# Short Circuit 213

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**SPEAKERS**

Jeff Redfern, Anthony Sanders

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A Anthony Sanders 00:07

Hello and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on March 31, 2022. Please tune in next week to listen to a special Short Circuit that will be recording before a live and now sold-out studio audience at the National Press Club in Washington, DC. We will focus on the DC circuit with a star-studded panel of Supreme Court lawyers. This week though, we're gonna smile. And who doesn't love a good smile with a whole set of straight pearly whites? The California Dental Board, that's who. Some of its members are themselves dentists, yet they take enforcement actions against lower-cost competitors. An upstart business offering orthodontic products that you can order online had enough of this and sued the members of the board. Its name is Smile Direct. Get it? But unlike in the kind of case we at the Institute for Justice would bring, a constitutional challenge, Smile Direct brought a case under the federal antitrust laws. It said the board members were engaged in a conspiracy against trade and were not immune from antitrust law just because they work as government agents. And, at least for now, it looks like they have a point, as the Ninth Circuit said their case can go forward. If you're sad, we'll turn that frown upside down with this story in a moment. But you know who isn't smiling? Judgment creditors in the state of Louisiana. If you sue the state of Louisiana in one of its courts, so a state court, and you win, you can't automatically go get your money. You need the legislature to vote to give it to you. And if it doesn't, sorry. That's it. So what's the good of going to court in the first place? Well, the Fifth Circuit recently said, that is a good question, to which it doesn't have a good answer. Well, here to discuss these matters is IJ's Jeff Redfern. Jeff, welcome back.

J Jeff Redfern 02:24

Thanks for having me, Anthony.

A Anthony Sanders 02:26

Well, I'll talk a little bit about Smile Direct and the smiling in the Ninth Circuit in a little bit. But

let's begin with you and the Fifth Circuit. And please explain this bizarre system of Louisiana apparently not having courts really, if you sue the state.

J

Jeff Redfern 02:48

Yeah, it's it's a pretty awful situation for plaintiffs in the state. Basically, if you win a judgment against the state or any of its political subdivisions, so you know, agencies, cities, whatever, they don't have to pay you. You have to go convince the legislature to specifically appropriate money. And if it doesn't do that, you're just out of luck. And there are a lot of examples of some pretty bad behavior here. There are agencies that will only appropriate money if you agree to waive interest on the judgment. So you know, even if it's been years and years, you're stuck with the original judgment, whereas, you know, under statute, you'd be entitled to get interest on it. And then there are also agencies that they'll only settle. They'll say, yeah, the court found we owe you this much, But we're willing to give you a lesser amount, take it or leave it. And a lot of people end up having to take it. So what happened in this case is interesting, though, because this wasn't a typical state court judgment. It wasn't a tort or a contract. This was a federal takings claim. Now, the Fifth Amendment says that when the government, whether it's state or local, takes your property, it has to pay you for it. And that includes when it just damages your property. So what happened in this case is you got 70 landowners and their property in New Orleans, which was damaged by the construction of some flood control culverts. So they sued in state court. They alleged a federal takings claim, they won and they got a judgment for $10 million collectively. But they could not collect in the state court. So what they did was they went to federal court, and they said that they have a takings claim. It's a federal claim, it's federal constitutional claim, and the state has to pay them. Well, the district court and the Fifth Circuit both said that a failure to timely pay a judgment isn't a taking. Well, that is basically true. But it's not really what the claim was here. The claim was that the damage to the property itself was a taking, that the federal constitution entitles them to compensation, and that they still have not been paid. And that's not really the question that the court answered in this case. It sort of dodged the underlying federal constitutional issue. Now, full disclosure, I wrote an amicus brief in this case and in a similar case that ended up getting settled a couple of years ago, before there was a judgment. So this is an issue that comes up a lot in the Fifth Circuit, because, you know, Louisiana continues to not pay people when it takes their property. Now, what's interesting about this is that it turns out the origin of the Fifth Amendment here, we're gonna get really nerdy.

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Anthony Sanders 05:59

That is what our listeners are here for.

