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ATTORNEY GENERAL OPINION NO. 92-111

The Honorable Richard L. Bond
State Senator, 8th District
9823 Nall
Overland Park, Kansas 66207

Re: Public Health -- Solid and Hazardous Waste; Solid Waste -- Restriction or Prohibition Against Solid Waste Generated Outside Solid Waste Disposal Plan Area; Tonnage Fee on Solid Waste Generated Outside State; Special Charge on Solid Waste Generated Outside Solid Waste Disposal Plan Area

Synopsis: Because the legislative means chosen to accomplish a legitimate public purpose (i.e. minimizing the accumulation of solid waste) discriminates against articles of commerce (i.e. solid waste), L. 1992, ch. 316, new sections 10, 11 and 12 must be characterized as economic protectionist measures which impermissibly burden interstate commerce. In our opinion, the state of Kansas would not be able to establish that L. 1992, ch. 316, new sections 10, 11 and 12 further public health, safety and welfare concerns that cannot be adequately served by nondiscriminatory alternatives. Cited herein: K.S.A. 65-3401; L. 1992, ch. 316, §§ 10, 11, 12.

* * *

Dear Senator Bond:

As state senator for the eighth district, you inquire whether certain 1992 amendments to the Kansas solid and hazardous waste act, K.S.A. 65-3401 et seq., may be subject to challenge under the interstate commerce clause of the United States constitution. You ask us to evaluate the constitutionality of L. 1992, ch. 316, new sections 10, 11 and 12 in light of two recent United States Supreme Court decisions which found impermissible discrimination against interstate commerce in a Michigan solid waste statutory provision and in an Alabama hazardous waste statutory provision.

Among other amendments to the Kansas solid and hazardous waste act, L. 1992, ch. 316 contains the following new sections:

> "New Sec. 10. On and after the effective date of this act and upon amendment of the applicable solid waste management plan, any county having a county solid waste management plan and any group of counties cooperating in a regional solid waste management plan may restrict or prohibit solid waste generated outside the area covered by the plan from being disposed of at any solid waste disposal area located within the area covered by the plan.
>
> "New Sec. 11. (a) Except as provided by subsection (b), on and after July 1, 1992, each county in this state shall impose, in addition to any other fee provided for by law, a solid waste tonnage fee of $25 for each ton or equivalent volume of solid waste, generated outside this state and disposed of at any solid waste disposal area located in such county. Such fee shall be collected by the county and deposited in a special fund in the county treasury, to be used only for costs of closure and postclosure cleanup of solid waste disposal areas in the county.

> "(b) The board of county commissioners of any county by unanimous vote may modify, discontinue, reinstate or determine not to impose the fee provided for by subsection (a).
>
> "New Sec. 12. (a) Except as provided by subsection (c), on and after July 1, 1993, any county or group of counties operating a solid waste disposal area shall levy a special charge on solid waste generated outside such county or counties and deposited at such disposal area. Such charge may be higher than charges levied on solid waste generated within the county or counties. The revenue from such charge may be used by the county or group of counties for the development and implementation of its solid waste management plan and the costs of closure and postclosure cleanup of solid waste disposal areas within the county or group of counties."
>
> . . . .
>
> "(c) The board of county commissioners of any county by unanimous vote may determine not to impose the fee provided for by subsection (a). . . ."

(For the sake of linguistic simplicity, "solid waste generated outside a county having a solid waste management plan or group of counties cooperating in a regional solid waste management plan" will be referred to as "out-of-county generated solid waste.")

New section 10 authorizes subdivisions of the state (i.e. a county or group of counties) to restrict or prohibit out-of-county generated solid waste from being disposed of within the boundaries of such subdivisions. Absent affirmative action by county commissioners, new section 11 requires subdivisions of the state to impose a $25 tonnage fee for disposal of solid waste generated outside the state. Absent affirmative action by county commissioners, new section 12 requires subdivisions of the state to impose a special charge for disposal of out-of-county generated solid waste.

