7727 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

March 23, 2004

The Honorable Ronnie W. Cromer
Senator, District No. 18
P. O. Box 378
Prosperity, South Carolina 29127

Dear Senator Cromer:

In your recent letter, you reference Senate Bill S.975. You wish to know "if this bill is constitutionally legal in South Carolina and in interstate commerce laws." In essence, you wish to know whether the Bill, if enacted by the General Assembly, would withstand constitutional scrutiny under the Commerce Clause of the United States Constitution.

Law / Analysis

We begin our analysis with the fundamental principle that if S.975 is enacted, "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unless limited by the Constitution, unlike the federal Congress, whose powers are specifically enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While we may comment upon what we deem an apparent constitutional defect, we may not declare an act void as unconstitutional. Put another way, a statute, if enacted, "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

S.975 is entitled the "South Carolina Dairy Fairness Act." The goal of the legislation is to "establish a fair market breakeven price" for South Carolina milk producers. Created by the Act is the South Carolina Milk Board whose principal function is general supervision over the milk industry in this State so that South Carolina milk producers receive "a fair market breakeven price" for their milk production.

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

Specifically, the General Assembly finds in Section 39-34-20 of the Bill that

> ... the production, price and availability of fluid milk to the citizens of this State is of primary importance based upon the health benefits and year-round demand for fresh, safe high quality fluid milk. As a result of these needs, the General Assembly finds that the formation of the South Carolina Milk Board and the enactment of this 'Dairy Fairness Act' will safeguard the interests of dairy producers in this State, ensure that dairy producers receive fair market breakeven prices, and to provide consumers a continuous and affordable supply of South Carolina produced fluid milk.

Section 39-34-30 defines certain terms used in the Act. Subsection (B) of § 39-34-30 states that "[t]he primary duty of the South Carolina Milk Board is to establish a fair market breakeven price for producers and to exercise general supervision over the state milk industry for the purpose of protecting the availability and affordability of fluid milk consumed in this State by monitoring the consumption and distribution of South Carolina produced milk." Section 30-34-70(B) of the Act enumerates the powers of the Board, including the power to enter into compacts with other states "to ensure fairness in the prices of milk paid to dairy producers in this State."

Section 39-34-100 is the key provision of the legislation. Such Section provides that

> (A) [t]he board may announce, by regulation, the fir market breakeven price to be paid to producers in this State. If the USDA Class I price of fluid milk in this State drops below the fair market breakeven price set by the milk board, the milk board may collect a fee from all buyers of South Carolina milk as determined by a formula published in the regulations promulgated by the milk board. If the Class I price of milk does not drop below the fair mark breakeven price, no buyer fee may be collected for that month.
>
> (B) Buyer fees must be collected on all fluid milk produced in this State, and these fees must be collected by the milk board and remitted to the State Treasurer to be placed in an account separate and distinct from the general fund and entitled the 'Dairy Producers Settlement Fund.' All buyers fees collected in a certain month must be disbursed, based on Class I fluid milk sales, to all producers in this State who sold or shipped milk in the month when prices fell below the fair market breakeven amount as determined by the milk board.

Section 39-34-30(3) defines a "buyer" as "a person who purchases, markets, or handles South Carolina produced fluid milk." A "producer" is defined in Subsection (11) of that same Section as "a person irrespective of whether the person is also a buyer, who produces fluid milk in this State." "South Carolina milk" is defined in § 39-34-30(16) as "all milk produced in this State."

Pursuant to § 39-34-120 a milk "buyer" may not engage, either directly or indirectly, in the purchase of South Carolina milk without a license issued by the Milk Board. Criminal penalties are authorized for violation of the Act.

Thus, the Bill would empower the South Carolina Milk Board to determine the "fair market breakeven price" each month. If the USDA Class I price of milk falls below that amount, the Board is authorized to "collect a fee" from all "buyers of South Carolina milk." These fees are then distributed to South Carolina milk producers from a special fund separate and apart from the General Fund.

The seminal decision in this area is the United States Supreme Court case of West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, (1994). In West Lynn, the Court held that a Massachusetts milk pricing order, which placed an assessment upon all fluid milk sold by dealers to Massachusetts retailers and mandated that the funds therefrom be placed in a special fund for redistribution to Massachusetts dairy farmers, violated the Commerce Clause. Two thirds of that milk was produced out of state.

