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Constitutional Law - Commerce Clause - Waste Not, Want Not or How Alabama Went to Bat with an Additional Fee on Imported Hazardous Waste and Didn't Strike out under the Commerce Clause - Hunt v. Chemical Waste Management, Inc.

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CONSTITUTIONAL LAW—Commerce Clause—“Waste Not, Want Not” or How Alabama Went to Bat With an Additional Fee on Imported Hazardous Waste and Didn’t Strike Out Under the Commerce Clause. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367 (Ala. 1991).

For a moment, consider a vast wasteland, not one resembling the crisp habitat of the Arctic tundra or the vast expanses of the Australian outback, but a futuristic “no man’s land” made inhospitable by landfilled refuse and toxic remnants of earlier generations. Whether Alabama’s legislature responded viscerally to these images or intellectually to the very real problems associated with the disposal of hazardous waste, it has responded. In April of 1990, the Alabama legislature enacted legislation (the Act),¹ which imposes two different fees on waste disposal at Alabama commercial hazardous waste facilities. The operators of each site must pay a base fee of \$25.60 per ton for all waste disposed of at the site. Operators must also pay an additional fee of \$72.00 per ton on all hazardous waste generated outside Alabama and subsequently deposited at the facilities.²

The Act also imposes a cap on the amount of hazardous waste that can be disposed of in any one-year period at hazardous waste facilities handling in excess of 100,000 tons of total waste annually. The yearly cap on hazardous waste can be no greater than the amount disposed of during the first year the new tonnage fees are in effect. The amount of hazardous waste disposed of during this benchmark period thus becomes the permanent ceiling for subsequent years.³ The commercial landfill at Emelle has the somewhat dubious distinction of being the only Alabama facility handling in excess of 100,000 tons annually.⁴

On June 5, 1990, Chemical Waste Management, Inc. (CWM), the owner of the Emelle facility, filed suit for declaratory and injunctive relief against the State of Alabama.⁵ CWM challenged the constitutionality of the Act’s base fee, additional fee, and cap provision under

1. Ala. Code § 22-30B-1 et seq. (1975 & Supp. 1990). Alabama Governor Guy Hunt signed Act No. 90-326 to be effective commencing July 15, 1990.

2. *Id.* The Emelle facility owned by Chemical Waste Management is the only commercial hazardous waste landfill facility currently operating in Alabama. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1369 (Ala. 1991). After this case-note had been sent to the publisher, the United States Supreme Court, on appeal of this case, reversed the Alabama Supreme Court decision and held that the Alabama statute is an unconstitutional violation of the Commerce Clause. *Chemical Waste Management, Inc. v. Hunt*, No. 91-471, 1992 WL 112337 (U.S. June 1, 1992).

3. *Hunt*, 584 So. 2d at 1371. The benchmark period ran from July 15, 1990 to July 14, 1991; however, the governor or his designee has continuing authority to lift the cap and increase tonnage if necessary to protect the state’s human health or environment, or to comply with state or federal laws in assuring adequate disposal capacity. *Id.*

4. *Id.* at 1369.

5. *Id.* Defendants include Alabama Department of Revenue, Commissioner James M. Sizemore, Jr. and Alabama Governor Guy Hunt. *Id.*

the Commerce, Equal Protection, and Due Process Clauses of the state and federal constitutions.⁶ On February 28, 1991, the trial judge declared the base fee and cap provisions of the Act valid and constitutional but found that the additional fee imposed on out-of-state waste violated the Commerce Clause of the United States Constitution.⁷ Both Alabama and CWM appealed to the Alabama Supreme Court.⁸

In its subsequent decision, the Alabama Supreme Court agreed that Alabama had a legitimate purpose in treating out-of-state wastes differently and that the imposition of a less discriminatory alternative would not effectively serve that purpose.⁹ Thus, the Alabama Supreme Court reversed the trial court's decision and held the \$72.00 additional fee valid under traditional Commerce Clause analyses.¹⁰

This casenote examines the Alabama court's decision upholding the constitutionality of the additional fee under traditional Commerce Clause analysis. Precedential Supreme Court and federal court cases are analyzed and distinguished in relationship to the court's rationale in the *Hunt* decision. The primary focus is on the Alabama Supreme Court's application of the strict scrutiny test in validating the \$72.00 additional fee as a permissible burden on interstate commerce. The justifications for the additional fee as a response to Alabama's hazardous waste predicament are analyzed as are the policy reasons for concluding that the fee's purpose is environmental, rather than economic, protectionism.

BACKGROUND

The United States Constitution provides: "The Congress shall have power . . . to regulate commerce . . . among the several states."¹¹ The intrinsic purpose of the Commerce Clause is to ensure that any state's regulation does not disrupt the economic unity of the nation.¹²

6. *Id.* at 1370, note 1. CWM also contended: 1) the cap provision was preempted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 (1982), the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 (1982), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 (1982); and 2) the Act was a revenue bill enacted during the last five days of the legislative session in violation of Article IV of the Alabama Constitution. In response, Governor Hunt filed a counterclaim for declaratory relief asking that the Act be declared constitutional. *Id.*

7. *Id.*

8. *Id.* The State of Alabama appealed the ruling on the additional fee to the Alabama Supreme Court. It contended the \$72.00 fee did not violate the Commerce Clause because it advanced a legitimate local purpose which could not be adequately served by reasonable nondiscriminatory alternatives. CWM then cross-appealed contending that the \$72.00 fee was invalid under the Commerce Clause because it obstructed interstate trade and advanced the illegitimate local purpose of economic protectionism. *Id.*

9. *Id.* at 1390.

10. *Id.*

11. U. S. CONST. art. I, § 8, cl. 3.

12. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949).

