10 MRSA §1452 Contracts License Constitutional Regulation of Business

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The Honorable Howard M. Trotsky, Senate Chairman
The Honorable Richard Davies, House Chairman
Committee on Energy

Re: LD 972 and Related Legislation Regarding Ownership or Retail Gasoline Distributors

Dear Sirs:

I have studied the two bills which you have submitted to me for opinion, one entitled An Act to Restrict Oil Firms to One Phase of the Oil Industry, and the other entitled An Act to Prohibit Producers, Refiners and Distributors of Motor Fuels From Engaging in the Retail Sale of Gasoline, both of which propose amendments and additions to Title 10 M.R.S.A. §1452 et seq.* I have also studied the underlying legislative document entitled Report of the Committee on Energy which you submitted to me along with drafts of the two bills.

Each of the two bills relating to who may operate retail gasoline outlets faces similar constitutional problems. Although I can outline these problems for you, and indicate their relative strength, I am unable to conclude whether they are fatal constitutional problems. The ultimate test of constitutionality of these bills must be found in their effect upon the competitive structure of the retail gasoline market. As I will more carefully detail, there does not exist sufficient analysis of the relevant economic facts to determine whether the bills do rationally relate to their stated purpose.

The common constitutional problems which these bills face are the following:

I. Do they concern any area preempted by federal law?

II. Do they violate guarantees of substantive due process?

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*See L.D. 972

III. Do they constitute a taking of property without just compensation?

IV. Do they violate guarantees of equal protection of laws?

V. Do they violate the commerce clause?

I. Federal Preemption

Federal preemption is a doctrine based upon the supremacy clause, U. S. Constitution Art. VI, Section 2, which provides that the constitution and laws of the United States shall be the supreme law of the land. The doctrine operates to invalidate state law which is in conflict with federal law or which infringes upon an area of dominant federal interest and regulation. Although there is extensive federal activity in trade regulation, it is not a federally preempted area. In the case of Parker v. Brown, 317 U.S. 341, (1943), the Supreme Court held that a state scheme of trade regulation would be permitted to stand despite its clear violation of federal law dealing with the same subject.

The Energy Petroleum Allocation Act of 1973, 15 U.S.C.A., Sections 751-56, (Supp. 1975), regulates the allocation and pricing of petroleum products but contains no provisions that is inherently incompatible with the presented bills. Given that there is no evidence of direct or implied congressional intent to regulate retail gasoline markets, these bills do not face serious threat of preemption by federal law as that law currently stands.

II. Due Process

The Maine Constitution, Article I, Section 6-A, and the U. S. Constitution, Amendments V and XIV, guarantee that persons will not be deprived of their property without due process of law. The right to own and operate a retail gasoline station is a valuable property right. Legislation which infringes upon such a right would usually be carefully scrutinized to insure adherence to procedural standards. However, legislation regulating economic activity does not enjoy such careful scrutiny. In light of the state's sovereign right to regulate the economic welfare of its citizens, Courts will generally refuse to review and pass upon the public policies embodied in the regulatory schemes. In fact, since 1937, the Supreme Court has consistently declined to strike down state regulation of economic activity on the grounds that such economic regulation interferes with the private enjoyment of property rights or the right to engage in contracts. (See, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U. S. 156 (1973)).

The concept of due process also requires that statutory language must have sufficient clarity to allow citizens to plan their conduct in accordance with the dictates of law. There is language in each of these two bills which has been held unconstitutionally vague in cases concerning similar divestiture statutes. The words "voluntary allowances" and "uniformly" as in proposed §1454-A-2 of L.D. 972, were found to be unconstitutionally vague in Exxon Corporation et al. v. Connor, a 1975 Florida Circuit Court decision which dealt with a similar statute restricting refiner participation in the retail gasoline market.

However, a 1976 Maryland Circuit Court decision, Exxon Corporation et al. v. Mendall, which also held these same terms to be unconstitutionally vague, has been reversed on this issue. The Maryland Court of Appeals recently held that when a statute regulates commercial activity it must be sufficiently definite so as to inform one possessing "ordinary commercial knowledge" of what conduct is prohibited. They found these particular words to have meaning to a person possessing ordinary commercial knowledge, and therefore not unconstitutionally vague.

The bill prohibiting just distributors from engaging in retail operations contains (in proposed Section 3, 10 M.R.S.A. §1454-A) the phrase "under a contract with any person, firm or corporation managing a service station on a fee arrangement with producer or refiner," but fails to define "fee arrangement" or "retail service station dealer." The statutory definitional section for the latter phrase indicates that it includes corporations and other legal entities as well as natural persons. Therefore, it could conceivably include distributor companies. "Fee arrangement" could mean anything from fair value return on a lease to a kickback.

A more precise use of language and inclusion of a definitional section could eliminate any serious constitutional problems on these due process grounds.

III. Taking Without Just Compensation

The Maine Constitution, Article I, Section 21, which prohibits the taking of property for public use without just compensation applies only to property taken for actual public use. The Fifth Amendment of the U. S. Constitution has been applied to protect citizens from the taking of property regardless of the use to which the property was later applied. However, a distinction has developed in federal law between loss of property rights through regulation and actual appropriation of property rights for public use. C.F. In Re Spring Valley Development, 300 A.2d 736 (Me. 1973). The question is whether these bills constitute a taking of property or are merely a regulation upon use.

