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2004-2005 FOURTH CIRCUIT SUMMARY

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Each year, the staff of the *Environmental Law and Policy Review* explores significant cases from the U.S. Court of Appeals for the Fourth Circuit as part of its ongoing commitment to serve practitioners as well as the academic community. This section of the *Review* provides synopses of important and recent decisions of the Fourth Circuit. It does not contain every decision issued from the Fourth Circuit, but rather concentrates on those which the editors believe would be of the most interest to our subscribers.

I. COMMERCE CLAUSE: *HARPER V. WEST VIRGINIA PUBLIC SERVICE COMMISSION*¹

A significant case involving the Commerce Clause² was brought before the U.S. Court of Appeals for the Fourth Circuit in the winter of this past term. Argued on October 28, 2004, and decided on January 24, 2005, the case of *Harper v. West Virginia Public Service Commission* highlighted the still-important influence of constitutional jurisprudence on environmental issues.

West Virginia requires those engaged in the collection, transport, and disposal of solid waste to receive a certificate of convenience and necessity from the Public Service Commission.³

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¹ 396 F.3d 348 (4th Cir. 2005).

² U.S. CONST. art. I, § 8, cl. 3.

³ *Harper*, 396 F.3d at 350. A “certificate of convenience and necessity,” sometimes also called a “certificate of public convenience and necessity” or

In the current economic environment, emphasizing deregulation of traditionally-regulated industries, the Public Service Commission of West Virginia had effectively granted an exclusive franchise to a number of disposal services in certain geographical areas.⁴ Harper and his company, Southern Ohio Disposal, wanted to do business in spite of their lack of a certificate from the Commission.⁵ The Commission prohibited Southern Ohio Disposal from doing business, and the owner and his company sued in federal court to prevent enforcement of the Commission's order.⁶ The regulated system of certificates was implemented to "[prevent] unnecessary multiplication of service" and applied to all in-state competitors.⁷

The new issue addressed by the Fourth Circuit in *Harper* opened the door to evaluation of the constitutionality of West Virginia's regulation of trash collectors. The district court found that the federal courts should abstain from deciding the case under the *Younger* abstention doctrine.⁸ The Fourth Circuit reversed and remanded, holding that

"CPCN," is often required when working in regulated industries, such as energy, telecommunications, and water and sewer services. In West Virginia, it is also required for solid waste removal. *See* W. VA. CODE ANN. § 24A-2-5(a) (Michie 2004).

⁴ Some of these companies intervened in the case at the district court and are named as intervenors/defendant-appellees in the Fourth Circuit case. *See Harper*, 396 F.3d at 348.

⁵ *Id.* at 349.

⁶ *Id.*

⁷ *Id.* at 350 (quoting W. VA. CODE ANN. § 24A-2-5(a) (Michie 2004)).

⁸ *Harper v. PSC*, 291 F. Supp. 2d 443, 462 (S.D. W. Va. 2003) (citing *Younger v. Harris*, 401 U.S. 37 (1971)). The district court also found that *Buford v. Sun Oil Co.* was an appropriate ground for an abstention. *See Buford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Fourth Circuit found that the district court's application of *Buford* was inappropriate. *Harper*, 396 F.3d at 357-58.

[t]he values of comity and federalism protected by *Younger* are undeniably important. But the state interests at stake here do not fall among those the federal courts have repeatedly recognized as deserving of special respect and solicitude. Moreover, the federal interest asserted under the commerce power lies at the core of the commercial values protected by that clause, namely the promotion of robust trade and enterprise among the several states.⁹

This opened the door to further examination of West Virginia's regulations by the district court. Pointing to a similar case on the issue of medical waste transport, the Fourth Circuit alluded to the fact that West Virginia's restrictions on market entry may be unconstitutional.¹⁰ The central holding in the previous decision was that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose."¹¹ *Harper* was remanded to the district court, relying heavily on precedent that interests affecting interstate commerce must be examined in federal court and must not be dismissed via abstention, even in light of serious state health, welfare, and environmental concerns.¹² The case involved a "vital *federal* question," and must be heard in federal court.¹³ It remains to be seen what the end result will be in the *Harper* case.

⁹ *Harper*, 396 F.3d at 350.

¹⁰ *Id.* at 351 (citing *Medigen of Kentucky, Inc. v. Public Service Comm'n*, 985 F.2d 164 (4th Cir. 1993)).

¹¹ *Id.* (quoting *Medigen*, 985 F.2d at 167).

¹² *Id.* at 357 (citing *Medigen*).

¹³ *Id.* at 358 (emphasis in original).

II. EMINENT DOMAIN & NATURAL GAS ACT: *EAST TENNESSEE NATURAL GAS COMPANY V. SAGE*¹⁴

In this eminent domain case, the East Tennessee Natural Gas Company ("East Tennessee") received a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC"), which enabled it to condemn property pursuant to the Natural Gas Act.¹⁵ The Fourth Circuit affirmed a decision by the district court which used equitable jurisdiction to permit the company to access the condemned property immediately so as to install the pipeline without delay. The installation, it was reasoned, would be in the public interest.¹⁶ Contrary to the wishes of landowners, just compensation for the property would need not be determined prior to the actual taking.