The states retain residual legislative power to protect the health, environment, and public welfare of their citizens as long as interstate commerce is not unduly burdened.¹³ However, when a state's legislation directly or indirectly results in economic isolation or protectionism for that state, it may be invalidated by the courts.¹⁴

Historically, the United States Supreme Court has recognized that the Commerce Clause limits the authority of a state to discriminate against interstate commerce.¹⁵ In *Milk Board v. Eisenberg Co.*,¹⁶ a Pennsylvania law established a minimum milk price dealers were required to pay Pennsylvania farmers. Eisenberg, who shipped to New York any milk he purchased from Pennsylvania farmers, contended that the law unconstitutionally regulated interstate commerce.¹⁷ The Court found that the law did not regulate the sales price of Eisenberg's milk once it reached New York. Additionally, since only a small fraction of Pennsylvania milk was shipped out of state, the Court held that the law's effect on interstate commerce was indirect and the law was therefore not invalidated under the Commerce Clause.¹⁸

Alternatively, in *Dean Milk Co. v. Madison*, the Court struck down a municipal law imposing direct burdens on interstate commerce. A Madison ordinance was challenged because it prohibited the sale of milk in the city of Madison unless it had been pasteurized and bottled within five miles of the city.¹⁹ The Court agreed that sanitary regulation of milk to protect the safety, health, and well-being of local communities was a legitimate purpose, even though interstate commerce was affected.²⁰ However, the Court found the ordinance's practical effect was protection of the local milk industry from out-of-state competition. Notwithstanding the ordinance's legitimate local purpose and the state's unquestioned power to enact it, the Court found reasonable nondiscriminatory alternatives available and struck down the Madison ordinance.²¹

The Court's criteria for testing the constitutionality of the local regulations in the *Eisenberg* and *Dean Milk* cases have since evolved

13. See *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981).

14. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Where economic protectionism is the only effect of state legislation, a virtually per se rule of invalidity has been invoked. *Id.*

15. *Hood*, 336 U.S. at 534-35.

16. 306 U.S. 346 (1939).

17. *Id.* at 350.

18. *Id.* at 353.

19. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350 (1951).

20. *Id.* at 353-54.

21. *Id.* at 358. This was the first time a health law was struck down because the Court found a more reasonable, less discriminatory alternative was available for safeguarding health. *Id.* The vigorous dissent questioned the "reasonable alternative" criterion: "In my view, to use this ground now elevates the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk." *Id.* (Black, J., dissenting).

and today are incorporated in the *Pike* balancing test²² and the strict scrutiny test of *Maine v. Taylor*,²³ respectively. This casenote will focus on the strict scrutiny test because Alabama's additional fee is an act which facially and directly discriminates against interstate commerce.²⁴ In order to survive Commerce Clause analysis, such legislation must serve a legitimate local purpose, which could not be served as well by a less discriminatory alternative.²⁵

Cases Decided Before Maine v. Taylor

In 1978, the United States Supreme Court decided *Philadelphia v. New Jersey*, a landmark case under Commerce Clause analysis.²⁶ The Court struck down a New Jersey law which prohibited importation of solid or liquid wastes generated or collected out of state. New Jersey passed the legislation to foreclose the anticipated exhaustion of New Jersey's landfill capacity within a few years.²⁷ The Court concluded that the New Jersey statute effectively protected the state's economy and that its burden on interstate commerce was substantial.²⁸ The Court found no credence in the state's environmental purpose, noting that out-of-state and in-state wastes, once landfilled, are indistinguishable and pose identical risks. The Court held that New Jersey must have a reason, apart from origin, to treat out-of-state wastes differently.²⁹ The Court thus made it clear that New Jersey's legitimate goal of protecting its environment could not be achieved by the illegitimate means of isolating the state from the national economy.³⁰

22. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* test is applied to nondiscriminatory state or local legislation resulting in indirect or incidental effects on interstate commerce. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

23. 477 U.S. 131, 138 (1986).

24. *Id.* The Alabama Supreme Court admitted that the Act's disparate fees on in-state and out-of-state disposal of hazardous wastes subjected it to the strict scrutiny test of *Maine*. *Hunt v. Chemical Waste Management*, 584 So. 2d 1367, 1386 (Ala. 1991).

25. *Maine*, 477 U.S. at 138.

26. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

27. *Id.* at 618. The New Jersey Supreme Court also thought it crucial to extend the life of existing landfills to prevent further virgin wetlands or other undeveloped lands from being converted to additional landfills. *Id.* at 625.

28. *Id.* at 629. See also David Pomper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and The Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1311 (1989) [hereinafter *Recycling*].

29. *Philadelphia*, 437 U.S. at 629.

30. *Id.* at 627. The Court then concluded its opinion by dispelling appellees' argument that the New Jersey law operated no differently than quarantine laws. "It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed to out-of-state commerce. Those quarantine laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *Id.* at 628-29.

