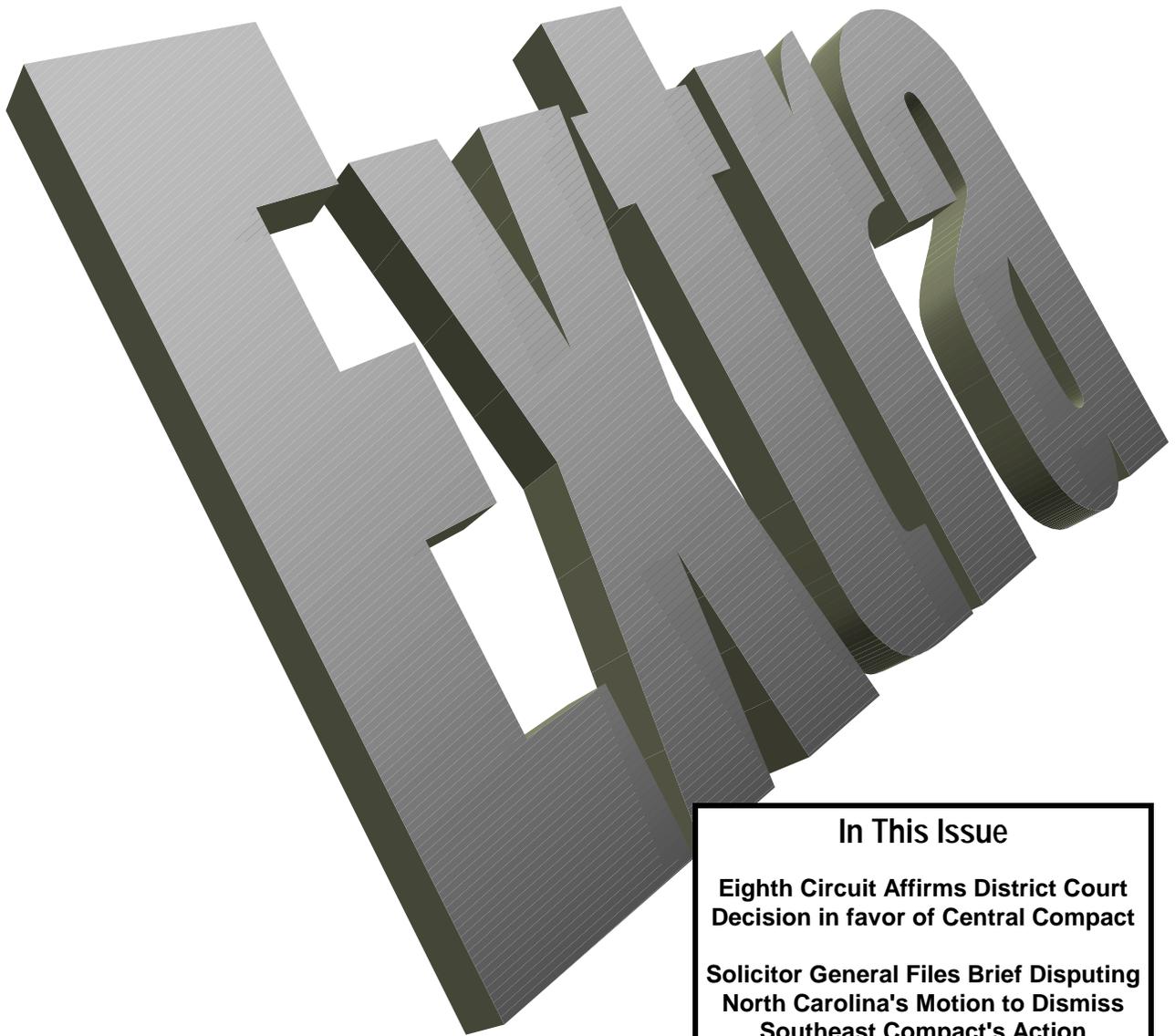


# LLW *notes*

Volume 19, Number 1.1 January/February 2004



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LLW Forum, Inc • 1619 12th Street, N.W. • Washington D.C. 20009  
(202) 265-7990 • FAX (202) 265-7995 • E-MAIL [llwforuminc@aol.com](mailto:llwforuminc@aol.com) INTERNET [www.llwforum.org](http://www.llwforum.org)

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# Low-Level Radioactive Waste Forum, Inc.

