



1992

Recent Developments: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources: Waste Import Restrictions Violate Interstate Commerce Clause

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Recommended Citation

Cohen, Carol Nakhuda (1992) "Recent Developments: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources: Waste Import Restrictions Violate Interstate Commerce Clause," *University of Baltimore Law Forum*: Vol. 23 : No. 1 , Article 10.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol23/iss1/10>

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notice to the public that they may successfully sue a state official for the deprivation of their federal rights, whether the official was acting in accordance with the state's laws or in abuse of them. *Hafer* sends a message to public officials who do not enjoy absolute immunity that they will be held personally accountable for depriving citizens of their federal rights, regardless of the nature of officials' actions. With the cautionary signal that the Supreme Court is sending through *Hafer*, state officials must make less arbitrary, and more thoughtful decisions or else be held accountable to the public they serve.

- Kenneth J. Goldsmith

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources: **WASTE IMPORT RESTRICTIONS VIOLATE INTERSTATE COMMERCE CLAUSE.**

In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992), the United States Supreme Court held that because solid waste is constitutionally protected as an article of commerce, any regulation imposed upon the movement of solid waste must withstand strict scrutiny under the Commerce Clause of the United States Constitution. The Court found that the waste import restrictions of Michigan's Solid Waste Management Act ("SWMA") were economically protectionist and, thus, in violation of the Commerce Clause of the United States Constitution.

Two provisions implementing waste import restrictions were adopted in 1988 when Michigan's SWMA was amended. Section 299.413a prohibited the disposal of solid waste from other counties and states in any county in Michigan. However, waste could be imported into a county if that county's solid waste management plan explicitly authorized the importation of out-of-county waste. Fort Gratiot Sanitary Landfill ("Fort Gratiot") applied to the St. Clair County Solid Waste Planning

Committee ("Committee") in 1989 for approval to accept out-of-state waste. Even though Fort Gratiot promised to reserve space for waste generated within the county, the Committee denied the application because the county's solid waste management plan did not authorize the acceptance of waste originating outside the county.

Fort Gratiot contested the decision, charging that Michigan's 1988 SWMA waste import restrictions were unconstitutional because they authorized the counties to prevent privately owned operations from participating in interstate commerce. The United States District Court for the Eastern District of Michigan held that there was no facial discrimination because the county plan did not treat states any worse than other counties in Michigan. The district court noted that each county had the option of disallowing waste generated from outside the county to enter county landfills and, therefore, the statute did not place an outright ban on out-of-state waste. Based upon their analysis of Michigan's SWMA, the district court dismissed Fort Gratiot's complaint. The Court of Appeals for the Sixth Circuit agreed with the district court's reasoning and affirmed the decision. The United States Supreme Court granted certiorari to determine the SWMA's constitutionality. The Supreme Court rejected the state court's analysis that solid waste had no constitutional protection because it was valueless. *Id.* at 2022. The Court reasoned that "whether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as "sales" of garbage or "purchases" of transportation and disposal services, the commercial transactions unquestionably have an interstate character." *Fort Gratiot*, 112 S. Ct. at 2023. Relying on *Philadelphia v. New Jersey*, in which a New Jersey law prohibiting the importation of out of state waste was struck down as violative of the Commerce Clause, the Court stated that although solid waste has no value,

it is an article of commerce and, therefore, the interstate movement of solid waste is regulated by the Commerce Clause. *Fort Gratiot*, 112 S. Ct. at 2023 (citing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978)).

Michigan and St. Clair County attempted to circumvent the application of the Commerce Clause by distinguishing *Philadelphia v. New Jersey*, because there, the prohibition was placed only upon out-of-state waste. *Fort Gratiot*, 112 S. Ct. at 2024. They argued that Michigan's SWMA did not place an unreasonable burden upon interstate commerce because the restrictions treated states and other Michigan counties in a similar manner. *Id.* The Court, however, disagreed with this argument and declared that "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Fort Gratiot*, 112 S. Ct. at 2025 (quoting *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891)).

The Court declared that it was immaterial that other counties in Michigan had adopted separate plans which allowed the importation of out-of-county waste. *Fort Gratiot*, 112 S. Ct. at 2025. The discretion given to the counties by the SWMA amendments was deemed not to exempt the statute from scrutiny under the Commerce Clause. *Id.* at 2025-26. As in *Philadelphia v. New Jersey*, where a New Jersey statute gave a state agency the permission to import certain categories of waste, the Court in *Fort Gratiot* held that Michigan's authorization for counties to accept out-of-county waste "merely reduced the scope of the discrimination," but it did not cure the discriminatory effect upon interstate commerce. *Fort Gratiot*, 112 S. Ct. at 2025.