J

Jeff Redfern 06:02

I assumed as much, Anthony. I mean, it's your podcast, after all, so fair point. So the Takings Clause, as far as we can tell, has its origin in the Magna Carta. So go back 800 years, what was the issue that they were complaining about? Well, it's not that government was taking property without paying for it, it's that government was taking property without providing timely payment. They were giving these IOUs that were essentially worthless except to offset some future tax burden that you might have against the government. Well, what's crazy about this

case is that essentially we've turned back the clock to before the Magna Carta. Government in Louisiana is taking property, they aren't paying for it, and you're getting these paper judgments, these state court judgments that can't be enforced. And as far as I can tell, the only possible use that they have is to, you know, offset a future debt that you might have to the government. So it's really like exactly the same situation that, you know, the barons were upset about when they forced King John to sign the Magna Carta. So that was one of the points that we made in our amicus brief. And I understand that there is an en banc petition that's going to be filed in this case. So hopefully, the Fifth Circuit will get its act together and address this issue, at least with respect to federal takings claims.

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Anthony Sanders 07:36

It seemed like in the case, there's some bad Fifth Circuit precedent. But there's also US Supreme Court precedent that's kind of in the background that the court has to worry about. How does that really affect things?

J

Jeff Redfern 07:54

So there are a few issues here. The precedent that the court was relying on is for the basic proposition that the failure to timely pay a judgment isn't a taking. And that's basically true. And the plaintiffs in this case didn't really dispute that. You know, if you have a contract dispute or tort dispute, in particular with the state, you know, those legal claims are creatures of state law, and the state has the right to define the scope of that, including the scope of the remedy. So if the state wants to say, you know, if you have a contract dispute with the state, you have certain rights, but one of those rights is not to collect on the judgment unless the legislature appropriates the money that's basically within the state's rights.

A

Anthony Sanders 08:45

So if the state doesn't maintain the sidewalk in front of a government office building, you slip and fall, you sue, you win for damages, the US Supreme Court has said, there's just no right to collect that judgment if you brought that in state court.

J

Jeff Redfern 09:13

That's basically right. Yeah.

A

Anthony Sanders 09:16

And how far back does that go? It just sounds like, you know, before the Civil War, maybe it's true. But I mean, it sounds pretty close to something that, you know, the 14th Amendment was supposed to figure out.

J

Jeff Redfern 09:33

Jeff Redfern 09:55

You know, I'm not sure exactly how far back it goes. I know that pre-Civil War, the Louisiana practice was pretty standard, having to get private bills passed to pay judgments. On the other hand, there isn't evidence that at that time, there was the kind of abuse that's going on now, where you have sort of a systematic decision that we're going to use this immunity to avoid paying the judgment. It seems like at the time legislatures were fairly conscientious about regularly appropriating money to pay judgments.

Anthony Sanders 10:09

Sure. So listeners who have also listened to our fantastic documentary series Bound By Oath, and the second season, which just wrapped up about being made whole when there's a violation of a constitutional right, they probably won't be that surprised by this news, even though it was surprising to me. I know the Fifth Circuit has said what it's said, and it has its precedent. But where else might this intersect with how the federal Constitution is supposed to hold the state's feet to the fire when they violate the federal Constitution? I mean, it seems like if someone brought this case in federal court and they got a judgment, they actually could go collect on that, because of, you know, the supremacy of the US Constitution and federal law and all that. But, I mean, this was a federal claim. It wasn't state court, but it was a federal claim. And also, you know, there is something to the idea that the 14th Amendment, and not just the 14th Amendment but, you know, the Guarantee Clause, the republican form of government Guarantee Clause in the original Constitution that states are supposed to have some kind of justice system where you can go get justice, and you can petition for redress of grievances, so to speak. And that part of that is having a judgment you can collect upon from the state. Is there anything to that? Or do sovereign immunity and modern ideas about immunity that that we cover in Bound By Oath just mean that those arguments don't get very far?

Jeff Redfern 12:04

Well, personally, I find that persuasive, at least with respect to federal rights. I think it's pretty hard to say that there's any, you know, reasonable basis for states immunizing themselves from these kinds of federal claims, particularly the Takings Clause, because, you know, it's unique in the Constitution in that it's not only a right, it's the one right in the Constitution where the remedy is also prescribed. It says it right there in the Fifth Amendment, you get compensation. And the Supreme Court has said that it's a self-executing constitutional provision. I think it does get a little bit trickier when you talk about states defining the scope of state-created rights. At the margins, there are interesting cases where you can find there's a conflict between those. So in in a decision a few years back, there was a federal takings decision. And the dissenters said all that's going on here is they're defining the scope of state trespass law. Now state trespass law is clearly sort of a classic state law issue. But if you totally eliminate trespass law, have you taken someone's property? Is there an assumption that there's going to be some level of state law protection for property rights? And I think that a lot of these issues just have not been fully litigated yet.