## *LLW Notes Extra*

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Editor and Writer: Todd D. Lovinger

Layout and Design: Rita Houskie, Central Interstate Low-Level Radioactive Waste Compact

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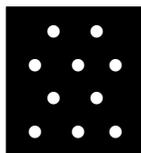
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LLW  
FORUM, INC

Low-Level Radioactive Waste Forum, Inc.  
1619 12<sup>th</sup> Street N.W.  
Washington, DC 20009  
(202) 265-7990  
FAX (202) 265-7995  
E-MAIL [llwforuminc@aol.com](mailto:llwforuminc@aol.com)  
INTERNET [www.llwforum.org](http://www.llwforum.org)

## Key to Abbreviations

U.S. Department of Energy DOE  
U.S. Department of Transportation DOT  
U.S. Environmental Protection Agency EPA  
U.S. General Accounting Office GAO  
U.S. Nuclear Regulatory Commission NRC  
Naturally-occurring and accelerator-produced radioactive material NARM  
Naturally-occurring radioactive material NORM  
Code of Federal Regulations CFR

## Eighth Circuit Affirms District Court Decision in Favor of Central Compact

On February 18, the U.S. Court of Appeals for the Eighth Circuit filed a decision affirming a lower court's ruling in a case filed by the Central Interstate Low-Level Radioactive Waste Commission against the State of Nebraska. The case involves a challenge of the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes*, September/October 2002, pp. 1, 15-17.) The court awarded the compact commission over \$151 million in damages.

In affirming the lower court's decision in favor of the Central Commission, the appellate court concluded as follows:

After lengthy proceedings in the district court and multiple appeals before different panels of this court, the issues have been fully presented. We have carefully examined the extensive record and the arguments of the parties, and for the reasons cited we conclude that the district court did not err in striking Nebraska's demand for a jury trial, in finding that Nebraska breached its good faith obligation under the Compact, in exercising its discretion in fashioning monetary relief instead of an injunction, in its award of damages and interest, or in any other respect relevant to this appeal.

A copy of the appellate court's opinion itself can be viewed on-line at <http://www.ca8.uscourts.gov/opndir/04/02/023747P.pdf>

### Background

On December 21, 1998, Nebraska regulators announced their decision to deny US Ecology's license application. (See *LLW Notes*, January/February 1999, p. 8.) Nine days later, five regional utilities filed suit,

arguing that Nebraska regulators violated the compact, state, and federal law—as well as a statutory and contractual obligation to exercise "good faith"—in their review of the license application. (See *LLW Notes*, January/February 1999, pp. 16-17.)

**The Parties** The utilities which filed the original action included Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Wolf Creek Nuclear Operating Corporation; and Omaha Public Power District. (Omaha Public Power District voluntarily dismissed its complaint in advance of the trial, however, and is not part of the judgment.) One Nebraska utility opted not to join the action. In addition, US Ecology—the company chosen to site and operate the proposed Central Compact disposal facility—joined the action as a plaintiff in March 1999. The Central Interstate Low-Level Radioactive Waste Commission was originally named as a defendant in the suit, but subsequently realigned itself as a plaintiff.

Various Nebraska agencies, officials, employees and individuals were named as defendants to the original action. However, during the course of the litigation, several amended complaints were filed and certain claims—such as the due process claims put forth by the generators and US Ecology—were dismissed. In the end, the defendants to the action, as identified in the Central Commission's amended complaint, included the State of Nebraska, its Governor, and the Directors of the Department of Environmental Quality (NDEQ) and Department of Health and Human Services Regulation and Licensure (NDHHS).