The Supreme Court noted that "[t]he paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." 512 U.S. at 193. Such mechanisms were viewed as so patently unconstitutional under the commerce Clause, however, that state laws generally attempt to "reap some of the benefits of tariffs by other means," the Court noted. Id. The Court cited its previous decisions such as Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), which had held that a minimum price regulation which had the same effect as a tariff or customs duty was unconstitutional, as well as Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984), which had struck down a law which advantaged Hawaii produced liquors, as controlling. The Court explained that

> [u]nder these cases, Massachusetts' pricing order is clearly unconstitutional. Its avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States. The "premium payments" are effectively a tax which makes milk produced out of State more expensive. Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products. The pricing order thus allows Massachusetts dairy farmers who produce at higher cost to sell at or below price charged by lower cost out-of-state producers.

Id. at 193.

The majority noted that "a pure subsidy funded out of general revenue imposed no burden on interstate commerce, but merely assists local business." Id. at 198. However, the Massachusetts pricing order "is funded principally from taxes on the sale of milk produced in other States." Such a scheme, in the Court's view "burdens interstate commerce." To the Court, "conjoining a tax and a subsidy" was constitutionally fatal. In short, the Court reasoned that "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political process can no longer be relied upon to prevent legislative abuse ...." Id. at 200.

And, in Cumberland Farms, Inc., 33 F.3d 1 (1st Cir. 1994), the First Circuit reversed the District Court's conclusion that the Maine Dairy Farm Stabilization Act was constitutional, relying heavily upon West Lynn. That Act imposed a tax on all packaged fluid milk sold in Maine irrespective of the origin of the milk. However, only Maine dairy farmers were eligible to the rebate from the Maine Dairy Farm Stabilization Fund.

In Cumberland Farms, the defendants argued that West Lynn was distinguishable because the tax in Maine was "collected primarily from in-state milk sellers." However, the First Circuit rejected such distinction, concluding that "[t]he Court has rejected such quantitative distinction in the past ...." (citing New Energy Co. v. Limbach, 486 U.S. 269, 276-77 (1988). Thus, the First Circuit held that West Lynn, was controlling.

In Marigold Foods, Inc. v. Redalen, 834 F.Supp. 1163 (D. Minn. 1993), the District Court enjoined a Minnesota law which required Minnesota milk processors in their role as wholesalers to pay a charge "whenever the federal minimum price of Class I milk falls below $13.20 per hundred weight." The assessments were to be collected at the wholesale level and applied "to all milk no matter where it was produced and processed." Id. at 1165. The assessments were then "to be distributed only to Minnesota dairy producers." In enjoining this statute, the Court concluded that the plaintiff was likely to prevail on the merits that the Minnesota law violated the Commerce Clause. The District Court reasoned that "the premium directly regulates the price of milk in Minnesota, no matter where that milk was originally processed and produced." Id. at 1169. Thus, the "incentive to produce milk from out-of-state will be reduced." Id.

Moreover, in the Court's view, "... the premium directly regulates the terms under which an out-of-state processor may enter the Minnesota wholesale market. Processors from surrounding states will be required to pay the premium on milk, which was produced entirely outside of Minnesota." Id. at 1169. Finally, even though "the premium will collect large amounts of revenue from both in-state and out-of-state processor, the benefits will be confined to Minnesota dairy farmers." Id. Thus, since plaintiffs were likely to prevail on their Commerce Clause argument that "the premium is to subsidize Minnesota farmers by collecting the premium, at least in part, from non-Minnesota processors, or from milk processed in Minnesota, but produced out-of-state ....," the injunction was issued.

S.975 is somewhat distinguishable from the statutory scheme struck down by the Supreme Court in the West Lynn case. The fee imposed is upon buyers of "South Carolina milk" only. Thus, the South Carolina regulatory proposal is different in one sense from that of Massachusetts which was "funded principally from taxes on the sale of milk produced in other States." Whether or not this distinction is crucial as to upholding a statute such as S.975 is not clear from the Court's West Lynn opinion.

On the other hand, like the scheme struck down in West Lynn, S.975 is clear that the fees obtained from this imposition upon buyers must be "remitted to the State Treasurer to be placed in an account separate and distinct from the general fund and entitled the 'Dairy Producers Settlement Fund.' Thus, the proposal contained in S.975 would be similar to that of Massachusetts in that the General Assembly would be here "conjoining a tax and subsidy." Moreover, S.975 could not be deemed "[a] pure subsidy funded out of general revenue [which] ordinarily imposes no burden on interstate commerce." West Lynn, supra, 512 U.S. at 199. Here, a court would examine "the entire program – not just the contributions to the fund or the distributions from that fund ..." and whether that program "simultaneously burdens interstate commerce and discriminates in favor of local producers." Id. at 201.

