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## Oklahoma Industrial Waste Statute Held Unconstitutional

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# OKLAHOMA INDUSTRIAL WASTE STATUTE HELD UNCONSTITUTIONAL

CONSTITUTIONAL LAW: A provision of Oklahoma's Controlled Industrial Waste Disposal Act that required any state attempting to ship industrial waste into Oklahoma to have substantially similar standards for industrial waste disposal is found unconstitutional. *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

As the magnitude of the industrial waste disposal problem has become apparent within the last 20 years, states have been faced with the task of protecting public health and safety and preserving natural resources. Although states must act within the context of federal legislation that recognizes the national scope of the problem and the need for federal action, the federal government has not pre-empted state action in this area.<sup>1</sup> In fact, the Congress continues to see the collection and disposal of industrial waste as a matter of local concern.<sup>2</sup> However, state statutes may be held invalid if state resources are protected at the expense of residents of other states.<sup>3</sup> It was on this basis that Oklahoma's Controlled Industrial Waste Disposal Act<sup>4</sup> was challenged.

Two provisions of Oklahoma's Disposal Act were at issue.<sup>5</sup> The first provision required a state producing industrial waste to have enacted substantially similar standards for controlled industrial waste disposal before shipping such waste into Oklahoma. The second provision further required that such a state first must have entered a reciprocity agreement to accept similar shipments of waste from Oklahoma. The present case arose as a result of the invalidation of

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1. Resources Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976 & Supp. II 1978).

2. See 42 U.S.C. § 6926 (Supp. II 1978).

3. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

4. OKLA. STAT. ANN. tit. 63, §§ 2751-65 (West Supp. 1980).

5. "The Division shall disapprove any plan which entails the shipping of controlled industrial waste into the State of Oklahoma, *unless the state of origin of such waste has enacted substantially similar standards for controlled industrial waste disposal as, and has entered into a reciprocity agreement with, the State of Oklahoma.* The determination as to whether or not the state of origin has substantially similar standards for controlled industrial waste disposal is to be made by the Director of the Division, and all reciprocity agreements must be approved and signed by the Governor of Oklahoma." *Id.* § 2764 (emphasis added).

the substantially similar standards provision,<sup>6</sup> but is related to a similar and prior invalidation of the reciprocity provision.<sup>7</sup>

The statute was challenged by Royal N. Hardage, who owned and operated a surface site disposal facility in Oklahoma. When his plan to receive shipments of industrial waste from Texas was rejected by Oklahoma authorities for lack of a reciprocity agreement between the two states, Hardage brought suit against Oklahoma.<sup>8</sup>

While the U.S. Supreme Court has held that a mandatory reciprocity provision burdens interstate commerce by functionally excluding products issuing from any state not entering into a reciprocity agreement, the Court has balanced state and federal interests to determine the validity of the provision.<sup>9</sup> Lower courts have also balanced burdens on commerce against state statutes designed to protect legitimate state interests, and have upheld the statutes if such interests could not otherwise be protected.<sup>10</sup> But where such an agreement appears to be an economic protectionist measure, a reciprocity agreement will be stricken as the kind of unreasonable barrier to commerce expressly forbidden by the commerce clause.<sup>11</sup>

Before the commerce clause can be invoked to invalidate a reciprocity agreement, however, the agreement must involve an item of commerce. Because it believed that industrial waste was not an item of commerce, the U.S. District Court upheld Oklahoma's statute and never reached the constitutional issues.<sup>12</sup>

The Tenth Circuit Court of Appeals reversed<sup>13</sup> on the basis of the U.S. Supreme Court decision in *City of Philadelphia v. New Jersey*, which held that waste is an item of commerce protected by the commerce clause and that a state statute completely barring importation of waste is an economic protectionist measure and per se invalid.<sup>14</sup> The court of appeals found the Oklahoma reciprocity provision un-

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6. *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

7. *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978).

8. Hardage sought to enjoin the state from enforcing the statute against him, and also challenged the constitutionality of the reciprocity provision.

9. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

10. *See American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973); *Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975).

11. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). *Cf. Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (a facially discriminatory statute will be subject to strict scrutiny to ascertain whether it is the least restrictive means for furthering the state's interest).

12. *Hardage v. Atkins*, No. CIV 76-0945-E (W.D. Okla. May 27, 1977).

13. *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978).

14. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Court based its finding of economic protectionism on its belief that by allowing none but its own citizens to use New Jersey's landfills, New Jersey was delaying the time when its citizens would have to ship their waste out of state at greater expense.

constitutional, first implying that no rational relationship connected the required agreement to state protection of public health and safety. The court then characterized the provision as a discriminatory attempt by Oklahoma to protect its citizens and resources at the expense of out-of-state generators of industrial waste. The case was remanded to the district court for action consonant with this decision. On remand, the district court invalidated both provisions, although the decision of the tenth circuit encompassed only the reciprocity provision.

The state appealed in the present case,<sup>15</sup> seeking clarification of the prior decision by the court of appeals. Oklahoma argued that although the reciprocity provision was condemned, the district court on remand was not bound to invalidate the substantially similar standards provision. The state described the latter provision as an easier standard for other states to meet, and implied that the requirement was rationally related to the protection of Oklahoma's citizens because only states with lower standards for waste disposal would be barred by the provision.<sup>16</sup>

The court of appeals in its second decision admitted that Oklahoma had legitimate interests to protect, but found that the effect of the provision was to force other states either to enact similar legislation for industrial waste disposal, or to be barred completely from shipping such waste to Oklahoma. Thus, the court found that Oklahoma's substantially similar standards provision also amounted to discriminatory economic protectionism, and was therefore per se invalid.<sup>17</sup>

### CONCLUSION

The fate of Oklahoma's substantially similar standards provision illustrates the problems that state governments may encounter in their attempts to regulate industrial waste disposal. The federal statutes leave room for state action through recognition of the need to take into account local factors affecting industrial waste disposal. The U.S. Supreme Court, however, has extended the reach of the commerce clause by including waste as an item of commerce, and its decision in *City of Philadelphia* suggests it will not allow a balancing

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15. *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980).

16. Appellants apparently attempted to persuade the court to balance this slighter burden on interstate commerce against the legitimate state interest of protecting its citizens and resources.

17. The court failed to specify exactly why either provision amounted to *economic* protectionism, and it is hard to see how Oklahoma's statute can be characterized so clearly as protecting the economic interests of its citizens.

of state and federal interests if a state is found to discriminate in favor of its own citizens or resources. A finding of discrimination means that a court, as in *Hardage*, need not consider the nature of the local interest, nor whether a particular statute may be the only way a state can protect its interests. This is especially disturbing in *Hardage*, where Oklahoma did not completely ban importation of industrial waste, but sought to invoke a workable parity with other states. Oklahoma's experience suggests the comparative ease with which legitimate local interests can be ignored, and the necessity for, at the very least, a balancing of state and federal concerns in the crucial area of industrial waste disposal.

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