On June 1, 1992, the United States Supreme Court announced two decisions holding that Michigan's import waste restrictions and Alabama's disposal fee on hazardous wastes generated outside the state violated the interstate commerce clause. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. ____, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); Chemical Waste Management, Inc. v. Hunt, 504 U.S. ____, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992).

Fort Gratiot addressed the waste import restrictions in Michigan's solid waste act which prohibited private landfill operators from disposing of solid waste generated in another county, state, or country unless explicitly authorized in the receiving county's plan. A private landfill operator had applied to St. Clair county for authority to accept out-of-state waste at his landfill. The denial of such authorization effectively prevented him from receiving any solid waste that did not originate in St. Clair county. He contended that requiring a private landfill operator to limit its business to the acceptance of local waste constituted impermissible discrimination against interstate commerce. The United States Supreme Court agreed.

The issue in Fort Gratiot was whether a prohibition against disposal of out-of-county solid waste, unless explicitly authorized, constituted impermissible discrimination against interstate commerce. Variations on that issue are presented by your inquiry relating to L. 1992, ch. 316, new section 10, i.e. whether authority to restrict or prohibit out-of-county generated solid waste constitutes impermissible discrimination against interstate commerce, and to L. 1992, ch. 316, new section 12, i.e. whether the levy of a special disposal charge on out-of-county generated solid waste constitutes impermissible discrimination against interstate commerce.

Chemical Waste involved a commercial hazardous waste land disposal facility located in Emelle, Alabama which received in-state and out-of-state wastes. An Alabama law imposed an additional fee on hazardous waste generated outside Alabama, but disposed of at commercial facilities in Alabama. The owner of the facility sought to enjoin enforcement of the law as an impermissible discrimination against interstate commerce. The United States Supreme Court granted the relief sought.

The issue in Chemical Waste was whether the additional disposal fee imposed by Alabama on hazardous waste generated

outside, but disposed of at a commercial facility inside Alabama constituted impermissible discrimination against interstate commerce. Your inquiry also presents a variation of that issue in relation to L. 1992, ch. 316, new section 11, i.e. whether the assessment of a $25 tonnage fee on out-of-state generated solid waste constitutes impermissible discrimination against interstate commerce.

While the issues you present vary slightly from those in Fort Gratiot and Chemical Waste, the court's rationale and holdings in those cases are instructive. In both cases, the court initially noted that the framework for its analyses was provided by Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), which held that a New Jersey law prohibiting the importation of most solid or liquid waste which originated or was collected outside the territorial limits of the state violated the interstate commerce clause of the United States constitution. There the court had established that "solid waste, even if it has no value, is an article of commerce." (FN3) 437 U.S., at 622-623, 98 S.Ct., at 2534, 2525. In Fort Gratiot the court further explained:

> "Whether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character. The Commerce Clause thus imposes some constraints on Michigan's ability to regulate these transactions." 504 U.S., at _____, 112 S.Ct., at 2023, 119 L.Ed.2d, at 147.

Having affirmed the interstate character of solid waste, the Fort Gratiot court then quoted Philadelphia v. New Jersey regarding the "negative" or "dormant" aspect of the commerce clause which prohibits states from:

> "'advan(cing) their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.' A state statute that clearly discriminates against interstate commerce is therefore unconstitutional 'unless the discrimination is demonstrably

> justified by a valid factor unrelated to economic protectionism.' (Citations omitted)." 504 U.S. at _____, 112 S.Ct. at 2023, 119 L.Ed.2d at 147.

Both Fort Gratiot and Chemical Waste cited the following test as determinative of interstate commerce clause violations:

> "New Jersey's prohibition on the importation of solid waste failed this test: The evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accompanied [sic] by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. . . . Philadelphia v. New Jersey, 437 U.S., at 626-627, 98 S.Ct. at 2536-2537." Fort Gratiot, 504 U.S., at ____, 112 S.Ct., at 2023-2024, 119 L.Ed.2d, at 147. Chemical Waste, 504 U.S. at ____, 112 S.Ct. at 2024, 119 L.Ed.2d at 147. (Citation omitted).