In 1978, the Court's application of strict scrutiny in *Hughes v. Oklahoma* produced an identical result to *Philadelphia*.³¹ The Oklahoma statute in *Hughes* directly discriminated against interstate commerce by banning the exportation and sale of minnows, which ostensibly blocked the flow of interstate commerce at the state's borders.³² The law's alleged purpose was to prevent depletion of minnows from Oklahoma's natural streams through commercial exploitation.³³ Even though the Court acknowledged that the state's interest in preserving its ecological balance of minnows in state streams, rivers, and lakes qualified as a legitimate local purpose, the Court invalidated the statute because nondiscriminatory conservation alternatives were not tried.³⁴ The Court found that Oklahoma had chosen to conserve its minnows in the most discriminatory way.³⁵

The Maine v. Taylor Decision

In the 1985 *Maine v. Taylor* decision, a state statute criminalizing the importation of live baitfish into the state survived the Court's analysis.³⁶ Noting that the statute directly restricted interstate trade on its face, the United States Supreme Court applied the strict scrutiny test. The Court found a legitimate local purpose in preserving Maine's fragile fisheries from parasites found in out-of-state baitfish and concluded that no less discriminatory means of protection were currently available.³⁷ The Supreme Court concurred with the court below that Maine had a legitimate interest in guarding against *imperfectly understood environmental risks* (emphasis added).³⁸ The Court held that Maine had legitimate reasons to treat out-of-state baitfish

31. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

32. *Id.* at 325. The Court expressly overruled *Geer v. Connecticut*, 161 U.S. 519 (1896). The *Geer* court had held, *inter alia*, that wild animals were owned by the citizens of the state, subject to state control, and could be kept solely within the state without violation of the Commerce Clause. *Id.*

33. *Id.* A Texas businessman violated the regulation when he transported a load of minnows from Oklahoma to Texas. He was convicted and fined by the Oklahoma Criminal Appeals Court. The United States Supreme Court granted certiorari and reversed. *Id.* at 324.

34. *Id.* at 338. The Court noted that the state had placed no limits on how many minnows could be taken by in-state dealers and had not imposed any in-state limitations on minnow disposal. *Id.*

35. *Id.*

36. *Maine v. Taylor*, 477 U.S. 131, 148 (1986).

37. *Id.* at 143. Experts testified that there was no satisfactory way to inspect shipments of live baitfish for parasites, and the Court found this testimony persuasive. In fact, the examination procedure for parasites required the destruction of the fish. *Id.* at 141. The Court expressly agreed with the district court that the "abstract possibility" of developing acceptable testing procedures for parasites in live baitfish did not make those procedures an available nondiscriminatory alternative. *Id.* at 147.

38. *Id.* at 148. The Court made it clear that a state must avoid restraining interstate commerce at its borders, but Maine could not be required to develop new and expensive test procedures for baitfish when such measures might not be effective. *Id.* at 147.

differently, apart from their origin.³⁹

Cases Decided After Maine v. Taylor

Lower federal and state courts have subsequently reached different results in applying strict scrutiny analysis to state and local legislation. In *Al Turi Landfill, Inc. v. Goshen*,⁴⁰ the salient issue was whether a town ordinance which limited combined acreage of in-town sanitary landfills to 300 acres violated the Commerce Clause.⁴¹ The federal district court emphasized that because Goshen had imposed a flat acreage limitation applicable to interstate and local businesses alike, it did not impose the full brunt of conserving landfill space on the out-of-state businesses.⁴² The court found the local ordinance valid as its purpose was to “[s]low the flow of *all* waste, regardless of origin, into its borders.”⁴³ Additionally, the court found that Goshen’s interest in limiting total landfill acreage could not be characterized as *de minimus*. The court vindicated the legislation because sanitary landfills produce some amount of leachate,⁴⁴ are never problem-free and have a negative impact on surrounding properties.⁴⁵

Commerce Clause analysis in two recent federal court cases has produced inapposite decisions. In *Bill Kettlewell Excavating v. Michigan DNR*, amendments to the Michigan Solid Waste Management Act prohibited county landfill operators from accepting waste generated outside the county unless specifically authorized in that county’s approved solid waste management plan.⁴⁶ The federal district court held that the amendments did not serve an economic protectionist purpose as the mandate that importers appear in the county plan applied equally to other counties and out-of-state entities.⁴⁷ The court upheld the amendments because their implementation did not flatly prohibit importation of out-of-state wastes and because the incidental effects on interstate commerce were not clearly excessive compared to the benefits derived in protecting the public’s health, safety, and wel-

39. *Id.* at 152.

40. 556 F. Supp. 231 (S.D.N.Y. 1982).

41. *Id.* at 232. The ordinance also limited the total area of each facility to fifty acres, imposed application fees for construction of new facilities, and established a twenty-five cents per ton inspection fee on solid waste actually deposited in the town’s sanitary landfill. *Id.*

42. *Id.* at 236.

43. *Id.* at 238. The district court stated: “[I]t may be assumed as well that New Jersey may pursue those ends (i.e. environmental protection) by slowing the flow of *all* waste into the State’s remaining landfills, even though interstate commerce may incidentally be affected.” *Id.* at 236 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978)).

44. *Id.* at 238. Leachate is a highly noxious liquid which frequently pollutes ground and surface waters. *Id.*

45. *Id.* Along with social impacts in the neighborhood, landfill operations create noise, odor, litter, dust and heavy truck traffic. *Id.*

46. *Bill Kettlewell Excavating v. Michigan DNR*, 732 F. Supp. 761, 762 (E. D. Mich. 1990).

47. *Id.* at 766.

fare.⁴⁸ As in the *Turi Landfill* case, the court found that the purpose of the legislation was to slow the flow of all waste into county landfills and that this was the least discriminatory alternative available.⁴⁹

Conversely, in *National Solid Wastes Management Association v. Alabama Department of Environment* (NSWMA and ADEM, respectively), the Eleventh Circuit Court of Appeals agreed with NSWMA that the Holley Bill was unconstitutional as an economic protectionist measure.⁵⁰ The Holley Bill prohibited Alabama operators of hazardous waste facilities from disposing of hazardous waste imported from certain states and was the forerunner to the legislation embodied in the Act.⁵¹ The bill was Alabama's response to the federal mandate that every state assure the Environmental Protection Agency (EPA) of its hazardous waste disposal capacity for the next twenty years in order to receive federal money for state cleanup actions.⁵² Accordingly, Alabama's leaders were concerned that the growing amounts of hazardous wastes being disposed of at Emelle from the forty-eight states might preclude Alabama's twenty-year capacity assurance to the EPA.⁵³

