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Supreme Court of New Jersey Holds Delaware Chemical Company Subject to the Jurisdiction of the Board of Public Utility Commissioners

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consumer is represented by an attorney . . . ." 15 U.S.C. § 1692c(a)(2).

CheckRite admitted that it communicated with Johnson after it had received notice that he was represented by an attorney. CheckRite argued that under section 1-1-115(b) of the Wyoming statutes, it was required to send notice of the dishonored check directly to the consumer. CheckRite also argued that this type of "formal" communication was not the type of communication prohibited by section 1692c(a)(2). The court rejected this argument because the FDCPA did not provide an exception for "formal" communications. Thus, the court held that the second notice should have been sent to Johnson's attorney, and the direct communication with Johnson was an additional violation of the FDCPA.

Using a "Doing Business As" Name. The court rejected Johnson's allegation that CheckRite violated section 1692e(14) of the FDCPA by sending the initial demand letter without advising him of its true name ("Statewide Collections, Inc.") or that it was using a "doing business as" name ("CheckRite"). Section 1692e(14) expressly prohibits a debt collector from deceiving or misleading a debtor by using any name other than its true business name in its collection activities. The court noted that Statewide Collections, Inc. was a franchisee of CheckRite, Ltd. and was licensed with the Wyoming State Collection Agency Board as "Statewide Collections, Inc., d/b/a CheckRite." Therefore, CheckRite constituted part of Statewide Collections' true business name for the purposes of the FDCPA.

Collecting on Behalf of Another. Johnson also argued that CheckRite violated section 1692j of the FDCPA because CheckRite failed to notify Johnson that it was no longer the true holder of the check which allegedly created the debt. Section 1692j prohibits any action which would mislead the consumer to believe that someone other than the creditor is attempting to collect the debt. The court rejected Johnson's argument because CheckRite never attempted to mislead Johnson into believing that it was collecting the debt on its own behalf. Rather, it was obvious that CheckRite was collecting the debt for the retail merchant. Therefore, the court held that CheckRite did not violate section 1692j of the FDCPA.

The court reversed the district court's decision and reinstated the county court's judgment.

Joseph J. Morford

Supreme Court of New Jersey Holds Delaware Chemical Company Subject to the Jurisdiction of the Board of Public Utility Commissioners

The Supreme Court of New Jersey has held that a chemical company with a limited market is a public utility subject to regulation by the Board of Public Utility Commissioners. ***Petition of South Jersey Gas Co.,*** 561 A.2d 561 (N.J. 1989). The court found that the company's contract to supply methane-rich fuel to a large industrial user, coupled with the company's extensive efforts to market the gas to other industrial users, met the New Jersey legislature's definition of "public utility."

Background

SunOlin Oil Company ("SunOlin") operated a chemical plant in Claymont, Delaware, that converted oil refinery by-products into industrial gases. This process produced methane-rich fuel ("MRF"). MRF is an alternative energy source to natural gas and is generally suitable for industrial but not residential uses.

B.F. Goodrich Company ("Goodrich") manufactured its products in Pedricktown, New Jersey. Until 1986, Goodrich used natural gas in its manufacturing process. This natural gas was supplied by South Jersey Natural Gas ("South Jersey"), a regulated public utility that served approximately 180,000 residential, industrial, and commercial customers in seven southern counties of New Jersey. Sixteen industrial customers represented approximately twenty percent of South Jersey's total sales.

In July of 1983, Goodrich contacted SunOlin after Goodrich unsuccessfully attempted to enter into an arrangement with South Jersey for a long term supply of natural gas. SunOlin offered to sell MRF to Goodrich as an alternative to natural gas. However, SunOlin subsequently concluded that a contract with Goodrich would not be profitable and the transaction was never completed. By the fall of 1985, SunOlin was able to deliver MRF to Goodrich using a previously unavailable pipeline. SunOlin again made an offer to sell MRF to Goodrich. Goodrich estimated that it could save $18,000 per month by converting to MRF. SunOlin viewed the potential contract with Goodrich as an opportunity to expand the market for MRF.

While the contract with Goodrich was being negotiated, SunOlin contacted other potential industrial customers, such as E.I. Dupont Nemours and Company, Mobil Oil Research, Monsanto Chemical Company, Shell Oil Company, Allied Chemical and Atlantic City Electric Company, in an effort to sell MRF. However, no other agreements to sell MRF were ever reached.

In late 1986, SunOlin and Goodrich reached a preliminary agreement. Goodrich subsequently notified South Jersey that it intended to terminate its contract for natural gas as of March 1, 1987. On February 13, 1987, South Jersey commenced proceedings with the Board of Public Utility Commissioners ("the BPU"), the agency authorized to regulate New Jersey utilities. South Jersey sought a preliminary restraining order to prohibit SunOlin from selling and delivering MRF to Goodrich.