Justice Scalia's concurring opinion in West Lynn is also instructive here. This Justice focused his analysis upon the fact that the Massachusetts law was unconstitutional because it represented a "discriminatory refund of a nondiscriminatory tax." Id. at 211. In Justice Scalia's view, the State was free to assist or subsidize local industries by other means. He would

> ... therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund .... I draw the line where I do because it is a clear, rational line at the limits of our extant negative-Commerce Clause jurisprudence.

512 U.S. at 211-212.

It is possible that a court would find that the fact all funding for the distribution of funds to South Carolina dairy farmers would stem from the charging of the fee only on South Carolina-produced milk represents a substantive distinction, thereby rendering S.975 constitutional. As noted above, the West Lynn Court emphasized throughout that the Massachusetts fund was primarily made up of assessments upon milk produced out-of-state, rather than in-state. Arguably, unlike the statute in West Lynn, S.975 places no tax or fee on out-of-state milk producers. Thus, a Court could arguably conclude that the Fund created here was no different from an ordinary subsidy in the sense that the State is not extracting "a de facto tariff from out-of-state milk ..." See, Coenen, "Business Subsidies and the Dormant Commerce Clause," 107 Yale L. J., 965, 1039 (January, 1998). See also, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) [Supreme Court emphasizes direct subsidies to industries provide a permissible alternative]. Furthermore, the dissenting opinion in West Lynn argued that the Court in Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939) had upheld a Pennsylvania statute which established minimum prices to be paid to Pennsylvania farmers by taxing buyers or handlers of milk within Pennsylvania for distribution either within the State or elsewhere. The Eisenberg Court observed that "[t]he purpose of the statute ... is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania." 306 U.S. at 278. Moreover, in Marigold Foods, Inc. v. Redalen, 809 F.Supp. 714, 721 (D. Minn. 1992), the District Court, citing previous United States Supreme Court cases (such as H.P. Hood & Sons v. DuMond, 336 U.S. 525, 529-30 (1949) commented that "Minnesota has a right to set minimum prices for milk produced and sold by dairy farmers located within its borders." All of these authorities would argue for the proposed legislation being constitutional.

However, legal commentators, even though often critical of the Court's opinion in West Lynn, generally have taken the view that case has a broad reach in terms of Commerce Clause jurisprudence and that any tax-subsidy legislation is suspect. One commentator has explained the decision's impact as follows:

> [p]rior to its West Lynn Creamery decision, the Court historically refused to tamper with state subsidies even though the subsidies may distort market decisions .... The Court has also upheld under the Commerce Clause the establishment of minimum prices to be paid to domestic producers, ... preferences in public employment, ... rewards for participation in public programs, ... and preference in the operation of state-owned enterprises .... The Court has previously found these distortions and indirect out-of-state impacts to be justifiable because, unlike the interstate effects of discriminatory taxation, the states providing the subsidies largely bear their costs ....
>
> The West Lynn Creamery Court's decision to strike down the Massachusetts pricing order on negative Commerce Clause grounds dramatically expands the negative Commerce Clause doctrine and continues to erode the concept of federalism. Previously, the Court had upheld state regulations that either enacted broad-based taxes or subsidized local industry .... In West Lynn Creamery, however, the Court held that the interplay of the Massachusetts pricing order's tax and subsidy provisions unconstitutionally discriminated against interstate commerce. ... The Court's departure from its prior tax and subsidy decisions leaves states with significantly less economic power to respond to the economic difficulties faced by its domestic industries ... .
>
> While the West Lynn Creamery Court based its decision solely on analysis of the milk tax effect, the focus of the Court's analysis – and, as Justice Scalia pointed out, the only justifiable reason for invalidating the law was on the interplay of the Massachusetts' milk dealers' tax and the subsidy provided to Massachusetts dairy farmers from the tax proceeds ... . The Court reasoned that "the choice of constitutional means – nondiscriminatory tax and local subsidy – cannot guarantee the constitutionality of the program as a whole .... The Court's conclusion was based on a determination that "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a state's political process can no longer be relied upon to prevent legislative abuse ...." ...
>
> The majority opinion [in West Lynn] does not make clear what type of tax and subsidy scheme, or indeed whether any tax and subsidy scheme, would be

> constitutionally allowable. What is clear is that at least four Justices have explicitly stated that they would allow States "to subsidize [their] domestic industry so long as [they do] so from nondiscriminatory taxes that go into [their] general fund[s]. ... The Court's majority also indicated that such a law might pass constitutional muster by stating "a pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." ... Therefore, the door may yet be open to a state agricultural commodity tax that places the revenue into a general fund where there is a separate appropriation from the state's general fund for financial support of its struggling agricultural industry. However, the more likely answer is that the current Court will strike down any state government attempt to regulate milk prices received by farmers within the state through any kind of taxation scheme. The implicit negative Commerce Clause free market requirement for milk enunciated by the West Lynn Creamery majority demands such a result.