The appellate court in *NSWMA* did agree that Alabama can prohibit transportation of an object of interstate commerce across state lines when the dangers inhering in that movement far outweigh its worth in interstate commerce.⁵⁴ However, the court found hazardous wastes to be identical to the solid and liquid wastes in *Philadelphia*

48. *Id.* at 764. In addition to finding protection of the public's health and environment to be a legitimate local purpose, the court also found it significant that plaintiff did not contend it was virtually impossible for any out-of-state generator to be included in a particular county's landfill disposal plan. *Id.*

49. *Id.* The plaintiff Kettlewell did not allege that county officials were using their authority to reject plans calling for importation of wastes. *Id.*

50. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env't*, 910 F.2d 713, 720 (11th Cir. 1990) [hereinafter *NSWMA*]. NSWMA also challenged regulations in the bill requiring hazardous waste generators to receive the state's preapproval before importing wastes to Alabama. Additionally, NSWMA challenged regulations proscribing disposal of certain wastes unless they were pretreated. *Id.* at 715.

51. Ala. Code § 22-30-11 (1975 & Supp. 1990). The Holley Bill banned hazardous wastes from states which prohibited treatment and disposal of hazardous wastes within their borders. The bill also proscribed importation from those states having no commercial facilities to handle or treat hazardous wastes and from those having no interstate agreement with Alabama for disposal. The interdictions in the bill essentially prevented any out-of-state hazardous waste disposal in Alabama. *Id.* See also Robert O. Jenkins, Note, *Constitutionally Mandated Southern Hospitality*, 69 N.C. L. REV. 1001, 1004-05 (1991) [hereinafter *Hospitality*].

52. *NSWMA*, 910 F.2d at 716-17. The federal mandate requiring landfill capacity assurance from the states for the next twenty years is delineated in the Superfund Amendments and Reauthorization Act (SARA) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *Id.* at 716. See also Jonathan R. Stone, Article, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENV'T'L L. 1, 3 (1990).

53. *NSWMA*, 910 F.2d. at 715.

54. *Id.* at 718. The Supreme Court in the quarantine cases has authorized states to restrict interstate movement of an object when its "existing condition would bring in and spread disease, pestilence, and death." *Id.*

and concluded that the innate danger of hazardous waste did not outweigh its worth in interstate commerce.⁵⁵ Alabama's legitimate legislative purpose was to protect human health and the environment; but, as in *Philadelphia*, the court proscribed accomplishing that purpose by discriminating against hazardous wastes based solely on their origin.⁵⁶ Thus, the court held the Holley Bill unconstitutional because it erected a barrier which isolated Alabama from interstate trade.⁵⁷ The court also found the Holley Bill did not fall within the Commerce Clause exception of the quarantine cases because Alabama did not ban the wastes based on their degree of toxicity or dangerousness.⁵⁸ Rather, the court held that the Holley Bill discriminated impermissibly against interstate commerce on the basis of the state of generation.⁵⁹

THE PRINCIPAL CASE

In *Hunt v. Chemical Waste Management Inc.*, the Alabama Supreme Court first affirmed the trial judges' holdings that the base fee and the cap provisions were constitutional.⁶⁰ The court then addressed whether the trial court erred in holding that the Act's additional fee of \$72.00 per ton on disposal of out-of-state hazardous wastes discriminated against interstate commerce in violation of the Commerce Clause of the Constitution.⁶¹

The court initially recognized that the Commerce Clause does not invalidate all state restrictions on commerce. The court confirmed the states' residual police powers to make laws governing matters of local

55. *Id.* at 718-19.

56. *Id.* at 720. "Even if Alabama's purpose . . . was to protect human health and the environment in Alabama, that purpose 'may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" *Id.* (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).) *See also Hospitality*, *supra* note 51, at 1007.

57. *NSWMA*, 910 F.2d at 720.

58. *Id.* at 721. The court admitted that Alabama has the right to ban hazardous wastes based on dangers to human health or environment. However, the court found Alabama's law did not simply prevent traffic in noxious articles, whatever their origin, and therefore did not qualify as an applicable quarantine exception. *Id.*

59. *Id.*

60. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1369 (Ala. 1991). CWM challenged the base fee under the Commerce, Equal Protection, and Due Process clauses of the Constitution. CWM also challenged the annual cap on hazardous waste disposal based on the 1990 benchmark year under the Commerce, Supremacy, Contracts, Takings and Due Process clauses. The court found the base fee and the cap provision applied evenhandedly to both in-state and out-of-state wastes; and in applying the *Pike* test, the court found the regulations affected interstate commerce only incidentally. *Id.* at 1370-85. CWM then challenged the Act as a revenue bill enacted during the last five days of the legislative session, in violation of Article IV, Section 70 of the Alabama Constitution. The Alabama Supreme Court also affirmed this provision of the Act. *Id.* at 1385-86.