Administrative Proceedings

In March 1987, the BPU transferred South Jersey's petition to the Office of Administrative Law

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Public Utility Commissioners (from page 55)

to determine whether SunOlin qualified as a "public utility" and therefore was subject to regulation by the BPU. A "public utility" is any corporation that "may own, operate, manage, or control within [New Jersey] any pipeline [or] gas . . . plant or equipment for public use, under privileges granted . . . by [New Jersey]." N.J. Stat. Ann. § 48:2-13 (Supp. 1989). At a hearing before an Administrative Law Judge ("ALJ"), SunOlin stipulated that it owned and operated pipelines in New Jersey. Thus, the sole issue was whether SunOlin's activities were "for public use."

The ALJ applied the definition of a public utility from *Lewandowski v. Brookwood Musconetcong River Property Owners Association,* 37 N.J. 433, 181 A.2d 506 (1962), which states that "whether an entity is a public utility depends on the character and extent of the use." The ALJ determined that the character of SunOlin's use was to sell MRF only to the most profitable industrial users. The extent of SunOlin's use at the time was only one customer, but that use would cause South Jersey to lose $1.3 million in revenues and the state of New Jersey to lose $210,000.00 in taxes. This, in turn, could have resulted in a $400,000 rate increase for other South Jersey customers. The ALJ concluded that SunOlin's sales were substantial enough to be of consequence to the public and, therefore, SunOlin was a public utility within the BPU's jurisdiction.

The case then was returned to the BPU for a final decision on the merits. The BPU decided to exercise its jurisdiction over SunOlin because SunOlin's sales to Goodrich were sufficiently "clothed in the public interest" to warrant regulation. The BPU reasoned that it needed to regulate SunOlin to avoid potentially adverse effects on the regulated market for natural gas in New Jersey. The BPU concluded that its authority to regulate competition under sections 48:2-14 and 48:2-17 of the New Jersey statutes included the ability to exclude competitors from the natural gas market.

New Jersey Appellate Division

The New Jersey Appellate Division affirmed the BPU's decision, noting that the economic impact of SunOlin's selling only to the largest and most profitable customers sufficiently affected the public interest to justify regulation. The court rejected SunOlin's argument that, as a private company, it had no duty to provide service to the public and thus should be exempt from regulation by the BPU. The court explained that the issue was not whether SunOlin was obligated to sell MRF in New Jersey but the consequences to the regulated natural gas market if SunOlin did sell MRF in New Jersey. The court concluded that because SunOlin's sales had a potentially substantial impact on the natural gas market, the BPU had jurisdiction to regulate SunOlin's activities.

SunOlin appealed the decision to the New Jersey Supreme Court.

The New Jersey Supreme Court Affirms

The New Jersey Supreme Court began its analysis with an overview of the BPU's regulatory power. The BPU has the authority to grant franchises and privileges to any public utility and to "oversee utilities to prevent abuse of their franchise and to ensure that consumers are provided with safe and adequate services at reasonable rates." *South Jersey,* 561 A.2d at 565. A business is a "public utility" within the BPU's jurisdiction if the business operates "for public use." *Lewandowski v. Brookwood Musconetcong River Property Owners Assoc.,* 37 N.J. 433, 181 A.2d 506 (1962). Whether a business operates "for public use" depends on "the character and extent of the use" (37 N.J. at 445, 181 A.2d at 513), including the potential scope of the business' market (37 N.J. at 447, 181 A.2d at 514).

Although the facts in *Lewandowski* were distinguishable from the present case, the court cited analogous cases from other jurisdictions which applied the "public use" test. In *Industrial Gas Co. v. Public Utilities Commission of Ohio,* 135 Ohio St. 408, 21 N.E.2d 166 (1939), the Ohio Supreme Court held that a natural gas company which purposely limited its market was subject to public utility regulation. The *Industrial Gas* court reasoned that if selective contracting precluded public utility regulations, the business could multiply the number of its customers without ever being subject to regulation. Rather, the test was whether the business served such a substantial part of the public as to make its rates and operations a matter of public concern. 135 Ohio St. at 412-14, 21 N.E.2d at 168.

In *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission,* 328 Mich. 650, 44 N.W.2d 324 (1950), aff'd, 341 U.S. 329 (1951), the Michigan Supreme Court held that a natural gas company which contracted solely with Ford Motor Company and a few other industrial users was subject to public utility regulation. The *Panhandle* court reasoned that regulation was warranted because the company's selective contracts disadvantaged the regulated utilities in the area. 328 Mich. at 664, 44 N.W.2d at 330.

The court in the present case also examined several economic and regulatory factors. The court acknowledged the conflict between limiting SunOlin's entry into the market and promoting the New Jersey Energy Master Plan's objectives of enhancing competition in the natural gas industry. However, the court concluded that this apparent conflict did not affect the BPU's jurisdiction but rather gave the BPU the responsibility of reconciling these two conflicting goals to achieve the lowest prices and the best service possible for New Jersey consumers.

