

A Review of Recent Compact Litigation

by: Richard L. Masters

General Counsel

Interstate Commission for Adult Offender Supervision

Today nearly 200 compacts are in effect involving a wide range of public issues including the environment, child welfare, water allocation, health, education, multi-state taxation, transportation, emergency management, corrections and crime control. Although much of the recent state activity concerning interstate compacts is in the legislative arena, litigation concerning interstate compact issues appears to be on the increase. Since 1975 federal and state courts have issued more than 250 opinions involving interstate compacts. A digest of some of the more significant cases during the period from 1975 through 2000 is available at the Council of State Government web site at www.csg.org. (refer to *National Center for Interstate Compacts, Legal Information, "Interstate Compact Case Law, 1976-2000"*). Since that time a number of additional compact case decisions have been rendered which deserve attention. A more comprehensive review and analysis of the cases referred to in this outline and in the above referenced case law digest and numerous other reported decisions and legal authorities is contained in **"The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide"** Buenger, Masters, McCabe & Broun, 2006 published by the American Bar Association.

Administrative Procedures and Rulemaking

Organic Cow, LLC v. Northeast Dairy Compact Commission, 164 F.Supp2d 412 (2001), vacated and remanded, Organic Cow, LLC v. Ctr. for New England Dairy Compact Research, 335 F.3d 66 (2d Cir. 2003) holding that procedural limitations under an interstate compact where a petition seeking exemption from the regulations of the Compact was subject to restrictions limiting the parties to presentation of up to two (2) affidavits and a brief, without the benefit of an oral hearing were approved by the court which found that the intent of the compact was to establish a basic structure through which the regulatory commission created may achieve its purposes through regulatory techniques historically associated with milk marketing and to afford the commission broad flexibility to devise regulatory mechanisms to achieve the purposes of the compact. This case also holds that a compact created agency is not subject to the federal Administrative Procedures Act simply because it is sanctioned by Congress.

Commonwealth of Pennsylvania Board of Probation and Parole et al vs. Interstate Commission for Adult Offender Supervision, (Dist. DC 2004), appeal dismissed Commonwealth of Pennsylvania Board of Probation and Parole v. Interstate Commission for Adult Offender Supervision, 2005 U.S. App. LEXIS 3151 (D.C. Cir. 2005), the U.S. Dist. Court for the Dist. of Columbia denied an injunction sought by the State of Pennsylvania against enforcement of rules promulgated by the Commission alleging the rulemaking procedures violated the Administrative Procedures Act and various provisions of the Interstate Compact for Adult Offender Supervision. On appeal of the

denial of the injunction a three judge panel of the U.S. Court of Appeals for the Dist. of Columbia dismissed the appeal as moot.

Choice of Law and Forum Issues

Washington-Dulles Transport. Ltd. v. Metropolitan Washington Airports Authority, 263 F.3d 371 (4th Cir. 2001), holding that a compact provision that original jurisdiction over compact matters is vested in the courts of Virginia and that the courts “shall in all cases apply the law of the Commonwealth of Virginia” is a contractually valid agreement between the parties to the compact. Moreover, even if suit is brought in federal court, the party states have agreed that the federal courts will apply Virginia law in any dispute or litigation. In approving this compact, Congress consented to these choice of law provisions as binding elements in the agreement.

Civil Rights Liability under 42 U.S.C. Section 1983

Orville Lines v. Wargo, 271 F. Supp.2d 649 (W.D. PA 2003), holding that the provisions of the Interstate Compact for the Supervision of Parolees and Probationers, the predecessor of the Interstate Compact for the Supervision of Adult Offenders, do not create a private right of action under 42 U.S.C. Section 1983 for those subject to its provisions (offenders on probation or parole). The court held that nothing short of a right unambiguously conferred by Congress would support such a cause of action and that neither the compact language nor the consent of congress manifested an intent to create a new individual right for adult offenders.