61. *Id.* at 1386 (citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978)).

concern. If Congress has not preempted a particular area with federal legislation, state legislatures may pass laws which somewhat affect or regulate interstate commerce.⁶² The Alabama Supreme Court agreed with the trial court that the disparate fees imposed on in-state and out-of-state hazardous wastes facially discriminated against interstate commerce and subjected the Act to the strict scrutiny standard of review.⁶³

The court then refuted the trial court's reliance on *Philadelphia* and *NSWMA* as dispositive that the additional fee violated the Commerce Clause.⁶⁴ The Alabama Supreme Court distinguished the finding of economic protectionism in *NSWMA* and *Philadelphia* with a specific finding by the Alabama legislature that the additional fee dealt effectively with the health and environmental hazards caused by out-of-state hazardous waste disposal.⁶⁵ Consequently, the court concluded that legislation similar to the Act, which advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, can be validated under strict scrutiny.⁶⁶

Next, the court contrasted the result in *Philadelphia* with other United States Supreme Court cases where the distinction was simple economic protectionism versus state legislation enacted to protect the health, safety, welfare, and environment of the state's citizenry.⁶⁷ The Alabama court found significant to its decision that the *Philadelphia* holding did not proscribe banning out-of-state wastes based on health and environmental protectionism or efforts to slow the flow of hazardous wastes into the states.⁶⁸

In support of the constitutionality of the additional fee, the court referred to Justice Rehnquist's dissent in *Philadelphia*.⁶⁹ Acknowledging the ever present and burgeoning problem of waste disposal in the United States, Justice Rehnquist would have held that states can regulate out-of-state wastes under the same auspices that states have enacted quarantine laws to protect the public health.⁷⁰

62. *Hunt*, 584 So. 2d at 1386.

63. *Id.* at 1389.

64. *Id.* at 1387-89.

65. *Id.* at 1390.

66. *Id.* at 1388.

67. *Id.* at 1389.

68. *Id.*

69. *Id.* at 1388.

70. *Id.* (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting)). Justice Rehnquist noted that quarantine laws have not been forbidden as protectionist measures, even though they directly affect interstate commerce. He stated:

The Court recognizes, ante, that States can prohibit the importation of items, "which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption."

Id. at 1388 (citing *Maine v. Taylor*, 477 U.S. 131 (1986)). See also *Hospitality*, *supra* note

The Alabama court found additional support for the fee from the Supreme Court's decision in *Maine v. Taylor*.⁷¹ Justice Blackmun, writing for the majority, suggested that the free flow of trade must be maintained among the states and that a per se rule of invalidity will be applied to economic protectionist legislation. However, he also affirmatively noted that the "Commerce Clause . . . does not elevate free trade above all other values. [A] state . . . retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."⁷² The court noted that Justice Blackmun upheld Maine's ban on the importation of live baitfish as serving legitimate local purposes which could not adequately be served by available nondiscriminatory alternatives.⁷³

The Alabama court found that the purpose of the additional fee was not economic protectionism, as the Act did not impose an outright ban on importation and disposal of hazardous wastes at Alabama facilities.⁷⁴ Rather, in passing the additional fee, the legislature simply required that participating states bear a reasonable proportion of present and probable future costs as a result of increased risks to the environment, health, and safety of Alabama citizens.⁷⁵ Additionally, because millions of tons of hazardous waste have already been permanently stored at the Emelle facility, the court found that the identified and unidentified risks to Alabamians will continue in perpetuity along with the unknown costs of site monitoring and remediation. If the additional fee were not imposed, then a disproportionate share of these costs would fall on Alabamian taxpayers instead of those responsible for the out-of-state wastes.⁷⁶

The court found the additional fee served four legitimate local purposes which could not be adequately served by reasonable nondiscriminatory alternatives:

- (1) protection of the health and safety of the citizens of Alabama from toxic substances;
- (2) conservation of the environment and the state's natural resources;
- (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama;
- (4) reduction of the overall flow of wastes traveling on the state's highways,

51, at 1007.

71. *Hunt*, 584 So. 2d at 1388 (citing *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986)). The Supreme Court in *Maine* made it clear that environmental measures are entitled to greater deference than ordinary legislative acts. *Maine*, 477 U.S. at 151.

72. *Maine*, 477 U.S. at 151-52. The Court found adequate testing procedures were available only for salmonids, and not baitfish. *Id.* at 146.

73. *Id.* at 151-52.

74. *Hunt*, 584 So. 2d at 1389.

75. *Id.*

76. *Id.* Regarding reduction of the overall flow of wastes on the state's highways, testimony at the trial level showed 341,000 tons of hazardous wastes were buried at Emelle in 1985 and 788,000 tons during 1989. While CWM estimated Emelle's total capacity to be adequate for one hundred years, the amount of wastes buried at Emelle has more than doubled in the four-year period from 1985 to 1989. *Id.* at 1373.

which flow creates a great risk to the health and safety of the state's citizens.⁷⁷

The court also distinguished the doubtful environmental concern in *Philadelphia* with the legitimate concerns of Alabamians: "There is no dispute that the wastes dumped at Emelle include known carcinogens and materials that are extremely hazardous and can cause birth defects, genetic damage, blindness, crippling, and death. These wastes are far more dangerous to the people of Alabama than rags infected with small-pox or yellow fever."⁷⁸

Finally, the court noted the finite capacity for waste disposal at the Emelle facility.⁷⁹ The court stated that nothing in the Commerce Clause compelled Alabama to yield its total capacity for hazardous waste to out-of-state interests. Also, the court concluded that imposition of the additional \$72.00 rate per ton on Alabama-generated waste would be permissible, because Alabama generators and taxpayers were "bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country."⁸⁰

The court therefore found that the provision of the Act creating the additional fee was "a responsible exercise by the State of Alabama of its broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources," and that the Act, though facially discriminatory, survived the strict scrutiny of Commerce Clause analysis.⁸¹

ANALYSIS

The Alabama legislature reacted appropriately to the looming hazardous waste menace it faces now and in the future. Passage of the \$72.00 fee is constitutionally permissible as the fee is the most reasonable and least discriminatory solution available to protect Alabama's health and welfare. Alabama's legislation facially discriminates against interstate commerce. Thus, the additional fee can survive strict scrutiny analysis only if it advances a legitimate local purpose that cannot be adequately served by available nondiscriminatory alternatives.⁸²

77. *Id.* at 1389.

