## *Sixth Circuit Holds Exclusive Solid Waste Franchise Agreement Violates Commerce Clause*

The United States Court of Appeals for the Sixth Circuit has held that a franchise agreement and ordinance providing for the exclusive right to collect and process solid waste violated the Commerce Clause of the United States Constitutions because the agreement/ordinance required the use of a single in-state transfer facility and disposal at in-state landfills.

Warren County, Kentucky (the County) awarded a franchise agreement to Monarch Environmental, Inc. (Monarch) that granted it the exclusive right to collect and process municipal solid waste generated within Bowling Green, Kentucky (the City). The agreement (1) required Monarch to process all solid waste at the City's solid waste transfer facility; (2) required that Monarch dispose of all solid waste at a landfill "approved and permitted by the State of Kentucky," effectively prohibiting the use of out-of-state landfills; (3) required waste generators to employ Monarch as their sole solid waste hauler; and (4) prohibited waste generators from transporting their own waste or from hiring any other company to provide waste disposal services. The County also simultaneously adopted an ordinance that incorporated the terms of the franchise agreement, thus "transform[ing] the franchise agreement provisions into law."

Huish Detergents, Inc. (Huish) operates a laundry detergent manufacturing facility in Bowling Green that generates "considerable solid waste" that was subject to the County's ordinance and franchise agreement. Huish challenged the ordinance and agreement in federal court, arguing that they violate the "dormant Commerce Clause" of the United States Constitution. Huish argued that the following three aspects of the ordinance/franchise scheme violated the Commerce Clause: "(1) the designation of a single in-state processing station for municipal waste; (2) the prohibition on out-of-state waste disposal; and (3) the award of an 'exclusive franchise' to Monarch for waste collection and processing." The district court dismissed Huish's suit, holding that, because the County acted as a "market participant" when it "purchased" waste removal and processing services from Monarch, the County's activities were not subject to the constitutional limitations on the regulation of interstate commerce. The Sixth Circuit Court of Appeals, however, reversed the district court, holding that "the County has used its regulatory power-not its proprietary purchasing power-to retain Monarch's services" and, therefore, was not acting as a market participant.

The Commerce Clause grants Congress the power to regulate commerce among the states. Although the Commerce Clause is an affirmative grant of power to Congress and does not expressly govern the activities of states or local governments, federal courts have interpreted this constitutional provision to "prohibit[ ] States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'" This aspect of the Commerce Clause is often referred to as the "dormant Commerce Clause." A state law or local ordinance that discriminates against interstate commerce by treating in-state and out-of-state interests differently is invalid under the "dormant Commerce Clause" unless the state or local government can show that "there is no other means to advance a legitimate local interest." Courts have held that both solid waste, and the service of collecting, processing and disposing of solid waste, are articles of commerce subject to the Commerce Clause's limitations.

The Commerce Clause is not implicated, however, when the state or local government acts as a "market participant," rather than a market regulator. Courts have held that "there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Thus, the Commerce Clause does not apply "in cases where the State was spending 'its own funds,' or selling a resource that it owned or produced."

The County argued that it acted as a market participant when it entered into the franchise agreement with Monarch for solid waste services. The Sixth Circuit disagreed, stating that the "market participation exception does not come into play simply because a municipality labels its action as an 'agreement.' Rather, we must determine whether the municipality was acting in a proprietary capacity as a purchaser or seller with regard to the challenged action." The court held that the County was neither purchasing nor selling disposal services and, therefore, was not acting in a proprietary capacity. "By effectively forcing all city residents to purchase the processing services directly from Monarch," the court held, "the County's action far exceeded that which a private entity could accomplish on the free market." Thus, the court held that the market participation exception "did not shield the County's action from scrutiny under the Commerce Clause." The court then examined each of Huish's challenges to the County's ordinance/agreement scheme.

First, the court held that the requirement under the ordinance and agreement that Monarch deliver all solid waste to the City's transfer station-and nowhere else-discriminated against interstate commerce by benefiting a local interest at the expense of out-of-state transfer facilities. Accordingly, the court held that the ordinance and agreement constituted a violation of the Commerce Clause, which placed the burden on the County to demonstrate that there was no other means to advance its goals. The County argued that the exclusive use of the City's transfer station was necessary in order "to assure the 'safe and efficient' collection and disposal of solid waste." The court, however, rejected this argument, stating that the "County's conclusory justification for its actions" did not satisfy the County's burden of proof under the Commerce Clause and, in any case, the County offered "no explanation why these goals cannot be satisfied out-of-state." Therefore, the court held that the required use of the City's transfer station under the ordinance and agreement violated the Commerce Clause.

Second, the Sixth Circuit held that the requirement under the ordinance and agreement that solid waste be disposed of solely in Kentucky landfills also violated the Commerce Clause. The court held that "this prohibition facially discriminates against out-of-state disposal services which, again, constitutes a per se violation" of the Commerce Clause. The court further noted that, even if the County's agreement with Monarch constituted market participation, "the market participation exception would not insulate the County's regulation of the separate waste disposal market, which is downstream from the collection and processing."

Third, the Sixth Circuit declined to rule on Huish's argument that the County's award of an exclusive franchise to Monarch also violated the Commerce Clause because that issue had not been addressed by the district court. A concurring opinion by one of the three judges on the court, however, stated that he would have invalidated the franchise agreement as well. The concurring opinion states:

> Given the way in which vertical integration of the waste disposal services are provided by Monarch pursuant to its arrangement with the County for waste collection, hauling, processing and disposal, and given the comprehensiveness of the contractual arrangement between the County and Monarch, I would hold that the County violated the Commerce Clause by designating Monarch as the exclusive waste hauler and processor for municipal waste-notwithstanding the district court's inappropriate failure to address the issue.

Because the Sixth Circuit found that the County had violated the Commerce Clause with respect at least two of Huish's three claims, the court reversed the district court's dismissal of Huish's suit and remanded the matter to the district court for further proceedings.

***Huish Detergents, Inc. v. Warren County Kentucky,*** __ F.3d __, No. 98-5566 (6th Cir. May 31, 2000)

This article was prepared by Jeffrey L. Woolstrum, a partner in our Environmental Department, and previously appeared in the September, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.