The Court noted that under the Commerce Clause, a state statute that discriminates against interstate commerce is unconstitutional "unless the discrimination is demonstrably justifi-

fied by a valid factor unrelated to economic protectionism.” *Id.* at 2024 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)). Michigan and St. Clair County claimed that the amendments were not economically motivated; rather, they were intended to protect the health and safety of the citizens. *Fort Gratiot*, 112 S. Ct. at 2026. The Court explained that “because [the] provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives.” *Fort Gratiot*, 112 S. Ct. at 2027. In *Maine v. Taylor*, 477 U.S. 131 (1986), the Court upheld Maine’s ban on the importation of live baitfish because of parasites and other problems the nonnative baitfish posed. The Court concluded that Michigan’s Waste Import Restrictions violated the Commerce Clause because the amendments failed to present a reason, apart from origin, why solid waste from outside the county should be treated differently from solid waste from inside the county. *Fort Gratiot*, 112 S. Ct. at 2027-28.

The Court stressed that even if a legitimate goal were sought, illegitimate means to achieve that goal may not be used. *Id.* at 2027. Michigan and St. Clair County asserted that the restrictions were needed to allow counties to adequately plan for the safe disposal of future waste. *Fort Gratiot*, 112 S. Ct. at 2027. The Court acknowledged that “although accurate forecasts may be an indispensable part of a comprehensive waste disposal plan, Michigan could attain that objective without discriminating between in- and out-of-state waste.” *Id.* at 2027.

In his dissent, Chief Justice Rehnquist argued that the case should be remanded for consideration of whether the SWMA amendments were based upon legitimate local health and safety concerns. *Id.* at 2028. The Chief Justice asserted that in light of the problems associated with the disposal

of waste, Michigan was taking reasonable measures to protect its citizens and was not constructing a form of economic protectionism. *Id.* at 2028-29. Chief Justice Rehnquist declared, “the Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack.” *Fort Gratiot*, 112 S. Ct. at 2031.

In *Fort Gratiot*, the Court imposed a strict standard against the implementation of discriminatory waste import laws. The Court will strike down any statute that interferes with interstate commerce, unless a state can show that the restrictions were necessary to protect its citizens and that there were no less discriminatory options. In order for states or counties to enforce a waste management plan, the area that is to be protected must be held to the same standards that are imposed upon other counties and states.

- Carol Nakhuda Cohen

In re Criminal Investigation No. 1/242Q: ATTORNEY-CLIENT FEE RECORDS NOT PRIVILEGED FROM SUBPOENA.

The Court of Appeals of Maryland recently held that requiring an attorney to disclose jury records of the fees paid by two former clients to a grand jury did not violate the attorney-client privilege. *In re Criminal Investigation No. 1/242Q*, 326 Md. 1, 602 A.2d 1220 (1992). The court emphasized that although Rule 1.6 of the Model Rules of Professional Responsibility, governing confidentiality, is broader than the attorney-client privilege rule in Maryland, it does not provide an absolute shield to prevent this information from being subpoenaed.

As part of an investigation of known or suspected narcotics traffickers, the state routinely sought evidence of violations of the state income tax laws. The growing trend in narcotics investigation was to seek evidence of expenditures of large sums of money, includ-

ing attorney’s fees, as a means of interpolating the net worth of a suspect. For this reason, the Grand Jury for Anne Arundel County issued a subpoena duces tecum to attorney William H. Murphy, Jr. for the fee records of two of his former clients.

In a motion to quash the subpoena, Mr. Murphy pleaded that he had expressly promised his clients that all information about fees “would be personal, privileged, and confidential because of, among other things, the growing practice of prosecutors nationwide to use such information to establish violations of the narcotics laws . . .” *Id.* at 6, 602 A.2d at 1222. He argued that to reveal the information in light of his client’s express request that he not, was a breach of confidentiality.

The Circuit Court for Anne Arundel County granted the motion to quash the subpoena on the grounds that “the Maryland Rules of Professional Conduct have ‘enlarged the general principle of confidentiality.’” *Id.* at 3, 602 A.2d at 1221. On behalf of the grand jury, the State filed an appeal to the court of special appeals. Before the intermediate court heard the case, however, the Court of Appeals of Maryland granted certiorari and reversed the circuit court’s decision, holding that Rule 1.6 and the judicial application of the attorney-client privilege rule are distinct concepts. The court found that Rule 1.6 does not enlarge the attorney-client privilege rule in Maryland.

The court of appeals began by analyzing Rule 1.6 of the Model Rules of Professional Conduct. Citing the prefatory material to the Rules, which stated: “Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege, the court rejected the lower court’s contention that the adoption of this rule by the Maryland legislature affectively expanded the attorney-client privilege.” *Id.* at 4, 602 A.2d at 1221 (quoting Model Rules of Professional Conduct