78. *Id.* Currently, eighty-five to ninety percent of the wastes buried at Emelle are from out of state. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Justice Houston flatly refused to declare the additional fee unconstitutional unless and until the Supreme Court holds that hazardous waste containing poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death is an article of commerce protected by the Commerce Clause of the Constitution. *Id.* at 1390-91. See also *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). Whether hazardous waste is an article of commerce may be moot: "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia*, 437 U.S. at 622.

82. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

Protection of Alabama's environment, public health, and safety is legitimate, but protection of Alabama's economic interests is not. Even assuming a legitimate local purpose, the legislation will be constitutional only if the means chosen to accomplish that purpose are the most reasonable with the least restrictive burden on interstate commerce.⁸³ Thus, the existence of a legitimate local purpose not related to economic protectionism and the nonexistence of less discriminatory alternatives are the two hurdles the Alabama legislation must, and did, surmount to be constitutional.

The first hurdle is successfully cleared with proof of a legitimate legislative purpose. By imposing the additional fee, the legislature's overriding purpose is to protect Alabama's environment and the public health by ensuring that adequate funds are available to meet the present and future costs of monitoring and remediating toxic waste problems which may forever emanate from the Emelle facility. Such a critical purpose is not de minimus and is manifestly legitimate.⁸⁴

Currently, the Emelle facility is estimated to be disposing of seventeen percent of all hazardous wastes commercially landfilled nationwide, and eighty-five percent of that hazardous waste is imported.⁸⁵ Emelle is now the nation's largest hazardous waste facility, and CWM plans to continue its operation for at least one hundred years.⁸⁶ Because the wastes are landfilled at Emelle forever, Alabama will also forever face exposure to risks which are imperfectly known at this time. The State of Alabama has the weighty task of site monitoring and remediating toxic waste problems at the Emelle facility in perpetuity. Compounding that burden is the lack of any hard data as to just what those present and infinite future costs will total. As the hazardous waste industry had its genesis only ten years ago, the lack of precise figures is understandable but intensely problematic. Accordingly, as in *Maine v. Taylor*, Alabama has a legitimate purpose in guarding against imperfectly understood environmental risks.⁸⁷

The known risks include transportation risks; operation risks such as spills, fires, explosions, and accidents; natural risks caused by tornadoes and earthquakes; and surface and ground water contamination.⁸⁸ All could lead to severe health and environmental disasters. Even if hazardous wastes pose identical risks when initially landfil-

83. *Id.* See also *Hospitality*, *supra* note 51 at 1009.

84. *Philadelphia*, 437 U.S. at 626. In *Philadelphia*, the Court acknowledged that even a legislative purpose of economic protectionism was not relevant; the Court assumed New Jersey had the same right to protect its citizens' pocketbooks as it did their environment. *Id.*

85. *Hunt*, 584 So. 2d at 1373.

86. *Id.* at 1389.

87. *Maine v. Taylor*, 477 U.S. 131, 148 (1986). The Court found Maine had a right to protect itself from unknown environmental risks, even if those risks turned out to be negligible in the future. *Id.*

88. *Hunt*, 584 So. 2d at 1375.

led,⁸⁹ the effects on the environment of long-term burial could exacerbate a precarious situation into an environmental calamity. Faced with such a prospect, Alabama should not be required to "sit idly by and wait until potential irreversible environmental damage has occurred . . . before it acts to avoid such consequences."⁹⁰

An important "sub-hurdle" the additional fee must clear to constitute a legitimate legislative purpose under strict scrutiny is the United States Supreme Court's proscription against legislation effecting economic protectionism. The Court has long recognized the difference between health and safety regulations and those whose effect is to protect local industry from out-of-state competition.⁹¹ If the additional fee's effect is economic protectionism masquerading as environmental protectionism, the Court has applied a "virtually per se rule of invalidity."⁹²

The possibility of immeasurable environmental calamity from hazardous waste landfills and the unknown attendant costs of remediation lend credence to the proposition that Alabama has not enacted the \$72.00 additional fee simply to protect its citizens from outside competition.⁹³ Additionally, unlike the legislation in *Philadelphia* and *NSWMA*, Alabama has not totally banned landfilling of imported solid and hazardous waste within its borders, which would inequitably impose the full burden of conserving Alabama's remaining landfill space on out-of-state generators.⁹⁴ Such a response to Alabama's burgeoning hazardous waste quandary is clearly prohibited under Commerce Clause analysis.⁹⁵ Alabama has not overtly blocked the flow of interstate commerce at its borders.⁹⁶ The additional fee does not reduce the effectiveness of transportation of articles of commerce across Alabama state lines in any respect.

Instead, Alabama has continued to accept out-of-state hazardous waste across its borders for disposal at the Emelle facility, even when its worth in interstate commerce may be outweighed by countless and as yet unimagined dangers inhering in its transportation and perpetual interment at Emelle.⁹⁷ The fee places a discriminatory but non-prohibitive burden on a company engaging in interstate transportation of hazardous wastes for the benefit of the public's health, safety, and welfare. Its purpose is not economic aggrandizement for Alabamians or Alabama's isolation from the waste problems of other states.⁹⁸

89. *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

90. *Maine*, 477 U.S. at 148.

91. See *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982).

92. *Philadelphia*, 437 U.S. at 624.

93. See *supra* note 78 and accompanying text.

94. *Philadelphia*, 437 U.S. at 624.

