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Daphne Vlcek

COURT OF APPEALS OF NEW YORK

Consumers Union of United States, Inc. v. New York[1]
(decided June 20, 2005)

By 1992, the future of Empire HealthChoice, Inc. (Empire) "looked bleak."[2] In order to survive in the increasingly competitive health-care market, Empire required conversion to a for-profit organization.[3] On January 25, 2002, the New York State Legislature enacted the Health Care Workforce Recruitment and Retention Act (Chapter 1) to enable Empire to achieve this goal.[4] Chapter 1 amended Insurance Law section 4301(j),[5] and created Insurance Law section 7317.[6] The provisions were designed to allow Empire "to

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[1] No. 83, 2005 N.Y. LEXIS 1433 (N.Y. June 20, 2005).

[2] *Id.*, at *8.

[3] *Id.*, at *11.

[4] *Id.*, at *14.

[5] N.Y. INS. LAW §4301(j) (McKinney 2002) now provides in pertinent part:

> (2) An article forty-three corporation which was the subject of an initial opinion and decision issued by the superintendent on or before December thirty-first, nineteen hundred ninety-nine, as the same may be amended, may be converted into a corporation or other entity organized for pecuniary profit, or into a for-profit organization . . . .
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> (3) For the purposes of this subsection and section seven thousand three hundred seventeen of this chapter, "public asset" shall mean assets representing ninety-five percent of the fair market value of the corporation seeking to convert into a corporation or other entity organized for pecuniary profit pursuant to paragraph two of this subsection. Fair market value . . . shall be determined as of the date the superintendent approves the conversion transaction . . . .

[6] N.Y. INS. LAW §7317 (McKinney 2002) provides in pertinent part:

> (a)(1) An article forty-three corporation which was the subject of an initial opinion and decision issued by the superintendent on or before December thirty-first, nineteen hundred ninety-nine, as the same may be amended, which seeks to convert into a corporation or other entity

convert to a for-profit corporation, giving Empire the ability to raise capital needed to compete effectively in the current health care market."[7] Pursuant to Chapter 1, conversion to a for-profit organization required "95% of the fair market value of the for-profit entity to be transferred to a 'public asset fund,' "with the "remaining 5% . . . to be transferred to a 'charitable organization.' "[8]

On August 20, 2002, the plaintiffs, described as "Empire subscribers whose premiums and benefits will allegedly be adversely affected by the conversion, and organizations that work with chronically ill individuals whose work will allegedly be made more difficult when Empire's assets are no longer dedicated to not-for-profit purposes" filed a complaint challenging the constitutionality of Chapter 1 on several grounds.[9] First, based on the Fifth Amendment of the Federal Constitution[10] and on article I, section six of the New York State Constitution,[11] the plaintiffs alleged that Chapter 1

> organized for pecuniary profit or into a for-profit organization of any kind shall submit a proposed plan of conversion to the superintendent for approval pursuant to this section. . . .
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> (b) The proposed plan of conversion shall include all items and address all issues as may be required by the superintendent in order for the superintendent to assure that the conversion process will not adversely affect the applicant's contractholders or members, will protect the interests of and will not negatively impact on the delivery of health care benefits and services to the people of the state of New York and results in the fair, equitable and convenient winding down of the business and affairs of the applicant. The superintendent may adopt such rules or regulations or establish such procedures as he or she deems necessary or proper to implement the provisions of this section.

[7] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *15.

[8] *Id.*, at *18.

[9] *Id.*, at *20-21.

