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FEATURE CASE

Court Awards Egg Producer $5.4 Million in Takings Challenge to Emergency Health Protections

In a virtually unprecedented ruling, on February 22 the U.S. Court of Federal Claims awarded one of the largest U.S. egg producers $5.412 million, plus interest since 1990 and attorneys fees, in its takings challenge to emergency health protections issued in response to several Salmonella outbreaks that sickened more than 1000 people.

In *Rose Acre Farms, Inc. v. United States*, 2007 U.S. Claims LEXIS 47, No. 92-710C (Fed. Cl., Feb. 22, 2007), the court sustained Rose Acre's takings challenge to temporary health protections imposed by the U.S. Department of Agriculture from Nov. 1990 until Oct. 1992 following the outbreaks, which caused vomiting, diarrhea, and fever so severe that many victims were taken to area hospitals by ambulance, and some required hospitalization for more than a week. Roughly 1000 conventioneers were poisoned by an infected bread pudding dessert served at the Hyatt Regency Hotel in Chicago. Forty-two guests at a wedding reception in Versailles, Kentucky, consumed eggs benedict with tainted hollandaise sauce. In Tennessee, two families contracted food poisoning from banana pudding. Elsewhere in Tennessee, 27 restaurant customers became ill and tested positive for salmonella, and many others showed symptoms of food poisoning. All four outbreaks were traced back to Rose Acre eggs.

The USDA health protections did not prohibit Rose Acre from selling eggs, but instead required it to divert eggs from three contaminated farms from the table egg market to the less profitable "breaker" market, where the eggs are pasteurized to remove bacteria and other contaminants and then used for cake mix and similar products. The restrictions remained in place for twenty-one months until the three farms were determined to be safe.

The court's ruling in radical in several respects. First, it ignored longstanding precedent that makes clear public health protections rarely, if ever, give rise to takings liability, particularly temporary protections imposed in response to actual harm. In the 1987 landmark *First English* case, the U.S. Supreme Court ruled that compensation is the proper remedy for a regulatory taking, but on remand the California courts had little trouble rejecting the underlying takings suit because the challenged restrictions promoted public safety by restricting construction in a flood-prone canyon. In *Miller v. Schoene* (1928), the Supreme Court upheld the uncompensated destruction of red cedar trees to protect apple orchards threatened by disease, concluding the State properly could choose to destroy one type of property to protect another type. How odd it is then that, according to the claims court, the USDA cannot choose public health over eggs! Salmonella poisoning kills thousands each year, particular among seniors, children, and those with impaired immune systems. Only good fortune prevented Rose Acre's outbreaks from leaving dead bodies on the ground. Yet the court still imposed takings liability for restrictions designed to prevent further outbreaks.

Second, in evaluating economic impact under the *Penn Central* multifactor test, the court did not consider the reduction in value of the eggs caused by the restrictions (just 10.6 percent of the value of all eggs produced during the restrictions), and instead focused on lost profits. Virtually every public safety protection, however, runs the risk of reducing profits. As the Supreme Court made clear in *Andrus v. Allard* (1979), lost profits is a "slender reed" on which to rest a takings claim.

Furthermore, using lost profits as a basis for takings liability rewards inefficient, fly-by-night operations that operate on thin profit margins. A lost-profits analysis also fails altogether to identify regulations that are the "functional equivalent" of an actual expropriation, which should be the touchstone for all regulatory takings, as *Lingle* instructs.

In 2003, the same court upheld Rose Acre's takings claim largely because it concluded the health protections were overbroad and inefficient, even though a federal appeals court previously had rejected this contention. The Federal Circuit overturned that 2003 ruling in part because takings analysis does not allow courts to second-guess the wisdom of government action. We hope the Justice Department appeals once again, and CRC stands ready to provide amicus support, as we did on the first appeal.

OUTRAGE OF THE MONTH

A $10 Billion Dollar Misunderstanding

When Measure 37, the ballot initiative that eviscerated Oregon's unique land use planning system, passed in 2004, many supporters of sensible community land use regulations were stunned. How could Measure 37 have passed, when it was clear what the terrible results would be, outsiders asked? The anti-Measure 37 crowd wearily replied, "We told them. We told the voters what would happen, and they just didn't believe it. They said 'That could never happen.'"

It's happening now, much to the dismay of Oregonians, even those who voted for the law. "We all got suckered into it," one voter told the Oregonian newspaper. "I did vote for Measure 37 back when it was on the ballot, but like a lot of people, I was not voting for what it seems to have become," another voter said in a video produced by the Sightline Institute.

The law was sold as way to bring some relief to a few landowners who couldn't build the house of the dreams, or a house for their children, on their own land. But the reality is a little different. According to Governor Ted Kulongoski, of the roughly 7000 claims, for $10 billion dollars, filed with state and local officials, only 15 percent are from landowners seeking to build one home on a single lot. The bulk of the claims are for subdivisions, commercial uses, or multiple homes, which don't mesh well with farming practices or sensitive environments.

One of the most egregious examples of the unintended consequences of Measure 37 is a $203 million claim in Clackamas County for a pumice mine and geothermal plant on private land inside the Newberry Crater National Volcanic Monument.

Recent polls suggest that Measure 37 would not pass today if it were put before the voters. That should give the state legislature additional impetus to fix the law so that it better reflects what voters thought they were getting. And it should give voters in other states every reason to reject these insidious proposals.

ON THE HORIZON

High Court Skeptical of Personal Liability for Alleged Fifth Amendment Violations

At the March 19 oral argument before the U.S. Supreme Court in *Wilkie v. Robbins* (No. 06-219), the justices expressed serious reservations about allowing a landowner to hold federal officials personally liable for alleged "retaliation" of the exercise of his rights under the Takings Clause of the Fifth Amendment.

In our December 2006 issue, we reported that the court agreed to decide whether federal employees may be held liable for violations of the Takings Clause under the federal racketeering laws or in an implied cause of action under *Bivens*. Harold Robbins contends that after he declined to enter into a reciprocal easement with the United States, federal officials retaliated by attempting to pressure him into giving them an easement without just compensation, pressure that allegedly included the filing of false criminal charges. Robbins challenged some of the acts of alleged harassment on an individual basis without success, and now argues he should be allowed to challenge the entire "conspiracy" as a whole.

Several justices, however, expressed concern that expanding *Bivens* or applying federal racketeering laws to this case would open the floodgates. As Justice Breyer put it, because countless government actions affect property, if Robbins' claims are permitted to go forward "vast numbers of regulations will be suddenly in Federal court" as people transform their regulatory disputes into property-related conspiracy charges. The court also noted that legal remedies already exist for each of the acts of harassment alleged by Robbins, thereby obviating the need to create a new cause of action for alleged property rights violations that would have an exceedingly wide sweep.

Because the courts below denied the government's summary judgment motion, the Supreme Court will view factual disputes in the light most favorable to Robbins, a difficult procedural posture for the government. We hope, nonetheless, the court remains sensitive to the chilling effect a new, expansive cause of action would have on legitimate government actions across the board. The court is expected to rule before the end of June.