95. *Id.*

96. *Id.*

97. See *supra* note 55 and accompanying text.

98. See *Philadelphia*, 437 U.S. at 628.

In addition to providing compensatory revenue for the disproportionate known and unknown costs out-of-state generators will ultimately create at Emelle, the additional fee will help establish economic disincentives for undertaking undesirable activities.⁹⁹ As a policy matter, it is undesirable for states to conveniently rely on hazardous waste disposal in Alabama when those states would be better served by utilizing waste minimization techniques and facility siting within their own borders. The additional fee may provide the impetus for these states to take charge of their own hazardous waste destinies. Finally, as in *Al Turi Landfill* and *Bill Kettlewell*,¹⁰⁰ Alabama also wanted to slow the flow of all waste into its borders, regardless of origin.¹⁰¹ Easing the flow of all waste into Alabama's remaining landfills, even though interstate commerce may be incidentally affected, was expressly not precluded in the *Philadelphia* decision.¹⁰²

It seems somewhat incongruous that Alabama might be considered guilty of economic protectionism, when the so-called article of trade Alabama is attempting to regulate is an object which is anathema to all states, and its intrinsic value as an item of trade or barter is dubious.¹⁰³ Normally, an item in the stream of commerce has value to an end user. Such value is readily apparent when a consumer buys garbage bags or a manufacturing company agent purchases industrial-strength garbage cans for temporary refuse disposal. However, at the moment this temporarily-stored hazardous refuse is permanently buried through a commercial transaction at Emelle, the admitted economic benefit to the community in the form of jobs and dollars must be balanced against the corresponding escalation of risks to the environment. The end product of interred hazardous waste has no value to the community. To the contrary, it has become a liability for which the additional fee may or may not adequately compensate in the future. The reality is that importers haul this liability in and pay cash for Alabama to get rid of it. Any corresponding economic benefit accruing to Alabama for this "trade" transaction is one Alabama would, understandably, willingly forego, as the perceived benefits do not outweigh the corresponding risks.¹⁰⁴

99. *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1389 (Ala. 1991). Out-of-state wastes buried at Emelle are estimated at eighty-five to ninety percent. Over the years and centuries, it is conceivable that hazardous waste problems will compound due to prolonged interment, leaching, etc. This possibility combined with inflation over time may attach responsibility for toxic spills or calamities at a much higher cost than originally anticipated at time of disposal in the Emelle facility.

100. See *supra* notes 40-49 and accompanying text.

101. *Hunt*, 584 So. 2d at 1389.

102. *Philadelphia*, 437 U.S. at 626.

103. See *Philadelphia*, 437 U.S. at 622. The Supreme Court held in a prior decision that states can ban the importation of some innately harmful articles because they "are not legitimate subjects of trade or commerce." *Id.* (citing *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465, 489.)

104. *NSWMA v. ADEM*, 910 F.2d 713, 720 (11th Cir. 1990). If Alabama were interested only in the additional revenue from the \$72.00 fee, it would not have first attempted a total ban of imported hazardous wastes through enactment of the Holley

Once economic protectionism is ruled out and a legitimate legislative purpose is verified, the second hurdle of strict scrutiny must be cleared. The means employed to accomplish Alabama's legitimate local purpose must be the most reasonable and least discriminatory of available alternatives.¹⁰⁵ The thrust of the *Philadelphia* Court's concern¹⁰⁶ was that accomplishment of New Jersey's legitimate purpose could not be achieved by discriminating against out-of-state articles of commerce based solely on where those articles originated.¹⁰⁷ New Jersey's statute essentially banned disposal of all solid or liquid waste originating outside its borders. Alabama has not imposed the additional fee on out-of-state generators of hazardous wastes solely because those wastes originate in sister states. It is eminently more sensible to conclude that Alabama is discriminating against importers of hazardous wastes based primarily on the volume of tonnage imported and landfilled at Emelle¹⁰⁸ and the imperfect knowledge of how permutations and permeations from protracted interment of toxins and poisons could affect the environment. Akin to the quarantine cases previously upheld by the United States Supreme Court,¹⁰⁹ Alabama is simply discriminating against noxious articles from all importing states while seeking to responsibly solve her own hazardous waste disposal problems.¹¹⁰ Additionally, the very movement of hazardous wastes in interstate commerce does risk contagion, perhaps even death; however, unlike diseased livestock or infected rags, no technology currently exists for the immediate destruction of toxic wastes. As in *Maine*,¹¹¹ until man's creative mind prevails over matter contaminated with toxins, Alabama must be able to guard against imperfectly known environmental risks which could result in the annihilation of Alabama's quality of life.¹¹²

In order to clear the second hurdle under Commerce Clause strict scrutiny analysis, the least discriminatory alternative must be implemented to achieve the local legislative purpose.¹¹³ Accordingly, the Alabama legislature did consider the following alternatives before enacting the additional fee. The legislature could:

1. Do nothing;

Bill. *Id.*

105. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

106. See *supra* notes 26-30 and corresponding text.

107. *Philadelphia*, 437 U.S. at 626-27.

108. See *supra* note 98 and accompanying text.

109. See *Asbell v. Kansas*, 209 U.S. 251; *Reid v. Colorado*, 187 U.S. 137. See also *supra* note 54 and accompanying text.

