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NO. STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

DATE: April 15, 1993

SUBJECT: AM0916: Amendment to LB 137 Making Ten-Year Statute of Repose in Neb. Rev. Stat. § 25-224 Inapplicable to Products Manufactured Outside Nebraska

REQUESTED BY: Senator Stan Schellpeper
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

You have proposed an amendment to Legislative Bill 137 making the ten-year statute of repose in Neb. Rev. Stat. § 25-224(2) (1989) inapplicable "to products manufactured outside of the State of Nebraska." Your proposed amendment would also add the following section to § 25-224:

> It is the intent of the Legislature that the changes made to this section by this legislative bill be applied retroactively to revive causes of action for injury caused by defective products which were barred by interpretation of this section prior to the effective date of this act. It is further the intent of the Legislature to protect Nebraska Manufacturers and to foster a good business climate in the state.

AM0916, § 6 (1993).

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You have asked whether these provisions violate the Commerce Clause of the U.S. Constitution. Based on the following analysis, we conclude that AM0916 violates the Commerce Clause, as well as the due process guarantee in the Nebraska Constitution. U.S. Const. art. I, § 8, cl. 3; Neb. Const. art. I, § 3.

I. DISCUSSION

A. Commerce Clause

The Commerce Clause of the U.S. Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although Congress has such power, it may remain silent on potential areas of federal regulation because of the local character, number, and diversity of these subject areas. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). "In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself." *Id.* *Accord Raymond Motor Transp. v. Rice*, 434 U.S. 429, 440 (1978). Thus, the Supreme Court has stated that the affirmative grant of power to Congress contained in the Commerce Clause also encompasses a "negative" or "dormant" aspect which prohibits states from engaging in economic protectionism--that is, imposing "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988). *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992); *Healy v. Beer Institute, Inc.*, 109 S. Ct. 2491, 2494 n.1 (1989).

The Supreme Court has gradually defined the restraints imposed upon states by the Commerce Clause in light of the basic purposes of the Clause.

> [T]he rationale of the commerce clause was to create and foster the development of a common market among the states, eradicating internal trade barriers, and prohibiting the economic Balkanization of the Union. Approval of discriminatory regulation enacted by one state would merely serve to invite retaliatory legislation by the burdened jurisdictions. . . . When local legislation thwarts the operation of the common market of the United States, the local laws have then exceeded the permissible limits of the dormant commerce clause.

2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 11.1, at 4 (2d ed. 1992). *See* ***Healy***, 109 S. Ct. at 2499 (the Constitution is concerned with maintaining a "national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres"); ***City of Philadelphia***, 437 U.S. at 623 (since the nation is our economic unit, the states are not separable economic units; one state may not economically isolate itself in its dealings with other states).

Giving effect to these purposes, the Supreme Court has defined the Commerce Clause restraints applicable to state regulation using a two-tiered approach: (1) a *per se* rule of invalidity and (2) a balancing approach. ***Brown-Forman Distillers Corp. v. New York State Liquor Auth.***, 476 U.S. 573, 578-79 (1986).

1. *Per Se* Rule of Invalidity

"When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." ***Id.*** Some of the Court's decisions have called this approach a virtual "*per se* rule of invalidity," applicable to state laws which constitute discriminatory economic protectionism. ***Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas***, 489 U.S. 493, 523 (1989); ***City of Philadelphia***, 437 U.S. at 624.

Under this tier of Commerce Clause analysis, a state statute which clearly discriminates against interstate commerce will be held unconstitutional "'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'" ***Fort Gratiot***, 112 S. Ct. at 2024 (quoting ***New Energy***, 486 U.S. at 274). ***See Healy***, 109 S. Ct. at 2501. Economic protectionism may be evidenced by discriminatory purpose or discriminatory effect. ***Chemical Waste Management, Inc. v. Hunt***, 112 S. Ct. 2009, 2015 n.6 (1992).

It is the state's burden to justify discrimination against interstate commerce by establishing the local benefits served by the statute and the unavailability of nondiscriminatory alternatives which would adequately further these local interests. ***Id.*** at 2014. "'At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.'" ***Id.***

2. Balancing Approach

When a statute "has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." ***Brown-Forman***, 476 U.S. at 579. This approach, developed by the Court in ***Pike v. Bruce Church, Inc.***, 397 U.S. 137 (1970), involves a lesser degree of scrutiny than the *per se* rule of invalidity outlined above, but is only available when "other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade." ***City of Philadelphia***, 437 U.S. at 624. ***See Chemical Waste Management***, 112 S. Ct. at 2014 n.5.

The Court has noted a lack of clear separation between state regulation which is *per se* invalid under the Commerce Clause, and that which is subject to the ***Pike*** balancing approach. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." ***Brown-Forman***, 476 U.S. at 579.

