

Recent Developments in Environmental Law

Recent Developments: Solid Waste

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THERE WERE ONLY FOUR SOLID WASTE CASES of any import this past year. The first of these was the U.S. Court of Appeals for the Sixth Circuit's decision in *National Solid Wastes Management Ass'n v. Daviess County (NSWMA v. Daviess)*.¹ This decision declined to adopt the Second Circuit's approach to the Commerce Clause that makes a distinction between private property and public property. The Second Circuit's approach is illustrated in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority (United Haulers I)*,² which promoted a minority of the Supreme Court in *C&A Carbone, Inc. v. Town of Clarkstown*³ as authority to overrule the majority. Instead of following a minority of the court as the Second Circuit did, the Sixth Circuit's decision in *NSWMA v. Daviess*⁴ defended the Supreme Court's majority decision in *C&A Carbone v. Town of Clarkstown* which failed to make the distinction between public and private property for Commerce Clause analysis purposes.⁵

Following the Sixth Circuit decision, the Second Circuit continued its assault on the Commerce Clause in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority (United Haulers II)*.⁶ Some might say that the Second Circuit and the New York State Court of Appeals have never seen a Commerce Clause case they could not dismiss. To say that *NSWMA v. Daviess* expressly disagrees with *United Haulers I* (and presumably II) is an understatement.

First, some history. In the *Carbone* case, the plaintiff went to the U.S. Supreme Court not from a federal circuit court and not from the New York State Court of Appeals, the state's highest court. Rather the New York State Court of Appeals did not find a substantial constitu-

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1. 434 F.3d 898 (6th Cir. 2006).

2. 261 F.3d 245 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 815 (2002).

3. 511 U.S. 383 (1994).

4. 434 F.3d 898.

5. 511 U.S. 383.

6. 438 F.3d 150 (2d Cir. 2006).

tional issue and so the appeal went to the Supreme Court from a lower court decision. In *Carbone*, the town had contracted with a local contractor to construct and operate a transfer station on the old town dump with a relatively short lease and a one dollar transfer to the town at the end of the lease.⁷ To secure sufficient revenue to the preferred developer, the town enacted a flow control law requiring all waste to flow through the selected vendors' facilities on town property.⁸ The Supreme Court ruled in a 5-1-3 decision in *Carbone* that the law was a per se violation of the Commerce Clause.⁹ Justice O'Connor concurred, agreeing with the result, but she would have reached the decision by way of the *Pike v. Bruce Church*¹⁰ balancing test.¹¹ Justice Souter's dissent, in which Justices Rehnquist and Blackmun concurred, distinguish between private and public facilities, with flow control to public facilities being legal.¹² In *United Haulers I*, the Second Circuit, citing to the three-judge dissent and Justice O'Connor's concurrence, ruled that because the Oneida Herkimer Solid Waste Disposal Authority was a public facility, the *Pike* balancing test had to be applied and not the per se rule.¹³ Accordingly, the Second Circuit remanded the case for the developing of a record based upon the balancing of equities.¹⁴

Comes the Sixth Circuit with its January 24, 2006, decision in *National Solid Wastes Management Association v. Daviess County*:¹⁵ Rarely, do you see a court take on a sister court with such explicit zest and rejection. The amount of print that the Sixth Circuit gives to the *United Haulers I* decision is extraordinary. The Sixth Circuit opined that the U.S. Supreme Court's *Carbone* decision had "implicitly rejected the public-private distinction" on which the Second Circuit had relied.¹⁶ The Sixth Circuit concluded that "[t]he fact that Defendant acts as both a business and a government, as opposed to just a government, does not cloak its facially protectionist activity from the appropriate scrutiny under the Commerce Clause." The Sixth Circuit struck down the Daviess County flow control scheme.¹⁷

7. 511 U.S. at 387.

8. *Id.*

9. *Id.* at 394.

10. 397 U.S. 137 (1970).

11. *Carbone*, 511 U.S. at 405.

12. *Id.* at 421.

13. 261 F.3d at 248.

14. *Id.* at 264.

15. 434 F.3d 898.

16. *Id.* at 912.

17. *Id.*

On February 16, 2006, the Second Circuit handed down its opinion in *United Haulers II*, the appeal from the district court decision resulting from the *United Haulers I* remand.¹⁸ While the district court decision dismissed the suit, basing its decision on the failure of *Pike* proof and the weighing of equities, the Second Circuit decision framed the issues in constitutional terms.¹⁹ The framing of issues seems to anticipate the possibility of Supreme Court review. The Second Circuit framed the essential issue as:

Since the Commerce Clause does not restrict the Authority's choices about how to dispose of the trash that it has lawfully collected, the question truly presented is whether the Counties in fact act lawfully in using their governmental powers to gain possession of all locally generated solid waste, or whether they violate the Commerce Clause in doing so.²⁰

The parties agreed that Oneida-Herkimer laws require all waste and recyclables to be brought to the governmental facility and prevent the waste from being processed either intrastate or interstate, and that the regulations restrict all private entities equally, and do not regulate outside the counties' boundaries.²¹

The court then framed the question again stating: "The question is whether this non-discriminatory regulatory scheme nonetheless imposes a cognizable burden on interstate commerce because it has the direct and clearly intended effect of prohibiting articles of commerce generated within the Counties from crossing intrastate and interstate lines."²² The court found that the laws in question did not create such a burden.²³ The court acknowledged that the laws have the "practical effect" of raising the cost of waste collection services within the counties and point out that "[s]uch circumstances raise the risk that state policymakers will not bear the true political costs of their decisions."²⁴ The Second Circuit made no mention of the Sixth Circuit decision criticizing *United Haulers I*.

