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# ***LeFrancois v. Rhode Island: A Case in Which the Leaf Falls Very Far from the Tree***

## I. Introduction

The important role played by solid waste disposal in today's society cannot be underestimated. The term "solid waste" means "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities. . . ."<sup>1</sup> Although the future may not be predicted with any accuracy, it is reasonable to surmise that without provisions for the proper disposal of waste, the resulting consequences to society's health and well-being, as well as to the surrounding environment, would be disastrous at best. Thus, it follows that the laws governing the disposal of solid wastes and regulating the operation of landfills are indispensable tools for shaping the future character of the environment.

Society frequently looks to judicial decisions for the formulation of concepts or principles which may be relied on for some order in an often chaotic world. Occasionally, these concepts become twisted and distorted with their application, resulting in unanticipated consequences. Such is the case regarding the "market participant doctrine"<sup>2</sup> and the unexpected results caused by its application in situations involving the disposal of solid wastes.

Although *City of Philadelphia v. New Jersey*<sup>3</sup> seemed to unequivocally decide in the negative the question whether an

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1. 42 U.S.C. § 6903(27) (1984 & Supp. IV 1986).

2. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

3. 437 U.S. 617 (1978).

individual state could close its borders to other states, specifically for solid waste disposal purposes, it failed to close a small loophole through which a concept, previously expounded in *Hughes v. Alexandria Scrap Corp.*,<sup>4</sup> gained momentum. This became known as the market participant doctrine, exempting states that were actively participating in the market and allowing them to favor citizens of their own state over citizens of other states.<sup>5</sup> This concept was significantly extended and expanded upon in *Reeves, Inc. v. Stake*.<sup>6</sup> It is doubtful that the creation of such a principle, enabling states to close their borders under the guise of market participation, was ever anticipated. In fact, it is more likely that the ramifications caused by its recent application in the area of solid waste disposal were completely unforeseen.

The market participant concept took on a new dimension recently in *LeFrancois v. Rhode Island*.<sup>7</sup> Therein, the court was called upon, once again, to decide whether it was permissible for a state to close its borders, for disposal purposes, to wastes generated elsewhere.<sup>8</sup> Applying the market participant concept to landfills, the court held that a state's action in limiting access to its landfills was constitutional.<sup>9</sup> In so doing, the court reached a conclusion at odds with that reached in *City of Philadelphia*.<sup>10</sup> Undoubtedly, this holding will have strong repercussions and will greatly affect the nature of solid waste disposal. This note illuminates how a significant judicial principle may be both extended and distorted, sometimes creating, as here, highly unexpected and detrimental results to the surrounding environment.

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4. 426 U.S. at 809.

5. *Id.*

6. 447 U.S. 429 (1980).

7. 669 F. Supp. 1204 (D.R.I. 1987). Note, this case was decided by the district court on three different constitutional bases: the Commerce Clause, the Contract Clause and the Privileges & Immunities Clause. For purposes of this note, only the part of the case dealing with the Commerce Clause will be discussed.

8. *Id.* at 1212.

9. *Id.*

10. 437 U.S. at 629.

## II. Facts

The background facts of *LeFrancois v. Rhode Island*<sup>11</sup> are as follows. The plaintiff, Jack LeFrancois, is a resident of Massachusetts and a commercial hauler of refuse, trash, and other solid waste.<sup>12</sup> His refuse-hauling business, known as Blackstone Valley Disposal, operates primarily in the area around Blackstone, Massachusetts, close to the Rhode Island-Massachusetts border.<sup>13</sup> Blackstone collects waste from sources located in both Rhode Island and Massachusetts on a regular basis, with "approximately 20% to 30% of . . . gross revenues [being] derive[d] from its waste-collection activities in Rhode Island."<sup>14</sup>

The defendant is the Rhode Island Solid Waste Management Corporation, a legislatively-created agency that is responsible for "plan[ing], construct[ing], operat[ing] and maintain[ing] a statewide system of solid waste management facilities and services."<sup>15</sup> The Rhode Island Solid Waste Management Corporation is also the owner of the Central Landfill in Rhode Island.<sup>16</sup> This is "currently the largest sanitary landfill in New England and the only sanitary landfill in Rhode Island that accepts all categories of non-hazardous waste."<sup>17</sup>

In September of 1986, LeFrancois, doing business as Blackstone Valley Disposal, entered into a contract with the Rhode Island Solid Waste Management Corporation.<sup>18</sup> The contract allowed LeFrancois to dispose, at the Central Landfill, any waste he collected, regardless of the geographic origin of the waste, so long as the "amount of Massachusetts waste deposited at the landfill did not exceed the amount of Rhode Island waste deposited in Massachusetts."<sup>19</sup> In accordance with this agreement, LeFrancois deposited "an average of four

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11. 669 F. Supp. 1204 (D.R.I. 1987).

