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Second Circuit Finds That New York Cable Downgrade Fees are not Preempted by Federal Cable Act

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fer of wealth did not in itself convert regulation into physical invasion.

Because the Escondido rent control ordinance did not compel a landowner to suffer the physical occupation of his property, the Court concluded that it did not constitute a per se taking by the government and compensation was therefore not required.

Daniel Hynes

Second Circuit Finds That New York Cable Downgrade Fees Are Not Preempted By Federal Cable Act

In *Cable Television Association of New York, Inc. v. William B. Finneran,* 954 F.2d 91 (2nd. Cir. 1992), the United States Court of Appeals for the Second Circuit held that a federal cable communication law does not preempt New York regulations of cable television downgrade charges. The court found that Congress intended to preempt only state rules that regulate rates for the provision of cable services, and downgrade charges were not this type of rate within the meaning of the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. 521 *et seq.* (1992).

Background

On December 3, 1990, in response to customer complaints about $40 to $100 charges, the New York State Commission on Cable Television ("the Commission") adopted regulations limiting cable television companies' imposition of downgrade charges. Since consumers saved about $10 per month by dropping to a lower level of cable service, the high downgrade fees tended to remove any incentive to switch to a lower tier of service. In addition, the cable companies' cost to downgrade service was either minimal, for newer cable-ready television sets, or between $50 and $75, for older sets requiring removal of a descrambler box.

The Commission's regulations define a downgrade charge as a fee imposed on a subscriber for a change in service that results in a less expensive tier of service. The regulation did not prohibit downgrade charges entirely but limited the fee to the companies' actual downgrading cost if: the customer had been given adequate notice; and the existing service had not been maintained for the previous six months.

Downgrade charges were also permitted in order to prevent churning. Churning occurs when a customer signs up for a premium channel in order to watch a particular program, and soon after elects to downgrade to a cheaper service tier.

On December 26, 1990, the Cable Television Association of New York, Inc. ("Association") filed suit in the District Court for the Northern District of New York, seeking a declaration that the Cable Act of 1984 preempted the Commission's downgrade regulations. The district court found that the preemption provision of the Cable Act did not apply to the Commission's regulations. The Association appealed to the Court of Appeals for the Second Circuit.

Cable Act Does Not Preempt State Regulation

The Second Circuit began by examining whether Congress intended to preempt the entire field of cable television regulation when it passed the Cable Act of 1984. After a comprehensive examination of the Cable Act's history, the court of appeals noted that in 1984, the United States Supreme Court gave the Federal Communication Commission ("FCC") discretion to preempt virtually any state regulation of the cable industry. As a result of the Supreme Court's decision, Congress passed the Cable Act and thereby expressed its intent to create a comprehensive scheme for regulating cable television.

Despite this broad ability to preempt, previous case law had held that in the Cable Act, Congress did not preempt state regulation of downgrade charges. The court of appeals reasoned that if the FCC had meant to reverse this prior decision, it could have done so while issuing interpretations of the Cable Act. The FCC's failure to do so strongly indicated that no such preemptive intent existed.

The Association argued that Congress must have intended to preempt state regulation of downgrade charges since the Cable Act effectively regulated other rates relating to the provision of cable services. Although the court of appeals agreed that state regulation of downgrade charges had some effect on the rates cable companies charged for general cable services, the court stated that to preempt every cost-imposing state regulation would conflict with the Cable Act's express authorization of state regulation.

Lastly, the court of appeals addressed the Association's argument that the regulations' impact on cable provision rates was sufficiently large to force the conclusion that Congress must have intended to preempt state regulation of downgrade charges. The court of appeals found no such congressional intent for two reasons.

First, the Cable Act expressly authorized state regulation in numerous fields that affected cable company service rates, and states were allowed to regulate charges associated with the complete disconnection of service.

Second, the language of the preemption clause at issue failed to evidence Congressional intent to carve out a wide area free from state regulation. The court held that Congress meant to preempt only state rules that regulated cable rates relating to providing customers with service, not all cable charges generally.

Downgrade Charges Are Not Rates

The Association also argued that downgrade charges fell under the definition of rates and accordingly were within the express preemption provisions of the Cable Act. The Association contended that a customer is provided with service when, in fact, cable access is being downgraded because cable service includes service of machinery that is necessary to facilitate programming. The court of appeals disagreed, finding that although cable

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service is not limited to cable programming, the Cable Act preempted only laws regarding the provision of cable services, not all cable services generally.