This case involved a pre-judgment possession of property which was the subject of a condemnation proceeding. Although the Natural Gas Act allows for just compensation via a condemnation action, the Act does not allow for immediate possession of the condemned land.¹⁷ The Fourth Circuit held that the district court could, however, grant injunctive relief to hand immediate possession of the land to East Tennessee.¹⁸ It also noted that the substance of the injunctions entered against landowners were sound.¹⁹ For environmental law practitioners, it should be noted that FERC, in the course of granting a certificate, must make an evaluation of the environmental impact of the proposed gas pipeline and issue an impact statement.²⁰

¹⁴ 361 F.3d 808 (4th Cir. 2004), *reh'g denied and reh'g en banc denied*, 369 F.3d 357 (4th Cir. 2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 478 (2004), and *cert. denied*, ___ U.S. ___, 125 S. Ct. 479 (2004).

¹⁵ See 15 U.S.C. § 717f(h) (2000).

¹⁶ See *Sage*, 361 F.3d at 823-28.

¹⁷ *Id.* at 818.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (citing for reference 42 U.S.C. § 4332 (2000)).

The district court applied, and the Fourth Circuit approved, the methodological analysis ordinarily used to grant a preliminary injunction.²¹ No heightened standard was applied. The use of an injunction was neither a “straight condemnation” nor a “quick-take condemnation,” two of the more common proceedings in federal eminent domain proceedings.²² The court concluded that

[i]n sum, we hold that once a district court determines that a gas company has the substantive right to condemn property under the [Natural Gas Act], the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction. Because the district court did not abuse its discretion in granting preliminary injunctive relief to [East Tennessee] in these cases, we affirm the district court’s orders.²³

III. CERCLA AND RCRA: *SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL V. COMMERCE & INDUSTRY INSURANCE CO.*²⁴

This case addressed the question of whether the “direct action” provision of RCRA²⁵ may be used to pursue a claim arising under CERCLA.²⁶

²¹ *Id.* at 820 (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Selig*, 550 F.2d 189 (4th Cir. 1977)). The court analyzed factors such as the likelihood of irreparable harm to East Tennessee, the likelihood of irreparable harm to the landowners, East Tennessee’s likelihood of success on the merits (conceded by the landowners and all but assured by the Natural Gas Act and FERC’s certificate), and the public interest. *Sage*, 361 F.3d at 828-31.

²² *See Sage*, 361 F.3d at 820-22.

²³ *Id.* at 831.

²⁴ 372 F.3d 245 (4th Cir. 2004).

²⁵ 42 U.S.C. § 6924 (2000). RCRA is the Resource Conservation and Recovery Act, which begins in codified form at 42 U.S.C. § 6901 (2000).

²⁶ CERCLA, the Comprehensive Environmental Response, Compensation, and

Stoller Chemical Company ("Stoller") operated a fertilizer manufacturing plant in South Carolina from 1978 to 1992. This facility was classified as a hazardous waste treatment, storage, and disposal facility pursuant to RCRA.²⁷ In order to obtain building permits under RCRA, Stoller was required to obtain insurance against damage or injures that the plant caused to third parties.²⁸ Appellee insurance companies provided this RCRA liability insurance to Stoller and filed the RCRA-mandated certificates with the South Carolina Department of Health and Environmental Control ("DHEC").²⁹

Stoller closed its fertilizer plant and declared bankruptcy under Chapter 7 of the Bankruptcy Code in 1992.³⁰ An investigation subsequently revealed that the property surrounding the plant was chemically contaminated and required remediation.³¹ DHEC initiated CERCLA enforcement proceedings against several corporations that faced partial CERCLA liability for their use of the property during its operation.³² These parties, which the court called the "corporate claimants," settled and sought contribution from the defendant-appellees (the "insurance companies") as insurers of Stoller.³³ The district court found in favor of the insurance companies, and the corporate claimants appealed.³⁴

Liability Act, begins in codified form at 42 U.S.C. § 9601 (2000). CERCLA is also commonly referred to as "Superfund." See *Commerce & Indus. Ins. Co.*, 372 F.3d at 249.

²⁷ *Id.* at 252.

²⁸ *Id.*

²⁹ *Id.* at 252-53. EPA authorized South Carolina's Department of Health and Environmental Control to act as its principal enforcement agency for RCRA claims arising in South Carolina pursuant to 42 U.S.C. § 6926(b) (2000). *Commerce & Indus. Ins. Co.*, 372 F.3d at 254.

³⁰ *Id.* at 253. Chapter 7 of the Bankruptcy Code begins at 11 U.S.C. § 701 (2000). Bankruptcies filed under Chapter 7 of the Code are traditionally known as "liquidation bankruptcies."