12. *Id.* at 1206.

13. *Id.*

14. *Id.*

15. *Id.* at 1206.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

hundred tons of solid waste per month at the Central Landfill."<sup>20</sup>

In June of 1987, the State of Rhode Island enacted an amendment to the Rhode Island General Laws which prohibited the disposal, in the Central Landfill, of solid waste generated outside the territorial limits of Rhode Island.<sup>21</sup> Any violation of this law was punishable by up to three years imprisonment and/or fines of up to five thousand dollars.<sup>22</sup> The Rhode Island Solid Waste Management Corporation then notified LeFrancois of the passing of the amendment and informed him of its refusal to accept any further "out-of-state waste at the Central Landfill, including the [products] that [were] the subject of the parties' earlier agreement."<sup>23</sup> LeFrancois filed a motion for a temporary restraining order to prevent the defendant from enforcing the amendment or instituting proceedings against him until the constitutionality of the amendment to the statute was determined.<sup>24</sup>

### III. Background

The Commerce Clause of the Constitution bestows upon Congress the power to "regulate commerce . . . among the several states."<sup>25</sup> The Supreme Court has traditionally interpreted this grant of power as a limit on the power of the individual states to obstruct interstate commerce, regardless of whether Congress has legislated with respect to a specific activity.<sup>26</sup> In the absence of conflicting federal legislation, indi-

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20. *Id.*

21. R.I. GEN. LAWS § 23-19-13.1 (1987).

The amended statute reads as follows:

(a) No person, firm or corporation engaged in the business of collecting and disposing of solid waste shall deposit solid waste that is generated or collected outside the territorial limits of that state at the central landfill. Each deposit in violation of the provisions of this subsection shall be punishable by imprisonment for up to three (3) years and/or a fine not to exceed five thousand dollars (\$5000).

22. *Id.*

23. 669 F. Supp. at 1206.

24. *Id.* at 1207.

25. U.S. Const. art. I, § 8, cl.3.

26. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 534-38 (1949).

vidual states retain some authority to regulate matters that are of legitimate local concern.<sup>27</sup> However, state regulatory activity which burdens interstate commerce is normally subject to a balancing test in which the court weighs the burden placed upon commerce by the state regulatory activity against the existence of legitimate purposes necessitating such state legislation.<sup>28</sup>

Beginning with *Hughes v. Alexandria Scrap Corp.*,<sup>29</sup> the Supreme Court began to grant immunity from the confines of the Commerce Clause for state activity deemed to be proprietary.<sup>30</sup> In *Hughes*, the State of Maryland enacted a statutory scheme designed to promote the destruction of abandoned automobiles.<sup>31</sup> To encourage the cleanup of the state's environment, Maryland provided for the payment of bounties to processors of junked cars.<sup>32</sup> Prior to receiving the bounty, the scrap processor had to present documentation which proved clear title to the vehicle.<sup>33</sup> However, out-of-state processors were required to provide much more documentation to support title of the vehicle than those scrap processors located within the State of Maryland.<sup>34</sup> Because many suppliers of junk cars were inclined to take these " hulks " <sup>35</sup> to the processor demanding the least documentation of title, out-of-state processors challenged the statute as an impermissible burden on interstate commerce and, therefore, in violation of the Commerce Clause.<sup>36</sup> However, the Supreme Court held to the contrary, pronouncing that this type of action was not within

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27. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

28. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (The Court's reasoning was predicated on *South Carolina v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938), *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949), and *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978)).

29. 426 U.S. 794 (1976).

30. Comment, *Commerce Clause Immunity for State Proprietary Activities: Reeves, Inc. v. Stake*, 4 HARV. J.L. & PUB. POL'Y 365, 367 (1981).

31. *Hughes*, 426 U.S. at 796.

32. *Id.* at 797.

33. *Id.* at 798.