3. Applicability of Commerce Clause Analysis to AM0916

> Although statute of limitations defenses are not a fundamental right, it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 893 (1988) (citation omitted). Therefore, the amendment at issue is subject to Commerce Clause analysis.

The proposed amendment directly discriminates against interstate commerce by excepting out-of-state manufacturers from the protection afforded by the ten-year statute of repose in section 25-224(2). By its stated intent of protecting Nebraska manufacturers and fostering a favorable business climate in the state, the amendment clearly furthers in-state economic interests by burdening out-of-state interests.

Since this type of economic protectionism is the stated intent, as well as the effect, of the proposed amendment, there is no evidence of a valid factor unrelated to such protectionism which would justify the amendment. Further, it appears that nondiscriminatory alternatives which would adequately foster the state's business climate exist, such as simply retaining the current statute of repose in section 25-224(2) for all products--whether manufactured in or outside the state.

Such blatant discriminatory economic protectionism, in both purpose and effect, without a legitimate local purpose unrelated to such protectionism and with nondiscriminatory alternatives available, would probably be held unconstitutional under the *per se* rule of invalidity described above.

Even assuming the proposed amendment had only indirect effects on interstate commerce, regulated evenhandedly, and was not patently discriminatory against interstate trade--therefore making the amendment subject to the balancing approach--the amendment would still be unconstitutional. The proposed amendment places a substantial burden on interstate commerce by forcing out-of-state manufacturers to choose between moving their manufacturing operations to Nebraska in order to be eligible for the liability protection provided by the statute of repose in section 25-224(2), and forfeiting this protection by continuing to manufacture outside the state, thereby remaining subject to product liability suits in Nebraska indefinitely. Such a significant burden cannot be outweighed by the local benefits achieved through an amendment based on burdening out-of-state competitors in order to benefit Nebraska's economic interests--the very type of discriminatory economic protectionism the dormant Commerce Clause is intended to prohibit.

Because Nebraska's interest and purpose in enacting this amendment is not legitimate under Commerce Clause analysis and because the burden on interstate commerce clearly exceeds local benefits, the proposed amendment would also violate the Commerce Clause under the balancing approach.

B. Due Process

In ***Givens v. Anchor Packing, Inc.***, 237 Neb. 565, 466 N.W.2d 771 (1991), the Nebraska Supreme Court evaluated the constitutionality of retroactively applying an amendment to section 25-224 which excepted actions to recover damages for asbestos-related injuries from the four-year statute of limitations in section 25-224(1) and the ten-year statute of repose in section 25-

224(2). The court held that the amendment could not be applied retroactively because while the Legislature may change statutes prescribing limitations on actions, it may not remove a bar or limitation which has already become complete. *Id.* at 568-69, 466 N.W.2d at 773.

The court's stated rationale for its decision was Article I, Section 3 of the Nebraska Constitution, which prevents one from being denied their property without due process of law. *Id.* at 569, 466 N.W.2d at 773.

> The immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. Just as a judgment is a vested right which cannot be impaired by a subsequent legislative act, so, too, is immunity granted by a completed statutory bar. These are substantive rights recognized by Nebraska law and protected by its Constitution.

Id. at 569, 466 N.W.2d at 773-74 (citations omitted). The court reiterated that a completed statutory bar is a "substantive, vested right which the Legislature cannot abrogate." *Id.* at 571, 466 N.W.2d at 774-75. ***See also Stewart v. Keyes***, 295 U.S. 403 (1935) (denial of due process to allow suit to recover property where the action had been barred by a completed statutory limitations period).

Your proposed amendment to section 25-224 states that the amendment is to be applied retroactively to revive causes of action that have been previously extinguished by a completed statutory bar in section 25-224. Under ***Givens***, out-of-state companies have a vested property right in the immunity to suit provided by a completed statutory bar, such as the ten-year statute of repose in section 25-224(2). Reviving causes of action already barred by this statute of repose would deprive these out-of-state companies of their vested rights in violation of the due process guarantee found in Nebraska's Constitution.

II. CONCLUSION

Proposed Amendment 0916 violates both the Commerce Clause of the U.S. Constitution and the due process guarantee provided in the Nebraska Constitution. U.S. Const. art. I, § 8, cl. 3; Neb. Const. art. I, § 3.

We note that you have also asked us to suggest other methods of achieving the Legislature's desired result which would be more likely to withstand constitutional challenge. While we believe that specific strategic and drafting decisions should be undertaken by the Legislature in this matter, we generally suggest that provisions aimed at benefiting Nebraska's economy should not do so by impermissibly burdening out-of-state competitors, in purpose or effect. Further, the amendment should not seek to revive previously barred causes of action.

Sincerely,

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cc: Patrick J. O'Donnell
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Approved By:

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