Regarding the Michigan law, the court in Fort Gratiot stated:

> "The Waste Import Restrictions enacted by Michigan authorize each of its 83 counties to isolate itself from the national economy. Indeed, unless a county acts affirmatively to permit other waste to enter its jurisdiction, the statute

> affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas. In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of this case." 504 U.S., at _____, 112 S.Ct., at 2024, 119 L.Ed.2d, at 148.

Further, regarding the argument that the Michigan statute treated waste from other Michigan counties no differently than waste from other states and therefore did not discriminate against interstate commerce, the Fort Gratiot court had this to say:

> "We disagree, for our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." 504 U.S. at _____, 112 S.Ct., at 2024, 119 L.Ed.2d, at 148.

In addition, regarding the county option provision of the Michigan law, the court in Fort Gratiot stated:

> "Nor does the fact that the Michigan statutes allow individual counties to accept solid waste from out of state qualify its discriminatory character. . . . [S]t. Clair County's total ban on out-of-state waste is unaffected by the fact that some other counties have adopted a different policy.
>
> "In short, neither the fact that the Michigan statute purports to regulate intercounty commerce in waste nor the fact that some Michigan counties accept out-of-state waste provides an adequate basis for distinguishing the case from

> Philadelphia v. New Jersey." 504 U.S., at ____, 112 S.Ct., at 2025-2026, 119 L.Ed.2d, at 149.

The state of Michigan and St. Clair county argued that the Michigan solid waste management act constituted a comprehensive health and safety regulation rather than "economic protectionism" of the state's limited landfill capacity. The Fort Gratiot court determined that while the act generally could be fairly characterized as health and safety regulations with no protectionist purpose, the same could not be said with respect to the waste import restrictions themselves.

> "Because those provisions unambiguously discriminate against interstate commerce, the state bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives. Michigan and St. Clair County have not met this burden." 504 U.S., at _____, 112 S.Ct., at 2027, 119 L.Ed.2d, at 151.

To address this burden, Michigan and St. Clair county asserted that the restrictions of waste import were necessary to enable individual counties to make adequate plans for the safe disposal of future waste. While the court in Fort Gratiot acknowledged that such forecasts may be an indispensable part of a comprehensive waste disposal plan, it found that:

> "Michigan could attain that objective without discriminating between in- and out-of-state waste. Michigan could, for example, limit the amount of waste that landfill operators may accept each year. See Philadelphia v. New Jersey, 437 U.S., at 626, 98 S.Ct., at 2536-2537. There is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State. Of course, our conclusion would be different if the imported waste raised health or other concerns not

> presented by Michigan waste." 504 U.S., at ____, 112 S.Ct., at 2027, 119 L.Ed.2d, at 152.

The Fort Gratiot court held:

> "[t]he Waste Import Restrictions unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause." 504 U.S., at ____, 112 S.Ct., at 2028, 119 L.Ed.2d, at 152.

Alabama also attempted to meet the burden of demonstrating that, although the additional fee for out-of-state hazardous waste discriminated against interstate commerce, such was justified in terms of local benefits and the unavailability of nondiscriminatory alternatives. Four bases were presented:

> "(1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens." 504 U.S., at ____, 112 S.Ct., at 2014, 119 L.Ed.2d, at 133.

The Chemical Waste court, however, disposed of Alabama's purported justification thus:

> "'[A]lthough the Legislature imposed an additional fee of $72.00 per ton on waste generated outside Alabama, there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. The Court finds under the facts of this case that the only basis for additional fee is the origin of the waste.' App. to Pet. for Cert.

> 83a-84a. In the face of such findings, invalidity under the Commerce Clause necessarily follows, for 'whatever (Alabama's) ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" (citations omitted). 504 U.S., at ____, 112 S.Ct., at 2014-2015, 119 L.Ed.2d, at 133.

Turning now to the Kansas solid waste act amendments, under Fort Gratiot and Chemical Waste, the first question is whether L. 1992, ch. 216, new section 10, 11 or 12 curtails the movement of solid waste into or out of the state or its political subdivisions.