Anthony Sanders 13:41

Yeah, I mean, that's really something that we've talked about a few episodes ago about the

idea that the Supreme Court has always said property law itself is defined by state law. And then when that property, I guess, gets moved around by the government, you have a federal takings issue. But is there some limit to how the state can initially define that property law? I think there has to be, otherwise it's kind of like it's turtles all the way down, so to speak.

J

Jeff Redfern 14:16

Yeah, I think that's right. We talked a few years ago about some laws that were eliminating the tort of private nuisance where somebody who lives near you is doing something on their property that's just so outrageous that it makes it so you can't enjoy your own property. And that, you know, if they really are eliminating that entirely, and someone is able to make it impossible to live on your property, is it really the case that that's just a question of state law and isn't a taking? That seems a little hard to swallow.

A

Anthony Sanders 14:52

Well, this hopefully is not going to be an issue that comes up many more times, and the Fifth Circuit can figure some of this out. And maybe the state of Louisiana, which is very good at getting new constitutions and changing its constitution. It actually, I think, has the record for the most constitutions of any state in US history, something like 11. Maybe they can sort this out. And so it won't be a problem going forward for anyone, whatever your claim is, who rightfully is owed money by the state government. If you want to dig a little bit more into these questions of remedies and how to be made whole by the government when it does something wrong to you, again, of course, you can listen to Bound By Oath, the series. Just search Bound By Oath on any podcast app, and we'll put a link on the show notes as well, if you're not familiar with that podcast series. Also, self-promotion, I wrote a piece on our blog, the Center for Judicial Engagement blog, about a year ago on various ideas of rights against against the government. One that doesn't come up very much that some people have written about recently is the Petition Clause. In the First Amendment, it says the right to petition the government, and actually at the time of the founding or the time of Blackstone, certainly before that, that could mean just suing the government, because most lawsuits were technically started with a petition. So not something Supreme Court has recognized but maybe that'd be something that could be be claimed in the future when we're talking about the government violating your rights and not giving you your just compensation. So now we're going to turn away from these unhappy tails in the state of Louisiana to smiles in the Ninth Circuit. So this is an issue that we at the Institute for Justice don't litigate but we know a bit about, because we have been involved in some economic liberty cases over the years that involve the dental industry. The dental industry, like many industries, is very protectionist. Of course, the dental industry is very regulated, you need a license in any state to practice dentistry and various subcategories of dentistry. Also, things like dental hygienists, you know, they need a license. And so there's a lot of restrictions that are pretty anti-competitive, that go beyond just protecting public health and safety in the dental industry. So we filed an amicus brief a few years ago about our work when it comes to economic liberty and in constitutional protections of economic liberty in a case that went to the US Supreme Court about antitrust law. So something people don't realize sometimes is that antitrust law can apply to the government in a way like it can to private businesses. Now, I know, especially libertarians have a lot of critiques of antitrust law. And those are often very good criticisms about how it's not really about competition and how it can actually hurt competition. But federal antitrust law has been