Conflict of Compact with Subsequent State Laws

International Union of Operating Engineers, Local 542 v. Delaware River Joint Toll Bridge Commission, 311 F.3d 273 (3d Cir. 2002), holding that the question of whether subsequent state legislation is binding upon a compact which was not the subject of congressional consent was dependant upon whether the states that pass substantially similar legislation have in effect amended a compact to impose new law. As this opinion indicates, the courts are not in agreement.

Skamania County v. Woodall, 104 Wash. App. 525, 16 P.3d 701 (2001) holding that the Columbia River Gorge Compact must apply Washington state law because the Columbia River Gorge Compact language did not specifically reject such state law.

Arkansas Department of Health and Human Services v. Kandie Sue Kucera Feryanitz et al., Cir. Ct. of Newton Co. Ark., Juv. Div. No. JV2003-20-2, (Jan. 23, 2006), declaring the application of the Interstate Compact for the Placement of Children unconstitutional under the equal protection clauses of the U.S. Constitution and Arkansas Constitution based on a subsequent state legislative amendment to the compact redefining foster care in a manner contrary to the existing definition in all other states which are members of the compact (ICPC in effect in 50 states).

Congressional Consent

Intermountain Municipal Gas Agency v. F.E.R.C., 326 F.3d 1281 (D.C. Cir. 2003), holding that Utah and Arizona could not by interstate agreement create a mutual governing entity to escape the regulatory authority given to the Federal Energy Regulatory Commission by the federal Natural Gas Act. Therefore, while Congress may use its consent power to alter the “landscape” in which joint state action takes place, states may not conversely use the interstate compact or similar process as a means for avoiding or circumventing congressional authority in the absence of the explicit agreement by Congress that such action is permissible.

U.S. ex rel. Blumenthal-Kahn Elec. Ltd. Partnership v. American Home Assurance Company, 219 F. Supp.2d 710 (E.D. VA 2002), holding that the provisions of the Miller Act which require a contractor to provide a performance bond prior to construction or alteration did not apply to the Metropolitan Washington Airports Authority and the agency created pursuant to the compact because the entity is not a “federal agency” even though it has received congressional consent.

Heard Communications, Inc. v. Bi-State Development Agency, 18 Fed. Appx. 438 (8th Cir. 2001), holding that congressional consent does not transform bi-state development agency into federal administrative agency.

Friends of the Columbia Gorge v. Columbia River Gorge Commission, 108 P.3d 134 (Wash. Ct. App. 2005), holding that while state courts are required to apply federal law in interpreting the compact, in the absence of specific procedural rules, the state court applies state administrative law. *amended by Friends of the Columbia Gorge v. Columbia River Gorge Commission*, 2005 Wash. App. LEXIS 968 (May 5, 2005).

Due Process Issues

Organic Cow, LLC v. Northeast Dairy Compact Commission, 164 F.Supp.2d 412 (2001), *vacated and remanded, Organic Cow, LLC v. Ctr. for New England Dairy Compact Research*, 335 F.3d 66 (2d Cir. 2003) holding that if constitutionally protected interests are implicated by an action taken under an interstate compact, due process claims may be subject to the balancing of interests called for under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Here the questions are: what are the private interests involved; what is the risk of error and the value of additional procedural safeguards to avoid that risk; and what are the strengths of the compact agency’s interests. In this case a corporate entity subject to the compact was seeking an exemption from a price regulation under the compact based on an asserted constitutionally protected property right which the court held could not be denied without ‘appropriate procedural safeguards’ *Id at 421*.

Eleventh Amendment Immunity and Sovereign Immunity

Kansas v. Colorado, 533 U.S. 1 (2001), holding that 11th Amendment immunity precludes a direct action by citizens of Kansas against Colorado for recovery of damages based on alleged losses sustained by individual water users.

Abdulwali v. Washington Metropolitan Area Transit Authority, 315 F.3d 302 (D.C. Cir. 2003) holding that where compact did not prescribe design specifications for metro cars; agency made discretionary choices when it established plans, specifications, or schedules regarding the metro system that fell within the scope of a discretionary function, and thus sovereign immunity barred plaintiff's claims.