The bills do not prohibit all uses of refiner and/or distributor property, but restricts the use of that property as a retail gasoline outlet. Presumably, either bill would allow a refiner or distributor to lease an owned station to some other person or other legal entity for operation of the retail gasoline outlet so long as the station is not under the control of the refiner or distributor. However, as pointed out in the previous section, the vagueness of the words "fee arrangement" and the bill relating to distributors could mean that a lease arrangement for fair value rental would be in violation of that section. Such a construction would of course limit to a much greater degree the use owners could make of their retail gasoline outlet, and could amount to a taking of that property.

If the practical effect of this legislation was to force the refiner and/or distributor owners of retail gasoline outlet property to sell their property, a taking might well be found. This would be particularly true if a number of stations were forced onto the market at the same time. The bill requiring distributors and refiners to exclude themselves from retail sales allows one year to leave the market after enactment, and the bill relating to distributors alone allows only three months. Given the limited period for divestiture of the stations provided by the statute, forced sales could result in substantially depreciated prices. The lengthening of the time in which the dealer, refiners and distributors could free themselves of their retail holdings would soften the potential "taking" effect.

IV Equal Protection

The bills probably face their greatest constitutional challenge as a violation of equal protection of laws. That doctrine requires that if a state is to treat different classes of people differently, the classifications must bear some rational relation to the purpose or object of the legislative scheme. These bills do create different classes defined by virtue of their function within the gasoline industry, and then proceed to discriminate as to which of these classes may operate a retail gasoline outlet.

The Maine standard for determining whether a discriminatory classification bears a "rational relation" to the avowed object of an act was articulated in the case of State v. Rush, 324 A.2d 748 (Me. 1974). That case held that the object of the legislation must be to provide for the public welfare; the means employed to achieve the object must be appropriate in light of the object; and the manner of exercising that means must not be unduly arbitrary or capricious. The stated purpose or object of these two bills is to preserve competition in the retail gasoline market. However, the actual effect of the bills may be to limit competition in the retail gasoline market in favor of independent retail gasoline operators. There is some difficulty, therefore, in identifying the actual object of these bills and in determining whether that object is a proper exercise of the state's police power. The

determination of what these bills will actually accomplish can only be found in understanding the application to and effect upon the competitive structure of the retail gasoline market.

There have not been sufficient facts presented to determine what effect of eliminating certain classes of sellers from retail gasoline sales will have upon the competitive market structure. The underlying legislative document, "The Report of the Committee on Energy on its Study of the Gasoline Industry and the Gasoline Market in Maine," issued December 28, 1976, does not speak to the variety of services offered by the various classes of participants in the retail market, the presence or absence of predatory pricing, or the marketing innovations which might be anticipated from these various competitors. These factors were found to have significance in the decisions made by the Florida and Maryland Courts regarding the constitutionality of their divestiture statutes.

Even if the object of these bills is the fostering of healthy competition, a proper public purpose, the legislative plan may not necessarily be found to bear a real and substantial relationship to that purpose. Economic legislation in this State, as recited in the case of State v. Union Oil Co. of Maine, 151 Me. 438, 120 A.2d 708 (1956), at 449, must bear a substantial relationship to public health, morals, or to any other phase of general welfare. As pointed out in the previous discussion of the object of these bills, the proposed divestiture scheme may, upon application to the relevant facts, bear only a secondary relationship to the public welfare, with a real and primary relationship to the welfare of the independent gasoline dealers. The contention that the public will suffer future economic harm as a result of an anticipated change in the current ownership patterns of retail gasoline outlets may not be sustainable within a more carefully detailed study and analysis of competition in the retail gasoline markets of this State.

V. Commerce Clause

Section 8 of the U. S. Constitution reserves the regulation of interstate commerce to the federal government but as held in the case of Merrill, Lynch, Pierce, Fenner and Smith v. Ware, 414 U. S. 117(1973)., the states may regulate in such a way as to have effect on interstate commerce. However, the regulation will be more carefully scrutinized in terms of its interference with interstate commerce when it relates to economic welfare alone, as opposed to the physical, health, safety or welfare of the state's citizens. The bills at hand appear to relate solely to economic welfare.

The case of Dean Milk Companies v. The City of Madison, 340 U.S. 349 (1951), concerning a municipal ordinance which required that milk sold in the City of Madison had to be from approved dairies within five miles of the city, scrutinized the resulting burden upon

interstate commerce and held that even though the economic regulation had justifiable health reasons for enactment, the burden placed on interstate commerce was so great that it would not be allowed to stand in light of the fact that less restrictive alternatives were available to accomplish the same ends.

In the bills at hand, the elimination of major competitors from the retail sales market is a radical remedy and a highly restrictive alternative to accomplish the desired economic welfare end. Other less restrictive means are available to maintain a competitive retail gasoline market short of the proposed regulation, e.g. enforcement of the state's antitrust laws. Thus, the bills may face a fairly serious constitutional problem as regard the commerce clause.

Conclusion

Balanced against the potential constitutional problems of these bills is the presumption of constitutionality which they will enjoy if they are in fact enacted into law. The strength of this presumption as outlined in cases such as State v. Fantastic Fair and Karmil, 186 A.2d 352 (1961) and State v. Poulin alias Pooler, 195 Me. 224, 74 A. 119 (1909) could very well be persuasive in litigation testing the constitutionality of either of these bills. Such was the case in the reversal of the referred to Maryland case in which the Court of Appeals reversed a lower court decision on many of the same grounds recited here. However, it is impossible to give any assurance as to which direction this balance would weigh in light of the absence of many of the relevant economic facts.

I hope this legal analysis is helpful to you in your deliberations upon these bills.

Yours truly,

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JEB/bls