

1990

Public Utilities' Recoupment of Charitable Contributions Through Rate Structure Violated the First Amendment

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Recommended Citation

Jonathan E. Barrish *Public Utilities' Recoupment of Charitable Contributions Through Rate Structure Violated the First Amendment*, 3 *Loy. Consumer L. Rev.* 29 (1990).

Available at: <http://lawcommons.luc.edu/lclr/vol3/iss1/11>

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cy, he had rescinded the loan in a letter from his attorney to Mid-Penn. Mid-Penn claimed that its president had replied to the letter, stating that the rescission was not valid.

The Bankruptcy Court's Ruling

Under the TILA and its regulations, insurance premiums written in connection with consumer loan transactions normally must be included in the finance charges rather than in the principal. 15 U.S.C § 1605(c) (1988); 12 C.F.R. § 226.4(d)(2) (1990). In the present case, Mid-Penn excluded the insurance premiums from the finance charge. Thus, Mid-Penn was required to inform the Debtor of his right to choose which insurance company insured his home. Mid-Penn alleged that the TILA only required disclosure if the insurance was purchased "by or through" a creditor. Mid-Penn claimed that it did not have to disclose to the Debtor this right to choose an insurer, as Mid-Penn merely renewed the Debtor's policy.

The bankruptcy court rejected Mid-Penn's allegation. Although Mid-Penn initially did attempt to renew the Debtor's expired policy, Mid-Penn ultimately obtained the insurance from a company of its own choice. Moreover, the court found that the applicability of the disclosure requirement did not depend on whether the insurance was purchased "from or through" the creditor. Instead, TILA requires that the right to choose an insurance company always must be disclosed to the borrower if the premium is excluded from the finance charge.

Furthermore, the court held that the disclosure must be in the TILA statement itself rather than communicated orally or through other documents. Because the TILA statement given to the Debtor did not contain this disclosure, the court found that Mid-Penn's actions constituted a violation of the TILA, albeit a technical one made in good faith. The technical nature of the TILA violation and the good faith intentions of the creditor,

however, were irrelevant. The court stated that subsequent to the simplification of TILA in 1980, all violations which remain viable under the amended TILA, even if technical, entitle the Debtor to full remedies provided by the law. *In re Brown*, 106 B.R. 852, 853, 856-857 (Bankr. E.D.Pa. 1989).

The court held that this material violation of the TILA permitted the Debtor to rescind the loan. Mid-Penn's improper response to the rescission allowed the Debtor to recover statutory damages and recoupment in the same amount, relieved him of liability for the finance charge and eliminated Mid-Penn's security interest.

The court held that the Debtor was obligated to repay only the amount he actually received from Mid-Penn. Further, the Debtor could credit his recoupment and previous payments against this amount. Therefore, because the court calculated that the sum of the recoupment and the payments already made was greater than the obligation, it offset Mid-Penn's claim entirely. The court also awarded the Debtor attorneys' fees and costs.

Suzi Guemmer

PUBLIC UTILITIES' RECOUPMENT OF CHARITABLE CONTRIBUTIONS THROUGH RATE STRUCTURE VIOLATES THE FIRST AMENDMENT

In *Cahill v. Public Serv. Comm.*, 76 N.Y.2d 102, 556 N.Y.S.2d 840 (N.Y. 1990), the New York Court of Appeals held that a public service commission's policy of allowing utilities to pass along the cost of corporate charitable contributions to ratepayers violated the ratepayers' first amendment rights. The policy violated the ratepayers' first amendment rights because it com-

ped the ratepayers to contribute financially to the charitable organizations and identified the ratepayers with the causes supported by the organizations. The court rejected the utilities' argument that the compelled recoupment of charitable contributions from ratepayers was analogous to the government's use of tax money for purposes that some taxpayers find objectionable. The court explained that while the government has the authority to use tax money for purposes that taxpayers find objectionable, it cannot delegate its authority to tax to publicly regulated enterprises.

Background

The New York Public Service Commission ("PSC") is a state agency which has total regulatory and rate-fixing authority over public utilities in New York. Prior to 1970, the PSC prohibited utilities in New York from recouping corporate charitable contributions from ratepayers. As a result, the utilities and their shareholders absorbed these costs.

In 1970, the PSC reversed its policy and permitted the utilities to pass along the costs of charitable contributions to ratepayers. The individual utilities treated the contributions as utility operating expenses and incorporated these costs into the utility's rate structure. In accordance with the new rules, New York Telephone ("NY Tel") and Rochester Gas and Electric ("RG & E") sought to recoup from their ratepayers charitable expenditures made to political, religious and other organizations.