Watters v. Washington Metropolitan Area Transit Authority, 295 F.3d 36 (D.C. Cir. 2002), holding that an entity created pursuant to the Compact Clause of the federal Constitution will not be presumed to qualify for 11th Amendment immunity unless there is good reason to believe that the states structured the entity to arm it with the states' own immunity, but even where the 11th Amendment does not offer protection such an entity may be immune from suit under the laws of the states that created it. The Watters court also held: "We may find a waiver of sovereign immunity 'only where stated by the most express language or by such overwhelming implications from the text [of the compact] as will leave no room for any other reasonable construction.'" (citations omitted).

Lizzi v. Alexander, 255 F.3d 128 (4th Cir. 2001), holding that if properly conferred, a compact created agency receiving 44% of its funding from member states may be considered an entity of the "state" and thus shielded by 11th Amendment immunity.

Entergy, Arkansas, Inc. v. Nebraska, 68 F. Supp.2d 1093 (D. NE 1999), aff'd Entergy, Arkansas, Inc. v. Nebraska, 241 F.3d 1979 (8th Cir. 2001), construing claims of 11th Amendment protection by Nebraska officials as commissioners under the Central Interstate Low-Level Radioactive Waste Compact, holding that the state and its officers are protected in their official capacity against any claims other than declaratory and injunctive relief.

Enforcement of Compacts and Regulations

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) recognizing the validity of interstate compact regulations establishing environmental thresholds for air quality, water quality, soil conservation, vegetation preservation, wildlife, fisheries, noise, recreation and scenic resources and that the mere enactment of regulations implementing a 32 month moratorium on development in the Tahoe Basin did not constitute a per se taking of the landowners' property.

Washington-Dulles Transp., Ltd. v. Metropolitan Washington Airports Authority, 87 Fed. Appx. 843 (4th Cir. 2004), cert denied, 125 S. Ct. 50 (Oct. 4, 2004), in regard to bidding procedures where a disappointed bidder challenges the decision of a compact agency, the court relying on an earlier decision in Old Town Trolley Tours v. Washington Metro. Area Transit Commission, 129 F.3d 201 (D.C. Cir. 1997) held that where the compact which created the regulatory entity is silent on the appropriate rulemaking standard, the courts have generally applied the “arbitrary and capricious” standard of review.

Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 311 F. Supp.2d 972 (D. Nev. 2004), in which the court held that compact agencies such as the Tahoe Regional Planning Commission have the authority to issue rules and regulations as long as such rulemaking is within the scope of its mandate under the compact. Judicial inquiry into the agency’s actions is limited to determining whether an act or decision is arbitrary, capricious, lacked substantial evidentiary support, or the agency failed to proceed in a manner required by law.

Interstate Commission for Adult Offender Supervision v. Tennessee Board of Probation and Parole et al (U.S. District Court, Eastern District of Kentucky, 04-526-KSF, 2005) relying upon Cuyler v. Adams, 449 U.S. 433 (1981) and Carchman v. Nash, 473 U.S. 716 (1985), in the first enforcement action filed by the Commission under the provisions of the Interstate Compact for Adult Offender Supervision the court held that an interstate compact receiving congressional approval enjoys the status of federal law and the administrative rules of the compact Commission function as a law of the United States applicable to the member states under the terms of the compact and through the operation of the Supremacy Clause of the Constitution. Thus, the terms of such compact and any rules and regulations authorized by the compact supercede substantive state laws which are in conflict.

Doe v. Ward, 124 F. Supp.2d 900 (W.D. PA 2000), holding that conflicting provisions of a state statute regulating sex offenders must yield to the provisions of the Interstate Compact for the Supervision of Parolees and Probationers because of its status as federal law as an interstate compact sanctioned under the compact clause of the federal Constitution.

Virginia v. Achu, 54 Va. Cir. 109 (Va. Cir. Ct. 2000), holding that the Metropolitan Washington Airports Authority was a properly constituted compact agency, and its regulations regarding the unlawful solicitation of passengers were constitutional and enforceable.