Oemichen, "Milk, State Taxes, State Subsidies, and the Commerce Clause: When States Cannot Tax an Agricultural Commodity To Fund A Subsidy for Its Struggling Industries, West Lynn Creamery, Inc. v. Healy, 114 S.Ct. 2205 (1994)," 18 Hamline L. Rev. 415, 418, 420, 424, 426 (1995). See also, Coenen and Hellerstein, "Suspect Linkage: The Interplay of State Taxing and Spending Measures In the Application of Constitutional Antidiscrimination Rules," 95 Mich. L. Rev. 2167, 2171 (June, 1997) ["Accordingly, [in West Lynn], the Massachusetts scheme was unconstitutional because, like a protective tariff, it allowed 'Massachusetts dairy farmers who produce at higher cost to sell at or below the price charged by lower cost out-of-state producers."]

Conclusion

Based upon the foregoing authorities, it is our opinion that S.975 is constitutionally suspect. In light of the West Lynn Creamery decision we have constitutional concerns regarding the distribution to South Carolina milk producers of a special fund obtained from the fee placed upon buyers of South Carolina produced milk. Although West Lynn involved the distribution to local dairy farmers of a special fund obtained from a tax placed upon mostly out-of-state milk, legal commentators generally agree that West Lynn is sufficiently broad enough to render unconstitutional any statute which requires the placement of the proceeds from a nondiscriminatory tax or assessment into a special fund to aid in-state milk producers to the exclusion of those out-of-state. Similarly, legal commentators agree that West Lynn calls into question virtually any state subsidy provided through a tax or assessment provision.

S.975 appears to treat out-of-state milk producers unequally in much the same way that the unconstitutional statute did in West Lynn. The funds from the fee mandated by S.975 are required to be placed in a fund separate and apart from the General Fund. Only South Carolina milk producers receive the benefit of these funds. Almost universally, subsequent cases have followed West Lynn in concluding that a court "cannot divorce the premium payments from the use to which the payments are put." Thus, it is clear that the West Lynn Court's reasoning makes suspect any joining together the imposition of a fee upon buyers of South Carolina milk with the distribution of that fee only to South Carolina milk producers. Such, in the Supreme Court's view, places a burden upon out-of-state milk producers in violation of the Commerce Clause. Compare, Cumberland Farms Inc. v. Mahany 943 F.Supp. 83 (D.Me), vacated on other grounds, 116 F.3d 943 (1st Cir. 1997) ["without linking the milk handling tax to the dairy subsidies, it cannot be said that the burden (on commerce) consists of an ultimate tax 'exemption' for in-state milk dealers ...."; Court thus finding that tax on handling of all milk sold for consumption in Maine did not violate the Commerce Clause].

However, while the West Lynn case renders S.975 constitutionally suspect, we do believe credible arguments can be made to distinguish S.975 from West Lynn. First of all, S.975, if enacted, would be afforded the strong presumption of constitutionality. The statute would be enforced unless and until a court sets it aside. Moreover, we note that we have found no case considering the constitutionality of a statute constructed precisely as S.975 is – i.e., one involving a fee placed only upon in-state produced milk. In a case subsequent to West Lynn, Justice Stevens – the author of West Lynn – in writing for the Court in Pharmaceutical Research and Manufacturers of America v. Walsh, 123 S.Ct. 1855 (2003), noted that the statute in West Lynn, had the effect of placing a tax upon out-of-state milk producers because two thirds of the assessed milk was produced by out-of-state farmers. According to Justice Stevens, because "the entire fund [in West Lynn] was used to benefit in-state farmers, "the order effectively imposed a tax on out-of-state producers to subsidize production by their in-state competitors." 123 S.Ct. 1871. Here, it is arguable that no such tax is placed upon out-of-state milk producers because the fee which S.975 imposes is only upon South Carolina produced milk. Thus, arguably S.975 is closer to earlier subsidy cases such as Milk Control Bd. v. Eisenberg, supra. See also, Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970) ["(w)here the statute regulated even-handedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."]. See also, Cumberland Farms, Inc. v. Mahany, supra; Carbone, supra.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an