Judy Koehler

Eighth Circuit Imposes Full CERCLA Liability On Seller Who Hid Contamination From Purchaser

In *Gopher Oil Company, Inc. v. Union Oil Company of California,* 955 F.2d 519 (8th Cir. 1992), the United States Court of Appeals for the Eighth Circuit held that the seller of a chemical plant site was 100 percent responsible for the environmental cleanup costs incurred by the purchaser because the seller caused the pollution and misrepresented the condition of the site when selling the property.

Background

A subsidiary of Union Oil Company of California ("Union") operated a petroleum product treatment facility on a five-acre site in Minneapolis, Minnesota from the early 1960's until 1980. The subsidiary's normal operating procedures resulted in leaks, spills, and the dumping of oil and industrial chemicals. When Union decided to sell the property in 1980, it removed some of the contaminated soil but covered other contaminated areas with landscaping gravel.

When Gopher Oil Company ("Gopher") expressed an interest in purchasing the site, Union representatives told Gopher of two previous chemical spills but did not inform Gopher that past operating procedures caused continual leaks and dumping on the site. During the site inspection conducted by Gopher representatives, some soil discoloration was visible, but much of the contaminated ground was hidden beneath the gravel. Although Gopher had access to Union's records, it did not examine them.

The president of Gopher contacted the Minnesota Department of Inspections and the Minnesota Pollution Control Authority ("the Authority"). The Authority told Gopher about the two major chemical spills but had no information about other pollution problems at that site.

Gopher purchased the site from Union in November, 1980. The purchase agreement stated that the land and facilities were transferred in an "as is" condition and that none of the warranties made in the agreement misstated or omitted any material facts. After the purchase, Gopher repaired the plant and claims to have controlled and cleaned up any leaks or spills.

Three years after the purchase, the Authority ordered an investigation, which revealed that the site still contained substantial pollution. Under a compliance agreement with the Authority, Gopher spent $423,272.81 in cleanup costs.

In January, 1988, Gopher sued Union in the United States District Court for the District of Minnesota, seeking damages for fraud and recovery of its cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607, 9613 (1992), and the Minnesota Environmental Response and Liability Act ("MERLA"), Minn. Stat. 115B.04, 115B.08 (1991).

Under CERCLA, a federal statute, the costs of cleaning up a polluted site are allocated among the responsible parties. If a party pays more than its fair share, it can sue other responsible parties for the difference. CERCLA also authorizes the award of attorney fees to the winning party in such an action. MERLA provides for essentially the same actions under Minnesota state law.

District Court Awards Full Cleanup Costs

The jury found that Union had made material misrepresentations about the condition of the site in order to induce Gopher to purchase it. The jury also found Union 100 percent responsible for the cleanup costs imposed under CERCLA. The district court awarded Gopher the amount of its past cleanup costs, plus interest and more than $500,000 in attorney fees.

Under Minnesota law, out-of-pocket loss is the difference between the actual value of the property Gopher received and the purchase price Gopher paid for it, in addition to any damages caused by the fraud. The district court reasoned that the cleanup activities would increase the value of the property. Therefore, the district court judge decided to determine out-of-pocket damages by calculating the difference between the purchase price and the value of the property after the cleanup. The judge decided to wait until the site was cleaned and revalued before determining Gopher's out-of-pocket loss.

Union moved for a new trial which the district court denied. Union appealed to the Court of Appeals for the Eight Circuit both the denial of a new trial as well as the judgment imposing CERCLA liability and the award of attorney fees. Gopher appealed the district court's decision to defer calculation of the damages under the fraud claim until after completion of the cleanup.

Fraudulent Misrepresentation Occurred

Union argued that the "as is" clause in the purchase agreement and Gopher's experience in the industry conferred upon Gopher a duty to investigate the property before purchasing it. Therefore, Gopher's evidence of fraud, which consisted of testimony that Union had assured Gopher the site was pollution free, was not substantial enough to support the jury's verdict. The appellate court upheld the district court's decision because the evidence showed that Union knew of the pollution and had tried to conceal it from Gopher. Additionally, Gopher had relied upon these misrepresentations when purchasing the property.

With regard to the common law fraud claim, Union argued that no law allows for recovery of attorney fees in this type of common law action. The court of appeals