**The Issues** In the original action, the generators and US Ecology claimed that the license application was denied on improper grounds and that the entire license review process was tainted by bias on the part of Nebraska and by the improper involvement of NDHHS. They cited various instances of bad faith by the state, all of which were disposed of by the lower court in regard to US Ecology's and the generators' suit, including but not limited to improper delays and impediments, the state's refusal to adopt adequate budgets or schedules, and the filing of repeated

## Courts *continued*

litigation against the project. They also challenged the constitutionality of the procedures employed in making a licensing decision, and they alleged various related statutory and constitutional violations. (For a more detailed explanation of the issues raised by US Ecology and the generators, see *LLW Notes*, January/February 1999, pp. 16-17.)

In its amended complaint, the Central Commission argued that "the defendant State of Nebraska has violated its contractual, fiduciary, and statutorily established obligations of good faith toward sibling Compact states and the administrative entity comprised of the representatives of the five states, that is, this Commission." (Persons interested in a listing of the specific alleged violations are directed to the amended complaint themselves.)

**Requested Relief** In its amended complaint, the Central Commission sought declaratory and monetary relief including, among other things:

- ◆ an accounting of all funds received by the State of Nebraska in furtherance of the project and the exact uses of said funds;
- ◆ compensatory damages for costs incurred due to Nebraska's alleged misconduct; and
- ◆ the creation of "a just and equitable remedy . . . including the removal from the State of Nebraska's independent control, supervision, and management any further aspect of the regional facility's license application process."

In particular, the Commission requested that the court "substitute an appropriate manner of completing the licensing, such as through an appointed Master, or through a scientifically qualified, appointed entity or group representing either all of the five Compact states equally, or in the alternative, none of them, or through another impartial appropriate governmental agency."

**District Court's Decision** On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes*, September/October 2002, pp. 1, 15-17.) In its decision, the court did the following:

- ◆ entered judgment in favor of the State of Nebraska and all defendants against the utilities and US Ecology;
- ◆ entered judgment in favor of the Central Interstate Low-Level Radioactive Waste Commission against the utilities and US Ecology;
- ◆ entered judgment in favor of the Central Commission against the State of Nebraska, the Nebraska Department of Environmental Quality, and the Nebraska Department of Health and Human Services Regulation and Licensure; and
- ◆ entered judgment in favor of Nebraska and all other defendants against the Central Commission regarding the commission's fiduciary duty claim and misuse of rebate claim.

In regard to the Central Commission's "good faith" claim, the court ruled that the commission shall recover from Nebraska the sum of \$151,408,240.37 plus post-judgment interest. In addition, the court issued a declaratory order that "the State of Nebraska breached its 'good faith' obligation under Art.III(f) of the Central Interstate Low-Level Radioactive Waste Compact when processing the license application." The court also taxed costs against the State of Nebraska.

The court rejected a proposal by the commission and some of the utilities to order an independent review of the license application via the appointment of a special master. In addition, the decision made clear that the court would not order the state to issue a license.

The court's entire opinion, which is approximately 200 pages in length, can be found on-line at <http://www.ned.uscourts.gov/entopinions/index.html>.

**US Ecology's Pursuit of Damages** Following the district court's decision, US Ecology announced its intention to seek over \$12 million in damages from the judgment awarded to the compact commission. That figure represents the \$6,247,920 that the court determined US Ecology made in contributions in the form of work intended to achieve a license, plus interest from the time of the contributions up to the date of the ruling. According to the court, "the Commission lost the entire value of these contributions as a direct result of Nebraska's bad faith conduct."

**Nebraska's Appeal** The state filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit on October 30, 2002. (See *LLW Notes*, November/December 2002, pp. 13 - 14.) In subsequent court filings, the state identified the following six issues to be raised in its appeal of the district court's decision.