34. *Id.* at 800-01.

35. *Id.* at 798.

36. *Id.* at 802.

the realm of the Commerce Clause.<sup>37</sup>

The Supreme Court found Maryland to be acting as an actual purchaser within the market, a market participant, and therefore, immune from the Commerce Clause challenge,<sup>38</sup> "as the Constitution does not address reactions within the market place due to market forces, but only taxing and regulatory actions taken by the state in their sovereign capacity."<sup>39</sup> Thus, the Supreme Court carved out of the Commerce Clause a broad immunity which came to be known as the market participant doctrine.<sup>40</sup> The doctrine draws a distinction between a market "regulator"<sup>41</sup> and a market "participator."<sup>42</sup> Thus, when a state enters the market to bid up the price of an article of commerce the state acts as a participant and there is no impermissible burden on interstate commerce. However, when the state behaves in a regulatory manner, restricting its trade to in-state businesses or citizens, there is a significant burden on interstate commerce.<sup>43</sup>

In *City of Philadelphia v. New Jersey*,<sup>44</sup> the Supreme Court struck down a New Jersey statute which banned, on the basis of health reasons, the importation of refuse into the state for disposal. The Court declared the statute to be a protectionist measure which unnecessarily burdened interstate commerce.<sup>45</sup> The Supreme Court held the statute invalid because it accorded state residents preferential treatment with respect to landfill access for solid waste disposal within the state's borders.<sup>46</sup> It was in this vein that the Court sought to

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37. *Id.* at 810.

38. *Id.* at 809.

39. Note, *Concrete Development Chips Away at Commerce Clause Analysis*, 14 CREIGHTON L. REV. 629, 634 (1981) [hereinafter Note, *Concrete Development*].

40. Observation, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 87 (1980).

41. Campbell, *State Ownership of Hazardous Waste Disposal Sites: A Technique for Excluding Out-of-State Wastes?*, 14 ENVTL. L. 177, 186 (1983).

42. *Id.*

43. Note, *Interstate Commerce: Building Cement Walls Against Interstate Sales*, 10 STETSON L. REV. 527, 531 (1981) [hereinafter Note, *Building Cement Walls*].

44. 437 U.S. 617 (1978).

45. *Id.* at 629.

46. *Id.* at 628. See Cain, *Routes and Roadblocks: State Controls on Hazardous Waste Imports*, 23 NAT. RESOURCES J. 767, 777 (1983).

maintain the unburdened, unhampered character of interstate commerce.

*Reeves, Inc. v. Stake*<sup>47</sup> served to significantly extend the market participant concept from purchasers to sellers, relying almost exclusively on the precedent set by *Hughes*.<sup>48</sup> In *Reeves*, the Supreme Court stated that the Commerce Clause prohibits states from enacting taxing and regulatory measures that affect trade, but that nothing exists to prevent or limit states from operating freely in the marketplace.<sup>49</sup> *Reeves* involved the State of South Dakota and its operation of a state-owned cement plant. The state established a policy which prohibited the sale of cement to out-of-state purchasers.<sup>50</sup> The Court held that if a state enters the marketplace as a market participant, it does not violate the Commerce Clause by refusing to sell a product to out-of-state distributors.<sup>51</sup> Thus, the concept of market participant, as extended in *Reeves*, was made applicable to states participating in the free market as purchasers or sellers.<sup>52</sup>

#### IV. The District Court's Decision

In *LeFrancois v. Rhode Island*,<sup>53</sup> the court held that a statute prohibiting the deposit of out-of-state solid wastes in a state-funded and state-operated landfill did not violate the Commerce Clause.<sup>54</sup> The district court held that a legitimate local interest was achieved by offering in-state residents a landfill waste processing service without creating an excessive burden on interstate commerce by permitting both in-state and out-of-state parties the opportunity to purchase private

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47. 447 U.S. 429 (1980).

48. Note, *NATURAL RESOURCES - COMMERCE CLAUSE - State Market Participation Exempt from Commerce Clause Review*. *Reeves, Inc. v. Stake*, \_\_\_ U.S. \_\_\_, 100 S. Ct 2271 (1980). 16 LAND & WATER L. REV. 85, 88-89 (1981).

49. *Reeves*, 447 U.S. at 436.

50. *Id.* at 433.

51. *Id.* at 436.

