January 2004
Vol. IV, No. 1

Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel

Community Rights Counsel
1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

NEW YEAR, NEW NAME—BROADER FOCUS!

In this first issue of the New Year, we are pleased to announce we are expanding our focus to include coverage of a broader array of constitutional challenges to community protections. Hence, the newsletter's new name: *Community Rights Report*.

We will, of course, continue to report on significant takings developments. But as many of our readers know, Community Rights Counsel has broadened its litigation bailiwick to assist in defending against preemption challenges to state and local protections, as well as challenges under the Commerce Clause and Section 5 of the Fourteenth Amendment to federal protections that provide minimum safeguards for all communities. *Community Rights Report* will report on these new initiatives while continuing to cover takings and the property rights movement.

FEATURE CASE

Aetna Health Inc. v. Davila
(U.S. Nos. 02-1845 & 03-83)

When HMO cost-cutting is hazardous to your health, may state legislatures and state courts do anything to protect you?

Juan Davila, a post-polio patient with diabetes and arthritis, received Aetna HMO coverage through his employer's health plan. To address his arthritis pain, his doctor prescribed Vioxx, which has a lower rate of bleeding, ulceration, and similar toxic effects than other pain relievers. But before filling the prescription, Aetna required Davila to try two different, cheaper medications. After three weeks, he was rushed to the emergency room with bleeding ulcers, which caused a near heart attack.

Ruby Calad underwent a complicated hysterectomy. Although her doctor recommended a longer stay, CIGNA's hospital discharge nurse decided that the standard, one-day hospital stay would suffice. Calad suffered serious complications, which she attributes to her early release.

Davila and Calad sued their HMOs for consequential damages in state court under a Texas statute that allows patients to challenge negligent medical decisions by HMOs. Aetna and CIGNA argue that the state statute is preempted by ERISA, the Employee Retirement Income Security Act, which does not allow ERISA plan beneficiaries to recover consequential damages. Worse still, they argue that the claims are not only preempted, but "completely preempted," and that therefore the cases should be removed from state court to federal court, even though the complaints plead only state law claims.

There are few indignities greater for a state court than to have a case snatched from its docket through complete preemption, which negates any previous investment of resources and precludes it from voicing any view whatsoever on the state law claims or the propriety of removal. On January 22, Community Rights Counsel submitted an amicus brief to the Supreme Court in support of Davila and Calad, demonstrating that complete preemption is improper here because the state-law claims are independent from, and do not require application of, ERISA or any ERISA plan. The brief is available at http://www.communityrights.org/PDFs/Briefs/Davila.pdf. Oral argument will be held March 23, and a ruling is expected before the Court's summer recess.

EYE ON WASHINGTON

Upcoming Takings Appeals to the Federal Circuit: Critical Opportunities to Set the Law Straight

Two of the most outrageous takings decisions of 2002 will be back in court in coming months. On Feb. 3, the Federal Circuit will hear oral argument in *Rose Acre Farms v. Madigan* (Sept. 2002 Takings Watch), in which the trial court awarded millions of dollars to one of the nation's largest egg producers after ruling that government restrictions on the sale of potentially salmonella-contaminated eggs constituted a taking. The case has special importance in light of the recent mad cow and avian flu outbreaks. We filed an amicus brief showing that these public health protections are not a taking. Later this Spring, the Federal Circuit will review Judge Loren Smith's ruling in *Stearns Co. v. US* (Aug. 2002 Takings Watch) that the Interior Department worked a physical taking of Stearns's mineral rights when it concluded that the company lacked "valid existing rights" to mine in the Daniel Boone National Forest, even though Stearns probably could have received permission to mine anyway. We will be filing an amicus brief in *Stearns*. On Feb. 6, the Federal Circuit will hear argument in *Bass Enterprises v. US*, which explores the application of the landmark *Tahoe* ruling to temporary restrictions on oil and gas leases. We will keep you apprised of developments in all three cases.

ON THE HORIZON

How Consistent Are the Court's "Friends of Federalism"?

On January 21, four of the Supreme Court's so-called "friends of federalism" let out a war whoop of Deanian proportions, complaining in dissent that the Court's ruling in *Alaska Department of Environmental Conservation v. Environmental Protection Agency* "relegate[s] States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect." Justice Kennedy's opinion -- joined by Chief Justice Rehnquist and Justices Scalia and Thomas -- lambasted the majority's conclusion that the federal Clean Air Act authorizes the Environmental Protection Agency to override a decision by the State of Alaska determining the air emissions technology required to allow a 40 percent expansion of a large zinc mine. Specifically, the court ruled that the Act authorizes EPA to block construction or expansion of a facility when EPA decides that the State specification of "Best Available Control Technology" is unreasonably lax, even though the Act directs the States to make those determinations. The opinion is available at http://www.supremecourtus.gov/opinions/03pdf/02-658.pdf.

Put aside, for the moment, the amicus brief filed by 13 States in support of EPA and against Alaska. A more fundamental question arises: Is the dissent's professed allegiance to federalism genuine and consistent or, as some commentators have suggested, simply a guise to advance an anti-regulatory agenda? Another Clean Air Act case before the Court this term could provide an intriguing glimpse into whether federalism still has friends among the Justices when industry groups argue against it.

In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* (U.S. No. 02-1343), auto manufacturers are challenging modest rules by a regional authority in southern California that require large public and private fleets to purchase cleaner vehicles. In the Los Angeles Basin, vehicles produce 80 percent of the emissions that form smog, and diesel engines account for 70 percent of the total cancer risk from air pollution. The rules are expected to reduce nearly 5000 tons of emissions per year by 2010 by introducing cleaner school buses, airport shuttles, garbage trucks, street sweepers, and other fleet vehicles.

Industry argues that the rules are preempted by section 209(a) of the Clean Air Act, which prohibits state and local governments from adopting any "standard" relating to the control of emissions. But it's clear from the Act that "standard" is a term of art that applies to limitations imposed on car manufacturers and sellers, not purchasers. Industry basically urges the court to read the Clean Air Act as creating a centralized command-and-control regime under which the federal government, rather than the affected localities, must play the lead role in addressing local pollution problems. In contrast, the courts below held that state and local authorities may pursue innovative pollution control programs targeted at vehicle purchasers, so long as they do not impose emission limits on manufacturers. Community Rights Counsel worked with the State and Local Legal Center to prepare a brief on behalf of our nation's cities, air officials, and other state and local officials in support of South Coast.

The Court heard argument on January 14. We were delighted when counsel for South Coast, Seth Waxman, expressly referred to our brief during the argument. By the end of June, we'll learn whether federalism as applied in this Term's Clean Air Act cases is a one-way street in favor of industry.

QUOTE OF THE MONTH

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

OUTRAGE OF THE MONTH

Sprawl Apologists Take Show on the Road

The so-called Preserving the American Dream Conference once again reared its ugly head last November, this time in Cincinnati. As we reported in our Feb. 2003 Outrage, the American Dream Conference is a one-sided propaganda festival for sprawl apologists and supporters of unfettered development. The latest conference featured headliner Wendell Cox, who argues that smart growth is a "naíve civic religion" and calls public transportation a "welfare service." The black-helicopter crowd was also in attendance in the form of representatives from the Thoreau Institute, whose website asks "Is Smart Growth a United Nations Conspiracy?" The groups are planning another builderfest for Portland, Oregon in April. For more information on their Cincinnati rant, see http://www.citybeat.com/2003-11-12/news.shtml.