- ◆ Whether a commission, not a party to an interstate compact, may recover money damages from a compact member state when neither the commission nor any compact member state suffered monetary loss from a breach of that compact?
- ◆ Whether a state that is a member of an interstate compact has a right to a jury trial in breach of compact action brought in federal court by a private party seeking money damages?
- ◆ Whether a district court can properly find that a state violated its compact duty to conduct a license application review process in good faith based on its findings that the state's governor publicly stated and acted as though he opposed the license, even though the evidence does not support a finding that (i) the governor ever directed the state's regulatory agencies to deny the license, (ii) the regulatory agencies ever agreed to or reviewed the license application on any basis other than its merits, and (iii) the agencies acted arbitrarily and capriciously by denying the license?
- ◆ Whether a district court may award prejudgment and post-judgment interest against a compact member state when the purported sovereign immunity waiver in or under the interstate compact does not provide for any award of interest, and may calculate prejudgment interest from the date of each payment by the plaintiff, rather than the date of the compact breach or other date?
- ◆ Whether a district court, which has enjoined a state licensing process because the state had conducted it in bad faith, can order the state to pay all of the money that third parties have spent on that process, rather than order it to correct any bad faith conduct and finish the process?
- ◆ Whether a district court's finding of liability and damages must be reversed because the evidence

relied upon to reach a finding of bad faith should have been barred, in whole or in part, by the applicable statute of limitations, the res judicata doctrine, and/or the Noerr-Pennington doctrine?

Oral arguments on the appeal were heard on June 12, 2003. (See *LLW Notes*, May/June 2003, p. 12.)

*For additional background information, see LLW Notes, May/June 2001, pp. 1, 11-12. For information about a novel "equitable remedy" requested by the Central Commission in its final brief, including the appointment of a Special Master to head a license review completion process and the possible termination of Nebraska's regulatory authority over low-level radioactive waste, see LLW Notes, August/September 2002, pp. 14-15.*

### **Appellate Court's Decision**

After reviewing the record, the appellate court made the following conclusions in regard to each of the issues that Nebraska raised on appeal:

**Did the District Court Err in Striking Nebraska's Jury Trial Demand?** The Seventh Amendment to the U.S. Constitution guarantees that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Supreme Court has explained this to mean that the "right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted." Applying this standard to the case at hand, the Eighth Circuit Court of Appeals held as follows:

[W]e conclude that the district court did not err by striking Nebraska's jury demand. The Commission's action is not analogous to one tried at law in the English courts of the Eighteenth Century. It involves a dispute growing out of an interstate compact, sanctioned by the Constitution and Congress, and entered into by five sovereign states. It is unlike disputes tried to a jury in the Eighteenth Century. The chief remedy sought by the Commission was sweeping injunctive relief to move the application process forward and construct a radioactive waste disposal facility in Nebraska. It was only after the district court had heard all of the evidence that the extent of Nebraska's bad faith was established and a suitable remedy

had to be fashioned. When the court found injunctive relief no longer practical, it turned to the Commission's interrelated request for compensatory damages to provide an appropriate remedy. We conclude that the district court did not commit legal error or abuse its discretion in fashioning this monetary relief and that it did not violate the Seventh Amendment by striking Nebraska's demand for a jury trial in the circumstances of this case.

**Did the District Court Err in Finding that Nebraska Breached its Good Faith Obligation Under the Compact?** The State of Nebraska argued that the district court should have applied an arbitrary and capricious standard of review in determining whether the state breached its good faith obligation because, among other things, Article V(g) of the Compact provides that a state's membership in the compact may be revoked if it is found to have "arbitrarily or capriciously denied or delayed the issuance of a license." The appellate court rejected this argument, however, holding that "[i]t does not follow that the standard for revocation of membership should control other issues under the Compact." Indeed, the appellate court concluded that limiting bad faith to arbitrary and capricious behavior would undermine the structure of the compact. Accordingly, the appellate court found that the district court properly determined the question before it to be "whether a preponderance of the evidence proved that the State of Nebraska failed to act in good faith in respect to its obligations under the Compact." In this regard, the appellate court held that "[t]he voluminous record supports the district court's factual findings of bad faith." These findings included, among other things, the following:

- ◆ Nebraska's final decision was at odds with the findings and conclusions contained in technical reports prepared by, or on behalf of, the state;
- ◆ Nebraska completely ignored conclusions contained in both the IPA and the DSER that groundwater did not pose a problem that would prevent licensing and opted instead to follow the conclusions of a later study conducted by its review manager for site characteristics (both the district court and appellate court concluded that this later study was not as scientifically persuasive as the earlier research);
- ◆ evidence indicates that the groundwater issue was raised to support a political decision to deny the license;
- ◆ evidence indicates that Nebraska attempted to manipulate the review of US Ecology's financial condition so as to support a decision denying the license;
- ◆ former-Governor Benjamin Nelson's administration appears to have been biased against the proposed disposal facility and evidence indicates that the administration intended to undermine it; and,
- ◆ Nebraska filed six cases against the Central Commission, at least one of which both the district and appellate courts viewed as an attempt to conduct "hit-and-run guerilla warfare by filing multiple lawsuits on the same claim in order to frustrate performance of the Compact."

Based on these findings, the appellate court concluded as follows:

[T]he district court did not clearly err in finding that Nebraska ultimately denied the license application for reasons not related to the merits of the application. Such a denial in the context of Nebraska's commitments in the Compact is the essence of bad faith, a calculated "evasion of the spirit of the bargain." Throughout the course of the licensing process, Nebraska exhibited a lack of diligence or cooperative effort and willfully rendered imperfect performance. We conclude that the district court did not err by finding that Nebraska breached the duty of good faith imposed by the Compact." (citations omitted)

**Was the District Court's Monetary Relief Award Erroneous?** Nebraska challenged the award of monetary damages by the district court, arguing instead that the proper remedy for a finding of a flawed administrative decision would have been to remand to the agency with instructions to correct the flaw. The appellate court rejected this argument, however, noting that nothing in the compact limits the remedies for breach to a remand and that the district court considered injunctive relief, but rejected it based on the unlikelihood that an injunction could be

effectively enforced. Accordingly, the appellate court held that "[g]iven the record of Nebraska's bad faith and antagonism to the disposal facility since the state was chosen as the first site, the district court did not abuse its discretion by awarding monetary relief when injunctive relief was no longer feasible."

Nebraska also argued that even if damages were a permissible form of relief, the Central Commission suffered no losses on which such a remedy could be based because the funds it was seeking to recover came from the generators. Furthermore, the state asserted that the district court overstated the commission's losses because it did not reduce its award to account for the residual value of the license application. The appellate court rejected these arguments finding (1) that the funds that the Central Commission sought to have reimbursed all became assets of the commission at some point during the licensing process, and (2) that the commission received no value from the licensing process that would justify a reduction in the district court's award.

### **Did the District Court Err by Awarding Interest?**

Nebraska challenged the award of interest by the district court on several counts. First, it claimed that the state enjoys sovereign immunity from interest and that only a specific waiver of such immunity would justify an award of interest. The Eighth Circuit disagreed, however, finding that "if a state's sovereign immunity does not bar the underlying monetary award, it will not bar an award of interest . . . Because Nebraska has waived its immunity from an award of damages, it also has no immunity from the assessment of interest." Next, Nebraska argued that even without constitutional immunity, an award of prejudgment interest was not legally permissible in this case because it was not specifically authorized by the compact. Again, the appellate court rejected this argument, noting that federal common law clearly permits prejudgment interest to be awarded as part of the remedy for breach of an interstate compact. The court further rejected Nebraska's argument that the district court should have applied a Nebraska statute that prohibits imposition of prejudgment interest on the state. In this regard, the court pointed out that the rule is that "whether interest is to be allowed . . . is a question of federal law where the cause of action arises from a federal statute." Finally, Nebraska challenged the amount of prejudgment interest awarded by the court. But, the appellate court determined that the district court did not abuse its discretion in awarding

prejudgment interest from the date that the Central Commission made payments in reliance on Nebraska's performance. Doing so, according to the appellate court, achieves the goal of full compensation.