Thus, we have a classic split between two circuits on an issue previously before the Supreme Court. This is an issue of wide interest,

18. 438 F.3d 150 (2006). In April 2006, the plaintiffs in *United Haulers* filed a petition for certiorari with the U.S. Supreme Court. As of the yet, this petition has not yet been ruled upon. *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, Petition for Certiorari, available at <http://wastec.isproductions.net/webmodules/webarticles/articlefiles/346-UnitedHaulerCertPet.pdf> (last visited May 29, 2006).

19. *Id.*

20. *Id.* at 158.

21. *Id.* at 157.

22. *Id.* at 159.

23. *United Haulers*, 438 F.3d at 159.

24. *Id.* at 160 (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001)).

increasing the likelihood of the Supreme Court granting certiorari to eventually decide this issue.

The other two cases of importance in the solid waste field, although not half as much fun, are *Southern Waste Systems, LLC v. City of Delray Beach*²⁵ and *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste*.²⁶

In the *IESI AR* case, the defendant Disposal Authority promulgated a regulation directing that solid waste generated in the district would have to be disposed at either in-district or out-of-state landfills, unless otherwise authorized by the district.²⁷ IESI AR purchased an in-district waste-transfer station that accepted deliveries from in-district haulers and transferred the waste to IESI AR's out-district landfill pursuant to an authorization previously granted to the IESI AR's predecessor by the district.²⁸ The district, however, told IESI AR that the previous transfer permit did not allow any increase in solid waste to the transfer station under the existing permit.²⁹ Citing its earlier decision in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*,³⁰ the circuit court stated:

IESI AR cannot complain about this regulation because it applies equally to all businesses operating in the state. IESI AR provides no evidence that out-of-state businesses suffered greater than in-state, but out-of-District, businesses. Under the regulation, IESI AR may transfer solid waste to any IESI landfill outside Arkansas. However, IESI AR's real complaint is that it cannot transfer additional waste to its in-state landfill without the District's approval—which applies equally to all businesses regardless of location. Because the regulation does not favor in-state economic interests over out-of-state interests, it does not discriminate in effect, and survives the first tier of dormant Commerce Clause analysis.³¹

The court then looked at the *Pike* balancing test and found that the burden on interstate commerce was at best minimal in relation to the regulation's benefits.³²

In *Southern Waste Systems LLC v. City of Delray Beach*, the plaintiff sued for a declaratory judgment that a contract between the two defendants was unconstitutional under *Carbone*.³³ Delray Beach issued a request for proposals allowing the successful bidder to become the exclusive service provider for residential waste collection, recycling col-

25. 420 F.3d 1288 (11th Cir. 2005).

26. 433 F.3d 600 (8th Cir. 2006).

27. *Id.* at 603.

28. *Id.*

29. *Id.*

30. 115 F.3d 1372, 1385 (8th Cir. 1997).

31. *IESI AR*, 434 F.3d at 606.

32. *Id.*

33. 420 F.3d 1288, 1289 (11th Cir. 2005).

lection, and commercial waste collection throughout Delray Beach.³⁴ Southern Waste Systems was a construction and demolition debris waste hauler and was not big enough to bid.³⁵ BFI was the successful bidder.³⁶ The city would set the rate, and BFI would bill and collect the fees and pay the city a 5 percent franchise fee.³⁷ Southern Waste sued after one of its customers was cited for continuing to do business with Southern Waste.³⁸ The district court entered partial summary judgment for the plaintiff holding that the exclusive franchise violated the Commerce Clause.³⁹

After pointing out that the city could constitutionally preempt the field of solid waste entirely, the court stated the question as “whether the City’s decision to allow BFI/WM to bill its customers directly and rebate a fee to the City transforms an otherwise constitutional exclusive waste hauling contract into an unconstitutional forced business transaction.”⁴⁰ Framing the question that way, the Eleventh Circuit said no. Referring to *Houlton Citizens’ Coalition v. Town of Houlton*,⁴¹ the court found that as long as “in-state and out-of-state bidders are allowed to compete freely on a level playing field, there is no cause for constitutional concern.”⁴² The purpose of the Commerce Clause is “to prevent economic protectionist policies, and that the relevant inquiry is whether the plan for their provision discriminates against non-local interests.”⁴³ The court reversed pointing out the critical issue is not how payment is made, but how the successful bidder is selected.⁴⁴

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Southern Waste Systems, LLC*, 420 F.3d at 1289.

39. *Id.* at 1290.

40. *Id.* at 1292.

41. 175 F.3d 178 (1st Cir. 1999).

42. *Southern Waste Systems, LLC*, 420 F.3d at 1291.

43. *Id.* at 1292.

44. *Id.*

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