Joseph Cahill ("Cahill"), a customer of NYTel, brought an Article 78 proceeding against PSC and the utilities, contending that the charitable contribution recoupment policy violated his first amendment right to free speech and association. Cahill argued that the policy compelled him to fund and to affiliate with organizations espousing political, religious and moral beliefs contrary to his own. Additionally, Cahill objected to the fact that the utilities decided

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which organizations to support without consulting ratepayers.

On behalf of all ratepayers, the Attorney General of New York also brought an Article 78 proceeding against the PSC and the utilities. The Attorney General advanced the same arguments as Cahill and, through the Article 78 proceeding, sought to prohibit further use of the charitable contribution recoupment policy. The Attorney General's action was consolidated with Cahill's.

At the outset of the litigation, the N.Y. Court of Appeals concluded that the PSC policy constituted state action and thus merited consideration on constitutional grounds. The New York Supreme Court and the New York Supreme Court, Appellate Division, the lower courts, held that the PSC policy violated a ratepayer's first amendment right to free speech and association.

The First Amendment

In analyzing Cahill's first amendment claim, the New York Court of Appeals noted that the first amendment protected a citizen from governmental interference with the citizen's right to speak and to associate freely and the citizen's right to refrain from speech and association. Second, the court emphasized that the court would uphold a state's interference with first amendment freedoms only upon a showing of a compelling state interest.

In interpreting the compelling state interest test, the court relied on the standard articulated in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In *Abood*, the United States Supreme Court considered the constitutionality of a state statute compelling non-union employees to pay a fee to the union in an amount equal to union dues. The Court concluded that to the extent that the non-union members' fees were used to support collective bargaining, contract administration and grievance adjust-

ment which advanced labor peace and Congressional labor relations policy, the compelled payments permissibly infringed on the employees' rights of association. However, the Court emphasized that it was unconstitutional to extract fees from non-union members for political and ideological purposes not germane to the Congressional labor relations policy.

Ratepayers Are Personally Identified

The utilities contended that because the ratepayer would never be personally identified with the organizations to which the utilities donated funds, the first amendment freedoms of speech and association did not apply.

The court found that the first amendment protected ratepayers against forced financial support of causes that they found personally distasteful; the amendment thus protected individuals from affirming or acquiescing in beliefs contrary to their own. The court noted that although the ratepayers' forced charitable payments were small, the payments were nevertheless direct support for charitable organizations. The court concluded that it did not matter whether the ratepayers were in fact identified as supporters of the organizations but rather that they subjectively believed they were supporting offensive causes. Thus, the court held that although the amount of contribution charged to a ratepayer would be monetarily insignificant, the charge violated a ratepayer's first amendment rights by serving as an endorsement of beliefs opposed to those of the ratepayer.

No Compelling State Interest

As an alternative argument, the utilities asserted that even if Cahill's claim involved first amendment rights, the intrusion on those rights was slight. Because the intrusion was germane to some identified state interest, something less than a compelling state interest would be sufficient to sustain the intrusion. The utilities also argued

that the PSC policy was constitutional because the recoupment of charitable contributions was germane to the reasonable cost of doing business and to the provision of utility services. The contributions were germane to the provision of utility services because certain communities inhabited by ratepayers would benefit from the donations.

The court rejected this analysis, finding that *Abood* had not substituted a "germaneness" test for the compelling state interest test but had incorporated it as part of the compelling state interest test. The court explained that in *Abood*, the Supreme Court first considered whether there was a compelling state interest and then examined whether the state's intrusion was germane to that interest. In this case, the state's interest was to ensure that ratepayers received vital utility services at a reasonable cost. The court acknowledged that ratepayers might benefit in some intangible way from the utilities' charitable contributions. However, the court found that the charitable contribution recoupment policy was too attenuated from the provision of utility services. In fact, the court stated that the policy primarily furthered the private interests of the utilities and their shareholders. Thus, the court held that the utilities failed to provide a sufficient reason to justify compromising the freedoms guaranteed by the first amendment.