### **Nebraska's Reaction**

Following the appellate court's decision, local news media reported that Nebraska Attorney General Jon Bruning said the state would contest the ruling, but he acknowledged the likelihood of success appeared limited. "I think it's safe to say this is not the end of the line," Bruning said at a news conference. "When you're dealing with \$151 million, you continue to fight." Nonetheless, Bruning acknowledged that the district court's finding of bad faith "would be a very high hurdle to clear" in an appeal. To prevail, he said, the state would have to show the judge's finding was clearly erroneous. Nebraska Governor Mike Johanns was also quoted in the local press as stating that the court's ruling left the state with three options: seek a rehearing from the panel, ask the full Eighth Circuit Court to consider the case, or file a direct appeal to the U.S. Supreme Court. "We really need to see this case to conclusion," Johanns said. "One hundred-fifty-million-dollar judgments, at least in this part of the world, are very rare."

*Alabama, Florida, Tennessee, Virginia and the Southeast Interstate Low-Level Radioactive Waste Management Commission v. State of North Carolina*

## Solicitor General Files Brief Disputing North Carolina's Motion to Dismiss Southeast Compact's Action

Last week, the Solicitor General filed a brief with the U.S. Supreme Court in regard to a lawsuit seeking the enforcement of sanctions against North Carolina, the Southeast Compact's designated host state, for its failure to develop a regional low-level radioactive waste disposal facility. (See *LLW Notes*, May/June 2002, pp. 1, 11.) The brief, which argues that North Carolina's motion to dismiss the claims of the Southeast Compact Commission should be denied, was submitted in response to the Special Master's invitation to the Solicitor General to express the views of the United States on North Carolina's motion.

### Background

**The Complaint** On June 3, 2002, the States of Alabama, Florida, Tennessee, and Virginia—as well as the Southeast Compact Commission—filed a "Motion for Leave to File a Bill of Complaint" and a "Bill of Complaint" in the U.S. Supreme Court against the State of North Carolina. The action, which accuses North Carolina of "failing to comply with the provisions of North Carolina and the Southeast Compact laws and of not meeting its obligations as a member of the Compact," seeks to enforce \$90 million in sanctions against the defendant state. It contains various charges against North Carolina, including violation of the member states' rights under the compact, breach of contract, unjust enrichment, and promissory estoppel. (See *LLW Notes*, May/June 2002, pp. 1, 11.)

*For specific arguments raised in briefs filed by the petitioners and respondent, see [LLW Notes](#), July/August 2002, pp. 15-17. For a procedural history of prior filings in the case, see [LLW Notes](#), May/June 2003, pp. 10 - 12.*

**Original Jurisdiction** Under Article III, Section 2 of the U.S. Constitution, the U.S. Supreme Court may exercise original jurisdiction over a judicial case or controversy between states. In

determining whether or not to do so, the Court has generally considered two factors: (1) the "nature of the interest of the complaining State," focusing mainly on the "seriousness and dignity of the claim," and (2) "the availability of an alternative forum in which the issue tendered can be resolved."

**Motion to Dismiss the Complaint** North Carolina filed a motion to dismiss the Southeast Compact Commission's claims on August 15, 2003. (See *LLW Notes*, July/August 2003, pp. 13 - 15.) In its motion, the state put forward three arguments in support of dismissal of the action: (1) the state is immune from suit by the commission, absent abrogation or consent, because the commission is not the federal government or a state, (2) the state has not waived its immunity from suit by the commission, and (3) the commission cannot ride "piggyback" on the claims of the states.

*For a detailed summary of North Carolina's arguments in support of dismissal of the action, as well as identification of affirmative defenses raised by the state, see [LLW Notes](#), July/August 2003, pp. 13 - 15.*

### Issues Identified by the Solicitor General

In the opening of its brief, the Solicitor General framed the overall issue presented to the Court by North Carolina's motion as follows:

Whether the Eleventh Amendment bars the Southeast Commission from asserting claims in a Supreme Court original action, jointly with four compacting States, that North Carolina has violated the Southeast Compact and is subject to the Commission's sanctions order?

