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## Keeping Out Non-Local Garbage: An End-Run Around the Dormant Commerce Clause?

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## *Keeping out non-local garbage: An end-run around the dormant Commerce Clause?*

by Robert H. Abrams

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**Fort Gratiot Sanitary Landfill, Inc.**

v.

**Michigan Department of Natural Resources, et al.,**

(Docket No. 91-636)

*Argument Date: March 30, 1992*

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### ISSUE

Does a state statute that prohibits the disposal within a county of any solid waste that has been generated outside the county, including all out-of-state waste, impermissibly discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution?

### FACTS

The underlying statutory provisions in this case are somewhat more complex than in other contemporary cases presenting dormant Commerce Clause challenges to state laws that limit the interstate movement of solid waste. Here, the primary statutory command of section 13a of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.), prohibits anyone from accepting for disposal "solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal area is located unless the acceptance of [out-of-county material] is explicitly authorized in an approved county solid waste management plan."

The county solid-waste management plan process that might give authorization for accepting out-of-county materials is somewhat cumbersome. A thumbnail sketch of the steps required to gain approval of a plan include (1) adoption by the county board of commissioners, (2) approval by the governing bodies of not less than 67 percent of the municipalities within the county, and (3) approval by the Director of the Michigan Department of Natural Resources. In this case, the county in which the Fort Gratiot Sanitary Landfill site (hereinafter Fort Gratiot) is located, St. Clair County, had a solid-waste management plan that did not authorize the acceptance of out-of-county materials at any in-county landfills.

In early February 1989, Fort Gratiot approached St. Clair

County officials seeking an amendment to that county's solid-waste management plan to allow Fort Gratiot to import 1,750 tons of out-of-county solid waste per day. The authorization would have more than quadrupled operations at the landfill site that was then accepting 500 tons per day of in-county waste. Using 65 cubic yard trucks, this increase in activity would have amounted to the delivery of roughly 80 extra truckloads of solid waste each day. Relying on a county waste planning commission report that landfilling wastes at that rate would exhaust all remaining in-county approved municipal solid-waste landfills within six years, the county officials declined to go any further with the requested amendment of the county solid-waste management plan.

Within days of that determination, in March 1989, Fort Gratiot initiated this litigation challenging the legislative scheme as impermissibly discriminating against out-of-state waste being transported to privately owned and operated landfills such as theirs. No challenge was raised to the statute as it applied to publicly owned facilities. Fort Gratiot's challenge was rejected by both the United States District Court and by the United States Court of Appeals for the Sixth Circuit. See *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources*, 931 F.2d 413 (1991).

### BACKGROUND AND SIGNIFICANCE

This case and another pending Supreme Court case, *Chemical Waste Management, Inc. v. Hunt* (previewed in this issue at page 337), require the Court to revisit the dormant Commerce Clause in the increasingly important context of state efforts to limit and control the importation of waste materials generated in other states. (The operation of the commerce clause in this setting is referred to as "dormant" because the power of the federal government acts as a limit on state power without affirmative congressional legislative action.) Here, an "in-county only" rule is being applied to private facilities that provide disposal for "ordinary" solid waste (predominantly municipal trash and its associated incinerator ash), while the *Chemical Waste* case involves a state-imposed tipping fee system (i.e., a tax) that requires hazardous waste imported from other states to be taxed at a substantially higher rate than hazardous waste that is generated in-state.

The states are being pushed in the direction of restricting access to their waste disposal sites by a number of factors. The citizenry, alarmed by news of environmental disasters such as Love Canal and Times Beach, have become militant in their opposition to siting waste disposal facilities. While

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this trend (frequently called the NIMBY—not in my back yard—phenomenon) applies with greatest force in the hazardous waste field, even landfills accepting only municipal solid waste can pose an environmental threat to aquifers and some nearby surface streams. Thus behind the public outcry lie genuine environmental and public health concerns, traditionally areas of regulation lying near the heart of the states' police power.