Implied or Express Termination of Compacts

Virginia v. Maryland, 540 U.S. 56 (2003), holding that an interstate compact negotiated in 1785, predating the Constitution of the United States was still in force and the Supreme Court will resolve disputes arising under the agreement exercising its original jurisdiction invoked by the parties.

Judicial Interpretation of Compact Language

Alabama v. Bozeman, 533 U.S. 146 (2001), holding that a congressionally sanctioned interstate compact under the compact clause of the federal Constitution has the status of federal law and is subject to federal construction.

New York v. Hill, 528 U.S. 110 (2000), holding that by transforming an interstate compact into federal law, congressional consent gives rise to federal questions subject to federal construction and resolution.

Entergy Arkansas, Inc. v. Nebraska, 358 F.3d 528 (8th Cir. 2004), cert. denied sub nom Nebraska v. Central Interstate Low-Level Radioactive Waste Commission, 2004 WL 1874952 (U.S. Aug. 23, 2004), where the Court looked to the Restatement (2d) of Contracts to decide whether an interstate commission acted in good faith in denying a license, a question of fact reviewed for clear error.

New York State Dairy Foods v. Northeast Dairy Compact Commission, 26 F. Supp.2d 249 (D. Mass 1998), aff'd 198 F.3d 1 (1st Cir. 1999), cert. denied, 529 U.S. 1098 (2000), holding that in the interpretation and enforcement of interstate compacts courts are constrained to effectuate the terms of the compact as a binding contract so long as those terms do not conflict with constitutional principles.

Standing and Indispensable or Interested Parties

Alabama v. North Carolina, 540 U.S. 1014 (2003), holding that a compact commission is not precluded from being an interested party to a suit between states and the presence of a compact commission as an interested party is not fatal to invoking the Supreme Court's original jurisdiction so long as the suit unequivocally involves states suing states in their sovereign capacity.

American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015 (9th Cir. 2002), applying F.R.C.P. 19 to answer whether the Arizona tribes with gaming compacts entered pursuant to A.R.S. Section 5-601(A) are indispensable parties. This case also stands for the proposition that in resolving questions related to standing to participate in the adjudicative process involving an interstate compact with congressional consent will be answered under federal law and will be based upon an analysis of which stakeholders are "parties" with standing to benefit from the procedural requirements of such an interstate compact. Under F.R.C.P. 19(a) joinder of such a party occurs if any of the following requisites are met: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii)

leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. *Id. at 1022.*

State or Federal Status of an Interstate Compact Entity

Heard Communications, Inc. v. Bi-State Development Agency, 18 Fed. Appx. 438 (8th Cir. 2001), holding that congressional consent does not transform bi-state development agency into federal administrative agency.

Murray v. Oregon, No. 9700012CC (Wasco County Cir. Ct., Mar. 4, 2002) appeal filed No. A117707 (Or. App. Mar. 28, 2002), lower court held that the Columbia River Gorge Commission, an interstate compact entity, is an Oregon state agency for the purpose of holding the State of Oregon liable in inverse condemnation for an action of the Commission.

Tort Liability for Negligent Supervision

Hansen v. Scott, 645 N.W.2d 223 (N.D. 2002) cert denied, 537 U.S. 1108 (2003), Daughters brought an action in connection with the murder of their parents by a parolee who had been transferred to North Dakota for parole supervision by Texas officials. The plaintiffs alleged that the employees of the Texas compact office which was responsible for administering the interstate compact for the supervision of this offender failed to notify North Dakota officials about his long criminal history and dangerous propensities and sought to hold the Texas employees liable on their wrongful death, survivorship, and 42 U.S.C. Section 1983 claims. The Supreme Court of North Dakota held the tort claim justified the exercise of personal jurisdiction over the Texas employees because of their affirmative action of requesting North Dakota to supervise a Texas parolee constituted activity in which they purposefully availed themselves of the privilege of sending the parolee to North Dakota and thus could have reasonably anticipated being brought into court in North Dakota to defend these claims and the exercise of personal jurisdiction comports with due process.