The Solicitor General then laid out the following specific arguments raised by North Carolina in support of its motion to dismiss the action:

- ◆ the Eleventh Amendment bars the suit by the Southeast Compact Commission because it is neither a state nor a federal agency and North Carolina has not consented to the Commission's suit; and
- ◆ although the Supreme Court has in the past allowed non-state, non-federal parties to intervene as plaintiffs in original actions against non-consenting states when a party with a viable claim is before the Court (i.e., Arizona v. California), a different result should obtain in the instant action because (1) the Southeast Compact Commission seeks substantially different relief than that which the plaintiff states may seek—namely monetary relief, and (2) the Court has since repudiated the theory of jurisdiction upon which it allowed the non-state parties to intervene in the Arizona case.

Finally, the Solicitor General laid out the Southeast Compact Commission's arguments in opposition to North Carolina's motion:

- ◆ the claims of the plaintiff states and the Southeast Compact Commission are identical and the Court's decision in Arizona should be adhered to in the instant case;
- ◆ even if the Special Master were to find that the Southeast Compact Commission's claims differ from the plaintiff states' claims, the Master would be required to address an unsettled question of "the extent of its ancillary jurisdiction in original actions and whether the Commission's claims fall within it;" and,
- ◆ even if the Special Master were to determine that its ancillary jurisdiction is insufficient to support the Southeast Compact Commission's claims, he would be required to address the additional undecided question of "whether a member State has Eleventh Amendment immunity from claims made by a Compact entity."

### **The Solicitor's Conclusions**

In regard to the overall issues presented in North Carolina's motion, the Solicitor General found as follows:

The Supreme Court's original jurisdiction extends to "all Cases . . . in which a State shall

be a party" and, by statute, is exclusive in "all controversies between two or more States." The Court accordingly may adjudicate the plaintiff States' original action against North Carolina, which seeks to enforce the provisions of the Southeast Compact. The Court has additionally ruled that the Eleventh Amendment does not bar the Court from allowing a non-state and non-federal party to intervene in such suits, at least in those circumstances in which that party's claims are the same as those of a party that is properly before the Court. The Southeast Commission's claims fit within that description, and the Special Master should accordingly deny North Carolina's motion to dismiss those claims. The Master should decline North Carolina's invitation to examine whether the Court's subsequent decisions, which do not directly address the continued vitality of that principle, have implicitly repudiated the Court's decision in Arizona v. California. (citations omitted)

### **The Plaintiff States' Claims Fall Within The Supreme Court's Original Jurisdiction**

The Supreme Court has original and exclusive jurisdiction over a judicial case or controversy between states. In the prior original action arising out of the same underlying dispute at issue in the present case, the Solicitor General argued that the Supreme Court's exclusive original jurisdiction does not extend to a suit brought solely by the Southeast Compact Commission to enforce the compact's provisions because the Southeast Compact Commission is not a state. In its brief, however, the Solicitor General noted that the Court would have original jurisdiction over a suit brought by one or more of the compacting states to enforce the compact's provisions. The Solicitor General adhered to such a position in the present brief. According to the Solicitor General, "[c]ontrary to North Carolina's suggestions, the plaintiff States, in the exercise of their own rights, may seek enforcement of the Commission's sanctions order, provided that they can establish that the Southeast Compact authorizes that order." (emphasis added) In support of its argument, the Solicitor General notes that the plaintiff states are not asserting claims on behalf of a private party against another state, but rather are seeking the lawful enforcement of sanctions provisions agreed to by the compacting states.

The Solicitor General did caution in its brief, however, that its conclusion that the plaintiff states are proper parties to enforce the Southeast Compact's sanctions provisions does not resolve the further issue of whether the compact's sanctions provisions authorize the sanction that the Southeast Compact Commission imposed in this case. On that question, according to the Solicitor General, the moving states and North Carolina appear to disagree on two basic interpretive issues:

- (1) whether the Compact empowers the Southeast Commission to impose, as a sanction for North Carolina's failure to construct a waste facility, a requirement that North Carolina return funds that the Commission provided in preparation for construction of that facility; and (2) whether the Compact divested the Commission of authority to impose that sanction when North Carolina withdrew from the Compact before the Commission completed the sanctions process.