At the same time public sentiment presses for protection against importing environmental problems as a by-product of importing waste, as a matter of intrastate economics and planning, excluding such waste benefits all segments of the local populous except the operator of the landfill. By legislating away non-local competition for use of the landfill space, the demand for that space is reduced, meaning that the price of disposal for locally generated waste will be lower. Just as important, in areas where acceptable landfill sites are rare, a local-only rule extends the effective life of the landfill sites as repositories for locally generated wastes by preventing them from being filled with imported waste in the meantime. Applying these precepts to the current case, it seems fair to conclude that in the absence of regulation that blocks waste importation, Fort Gratiot would be able to both (1) charge a higher price for all waste accepted and (2) fill the dumpsite more quickly.

As a matter of legal doctrine, the dormant Commerce Clause has long stood as a bulwark against myriad forms of local protectionism. One hallmark phrase that captures the sentiment of many of the cases expresses an anti-Balkanization principle when it declares, "Our economic unit is the nation." Looking more narrowly at the precedents that most closely resemble this case, two come to mind. First, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court invalidated New Jersey's effort to exclude from in-state landfills out-of-state solid waste of the sort involved in this case. Second, in *Dean Milk v. City of Madison*, 340 U.S. 349 (1951), the Court invalidated a local ordinance that discriminated in favor of local dairies to the disadvantage of both out-of-state and non-local in-state producers. While these two cases seem to point toward an outcome favoring Fort Gratiot, there are factors pointing the other way also. Initially, the composition of the Court has changed since *Philadelphia* was decided in 1978, and Justice (now Chief Justice) Rehnquist wrote a strong dissent in that case arguing in favor of the right of states to forbid out-of-state waste. Additionally, at least one intervening case, *Maine v. Taylor*, 477 U.S. 131 (1986), upheld a ban on the importation of baitfish where that ban was found to be vital to protecting aspects of the state's environment.

It is difficult to gauge the significance of this case. Any decision that validates a means for restricting landfill space to in-state residents is bound to have some potential for encouraging similar legislation in other states. Laws that erect only local discrimination, such as that in effect here favoring only in-county waste generators, may not pose much of a problem for the nation and may not be widely copied.

Local discrimination will frequently have only marginal impacts on interstate commerce. Beyond that, local option laws, because they disadvantage many would be in-state customers who are not local, are less likely to win political support in the state legislature where citizens feeling part of the regulatory burden are represented. Thus, it seems fair to predict that even if the Court affirms the validity of the Michigan statute in this case, there will not be the same rush to emulate the Michigan legislation as would occur if the Court upheld a law that discriminated exclusively against out-of-state waste.

#### ARGUMENTS

***For Fort Gratiot Sanitary Landfill, Inc. (Counsel of Record, Harold B. Finn III; Finn, Dixon & Herling, One Landmark Square, Stamford, CT 06901; telephone (203) 964-8000):***

1. The state law in this case impermissibly discriminates against interstate commerce even though the same law interdicts some intrastate commerce in the same articles.
2. Even though the case may be treated as involving natural resources, the ordinary jurisprudence of dormant Commerce Clause cases applies, and the statute here is therefore subject to the strict scrutiny given to discriminatory legislation.
3. The waste-importation restrictions at issue here do not serve a legitimate local purpose, nor are they the least commerce-burdensome method of achieving the state's objectives.

***For the State of Michigan (Counsel of Record, Thomas L. Casey, Assistant Solicitor General, PO Box 30212, Lansing, MI 48909; telephone (517) 373-1124):***

1. The law at issue regulates an area of legitimate local concern and does so in an even-handed fashion.
2. This legislation is not facially discriminatory against interstate commerce and, at most, imposes only an incidental burden on that commerce.
3. There are no less commerce-burdensome alternatives that adequately protect Michigan's legitimate waste management and environmental interests.
4. The market participant doctrine and principles of state sovereignty protect this Act against dormant Commerce Clause invalidation.

***For St. Clair County (Counsel of Record, Lawrence R. Ternan; Beier Howlett, 200 E. Long Lake Road, STE 110, Bloomfield Hills, MI 48304-2361; telephone (313) 645-9400):***

1. The legislation has the legitimate purpose of managing solid waste, does not discriminate against interstate commerce, and has only minimal effects on interstate commerce.
2. Strict scrutiny should not be applied in this case where there is a legitimate local purpose and the statute is not an economic protectionist measure.
3. Regulation of solid waste is a fundamental responsibility of state and local governments in their primary role as protectors of the environment.