around a long time. The Sherman Act was enacted in the late 19th century. And it has been understood not just to apply to, say, businesses getting together and colluding on things like prices and competition, but also actors for the government in certain ways. So the way it usually works is if you're the legislature and you pass a law regulating something or other in the state, that cannot be an antitrust violation. You can't say the legislators got together and they created a lack of competition because they had a price fixing law or something like that, or rent control or whatever it is. That that is not an antitrust law violation. But if you have something where you don't have a clear legislative guidance, or you don't have control review by someone, essentially, who works for the state itself, who's an elected representative, so say the governor or the attorney general of the state reviews what the regulators are doing, or has direct control over what the regulators are doing, then you can have an antitrust problem. So you don't have immunity, it's called Parker immunity after this case from the 1940s, for your antitrust violation. And so this case from 2015 looked at this kind of immunity at the US Supreme Court. And it had to do with the dental board of the state of North Carolina. It was North Carolina State Board of Dental Examiners v. FTC. And it was actually the FTC, the Federal Trade Commission, that brought this case. The details escape me, but it was about teeth whitening. And we've done a few cases to do with teeth whitening because dentists often don't like the competition from just, you know, whitening your teeth without having to go to a dentist and get expensive marked-up procedures done. And so the FTC brought this case, it went to the the US Supreme Court, on whether the members of the dental board, who are mostly dentists, as often is true of these professional boards, are immune from federal antitrust law. And the Supreme Court in that case said, there were some specific facts about how their decisions were reviewed and how the board was structured and that kind of thing, but basically, it said the individuals on the board were not immune from federal antitrust law. Whether or not there's an antitrust violation, a conspiracy, as we say, in antitrust law, is a different question. But the initial immunity from the suit in the first place wasn't found to be there. So fast forward, there is this company Smile Direct, as I mentioned earlier. I'm not exactly sure how they work. But they're these little gap spacers you put in your teeth that you can get online that will do some orthodontic work on your teeth without doing the full blown, you know, go to an orthodontist and get all the braces and all that. And so this was offered and licensed in the state of California by a company I think based in Washington state, or at least the service provider in this case. But nevertheless, Smile Direct says the dental board was harassing them with various enforcement mechanisms. So legal, or at least arguably illegal under the state's regulations, you know, that they were not living up to the four corners of whatever the regulation is, but in a way, they said, that wasn't being done to others. And so they were singling them out. And the conspiracy of the board members who themselves are competitors, in their private capacities, was an antitrust violation. The district court threw this out on a motion to dismiss . And it went up to the Ninth Circuit. Now, the interesting thing about what the Ninth Circuit did is that the district court said there's no immunity here under this North Carolina case from 2015. But then they said, nevertheless, what the board was trying to do was just enforce the law, and so there can't be an antitrust problem. And the Ninth Circuit said, Look, that's really saying immunity after you've said there's no immunity, that's really the same issue. So just because they're using government power, and it's not, you know, blatantly not according to the law, doesn't mean that there can't be an antitrust problem. It's just immunity in a different guise. And so they said there is a claim here, and they remanded to go forward with discovery and all the business that you have in a federal antitrust claim. And I have tried to understand this in the past. I'm not an antitrust lawyer. I never have been. And so I don't really get exactly what is needed now to prove the antitrust conspiracy. But I've been told by people who know, such as our friend Jared Bona, who practices antitrust law in

California and does these kinds of cases, this itself was not Jared's case, that it can be hard to prove that next level of antitrust. Jeff, before I continue, by the way, do you understand that and what the difference is?

J

Jeff Redfern 24:48

I guess I do a bit. I have a bit of an antitrust background, but it was more on the appellate side. So when it comes to actually doing the discovery and proving conspiracy, that's not something I've had to do myself. And my understanding is also that in this area where we're dealing with, you know, the intersection of public and private power, it's still a rapidly developing area after the Supreme Court's North Carolina decision.

A

Anthony Sanders 25:23

That a good point because the North Carolina decision is a Justice Kennedy decision, and in classic Kennedy style, although I do like the decision, there was some ambiguities about, you know, where the lines are going to be beyond maybe what you normally would have in the case because there was some broad flowing language and then some stuff where you're kind of scratching your head. So this very much is still being worked out.

J

Jeff Redfern 25:51

And for a long time, a lot of people were just operating under the assumption that, if you had any connection to state action, antitrust just didn't apply. I think the Supreme Court laid out pretty clearly why that was not correct and had never been the law. So it wasn't trying to change things in the North Carolina case, it was just clarifying that, you know, there had never been blanket immunity just because you hold a state position, particularly with boards like this. Like you said, these are not elected officials, these are people who are moonlighting as regulators, but basically are just industry participants regulating their own competitors.

A

Anthony Sanders 26:34

Yeah, and one thing that the Supreme Court said in that case was, if you do have a board like this, you need some strict supervision. I mean, that wasn't language they use, but essentially, you need some close supervision of the elected folks or the attorney general or the governor or what have you. And often if there's anything like that, it's really a rubber stamp, and the boards just kind of do what they want. And that seems to be some of what was going on here. That wasn't all that was claimed in this case. That was the major part of the appeal, and that will be the case going forward when it's on remand. But Smile Direct also brought a Dormant Commerce Clause claim, which didn't go very far. And I don't think we need to get into it, but they also brought an equal protection claim, under a class of one theory, it's called, and this is something that really is crying out for more development at the Supreme Court. And for some reason, the Supreme Court isn't interested in it. Well, I mean, we could guess why the Supreme Court isn't interested, but it hasn't been developed. And so there's a growing frustration in the circuit courts about what the heck it is. So class of one is the idea that you can have an equal protection violation even if you're not talking about, say, two separate groups. Now, the classic