The Solicitor General expressed no view on these issues in its brief, but rather simply stated that it "expects that those issues would be resolved in further stages of this original action."

**The Eleventh Amendment Does Not Prevent the Southeast Commission from Joining in the Plaintiff States' Complaint and Asserting Identical Claims in this Original Action** North Carolina argues that the Southeast Commission's claims should be dismissed because the Eleventh Amendment bars the Commission from suing a state. While the Solicitor General agrees that the Eleventh Amendment would bar the commission itself from bringing this action alone, the Solicitor General points out that the Supreme Court's previous decisions recognize that the amendment "does not bar a non-state and non-federal party from participating in a suit that is properly instituted under the Court's original jurisdiction, provided that the party does not 'bring new claims' against the State."

North Carolina contends that the Southeast Compact Commission is, in essence, bringing "new claims" because it seeks relief "different in quantity and quality" from that sought by the plaintiff states. The Solicitor General, however, agrees with the position of the commission and the states that, at least in

reference to the enforcement of the commission's sanction order, they are "making the same claim and seeking the same relief." The Solicitor General explains its reasoning as follows:

Given the apparent identity of the plaintiff States' and the Commission's claims, North Carolina's motion to dismiss should be denied . . . [T]he plaintiff States are entitled, as parties to the Southeast Compact, to seek enforcement of the Compact, including the Commission's sanctions order. There is nothing in the complaint suggesting that the Southeast Commission is asserting claims or seeking relief beyond what the plaintiff States themselves are seeking. The Supreme Court's decision in Arizona II accordingly counsels against dismissal of the Southeast Commission's claims. The Southeast Commission does "not seek to bring new claims" against North Carolina, and the Court's "judicial power over the controversy is not enlarged" by the Commission's presence. Under the Court's reasoning in Arizona II, North Carolina's "sovereign immunity protected by the Eleventh Amendment is not compromised." (citations omitted)

**The Special Master Should Decline North Carolina's Invitation to Treat the Supreme Court's Directly Applicable Precedent as "Effectively Disavowed"** North Carolina contends that even if the Supreme Court finds that the claims of the Southeast Commission and the plaintiff states are identical, the Eleventh Amendment still bars the Commission's claims because the Court's decision in Arizona II allowing such identical claims by non-state and non-federal parties "has been effectively disavowed by the Court in more recent Eleventh Amendment/sovereign immunity cases." The Solicitor General disagrees. In the first place, the Solicitor notes that the cases cited by North Carolina do not involve identical claims by private parties. Moreover, the decisions in those cases do not discuss Arizona II. Instead, the cases referenced by North Carolina "address[] the uniquely sensitive issue of federal court enforcement of a state law against a State or an arm of the State." The Solicitor also notes that the Court's decision in Arizona II does not stand in isolation, but rather "appears to state a principle of continuing vitality."

The Solicitor General also points out that North Carolina's Eleventh Amendment objection may ultimately have no bearing on the outcome of the action:

If it is ultimately determined that the plaintiff States may obtain enforcement of the Southeast Commission's sanctions order, then the Commission's identical claims for enforcement would appear to be of no substantial consequence. Similarly, if it is ultimately determined that the Commission's sanctions order was beyond the Commission's authority, then the Commission's identical claim for enforcement would not alter that outcome. The issue would be significant only if the plaintiff States cannot obtain enforcement of the sanctions order, but the order is nevertheless lawful.

Accordingly, the Solicitor General asserts that the Court should decline North Carolina's invitation to reexamine clearly applicable precedent. If the issue ultimately has any practical relevance to the case at hand, the Solicitor argues that North Carolina may present it to the Court through exceptions to the Master's ultimate recommendations.

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