[10] U.S. CONST. amend. V provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

[11] N.Y. CONST. art. I, § 6, states in pertinent part: "No person shall be deprived of life, liberty or property without due process of law."

deprived them and Empire of property rights without due process of law "because Chapter 1's procedural safeguards do not encompass any input from the public, the Attorney General, or Supreme Court into how Empire's not-for-profit assets are to be deployed."[12] However, the court found that "Chapter 1 provides Empire with process and plaintiffs with a remedy to grieve many of the Superintendent's determinations."[13] Next, the plaintiffs asserted that "Empire's Certificate of Incorporation (COI) is a contract between Empire and the public, and that this contract was substantially impaired by Chapter 1," in violation of both federal and state constitutional guarantees.[14] The court disagreed, holding that the COI is not a contract, and even if it were, that it was not impaired by Chapter 1 because the actions of Empire's board changed the COI.[15] The plaintiffs also argued that Chapter 1 violated the Exclusive Privileges Clause of the New York State Constitution[16] by "authorizing Empire alone to convert to a for-profit corporation."[17] The court did not find merit in this claim. Although "Chapter 1 is a 'private or local bill' because it applies only to Empire," it does not confer an exclusive privilege for it simply allowed Empire to operate

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[12] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *21, *46.

[13] *Id.*, at *47.

[14] *Id.*, at *47-48. *See* U.S. CONST. art. I, § 10, cl. 1 provides in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." *See also* N.Y. CONST. art. I, § 6. "Under this provision 'the State may not deprive a party to a contract of an essential contractual attribute without due process of law.' " *Consumers Union*, 2005 N.Y. LEXIS 1433, at * 48 (quoting Patterson v. Carey, 363 N.E.2d 1146, 1151 (N.Y. 1997)).

[15] *Consumers Union,* 2005 N.Y. LEXIS 1433, at *48-49.

[16] N.Y. CONST. art. III, § 17 provides in pertinent part: "The legislature shall not pass a private or local bill . . . [g]ranting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatsoever."

[17] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *50-51.

as other health insurers did, and "does not authorize Empire to prevent others from seeking to convert under similar parameters, or promise Empire that other not-for-profits will not be granted similar rights."[18] Finally, the plaintiffs claimed that Chapter 1 affected an illegal "taking of Empire's and plaintiffs' private property interests in violation of" federal[19] and state[20] law.[21] The court also rejected this argument and held that Chapter 1 effected neither an exaction, nor a regulatory taking, nor a per se taking.[22]

Empire originated in 1934 as Associated Hospital Services (AHS), a "membership corporation formed . . . to provide workers with affordable hospital care."[23] An "outgrowth of the Depression," AHS operated as a "financing linkage between people who needed care and hospitals that needed revenue."[24] In 1965, at the behest of its member hospitals, "AHS became the intermediary for Medicare Part A in New York," resulting in it being "even more thoroughly enmeshed in the operation of its member hospitals, by specifying accounting practices, cost definitions and cost allocations for Medicare."[25] A series of mergers between AHS and other New York membership corporations between 1944 and 1985 resulted in the

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[18] *Id.*, at *51-52.

[19] U.S. CONST. amend. V provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

[20] N.Y. CONST. art. I, § 7 (a), states: "Private property shall not be taken for public use without just compensation."

[21] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *21.

[22] *Id.*, at *37-46.

[23] *Id.*, at *2.

[24] *Id.*, at *2-3.

[25] *Id.*, at *4-5.

formation of Empire.[26]

Empire was incorporated under the Not-For-Profit Corporation Law, and was "chartered under Article 43 of the Insurance Law to provide affordable, pre-paid hospital and medical services/insurance coverage to lower and middle income persons statewide."[27] Though Empire initially offered only group plans, it later added individual coverage, fixing premiums according to "community rating" and allowing "open enrollment."[28] Empire became known as the "insurer of last resort," and played a "critical role in New York's health care delivery system."[29] Due to the "high costs of open-enrollment and community rating," and a series of events in the 1980's and 1990's,[30] Empire suffered devastating financial losses from 1986 through 1995.[31] In 1995, Empire

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[26] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *5.

[27] *Id.*, at *56 (G.B. Smith, J., dissenting).

[28] *Id.*, at *5 (majority opinion). Under "community rating," a single premium is "applicable to all subscribers without regard for past medical history or projected use of medical resources." *Id.*, at *57. "Open enrollment" simply means that Empire accepted all applicants. *Id.*

[29] *Id.*, at *6.

