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Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Federal Circuit Renders Split Decision In Salmonella Case

Rose Acre Farms, Inc. v. U.S., No. 03-5103 (Fed. Cir. June 30, 2004)

The good news is that on June 30, the Federal Circuit reversed a dreadful ruling by the U.S. Court of Federal Claims, which had held that federal efforts to address salmonella poisoning had worked a taking. The bad news is that the appeals court's ruling is a total hodgepodge that muddies the water on whether loss of profits is an appropriate measure of a taking under *Penn Central*.

The key issue raised by the *Rose Acre* case is whether taxpayers must compensate Rose Acre Farms for food safety protections imposed after three Salmonella outbreaks traced back to its eggs caused nearly 500 people to become ill and 150 people to be hospitalized. The U.S. Department of Agriculture temporarily banned Rose Acre from selling eggs from Salmonella-contaminated hen houses as table eggs, but it still permitted those eggs to be sold in the less lucrative breaker market (*e.g.*, for cake mix) because the pasteurization process used on breaker eggs kills the deadly bacteria.

The trial court ruled a taking of the eggs occurred based on a value loss ranging from 10-25% (depending on parcel definition), contravening decades of established precedent showing that government action must work a severe value loss, typically in excess of 90%, to constitute a taking. Just as disturbing, the trial court based its holding in part on its second-guessing of the wisdom of the challenged government restrictions, which the trial judge deemed "misguided," even though Rose Acre had lost a challenge to those restrictions in the Seventh Circuit, where it argued unsuccessfully that the government response was arbitrary.

On appeal, the Federal Circuit held that the lower court's analysis of *Penn Central*'s economic impact prong failed to gauge the specific impact of the regulations on Rose Acre. The appeals court also ruled that the trial court improperly concluded that the regulations were misguided. The Federal Circuit also rejected the trial court's conclusion that the killing and testing of various Rose Acre hens worked a per se taking.

In a troubling portion of the analysis, however, the Federal Circuit held that on remand, the trial court must decide whether loss of profit is a more appropriate measure of the takings claim than loss of value. The court disregarded the obvious fact that using lost profits as a benchmark for takings liability would reward inefficient, marginal firms that were operating just above the breakeven point prior to the challenged government action. Amazingly, the court's bizarre calculations suggest that going from a $1 profit to a $5 loss would constitute a 600% loss in profits, while dropping from a $12 profit to a $6 profit (the same $6 loss in absolute terms) would constitute just a 50% loss. The court also ignored the absence of any guidance in 80+ years of regulatory takings jurisprudence on how a court should evaluate a loss in profits as compared to a lesser loss in value. We are hopeful the trial court will ultimately apply the well-accepted value loss approach on remand.

Community Rights Counsel filed an amicus brief with the Federal Circuit in the case on behalf of several public health and consumer groups.

ON THE HORIZON

New York's High Court to Consider if *Dolan* Applies to Conservation Easements
In the Matter of *Smith v. Town of Mendon*

The New York Court of Appeals has agreed to hear a challenge that could have significant implications for municipal planning in the state. At issue in *Smith v. Town of Mendon* is the Town's requirement as a condition of approval of a site plan to construct a single-family home that the Smiths accept a conservation restriction on those portions of their site that lie within legislatively-imposed Environmental Protection Overlay Districts. The Smiths challenged the restrictions as an unconstitutional permit condition under *Dolan v. City of Tigard*.

The trial court rejected the Smiths' position, and on appeal the court ruled that *Dolan*'s "rough proportionality" test is inapplicable to a condition of this type, which does not impact the Smiths' right to exclude others from their property. Aided by the Pacific Legal Foundation, which has vowed to take the case to the Supreme Court if necessary, the Smiths convinced New York's highest court to consider the question. CRC is considering amicus participation.

OUTRAGE OF THE MONTH

The Problem With Myers

William Myers, a grazing lobbyist and former Interior Solicitor nominated to a lifetime appointment on the Ninth Circuit, has a long history of deeply troubling statements. He has likened federal land management to the tyrannical rule of King George over the American colonies. He has accused environmentalists of "mountain biking to the courthouse as never before, bent on stopping human activity wherever it might promote health, safety, and welfare." He argued that the ability to exploit property is just as fundamental as free speech rights.

In addition to this intemperate rhetoric, Myers' substantive record as Interior Solicitor gives no indication that he put aside his advocacy for his lobbying clients, as CRC painstakingly documented in pre- and post-hearing reports (available at www.communityrights.org). Myers' disturbing record and lackluster qualifications led to unprecedented opposition to his confirmation by groups such as the National Conference of American Indians and the National Wildlife Federation, which had never opposed a judicial nominee before in 65 years of operation.

Thus we were surprised to learn in a piece written in National Review Online by Jonathan Adler, www.nationalreview.com/adler/adler200407230901.asp, that the real problem with the Myers nomination was the fact that Community Rights Counsel was "agitating" against it. While recognizing that "Myers is not the most distinguished of Bush's court nominees," Adler accused CRC of trying to make a "nominee's purported views on environmental questions a litmus test for confirmation."

Earlier this month, Myers did become the first nominee in history whose confirmation was defeated primarily based on environmental opposition. But CRC and other groups opposed Myers not because of his views on environmental policy, but because his record in public service shows an unwillingness to set aside those views when his position so requires. If an Interior Solicitor, charged with protecting the public interest, acts as an industry sock puppet, it is hard to believe he will be fair as a federal judge.

The only litmus test we apply is whether a nominee will set aside personal views and apply the law in a fair and thoughtful way. Myers' record at Interior displays a predisposition to ignore the requirements of the law in order to advance his own agenda. That should be disqualifying by anyone's standards.

EYE ON WASHINGTON

Federalism in the 2004 Term

Several cases in the upcoming Term will give the U.S. Supreme Court an opportunity to bring clarity to its federalism revival. In *Ashcroft v. Raich*, No. 03-1454 (cert. granted June 28), the Court will decide whether Congress has authority under the Commerce Clause to restrict the medical use of marijuana. While we have great sympathy for anyone who needs marijuana to alleviate the side-effects of serious illnesses, Community Rights Counsel will file an amicus brief arguing that this debate should be resolved in the political process, not in the courts through a miserly reading of the Commerce Clause.

In *Bronster v. Chevron USA, Inc.*, the State of Hawaii soon will be asking the Court to review a ruling by the Ninth Circuit that struck down a statute that controls the rent that oil companies may charge service stations. The court invalidated the law as a "taking" of property based on its conclusion that the law does not substantially advance a legitimate government purpose. The circuit split created by the Ninth Circuit's ruling raises a question of historic proportions: May courts invoke the Takings Clause to resurrect heightened, *Lochner*-esque scrutiny of economic regulation? We plan to file an amicus brief on behalf of state and local government groups in support of Hawaii's cert. petition.

Finally, in *Bates v. Dow Agrosciences LLC*, No. 03-388 (cert. granted June 28), the Court will decide whether federal law preempts state remedies against an herbicide manufacturer for breach of warranty, fraud, and failure to warn. Federal pesticide law prohibits states from imposing "requirements for labeling or packaging" but authorizes them to regulate the sale or use of pesticides. The Supreme Court has sent inconsistent signals on whether the term "requirement" embraces state common law actions. The Court should reaffirm that federal law does not preempt state remedies unless Congress sends a clear and manifest signal of its intent to do so.

QUOTE OF THE MONTH

"Jefferson realized that the exercise of property rights might so interfere with the rights of the individual that the government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism but to protect it."

Franklin D. Roosevelt: Commonwealth Club Address (Source: *New York Times*, September 24, 1932).