and condition the granting of the franchise on an agreement to dispose of the MSW at a designated disposal facility. This system has been upheld by several courts under the "market participant exception" to the dormant Commerce Clause.[28] Similarly, several courts have upheld flow control laws that restrict in-state disposal to designated disposal facilities but allow MSW to be disposed in out-of-state landfills.[29] This so-called "intrastate flow control exception" to *Carbone* may be of decreasing relevance as the volume of MSW that crosses state lines continues to grow. Finally, several courts have ruled that if the process of selecting a waste disposal facility or service provider does not discriminate against interstate commerce, requiring the use of such a facility or provider is not contrary to the dormant Commerce Clause.[30]

Conclusions

There have been two changes in the membership of the U.S. Supreme Court since the *Carbone* decision was issued in 1994. Although the five Justices who joined together on Justice Breyer's majority opinion in *Carbone* remain on the Court, it is unclear whether all of them will see the *United*

Protection Agency estimates that the landfills in the LMOP program have "prevented the release of nearly 21 million metric tons of carbon equivalent (MMTCE – the basic unit of measure for greenhouse gases) into the atmosphere over the past eleven years." *Id.* The energy generated by these landfills has also offset the use of 162 million barrels of oil, *id.*, a number that increases daily.

[27] Timothy Wheeler, *Landfills Stink of Energy, Money*, Baltimore Sun (Oct. 7, 2006). There have been hundreds of similar articles throughout the United States over the past few years as landfills explore capturing methane for re-use or re-sale. The recent extension of a federal tax credit for landfill gas projects and recent state initiatives and proposed federal legislation in response to concerns over global warming will likely accelerate the use of methane from landfills as an energy source.

[28] See *Southern Waste Systems, LLC v. City of Delray Beach*, 420 F.3d 1288 (11th Cir. 2005); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995).

[29] See *IESI Ar. Corp. v. Northwest Arkansas Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006); *On the Green Apartments, LLC v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); but see *U&I Hauling v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000) (striking down a Nebraska town's intrastate flow control law under the *Pike* balancing test).

[30] See *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir. 2001); *Houlton Citizens Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); *Harvey & Harvey, Inc. v. Chester County*, 68 F.3d 788 (3d Cir. 1995).

Haulers case as being indistinguishable from *Carbone*, or whether the fact of governmental ownership of the Authority's designated disposal facility is a sufficient reason to differentiate the case. Several Justices, in speeches and other venues, have suggested they believe in a more limited scope of the dormant Commerce Clause. Because Chief Justice Roberts such a limited judicial record, it is difficult, to say the least, to predict how he might rule. Based on the questions and comments by the Justices at oral argument, neither side should be completely confident that they persuaded a majority of the Court with their arguments or briefs.

Because virtually every business and household generates MSW, and pays to have a local government or private hauler collect its MSW, this decision is one which could affect, at least potentially, every business and household in the United States. If local governments are able to engage in traditional flow control similar to the Authority, and create local MSW monopolies insulated from market competition, waste disposal costs will increase for haulers. These haulers are likely to pass along these costs to their customers. With waste disposal costs already on the rise due to the increasing cost of fuel, new environmental regulations, and other factors, an affirmance by the Supreme Court could take a small bite out of some businesses' and households' wallets, and a somewhat larger bite out of private sector haulers and landfill owners.