[30] *Id.*

> In the 1980's and 1990's, a number of events (i.e., the removal of Empire's favorable hospital reimbursement differential; revocation of Empire's tax exempt status [based on the United States General Accounting Office finding that Empire's underwriting practices were similar to those of commercial insurers]; and the fact that hospital and medical costs rose faster than approved subscription rates), and Empire's employment of community rating . . . and open enrollment . . . allowed commercial insurers, who could offer lower rates than Empire, to compete for and ultimately siphon off Empire's larger and healthier groups. This increased competition from commercial insurers, coupled with the rapid growth of health management organizations (HMOs), caused Empire to suffer a high rate of subscriber attrition.

Id., at *57 (G.B. Smith, J., dissenting).

[31] *Consumers Union,* 2005 N.Y. LEXIS 1433, at *58, n. 3 ("From 1986 to 1995, Empire's net operating losses exceeded $ 800 million and its subscriber base dwindled from 10 million to less than 5 million.").

"concluded that it had to restructure as a for-profit corporation in order to remain viable."[32] In 1999, Empire submitted its original restructuring plan to the New York State Superintendent of Insurance.[33] Despite the Attorney General's opinion that "Empire's restructuring would require a change in Insurance Law section 4301(j) as well as Supreme Court and regulatory approval," the Superintendent approved Empire's conversion plan.[34] On January 5, 2000, the Attorney General released a statement that, while he did "not oppose in principle Empire's wish to convert," he was "legally bound to protect the public interest when an organization that has enjoyed millions in state subsidies seeks to change its mission to earning profits for private owners."[35] For various reasons, Empire chose to forgo reorganization under the approved 1999 restructuring plan.[36]

In 2002, Empire submitted an amended conversion plan, pursuant to Chapter 1, to the New York State Department of Insurance.[37] This plan was "similar in many ways to the [restructuring] plan approved by the Superintendent in 1999" but

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[32] *Id.*, at *58.

[33] *Id.*, at *12, n.7 (majority opinion).

[34] *Id.*, at *12 ("In 1999, Article 43 of the Insurance Law , the article under which Empire operated, provided at section 4301(j) that 'no medical expense indemnity corporation, dental expense indemnity corporation, health service corporation, or hospital service corporation shall be converted into a corporation organized for pecuniary profit. Every such corporation shall be maintained and operated for the benefit of its members and subscribers as a co-operative corporation.' ").
N.Y. INS. LAW §4301(j) (McKinney 2002).

[35] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *13.

[36] *Id.*, at *14.

[37] *Id.*, at *14, *18.

abandoned by Empire.[38] The 2002 restructuring plan realized Empire's conversion to a for-profit corporation "through a transfer of assets, the creation of new for-profit corporations and a holding company, and a stock sale."[39] Like the 1999 plan, substantially all of Empire's assets were to be "transferred to wholly owned for-profit subsidiaries in exchange for 100% of the subsidiaries' outstanding and newly issued common stock."[40] In accordance with Chapter 1, the plan called for "95% of the fair market value of the for-profit entity to be transferred to a 'public asset fund,' "and the remaining 5% "to be transferred to a 'charitable organization' that shall operate as a tax-exempt organization . . . whose mission is expansion of access to health care generally."[41] Pursuant to Chapter 1,

> [t]he public asset fund is to be managed by a board of directors consisting of five members . . . . The net proceeds in the fund are to be transferred to the pre-existing Tobacco Control and Insurance Initiatives Pool . . . . Chapter 1 directs that the funds be used for recruiting and retaining non-supervisory health care workers with direct patient care responsibilities . . . ; the Elderly Pharmaceutical Insurance Coverage (EPIC) program, a State-sponsored prescription plan for needy senior citizens; treatment for breast and cervical cancer; Medicaid for disabled persons; quality improvement programs for nursing homes; and

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[38] *Id.*

[39] *Id.*, at *18.

[40] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *9.