52. Note, *Building Cement Walls*, *supra* note 38, at 533.

53. 669 F. Supp. 1204 (D.R.I. 1987).

54. *Id.* at 1212.

landfills.<sup>55</sup> Thus the Commerce Clause was not offended.<sup>56</sup>

Although a similar ban applied to all public and private in-state landfills in *City of Philadelphia v. New Jersey*, the *LeFrancois* court distinguished *City of Philadelphia*. The *LeFrancois* court found that the Supreme Court in *City of Philadelphia* “express[ed] no opinion about New Jersey’s power, consistent with the Commerce Clause to restrict state residents’ access to state-owned resources, or New Jersey’s power to spend state funds solely on behalf of state residents and businesses.”<sup>57</sup> The *LeFrancois* court believed that the action of the state legislature fell “within the reservation expressed in footnote six”<sup>58</sup> in *City of Philadelphia*, because the landfill in question was operated by a public agency and partially funded by the state.<sup>59</sup> The court, therefore, framed the issue as “whether the public character of the . . . [l]andfill exempts the state’s action from the restraints of the Commerce Clause”<sup>60</sup> and answered it in the affirmative.

The *LeFrancois* court relied on the market participant doctrine to support its holding.<sup>61</sup> The court was persuaded by the reasoning of the Court of Appeals of Maryland in *County Commissioners of Charles County v. Stevens*.<sup>62</sup> In *County Commissioners*, the court decided that where a county, state, or municipal government provides landfill services to waste haulers and collects a fee for the acceptance and disposal of the wastes in compliance with all applicable environmental and health laws, a “market” exists and the market participant analysis applies.<sup>63</sup>

Based on this reasoning, the *LeFrancois* court concluded that in operating the landfill, Rhode Island had done nothing more than purchase a resource (the landfill site) and offered

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55. *Id.* at 1211.

56. *Id.*

57. *City of Philadelphia*, 437 U.S. at 627 n.6.

58. *LeFrancois*, 669 F. Supp. at 1208.

59. *Id.*

60. *Id.*

61. *Id.* at 1211.

62. 299 Md. 203, 473 A.2d 12 (1984).

63. *Id.* at 208.

its customers the waste processing services.<sup>64</sup> The court then concluded that Rhode Island, by actively taking part in the competitive business of solid waste disposal, fell within the market participant concept, and held the state's actions in limiting access to its landfills to be constitutional.<sup>65</sup>

## V. Analysis

The *LeFrancois v. Rhode Island*<sup>66</sup> decision yields a result never intended by the Court in *City of Philadelphia v. New Jersey*.<sup>67</sup> The Supreme Court therein closed its opinion with a warning:

Today cities in Pennsylvania or New York find it expedient or necessary to send their waste into New Jersey and New Jersey claims the right to close its borders from such traffic. Tomorrow cities in New Jersey may find it necessary to send their waste into Pennsylvania or New York for disposal, and those states might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future just as it protects her neighbors now from efforts by one state to isolate itself in the stream of commerce from a problem shared by all.<sup>68</sup>

Rather than heeding this warning, the state of Rhode Island blatantly defied it, and in so doing opened the flood gates to innumerable problems in the future of solid waste disposal.

As Justice Powell stated in his dissent in *Reeves, Inc. v. Stake*,<sup>69</sup> this "policy represents the kind of economic protection the Commerce Clause was designed to prevent . . . ."<sup>70</sup> While the desire to preserve state sovereignty is commendable, "the Commerce Clause has long been recognized as a limit on that sovereignty . . . designed to maintain a national mar-

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64. *LeFrancois*, 669 F. Supp. at 1207-08.

65. *Id.*

66. 669 F. Supp. 1204 (D.R.I. 1987).

67. 437 U.S. 617 (1978).

68. *Id.* at 629.

69. 447 U.S. at 447 (Powell, J., dissenting).

70. *Id.* at 447.

ket and defeat economic provincialism."<sup>71</sup>

If courts follow *LeFrancois*, the effect will be to approve state protectionist policies, subject only to the condition that the state directly participate in the free market. This precedent will undoubtedly alter the concept of a free national economy. If the decision is applied liberally, unrestricted trade among the states would dwindle significantly, especially if undesirable articles of commerce such as toxic pollutants are involved. Thus, one of the major driving forces behind the Constitution, the assurance of unrestrained trade between the states,<sup>72</sup> would be considerably contravened. Significant environmental concerns would be raised if additional courts permit states to close their borders to certain offensive substances under the guise of participating in, but not regulating, the market.