Taxing Analogy

Finally, the utilities argued that there was no discernable distinction between coercing ratepayers to fund the utilities' charitable contributions and requiring taxpayers to support objectionable government programs. The court rejected this argument. The court reasoned that while the government had the constitutional authority to tax and to provide benefits that some taxpayers found offensive, it could not delegate this authority to publicly regulated enterprises. The court explained that government channeling of public

expression through preferred agents with mini-taxing authority would destroy the free expression of ideas. Such channeling would replace the marketplace of ideas with corporate utility ideas subsidized with consumer funds. Thus, the court affirmed the order of the New York Supreme Court, Appellate Division.

Concurring Opinion

In his concurring opinion, Judge Titone stated that the challenged practice represented governmental acquiescence in private economic decision making and did not rise to the level of state action. However, in accepting the "law of the case" that state action was involved, Judge Titone concluded that the charitable contribution recoupment policy violated the ratepayers' constitutional rights, but not those guaranteed by the first amendment.

Judge Titone first reviewed the majority's analysis of *Abood*. He noted that *Abood* stood for the proposition that if a state impinged on first amendment rights, it must have a compelling interest and narrowly draft the law to meet its identified interest. He stated that unlike the union dues policy in *Abood*, the PSC policy did not implicate or impair the ratepayers' association rights in any manner. The concurrence maintained that in *Abood* the issue was whether non-union members could be forced to pay union dues and thus be forced to associate with the union against their will. The concurrence explained that in *Abood* a non-union member was forced to associate with the union by virtue of her payments to the union and the union's reciprocal duty to represent her. In contrast, Judge Titone noted that the utilities' rates did not infringe on Cahill's and other ratepayers' rights of association. The ratepayers freely associated with the utilities and merely paid for services received; no compulsory association arose from the ratepayers' payments of utility bills. Therefore, Judge Titone refused to apply *Abood* to Cahill's claim.

PSC Policy Constituted Taxation Without Representation

For the concurrence, the dispositive issue was whether the Constitution prohibited the government from taxing indirectly through private business entities. The concurrence disagreed with the majority's objection to the government channeling expression through preferred agents, noting that the government did this whenever it allowed a tax deduction or credit for private charitable contributions. Therefore, the problem with the regulatory scheme was not that it delegated the spending of taxable funds to a private entity but rather that the scheme delegated the power to impose a tax. The concurrence explained that the levy in this case was impermissible. Tax levies for the welfare of the entire community were only permissible if implemented directly by the government because only the government was directly accountable to taxpayers through the ballot box. Thus, Judge Titone concluded that the delegation of general taxing authority through the PSC policy was unconstitutional. The policy constituted taxation without representation rather than a violation of the first amendment.

Jonathan E. Barrish

CONNECTICUT CONSUMERS PROTECTED AGAINST DECEPTIVELY ADVERTISED MANUFACTURER'S REBATES

The Connecticut Supreme Court upheld a regulation restricting net price advertising in *Caldor v. Heslin*, 215 Conn. 590, 577 A.2d 1009 (1990). Net price advertising occurs when a retailer advertises a product for a price that is the final price the consumer pays after deeming the rebate from the manufacturer. The Connecticut Su-

preme Court found such advertising inherently misleading to consumers and therefore, not constitutionally protected.

Background

The dispute arose from a regulation promulgated under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110b(a) (1987). CUTPA prohibits deceptive practices in the conduct of any trade or commerce. In § 42-110b(c) of CUTPA, the Connecticut legislature authorized the Connecticut Consumer Protection Agency ("CPA") to promulgate regulations addressing unfair or deceptive business practices. However, the CPA authority was limited by § 42-110b(c) of CUTPA; no CPA regulation could be inconsistent with the rules and decisions of federal authorities in their interpretation of the Federal Trade Commission Act.

The CPA promulgated a regulation which provides that net price advertising constitutes an unfair and deceptive practice unless the retailer provides the manufacturer's rebate price to the consumer at the time of purchase. Conn. Agencies Regs. § 42-110b-19 (1988). The regulation also provides that if the retailer merely advertises the availability of a manufacturer's rebate and does not state the net price of the item, the retailer would not be expected to pay the rebate price to the consumer at the time of purchase.

Caldor, Inc. ("Caldor"), a New York corporation which operated retail stores in Connecticut, sued the CPA. Caldor sought a permanent injunction against the enforcement of the net price advertising restriction.

The Trial Court's Decision

Caldor argued that the CPA regulation exceeded the agency's authority under CUTPA. In addition, Caldor asserted that the net price advertising restriction was arbitrary and capricious and thus violated substantive due process. Finally, Caldor contended that the

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