[41] *Id.*, at *18. Unlike the 2002 restructuring plan, the 1999 restructuring plan called for 100% of the value of the not-for-profit's assets to be transferred "to a newly-formed tax-exempt charitable foundation 'dedicated to promoting the availability and accessibility of high quality health care and related services to the people of the State of New York,' " thereby allowing Empire to "continue to offer health insurance, but as a for-profit corporation with greater potential for becoming and remaining competitive." *Id.*, at *10.

assistance for other public health programs.[42]

When Empire submitted the 2002 conversion plan to the New York State Superintendent of Insurance, the plaintiffs sought a declaration that Chapter 1 violated the state and federal constitutions, and an injunction that would prevent Empire "from taking any action to carry out the unconstitutional directives of the Legislation."[43] The gravamen of the plaintiffs' complaint "is that [100% of the] assets from the restructuring are not going to be used to further Empire's historic charitable purposes."[44] The plaintiffs did not challenge Empire's conversion to a for-profit corporation, but the "uses to which the conversion's proceeds – Empire's not-for-profit assets – will be put."[45] The superintendent's October 2002 approval of Empire's conversion plan was met with the plaintiffs' opposition to Empire's and the state's motions to dismiss the Plaintiffs' complaint.[46] The plaintiffs did not attempt to obstruct the November 8, 2002 stock sale, but were granted "provisional relief directing that any proceeds from the sale be held by the Comptroller in a separate account during the litigation's pendency."[47]

After determining that only the subscriber plaintiffs, and not the organizational plaintiffs, had "demonstrated a threatened injury-in-fact . . . and therefore had standing," the New York Supreme Court

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[42] *Id.*, at *19.
[43] *Id.*, at *22-23.
[44] *Id.*, at *21.
[45] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *53.
[46] *Id.*, at *23.
[47] *Id.*, at *23-24.

dismissed the plaintiffs' complaint on March 7, 2003.[48] The impairment of contract claim was dismissed "for the self-evident reason that there can be no impairment of a contract absent a contractual relationship."[49] Rejecting the plaintiffs' argument that Chapter 1 deprived them of due process, the court dismissed the plaintiffs' due process claim "on the ground that statutes are always vulnerable to subsequent . . . amendment."[50] The New York Supreme Court then dismissed the takings claim because Chapter 1 merely authorized, and did not require, Empire to convert.[51] Finally, after concluding that "the facts alleged clearly suffice to support a cause of action for violation of" the Exclusive Privileges Clause of the New York State Constitution, the trial court granted the plaintiffs leave to serve an amended complaint.[52]

On March 31, 2003, the plaintiffs filed an amended complaint alleging only that Chapter 1 violated the Exclusive Privileges Clause of the state constitution.[53] On October 2, 2003, the New York Supreme Court dismissed the plaintiffs' amended complaint "with respect to the individual members of [Empire's] Board," and determined that Chapter 1 violates the Exclusive Privileges Clause by allowing Empire alone to convert.[54] The Appellate Division affirmed

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[48] *Id.*, at *25.

[49] *Id.* (citing Ballentine v. Koch, 674 N.E.2d 292, 297 (N.Y. 1996) (holding that a statutorily authorized benefit program does not create contract rights)).

[50] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *26.

[51] *Id.* (citing Meriden Trust & Safe Deposit Co. v FDIC, 62 F.3d 449, 455 (2d Cir. 1995) (holding that where a company "voluntarily subjects itself to a known obligation . . . no unconstitutional taking occurs.")).

[52] *Id.*, at *26-27.

[53] *Id.*, at *27.

