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Opinion No. 00-033

1988 Tenn. Priv. Acts, ch. 144 - Restrictions On Solid Waste Disposal - Commerce Clause

QUESTION

Chapter 144 of the 1988 Private Acts of Tennessee prohibits all solid waste generated outside Bradley County from being disposed in the county-owned landfill or in public garbage receptacles owned or provided by the county. Is this enactment constitutional?

OPINION

It is the opinion of this Office that a court likely would hold that 1988 Tenn. Priv. Acts, ch. 144 violates the Commerce Clause of the United States Constitution. The act discriminates against interstate commerce by prohibiting the disposal of out-of-state waste in Bradley County's landfill and public garbage receptacles so as to preserve the disposal capacity of these facilities for local waste. Although Bradley County, as the owner of the facilities, is directly participating in the solid waste disposal market, this Office is of the opinion that the "market participant" exception to the Commerce Clause does not apply, because the disposal restriction is being imposed by a non-participant in the market, the State.

ANALYSIS

Chapter 144 of the 1988 Private Acts of Tennessee (Chapter 144) restricts the solid waste that may be disposed in a landfill owned by Bradley County, and in public garbage receptacles owned or provided by the county. In pertinent part, the act provides:

It shall be unlawful to carry or haul trash into Bradley County for the purpose of disposing of the trash or garbage in a landfill owned by Bradley County or in the public garbage receptacles owned or provided by Bradley County. Only trash or garbage generated in Bradley County may be disposed of in a landfill owned by Bradley County or in public garbage receptacles owned or provided by Bradley County.

1988 Tenn. Priv. Acts, ch. 144, § 1(a). Because Chapter 144 would prohibit solid waste generated outside of Tennessee from being disposed in these county-owned facilities, it implicates the Commerce Clause of the United States Constitution.

The Commerce Clause provides that Congress “shall have power . . . [t]o regulate commerce . . . among the several states.” U.S. Const., art. I, § 8, cl. 3. The United States Supreme Court has recognized as a negative or dormant aspect of the Commerce Clause the principle that, in the absence of express regulation from Congress, the clause limits a state’s power to impose burdens upon interstate commerce. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). Solid waste has been held to be an article of commerce subject to the constraints of the Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23, 98 S.Ct. 2532, 2534-35, 57 L.Ed.2d 475 (1978).

The Supreme Court also has recognized that the Commerce Clause generally does not apply “when a state or local government enters the market as a participant” rather than a regulator thereof. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980). The parameters of the “market participant” doctrine and its application in the context of solid waste are discussed in detail in Op. Tenn. Att’y Gen. 95-041 at 13-17 (April 18, 1995), which is attached to this opinion. Although Bradley County, as the owner of the facilities addressed by Chapter 144, is directly participating in the solid waste disposal market, the market participant doctrine does not shield Chapter 144 from Commerce Clause scrutiny. This is because the disposal restriction resulting from this law is being imposed by a non-participant in the market, the State.* *See* Op. Tenn. Att’y Gen. 95-041 at 17 (market participant doctrine “does not allow the state to prohibit the disposal of out-of-state waste at landfills owned by local governments”).

The primary objects of dormant Commerce Clause scrutiny have been state statutes that discriminate against interstate commerce. “State laws discriminating against interstate commerce on their face are ‘virtually *per se* invalid.’” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S.Ct. 848, 854, 133 L.Ed.2d 796 (1996) (citations omitted). For such a law to survive, the state must show that the statute serves a legitimate state interest, which cannot be achieved by “available nondiscriminatory means.” *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979). Under this standard, the state’s “burden of justification is so heavy that ‘facial discrimination by itself may be a fatal defect.’” *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon*, 511 U.S. 93, 101, 114 S.Ct. 1345, 1351, 128 L.Ed.2d 13 (1994) (citations omitted).

Chapter 144 facially discriminates against interstate commerce, because it prohibits the disposal of out-of-state waste in Bradley County’s facilities. Chapter 144 is similar to a Michigan law invalidated by the United States Supreme Court in *Fort Gratiot Sanitary Landfill, Inc. v.*

* The fact that this private act provides for local legislative approval, as mandated by Article XI, Section 9 of the Tennessee Constitution, does not alter our conclusion that Chapter 144 is subject to analysis under the Commerce Clause.

Michigan Dept. of Natural Resources, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992). That law prevented a private landfill from receiving waste generated outside the state. 504 U.S. at 357, 112 S.Ct. at 2022. The Supreme Court ruled that the Michigan law unambiguously discriminated against interstate commerce, and rejected the state’s argument that the law was a reasonable measure to conserve limited landfill capacity. *Id.* at 366-67, 112 S.Ct. at 2027. The Court held that the state could not validly regulate solid waste disposal so as to preserve landfill capacity for the benefit of local waste. *Id.* at 367, 112 S.Ct. at 2027. *See also City of Philadelphia*, 437 U.S. at 628, 98 S.Ct. at 2537 (state law prohibiting disposal of out-of-state waste in New Jersey landfills was protectionist and unconstitutionally discriminatory under the Commerce Clause).

The Supreme Court concluded that Michigan’s objective to conserve scarce landfill space could be attained “without discriminating between in- and out-of-state waste.” 504 U.S. at 367, 112 S.Ct. at 2027. One way, according to the Court, would be to limit the amount of all waste, regardless of origin, that landfill operators could accept on a yearly basis. *Id.* at 367, 112 S.Ct. at 2027. The Supreme Court also rejected Michigan’s argument that the law was valid, because some landfills were allowed to receive waste from outside the state. The Court held that in either situation, the discriminatory effect on interstate commerce remained and only the scope of the discrimination varied. *Id.* at 363, 112 S.Ct. at 2025. *See also Wyoming v. Oklahoma*, 502 U.S. 437, 455, 112 S.Ct. 789, 800, 117 L.Ed.2d 1 (1992) (Commerce Clause violated by state law that “reserve[d] a [10%] segment of the Oklahoma coal market for Oklahoma-mined coal”).

Chapter 144 prohibits the disposal of out-of-state waste in Bradley County’s facilities so as to preserve that disposal capacity for local waste. Based upon the analysis and ruling of the United States Supreme Court in *Fort Gratiot*, it is the opinion of this Office that a court likely would hold that Chapter 144 discriminates against interstate commerce in violation of the Commerce Clause.

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