

New Jersey Supreme Court Finds the Take All Comers Statute is Not an Unconstitutional Taking of Hospital Private Property: Next Stop . . . SCOTUS

By: James A. Robertson and Paul L. Croce

N.J.S.A. 26:2H-18.64 (the “Take All Comers Statute”) *requires* all New Jersey hospitals to provide admission and appropriate services to *any patient* who presents to the hospital *regardless of their ability to pay*. N.J.A.C. 10:52-11.14 prohibits hospitals from billing or seeking to collect for the services provided to any patient who qualifies for charity care. The combination of these two New Jersey laws effectively requires hospitals to provide a potentially unlimited amount of care to a potentially unlimited number of patients without any obligation by the State to pay for such care. The 5th Amendment of the United States Constitution prohibits the government from “taking” private property for a public purpose unless it pays the property owner “just” compensation.

For nearly two decades, New Jersey hospitals have sought to obtain “just” compensation for the uncompensated care they’ve provided to the State’s most vulnerable patient populations. New Jersey hospitals have fought this fight in the state agencies, administrative courts, New Jersey trial and appellate courts, and, most recently, in the New Jersey Supreme Court.

The hospitals have been told by the agencies and the courts that they don’t have the authority to hear constitutional takings challenges, that the agencies lacked jurisdiction to decide the constitutional issue, that the hospitals’ claims were not ripe for adjudication, that the duty to provide free care does not arise until the hospital makes someone a “patient” which is the hospital’s voluntary decision, and that the hospitals don’t have a legitimate expectation that they will be able to realize a profit from their operations in the heavily regulated healthcare industry.

But the hospitals keep fighting the good fight . . .

This past July, the New Jersey Supreme Court found that no taking of the hospitals’ property had occurred under two important Supreme Court of the United States (“SCOTUS”) cases entitled *Horne v. Department of Agriculture*, 576 U.S. 350 (2015) (*Horne*), and *Cedar Point Nursery v. Hassid*, 594

U.S. 139 (2021) (*Cedar Point*). Both *Horne* and *Cedar Point* held that unconstitutional takings had occurred under the facts of those cases.

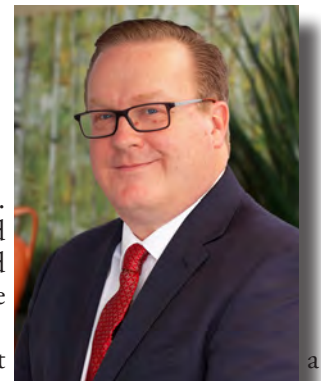
Horne held that regulation requiring California raisin growers to reserve a percentage of their crop for use by the Department of Agriculture was a per se physical taking. However, the New Jersey Supreme Court distinguished the facts in *Horne* from the hospitals’ case on the grounds that the Take All Comers Statute did not require hospitals to “physically set aside” any portion of the hospitals’ property for use by the government or indigent patients, nor was there a transfer of title to the property from the hospital to the government or indigent patients. The court suggested, however, that if the hospitals “were required to hand over boxes of bandages or to surrender medical devices to the government or a third party, which could then sell or dispose of those bandages or devices at will, this case would fall neatly into *Horne*’s analysis.”

Cedar Point held that a regulation requiring farm owners to permit access to their property by union organizers for up to 3 hours per day/120 days per year likewise constituted a per se physical taking of the farm’s private property. However, the New Jersey Supreme Court distinguished the facts in *Cedar Point* on the basis that a hospital, unlike the farm, is “open to the public,” which made the case more analogous to the shopping center which was found to be akin to the modern “town square” in SCOTUS’s earlier case of *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), and therefore, there can be no taking.

Despite finding no taking of the hospital property, the New Jersey Supreme Court acknowledged the charity care program’s unfair requirement “for medical professionals and hospitals to



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