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Georgia City Ordinance Requiring Towing Services to Accept Checks Held Constitutional

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property, but exempted "medical appliances" from the tax. Chicago Municipal Code § 200.6-4 (1984). However, the Chicago Department of Revenue ("the Chicago department") did not define "medical applicances" to expressly include tampons and sanitary napkins.

The State of Illinois exempted "medical appliances" from its Retailers' Occupation Tax (Ill.Rev.Stat., ch. 120, para. 441 (1985)) and Use Tax (Ill.Rev.Stat. ch. 120, para. 439.3 (1985)). The Illinois Department of Revenue ("the Illinois department") definition of "medical applicances" was nearly identical to the Chicago department's definition. In 1985, the Illinois department began construing "medical appliances" to include tampons and sanitary napkins, thus exempting them from taxes. The city continued to tax these products.

The purchasers challenged the Chicago department's failure to interpret "medical appliances" to include tampons and sanitary napkins. The city and retailers argued that tampons and sanitary napkins were only used for hygienic purposes and should be considered nonmedical appliances. The court pointed out that tampons and sanitary napkins perform an absorbent function similar to cotton and bandaids, two products that were considered "medical appliances" under the city ordinance.

Furthermore, the court noted that when the state exempted soft drinks from its taxes the city amended its ordinance to exclude soft drinks. In doing so, the Chicago City Council and the Chicago department indicated their intent to enforce the ordinance consistent with Illinois tax law. The court found the Chicago department's refusal to exempt tampons and sanitary napkins from the ordinance to be against the expressed intent of the Chicago City Council in passing the ordinance. Accordingly, the court held that tampons and sanitary napkins were "medical appliances" and exempt from the city tax.

Michael I. Leonard

GEORGIA CITY ORDINANCE REQUIRING TOWING SERVICES TO ACCEPT CHECKS HELD CONSTITUTIONAL

In ***Porter v. City of Atlanta,*** 384 S.E.2d 631 (Ga. 1989), the Supreme Court of Georgia held constitutional city ordinances requiring towing service operators to post signs indicating towing fees and to accept payment by insured checks and credit cards.

Background

A-Tow, Inc. ("A-Tow") was a towing company owned and operated by Val J. Porter ("Porter"). A-Tow and Porter were convicted of violating two Atlanta ordinances by failing to accept checks and to post towing rates. A-Tow and Porter appealed the convictions and challenged the constitutionality of the ordinances.

City's Authority to Enact Ordinances

On appeal A-Tow and Porter challenged the validity of the city ordinances, contending that Atlanta lacked the power to regulate businesses. To determine the ordinances' validity, the supreme court applied a two-pronged analysis: (1) whether the city possessed the power to enact the ordinances and, (2) if the power existed, whether the exercise of power was clearly reasonable.

The court noted that a municipality's power to regulate private enterprise is one of its most significant, but controversial, powers. The court emphasized, however, that the controversy was not the result of uncertainty concerning the source of a city's power to regulate trade: that power is firmly embedded in the right of the legislature to regulate trade and to authorize cities to do so. Rather, the controversy stemmed from courts' inconsistent analysis of whether such regulations are reasonable.

Power To Enact Ordinances

In its analysis of the ordinances, the court found that three sections of the Atlanta city charter authorized the city to regulate towing and wrecker services. First, the city charter provided the city with the general authority to license and regulate "privileges, occupations, trade and professions." Atlanta, Ga., City Charter, app. I, § (2). In addition to this general authority, the charter supplied the city with the specific authority to regulate city businesses that "may be dangerous to persons or property" (Atlanta Ga., City Charter, app. I, § (18)), and to "regulate and license vehicles operated for hire . . . and parking" (Atlanta, Ga., City Charter, app. I, § (37)). The court concluded that the city possessed the power to enact towing and wrecking service regulations.

Reasonable Exercise of Power

Having established that the ordinances satisfied the first prong, the court analyzed the ordinances' reasonableness. The court noted that the purpose behind the power to regulate is to allow the governing authorities to shield the public from the excesses of private entities and their activities. The extent of government control must not exceed the danger of the regulated activity because although private interest can pose a danger of abuse, excessive government control in the name of protectionism can pose an even greater danger.

Because both the government and the private sector are potential sources of abuse, courts must carefully view the exercise of government regulatory power over private activities. Such regulations are not presumed to be reasonable, but must be demonstrated to be reasonable after the protection the regulation affords the public is balanced against the oppressiveness imposed on individual rights.