L. 1992, ch. 316, new section 10 specifically authorizes subdivisions of the state (any county or group of counties) to restrict or prohibit out-of-county generated solid waste. While the Michigan waste import restrictions were mandatory absent explicit county authorization, the authorized Kansas restriction or prohibition against disposal of out-of-county generated solid waste are permissive county options. However, in our opinion, this is not a relevant distinction as L. 1992, ch. 316, new section 10, like the Michigan waste import restrictions, authorizes each county or group of counties "to isolate itself from the national economy." Like the Michigan waste import restrictions, L. 1992, ch. 316, new section 10 potentially "affords local waste producers complete protection from competition from out-of-state producers who seek to use local waste disposal areas." 504 U.S., at _____, 112 S.Ct., at 2024, 119 L.Ed.2d, at 148. In our opinion, therefore, L. 1992, ch. 316, new section 10 would curtail the movement of solid waste into the state and therefore discriminates against interstate commerce.

L. 1992, ch. 316, new section 11 requires political subdivisions of the state to impose a $25 tonnage fee on out-of-state generated solid waste. In our opinion, this provision, which clearly is a tax imposed on interstate commerce alone, would act to curtail the movement of articles of commerce (solid waste) into the state. And as made all too clear in Fort Gratiot, the fact that this provision allows individual counties to accept solid waste from out of state does not qualify its discriminatory character. Accordingly,

this provision likewise discriminates against interstate commerce.

L. 1992 ch. 316, new section 12 requires political subdivisions of the state to levy a special charge on out-of-county generated solid waste. (Since out-of-state generated solid waste also qualifies as out-of-county generated waste, conceivably the "special charge" could be levied on out-of-state generated solid waste in addition to the $25 tonnage fee.) In our opinion, this provision would likewise curtail the movement of articles of commerce (solid waste) into subdivisions of the state, i.e. its counties.

We acknowledge that the goal of curtailing the amount of solid waste accumulating in Kansas landfills may well serve legitimate public health and safety purposes. However, as reiterated in Fort Gratiot, "The evil of protectionism can reside in legislative means as well as legislative ends." 504 U.S., at _____, 112 S.Ct., at 2024, 119 L.Ed.2d, at 147. In other words, although the purpose of a statute may be legitimately unrelated to economic protectionism, the interstate commerce clause is violated if the means of accomplishing that purpose discriminate against articles of commerce. In our opinion, because the legislative means of accomplishing a legitimate public purpose discriminate against articles of commerce, L. 1992, ch. 316, new sections 10, 11 and 12 must be characterized as economic protectionist measures which impermissibly burden interstate commerce.

Given that L. 1992, ch. 316, new sections 10, 11 and 12 discriminate against interstate commerce, the second question under Fort Gratiot and Chemical Waste is whether public health, safety and welfare concerns can be adequately served by nondiscrminatory alternatives. It is difficult for us to believe that nondiscriminatory alternatives do not exist. Regarding L. 1992, ch. 316, new section 10, statutory authorization to restrict or prohibit the amount of solid waste without regard to its origin may be enacted. Regarding L. 1992, ch. 316, new section 11, to fund the costs of closure and postclosure cleanup of solid waste disposal areas, a statutory requirement to assess a tonnage fee on all solid waste deposited in disposal areas without regard to its origin may be enacted. Regarding L. 1992, ch. 316, new section 12, to fund the development and implementation of solid waste management plans and the costs of closure and postclosure of cleanup of solid waste disposal areas, a statutory requirement to levy a "special charge" on all solid

waste deposited in disposal areas without regard to its origin may be enacted.

Chemical Waste suggested other nondiscriminatory alternatives - a per-mile tax on all vehicles transporting (hazardous) waste across state roads or an evenhanded cap on the total tonnage landfilled at disposal areas. Other nondiscriminatory alternatives may also exist.

In our opinion, the state of Kansas would not be able to establish that L. 1992, ch. 316, new sections 10, 11 and 12 further public health, safety and welfare concerns that cannot be adequately served by nondiscriminatory alternatives.

In conclusion, it is our opinion that a constitutional challenge under the interstate commerce clause to L. 1992, ch. 316, new sections 10, 11 and 12 would be successful.

Very truly yours,

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