case, of course, would be, like, two groups of different races or two groups of different genders. Or if you're talking about more of a rational basis level, groups of, say, those who have licenses and those who don't, or what have you. Class of one is just you are your own class, but you have been treated differently than other folks in a different class, and so there's an equal protection problem. And then usually how this comes up is, say, a property owner. So I was denied a permit to build on my property, but my neighbor across the street has exactly the same looking kind of property, and he got a permit. And my little class of one was discriminated against. Well, Smile Direct is saying they're a class of one. Now, all of this is unfortunately under the rational basis test. So you need a really kind of barbaric situation like the kinds of cases we do at IJ, a rational situation where you where you have a chance of prevailing. But what is even the class in the first place? And so a lot of courts, and the Ninth Circuit now has joined them, have said, You need to have the class to be comparable in all material respects. Which to me sounds like you could argue you have to be exactly identical other than the thing that you're being treated unfairly about. So if your neighbor's lot across the street is just a little bit bigger than yours, are you comparable in all material respects? Well, I could see the city in that case arguing, no, we're not, there's the different sized lots, which kind of explodes any equal protection claim when you're talking about property because property is always different sizes. So in this case, Smile Direct, they say that that's going to be the standard. And they say that it was properly dismissed, because under the complaints, there wasn't sufficient allegations that it was comparable in all material respects. That wasn't the strongest claim in the first place. But this eventually needs to get to the Supreme Court. And I hope the Supreme Court gets a little teeth on what class of one means.

Jeff Redfern 30:33

Yes, or, you know, I have an issue with a lot of these cases, because it seems like what's happening is that whenever a court uses the phrase, class of one, well, first of all, the plaintiff is almost certainly going to lose. And second of all, it seems like class of one is an even harder claim to prevail on then a general equal protection claim that's brought under the rational basis test. And it's not clear that those are really supposed to be different things. You know, we know that we have heightened scrutiny if the government is distinguishing between people on the basis of race or gender, for instance, but when it's drawing distinctions on any other basis, it seems like it should be the same inquiry, whether it's a large group of people being treated differently, or just a handful or just one. I think another issue with this that, you know, has been discussed a lot in the scholarly literature is this whole similarly situated requirement seems to be just the easiest way in the world for courts to not really consider whether what's happening is fair, because you can always find some way that two groups of people are not really identical. Because if they were really identical, then they would be treated the same way. Which is why, you know, some states under their version of the Equal Protection Clause, they don't have a similarly situated requirement, they just say, are the differences in the way you're treating these people related to the differences in the way they're situated? And if you're treating them differently in a way that has no rational connection to the differences in how they're situated, then that states a claim. And it seems like that should be the situation here. If that were the standard, I think that Smile Direct would have stated an equal protection claim. Their argument is, Look, we've been singled out for no reason other than that we pose a competitive threat. And that, whatever differences there are in the way we run our business, those don't explain why we're being targeted in this way.

Anthony Sanders 32:49

Yeah, that is very frustrating in a lot of equal protection cases, that the court, instead of getting to the the merits analysis, which itself is going to be super hard if it's a rational basis standard of review, just gets rid of the claim on the similarly situated analysis. It almost seems like they think there's going to be an "open the floodgates" kind of situation of claims if they don't have that initial barrier, without thinking through that the rational basis test itself is going to be the what keeps out any spurious argument about opening the floodgates of litigation. Well, Jeff, thanks for smiling through this entire episode, despite what we started with. But we ended on some some good news for for smiles and perhaps for economic liberty, depending on your view of antitrust law. Next week, again, look forward to Short Circuit Live. It will be hosted by my colleague Anya Bidwell, with some really smart Supreme Court lawyers and, most importantly for the episode, former DC circuit clerks. And that again is Lisa Blatt, Kelsi Brown Corkran and Paul Clement. All names that will be familiar to Supreme Court watchers. And we look forward to that episode next week. In the meantime, though, with April Fool's Day right around the corner, this is no joke. I want all of you to get engaged.