Finally, the court rejected SunOlin's argument that the BPU imposed its jurisdiction solely be-

cause SunOlin had taken business away from South Jersey, a regulated utility, and not because of the character and extent of SunOlin's sales. The court found sufficient evidence in the record from which to conclude that SunOlin's actions warranted regulation. The court noted that in making this determination, the BPU was obligated to consider SunOlin's sales potential and marketing efforts in determining the "character and effect" of SunOlin's business. SunOlin had a supply of MRF equivalent to two-thirds of South Jersey's industrial volume. In addition, SunOlin could interconnect its pipelines to pose a substantial threat to South Jersey's industrial service area. In fact, SunOlin had solicited business from numerous South Jersey industrial users. The court held that the BPU properly concluded that SunOlin posed a substantial threat to South Jersey's industrial market and therefore SunOlin was a public utility within the BPU's jurisdiction.

Suzi Guemmer

The North Carolina Motor Vehicle Safety and Financial Responsibility Act Allows an Insured Party to Aggregate Separate Underinsured Motorist Insurance Coverages

In a case of first impression, the North Carolina Supreme Court held that by statute, a motorist who purchases underinsured motorist coverage for more than one vehicle, whether in one policy or in several policies, may combine all the coverages when making a claim on any one of the vehicles. ***Sutton v Aetna Cas. & Surety Co.,*** 325 N.C. 259, 382 S.E.2d 759 (1989). The court held that insured parties could do so even if their insurance policies specifically prohibit aggregating coverages because such prohibitions conflict with North Carolina statutory law.

Background

Over the past several years, underinsured motorist ("UIM") coverage has become a common type of insurance protection. UIM coverage compensates the insured party for expenses in excess of the tortfeasor's insurance coverage. In this way, UIM coverage protects the innocent victims of financially irresponsible motorists.

In 1985, North Carolina amended section 20-279.21(b)(4) of its Motor Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. §§ 20-279.1 to .39 (1988) ("the Act"), to address situations where owners purchase more than one UIM coverage, whether within a single policy or in several different policies. The amendment provided that in these multiple-coverage situations, the maximum protection would be "the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance." N.C. Gen. Stat. § 20-279.21 (b)(4). The legislature stated that it added this section to give the owner of UIM coverage the benefits of each coverage he or she purchased.

Facts

Sherry S. Sutton ("Sutton") purchased two auto insurance policies from Aetna Casualty & Insurance Company ("Aetna"). The first policy contained two separate coverages, one for a Buick and the other for a Chevrolet. Each coverage included $50,000 basic bodily injury coverage as well as $50,000 per person UIM coverage. The second policy covered two additional autos, a Plymouth and a Chevrolet pickup truck. The second policy differed from the first policy in that both its basic bodily injury coverages and its UIM coverages had a $100,000 per person maximum for each auto. Aetna charged separate premiums for the UIM coverage on each of Sutton's four vehicles. Both policies contained the following provision:

> The limit of bodily injury liability . . . for "each person", for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident . . . This is the most we will pay for bodily injury and property damage regardless of the number of . . . [v]ehicles or premiums shown in the [policy] . . . .

On May 31, 1986, Sutton was driving one of her insured autos when a vehicle driven by Anthony A. Genesio ("Genesio") crashed into her car. Genesio died in the accident and Sutton was injured. Sutton sued Genesio's estate for the injuries she suffered in the accident.

Genesio carried liability insurance of $50,000, the entirety of which his insurance company deposited with the court for Sutton's benefit. However, Sutton claimed in excess $70,000 in medical expenses plus a substantial loss of future income due to her inability to return to work. Consequently, she notified Aetna that she expected her UIM coverages to provide the difference between Genesio's $50,000 insurance coverage and the amount of her eventual judgment. Citing the policy provisions, Aetna informed Sutton that it would only provide $50,000 in UIM coverage, which was the amount she purchased for the car that was hit. Sutton sued Aetna in the North Carolina Superior Court of Hanover County seeking a declaration that she was entitled to aggregate all four of her UIM coverages in her two policies.

Superior Court of Hanover County

Aetna maintained that the terms of the policy controlled the dispute. The policy explicitly stated that Aetna's liability was limited to the amount of the single coverage for the auto which Sutton was driving when she was hit. Thus, Aetna argued that Sutton could only claim UIM coverage in the amount of $50,000.

Sutton argued that the Act overrode the terms of the policies. She argued that the Act allowed her to aggregate her coverages in both policies and thereby claim a total UIM coverage of $300,000: $50,000 each for the two autos in her first policy and $100,000 each for the two autos in her second policy.

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