In determining the reasonableness of the ordinances, the court initially examined the nature

of the towing industry. The court determined that Georgia law gives towing services a great advantage over owners of towed cars and creates great potential for unfair business practices and abuse of the public. If a car owner fails to pay a $2 parking fee the law entitles the towing service not only to remove the vehicle but to charge an involuntary fee and to deprive the owner of his or her automobile until the fee is paid.

Reviewing the ordinances, the court determined that the ordinance requiring towing services to post fees protected the public from potential overcharge. By requiring towing services to accept insured checks and major credit cards, the second ordinance protected the owner from unnecessary deprivation of his or her car while cash is not immediately available.

Finding the burden on the towing services to be insignificant, the court determined that the protective value of the regulation outweighed the inconvenience to the individual towing services. Therefore, the court held the ordinances to be clearly reasonable and valid.

Ordinances Did Not Violate United States Constitution

Article I, Section 8, Challenge. A-Tow and Porter urged two additional constitutional grounds for reversing the convictions. First, they contended that the requirement that wrecker services accept checks and credit cards violated Article I, section 8, of the United States Constitution because the ordinance strove to legislate a change in legal tender. Article I, section 8, clause 5, provides Congress with the exclusive power to coin money and regulate its value. The court rejected this argument, finding that the regulation does not require services to accept payment in anything but legal tender. In addition, the debt is discharged when the towing service receives payment in legal tender through a third party institution.

Ordinance Withstands Due Process Claim. A-Tow and Porter also argued that the ordinance requiring towing services to accept "any check which can be insured by a check approval agency . . ." violated the United States Constitution due process clause because the ordinance did not define the word "insured." To determine whether the ordinance was violative of due process, the court stated that the proper inquiry is "whether the statute forbids or requires an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application." *Porter* at 634. The court held that the term "insured" is not vague because, reasonably construed, it means that a check approval agency will indemnify the towing service if bank account funds are insufficient.

Sufficient Evidence That Checks Were Tendered and That Signs Were Not Posted

A-Tow and Porter posed two evidentiary arguments. First, they contended that there was no evidence that a check was properly tendered. While the court conceded that no fully drafted check was entered into evidence at trial, the court observed that the witnesses had testified that they had stopped writing checks when A-Tow told them that the checks would not be accepted. The court additionally noted that the ordinance does not require formal tender and that Georgia law does not necessitate formal tender where the towing company tells the consumer that the check will be refused. The court held that violation of the ordinance occurred when A-Tow indicated that a check, if written, would be refused.

Secondly, A-Tow and Porter asserted that there was insufficient evidence that the required signs were not properly posted. The court, however, found sufficient testimony to support the conviction for failure to post fees.

Sheila M. Hanley

SOUTH CAROLINA HOME BUYERS MAY RECOVER ONLY AGAINST BUILDERS UNDER IMPLIED WARRANTY OF HABITABILITY

In a recent case, the Supreme Court of South Carolina denied recovery to a new home purchaser who brought suit for breach of implied warranty of habitability against the seller, who was also the builder's lender. In ***Kennedy v. Columbia Lumber & MFG. Co.,*** 384 S.E.2d 730 (S.C. 1989), the court held that, absent knowledge of concealed defects, the seller-lender was not liable to the buyer on an implied warranty of habitability theory. However, the court also held that the builder could be liable to the buyer under an implied warranty of service theory.

Factual Background

On July 21, 1977, Columbia Lumber & Manufacturing Company ("Columbia Lumber") sold a new home to John Kennedy ("Kennedy"). Columbia Lumber had been the materials supplier to the builder of the house, Charles Crumpton ("Crumpton") of Rainbow Construction Company. Columbia Lumber had taken no part in the actual construction of the house. When Crumpton could not pay Columbia Lumber for the supplies, Columbia Lumber filed a mechanic's lien on the property. This lien put Columbia Lumber in a lender's position with regard to Crumpton. Eventually, Columbia Lumber took a deed in lieu of foreclosure on the property and paid off Crumpton's outstanding mortgages. In order to recoup its losses from Crumpton's default, Columbia Lumber sold the house to Kennedy, but received less than the amount Crumpton owed for materials.

Approximately six years after the sale, Kennedy spotted a crack in the brick veneer of the house. Almost two years later, an engineer employed by Kennedy to inspect

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