Further important considerations are raised by Justice Brennan in his dissent in *Hughes v. Alexandria Scrap Corp.*<sup>73</sup> These possibilities may become the sad reality if additional cases rely on *LeFrancois*. Dissenting in *Hughes*, Justice Brennan questioned whether a state may restrict its trade to its own citizens when it participates in the market as a purchaser.<sup>74</sup> This question was one never before considered by the Court. The Court was, according to Justice Brennan's argument, not justified in simply making the conclusory assertion that such behavior was permissible.<sup>75</sup> Specifically, Justice Brennan faulted the Court for failing to make known the source of the "right" which it accorded to the states.<sup>76</sup>

Justice Brennan also pointed out that often a much larger area of commerce is affected by state regulation and that such effects on commerce are not able to be confined within the state's boundaries.<sup>77</sup> Further, he encouraged the Court to sever itself from the state's supposed declaration of purpose

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71. *Id.* at 453.

72. Note, *Concrete Development*, *supra* note 39, at 639.

73. 426 U.S. 794, 817 (1976) (Brennan, J., dissenting).

74. *Id.* at 821-22.

75. *Id.*

76. *Id.* at 822.

77. *Id.* at 822-23.

and to closely scrutinize the regulatory measure which may often reveal that the "purported objective is feigned and not the real purpose."<sup>78</sup>

This is precisely the type of allegation justifiably made against states, such as Rhode Island herein, enacting statutes prohibiting certain undesirable substances to be transported across their borders. The Court rightfully should question whether the state is acting as a participant in the marketplace, or merely under the mask of a participant as a means to protect its own environment and citizens.

Justice Brennan further stated that "little imagination is required to foresee future state actions" which may work to further burden the free economy envisioned in the formulation of the Commerce Clause. This is especially so "if all state action is to be immunized from further analysis merely because the design of the regulatory scheme" is such that a market participant label may be applied.<sup>79</sup>

## VI. Conclusion

Fears expressed by the dissent in *Hughes* are indeed well-founded and have become the sad reality in *LeFrancois v. Rhode Island*.<sup>80</sup> The concept of market participant, when applied to valid environmental concerns such as the disposal of toxic pollutants and other solid wastes, yields drastic results which may prove to be even more disastrous in their consequences over time. Allowing states to close their borders may ultimately result in the formulation of fifty separate governmental entities making individualized determinations regarding the substances they will permit to be disposed of within their borders.<sup>81</sup>

At present, there is no subsequent history to *LeFrancois*. The case has not been cited in other opinions, and whether or

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78. *Id.* at 827 (quoting *Foster-Fountain Parking Co. v. Haydel*, 278 U.S. 1, 10 (1928)); see also *Buck v. Kuy Kendall*, 267 U.S. 307, 315-16 (1925); *Toomer v. Witsell* 334 U.S. 385 (1948).

79. *Hughes*, 426 U.S. at 829.

80. 669 F. Supp. 1204 (D.R.I. 1987).

81. Note, *Concrete Development*, *supra* note 39, at 635.

not it will become a front-runner and develop into a strong precedent remains to be seen. Should other states develop similar landfill restrictions and attempt to justify them under the market participant theory, one can only shudder when thinking of the potential impact this may have on the environment.

Attorneys for the plaintiff in *LeFrancois* indicated that their decision not to appeal the case was based on the unfavorable trends in case law which seem to make states' protectionist measures legitimate under the market participation theory.<sup>82</sup> The *LeFrancois* decision is a far cry from the holdings in *City of Philadelphia v. New Jersey*<sup>83</sup> and *Hughes v. Alexandria Scrap Corp.*<sup>84</sup> It is doubtful that the Supreme Court ever anticipated the seemingly legitimate concept of market participation to expand and gain the potential it now possesses to wreak havoc on the environment.

Kathleen O'Neill

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82. It should be noted that much of the policy considerations discussed in this paper are also addressed in the *Memorandum in Support of Plaintiff's Motion for Summary Judgment*. Telephone interview with Fontaine and Croll, LTD., Attorneys for the plaintiff (Oct., 1988).

83. 437 U.S. 617 (1978).

84. 426 U.S. 794 (1976).