110. *Philadelphia*, 437 U.S. at 629. The Court distinguished quarantine laws as banning the "importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils." *Id.* at 628-29. In *Philadelphia*, no claim was made that movement of solid or liquid wastes through New Jersey endangered health or that these wastes required immediate destruction. *Id.*

111. See *supra* notes 36-38 and accompanying text.

112. See *supra* p. 649 of text & note 38.

113. See *supra* notes 24-25 and accompanying text.

2. Close Emelle completely;
3. Ban all out-of-state hazardous waste but continue to allow disposal of Alabama-generated hazardous waste;
4. Substantially increase state fees on all hazardous wastes buried at Emelle; or
5. Establish a mechanism which (a) requires out-of-state generators of hazardous waste using Emelle to compensate Alabama for its future costs and risks; (b) creates economic disincentives to the generation of hazardous wastes; (c) reduces the overall volume of hazardous waste; and (d) caps or limits the annual total tonnage buried at Emelle.¹¹⁴

The first alternative was clearly unacceptable. Hazardous waste landfill space is being depleted rapidly in the United States. The out-of-state tonnage disposal at Emelle has increased at a tremendous rate during the last five years, so ignoring the problem completely was unthinkable.¹¹⁵

The second option was equally infeasible. Alabama's industry needs a site for landfilling, and closing Emelle doesn't solve any problems. It would be illogical and hypocritical for Alabama to encourage other states to ameliorate their own hazardous waste problems and then close a landfill with the remaining capacity necessary to solve her own. The irony is that Alabama would then export her state-generated wastes, the identical scenario Alabama is attempting to curtail with the additional fee on hazardous waste importers. And, as stated previously, Alabama's responsibility for monitoring, remediation, abatement, and attendant costs will continue indefinitely, with or without closure of the Emelle facility.¹¹⁶

The third possibility was even more improbable because banning all out-of-state waste would assuredly invite constitutional challenge as overtly blocking the flow of interstate commerce at Alabama's borders.¹¹⁷ Alabama's prior legislative effort to ban importation of hazardous wastes embodied in the Holley Bill met with an unceremonious reversal from the appellate court.¹¹⁸ Alabama would be accused of economic protectionism by hoarding an essential natural resource.¹¹⁹

The fourth choice, charging the additional fee for both in-state and out-of-state hazardous waste disposal at Emelle, was also an untenable solution. It would be unfair for Alabama's taxpayers to bear disproportionate and unknown costs of perpetually monitoring and

114. Brief for Appellant at 69, *Hunt v. Chemical Waste Management*, 584 So. 2d 1367 (1991) (No. 1901043) [hereinafter Brief for Appellant].

115. *Hunt v. CWM*, 584 So. 2d 1367, 1373 (Ala. 1991). In 1985, landfill disposal at Emelle totaled 341,000 tons. In 1989, 788,000 tons were landfilled. *Id.*

116. Brief for Appellant at 55.

117. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

118. See *supra* notes 50-59 and accompanying text.

119. *But see NSWMA v. ADEM*, 910 F.2d 713, 720 (11th Cir. 1990).

remediating wastes buried at Emelle when Alabama's contribution to the problem totals ten to fifteen percent of all hazardous wastes interred there.¹²⁰ Imposing the same fee on all hazardous wastes buried at Emelle seems feasible at first glance as, admittedly, Alabama's hazardous wastes are essentially the same as imported wastes when landfilled en masse at Emelle.¹²¹ However, Alabama generators of hazardous waste may be more readily accessible than out-of-state generators when and if the dreaded contamination occurs requiring additional funds for cleanup. Even if the importers can be located and held accountable after an environmental calamity, the lower \$25.60 fee imposed on Alabama operators is justified because of Alabama's continuous oversight capability and authority to control in-state hazardous waste operations through legislative fiat. Alabama can prospectively flex her police-power muscle to enforce in-state compliance with evolving environmental standards and to compel operator usage of innovative abatement technologies as they become available. The disparate fees are therefore appropriate as Alabama's power and oversight over her own hazardous wastes can never extend to other states. Lastly, under CERCLA, Congress has authorized states to impose additional taxes or fees on the responsible parties *after* a hazardous waste spill has occurred to meet the states' ten percent share of remediation costs under the Superfund cleanup amendments.¹²² Since Congress has explicitly authorized imposition of these fees after contamination has occurred, it seems eminently logical that states should be authorized to tax hazardous waste importers *before* any cleanup is necessary, as prevention is always the best cure.

Thus, the additional fee was the fifth and least discriminatory alternative available to Alabama. It gives Alabama's sister states an incentive to find solutions to their own hazardous waste problems. It apportions the costs based on usage of hazardous waste facilities at Emelle and will probably slow the flow of hazardous wastes into Alabama.¹²³ It requires out-of-state generators to pay their fair share now of unfathomable perpetual liabilities that otherwise would fall squarely on the backs of Alabama taxpayers. Alarming, the liability of out-of-state waste generators *ends* when the waste has been delivered to Emelle.¹²⁴ These considerations correctly led the Alabama legislature to enact the additional fee as the most reasonable alternative available to protect its citizens from the immediate and unknown long-term effects of hazardous waste interment at Emelle.

120. Brief for Appellant at 71.

121. *See supra* note 29 and accompanying text.

122. CERCLA, 42 U.S.C. § 9614(c) (1986). "Nothing in this section shall preclude any state from . . . imposing a tax or fee upon any person or upon any substance in order to finance the . . . preparations for the response to a release of hazardous substances which affects such state." *Id.*

123. Brief for Appellant at 72.

124. Brief for Appellant at 55.

CONCLUSION

The Alabama Supreme Court correctly upheld the \$72.00 additional fee on disposal of out-of-state wastes not only because futuristic images of Alabama as an inhospitable wasteland may imminently become the present reality, but because the identical scenario quite possibly awaits every state in the union. The additional fee provides the needed revenue to deal with Emelle's unknown future liabilities and an incentive for states to take care of these problems at home. Behind the additional fee are legitimate local purposes which could not be accomplished as effectively in a less discriminatory way.

Alabama does her sister states no favor in forgiving them their failure to recycle, to minimize total waste output, and to embrace responsibility for proper disposal of hazardous wastes within their own borders. Rather, her sister states need a stimulus to deliver themselves, the State of Alabama, and ultimately the nation itself from the vulnerable heel of Achilles whose name is hazardous waste. The additional fee is just such a stimulus and one the United States Supreme Court should recognize as a proper exercise of Alabama's residual power under the Commerce Clause.

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