³¹ *Commerce & Indus. Ins. Co.*, 372 F.3d at 253.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 253-55.

The corporate claimants, including various steel manufacturers, wanted to collect directly from the insurance companies in order to avoid getting involved in Stoller's bankruptcy proceedings.³⁵ The Fourth Circuit noted that Congress made specific provisions for such expedient measures.³⁶ Both CERCLA and RCRA contain "direct action" provisions that allow a party to obtain a judgment directly against an insurance company that has provided "evidence of financial responsibility" in the form of a certificate of insurance.³⁷ All parties agreed that the insurance companies did not provide CERCLA insurance coverage to Stoller, but rather that the insurance companies had issued a certificate as to their financial responsibility under RCRA only. The corporate claimants argued that the words "any claim" in section 6924(t) referred to claims arising under CERCLA as well as RCRA.³⁸ The procedural right of RCRA "direct actions," therefore, would extend to substantive claims arising under CERCLA.³⁹

In analyzing the corporate claimants' arguments, the Fourth Circuit noted that RCRA and CERCLA often overlap and are confused.⁴⁰ Both were enacted by Congress to address the same broad concern over the creation of unhealthy and environmentally dangerous conditions by industry.⁴¹ The Fourth Circuit noted, however, that while the broad policy goals of the two statutes

³⁵ See *id.* at 254.

³⁶ See *id.* at 249, 250 n.1 & 250-51.

³⁷ *Commerce & Indus. Ins. Co.*, 372 F.3d at 249. RCRA's direct action provision is located at 42 U.S.C. § 6924(t)(2) (2000). If the site owner or operator is in bankruptcy or reorganization, or under state insolvency proceedings, the claims which would ordinarily be asserted against the owner or operator may be asserted directly against the guarantor. *Commerce & Indus. Ins. Co.*, 372 F.3d at 249.

³⁸ *Id.* at 256-57.

³⁹ See *id.* at 256-57.

⁴⁰ See generally *id.* at 255-59 (containing the court's analysis in addressing the claims under the overlapping statutes).

⁴¹ *Id.*

might be the same, each act was created to address its own distinct problems.⁴²

RCRA was passed to allow claims "concerning present and future threats to human health and to the environment, as opposed to claims seeking to recover the costs of environmental cleanup activities."⁴³ CERCLA, in contrast, "serves goals that are remedial and curative rather than preventative."⁴⁴ The court thus concluded that whereas CERCLA liability is designed to equitably apportion responsibility for cleaning up past mistakes once they happen, RCRA liability is restricted to preventing the occurrence of these mistakes in the first place.⁴⁵

The Fourth Circuit used the distinction between the purposes of RCRA and CERCLA liability to reject the corporate claimants' argument that nothing in the RCRA direct action provision precluded them from pursuing claims under that provision arising under CERCLA.⁴⁶ The court specifically rejected the corporate claimants' reading of the "any claim" language in the RCRA direct action provision noting that "they misapprehend the context in which the term . . . is used. Read in context, the term 'any claim' refers to any claim *arising from conduct for which the insurer provided evidence of financial liability*."⁴⁷ Because the insurance companies only provided a RCRA certificate of insurance, their liability must be limited to substantive RCRA claims.⁴⁸ These would not include the costs of a remedial CERCLA cleanup.⁴⁹

In rejecting the corporate claimants' arguments, the Fourth Circuit noted that allowing the direct action provision of RCRA to

⁴² *Id.* at 255.

⁴³ *Commerce & Indus. Ins. Co.*, 372 F.3d at 255.

⁴⁴ *Id.* at 256 (citation omitted).

⁴⁵ *See id.* 255-56.

⁴⁶ *Id.* at 256-59.

⁴⁷ *Id.* at 256 (emphasis in original).

⁴⁸ *Id.*

⁴⁹ *Commerce & Indus. Ins. Co.*, 372 F.3d at 256-57.

apply to CERCLA claims would set an undesirable precedent.⁵⁰ Interpreting the “any claim” language to include liability outside the scope of RCRA would broaden RCRA insurance to an untenable degree.⁵¹ RCRA liability insurance would cease to have any relation to hazardous waste management.⁵² Taken to its logical conclusion, it could cease to have any principled limit. “If this position were valid, then Congress has also authorized the RCRA provision to be used . . . to pursue negligence claims arising from auto accidents resulting from the operation of such facilities.”⁵³

The court concluded that there was nothing in the legislative history of RCRA in general, or the direct action provision in particular, that sanctioned such a broad interpretation of the “any claim” language.⁵⁴ The Fourth Circuit concluded that the RCRA direct action provision must be limited to RCRA-based claims.⁵⁵ It affirmed the dismissal order of the district court.⁵⁶

⁵⁰ *Id.* at 257.

⁵¹ *Id.* at 257.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Commerce & Indus. Ins. Co.*, 372 F.3d at 257.

⁵⁶ *Id.* at 261.