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Here Comes the Judge, There Goes Your Business

by **Keith Biondo**
Publisher

Judicial activism impacts all business. Not content to legislate from the bench on social issues, the courts have now gone off the legal reservation and applied the activist and collectivist bias to business, your business. Whether or not you agree with the results of an activist decision is not the point. The point is that laws should be made by a democratic process, not by judges.

According to a recent Supreme Court decision, the concept of eminent domain has been rewritten, and the results of this judicial lawmaking can put your business at risk. Here's the issue: local taxing authorities now have the option to apply eminent domain not just for the greater public good, but to get the highest tax revenues.

Eminent domain is an extremely valid concept in terms of economic development. It used to mean that state and local governments could seize your property when building public works projects, such as an interstate or a new dam. Sometimes you were even fairly compensated for the land that stood in the way of the public works project.

This rationale was sound if your business stood in the way of an I-39 extension, for example. Your property rights were recognized but the rights of a greater number of citizens to have a freer flow of commerce trumped your individual rights. Eminent domain is fair, if it is applied

fairly. Democracy, right?

Now, however, in response to the unquenchable need for more taxes to fuel our burgeoning, all-encompassing, Matrix-like safety net, you might get a knock on your DC door.

"Hello, we're from the government and we're here to help. Now get out of your DC, your business, and get off our land."

"Why?" you ask. "Are you building a new interstate? Do you want to flood the valley to put up a new hydro-electric power plant that will provide larger economic development opportunities?"

"Nope, we're putting up luxury housing and a Krispy Kreme." Nice.

Where this new precedent will lead no one is certain. But what's clear is that more law suits will pit business against business. And the concept of private property rights, developed over thousands of years of practice and common sense, is left to the mercy of the voracious tax machine.

There is an inherent conflict of interest here because those who make the call on seizing your property are those who get the increased tax revenue.

Here's the best part. You can't fight them in court and win. Who says so? Why, the Supreme Court of the United States! In their zeal to create new pathways for wealth distribution, the Court, in its recent eminent domain ruling, ignored the obvious conflict of interest issue. It's obvious even to me, and I'm no jurist.

- Now start packing! It won't be long before some clever insurance underwriter begins offering an eminent domain protection rider to business insurance policies. I'm buying.

If you still think judicial activism doesn't impact your business, the Schramm v. Foster case should strike fear in the hearts of anyone who uses third-party logistics providers. Like the eminent domain decision, it is another case where judges ignore precedent, common law -- even common sense -- to circumvent the messy democratic process and craft a world they think is right and just.

The Schramm v. Foster case arose after a carrier hired by a 3PL was

found to have caused an accident that seriously injured two young men. Lawyers for family members sued not only the carrier, but also the 3PL that hired the carrier on behalf of a shipper. Historically, only carriers had been held liable for damages they caused. But in this case, the judge allowed the trial lawyers access to the deeper pockets of the logistics services provider.

In the words of Judge Motz, the deciding judge in the Maryland District Federal Supreme Court, "This is a case in which the law may simply have to catch up with an obligation that...[the 3PL] has voluntarily assumed."

Judge, if the 3PL assumed the liability, why was it contesting the decision in court? In absence of that law -- made by lawmakers, in that messy process that balances the rights of all -- I guess judges must make their own laws for us to follow.

I am surprised the judge did not allow the lawyers to go after the truck manufacturer as well. Or the shipper who hired the 3PL who chose the trucker. Or the customer who ordered the product from the shipper who hired the 3PL who chose the trucker.

Judge Motz's activist stance is a logical extension of the idea that it's OK to get money from anyone, even if they are not directly related to the issue creating the loss. Remember the McDonald's coffee cup? If no law existed, the judge should have thrown the case back to the regulating bodies instead of making his own law.

And it gets even worse. The judge also found, incredibly, that brokers and 3PLs are responsible for safety checks for any trucker they hire, if there is no existing DOT certificate. And, the 3PL has to check every transaction (shipment) with the FMCSA Safestat database -- as if that's up to date. The 3PL involved in Schramm v. Foster runs with more than 20,000 carriers and conducts millions of transactions each year. Get out your overalls and creeper.

If this decision stands, it will create an unjust liability that will impact the use of outsourced logistics providers. This case sets a precedent where anyone in the transportation chain is liable for damages created by anyone else in the chain. Don't think trial lawyers won't jump all over this. Thanks, Judge.

All those concerned in our industry should fight this kind of judicial activism -- redistribution of wealth and blame regardless of culpability, regardless of property rights. Don't sit there and fulminate. Do what you can now to get involved or those who sit above us all, high up on a bench, will hand down decisions that continue to damage business in America.

A handwritten signature in blue ink that reads "Keith Bonds". The signature is written in a cursive, flowing style.

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