[54] *Id.*, at *28.

both orders, and certified to the New York State Court of Appeals the "question of whether its decision and order affirming the Supreme Court's orders was properly made."[55] Initially, the court found that the plaintiffs did "not have an enforceable 'property interest' in the value of Empire's assets or in the dedication of those assets to Empire's mission."[56] Nevertheless, the court held that the plaintiffs had standing "solely for the purposes of protecting Empire's not-for-profit assets" under the "special interest" factors[57] exception to the general rules of standing.[58] The court agreed with the plaintiffs that the Attorney General "ha[d] been defrocked by virtue of his statutory obligation to defend the Legislature's enactments," and that the Board "ha[d] no incentive to jeopardize conversion by questioning whether Chapter 1 diverts Empire's property from its traditional not-for-profit purposes."[59] The court determined that these disabilities, which left only the plaintiffs to champion Empire, qualified as special interest factors.[60]

In *Nollan v. California Coastal Commission*,[61] the Supreme Court invalidated a condition placed on a land development permit requiring the Nollans, beachfront property owners, to "allow the

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[55] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *28.

[56] *Id.*, at *32.

[57] In *Alco Gravure, Inc. v. Knapp Foundation*, the New York Court of Appeals recognized that in cases involving charitable interests, there may be "special interest" factors justifying the relaxation of the general rule that "a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust." 479 N.E.2d 752, 755 (N.Y. 1985).

[58] *Consumers Union,* 2005 N.Y. LEXIS 1433, at *35-36.

[59] *Id.*, at *35.

[60] *Id.*

[61] 483 U.S. 825 (1987).

public an easement to pass across a portion of their property."[62] The Nollans challenged the condition as an unconstitutional taking.[63] The Court began by noting that under the condition, the landowners were required, without compensation, to relinquish their right to exclude others, "one of the most essential sticks in the bundle of [property] rights."[64] The Court held that such a condition constitutes an exaction in violation of the Fifth and Fourteenth Amendments where there is a "lack of nexus between the condition and the original purpose of the building restriction."[65] Finding that an easement across the Nollan's property lacked an essential nexus between the commission's interests in increasing public access to beaches and protecting visual access to the ocean, the Court concluded that California was free to attempt to use its eminent domain power to further its public purpose, but that it could not compel the Nollans to grant an easement without compensation.[66]

Seven years after *Nollan*, the Supreme Court addressed the "required degree of connection between the exactions imposed by [a] city and the projected impacts of . . . proposed development."[67] Florence Dolan challenged restrictions placed on a building permit which required her to dedicate a portion of her property to the "improvement of a storm drainage system" and for use as a

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[62] *Id.* at 828, 841.

[63] *Id.* at 829.

[64] *Id.* at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

[65] *Id.* at 837.

[66] *Nollan*, 483 U.S. at 841-842.

[67] Dolan v. City of Tigard, 512 U.S. 374, 377 (1994).

"pedestrian/bicycle pathway."[68] The Court first applied *Nollan*, and found an undeniable nexus between the city's interests in the prevention of flooding and reduction of traffic and the conditions imposed on Dolan's development of her property.[69] Next, the Court analyzed whether "the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of [Dolan's] proposed development."[70] The Court held that a showing of rough proportionality requires the city to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development,"[71] and determined that the "findings upon which the city relie[d] d[id] not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building."[72] Because the zoning code already required Dolan to dedicate 15% of her land to undeveloped open space, the Court found that it was "difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city ha[d] not attempted to make any individualized determination to support this part of its request."[73]

The Supreme Court recently summarized its takings jurisprudence in *Lingle v. Chevron U.S.A., Inc.* by identifying three

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[68] *Id.* at 380.
[69] *Id.* at 387-88.
[70] *Id.* at 388.
[71] *Id.* at 391.
[72] *Dolan*, 512 U.S. at 394-95.
[73] *Id.* at 393.

categories of takings requiring just compensation.[74] First, a per se taking occurs through "direct government appropriation or physical invasion of private property."[75] Next, a regulatory taking occurs either "where government requires an owner to suffer a permanent physical invasion of her property,"[76] or where a regulation "completely deprive[s] an owner of 'all economically beneficial use' of her property."[77] Further, "[o]utside these two relatively narrow categories, . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*."[78] According to the Court, the most important *Penn Central* factors are the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action."[79] The Court concluded that the focal point of each of these tests is the "severity of the burden that government imposes upon private property rights," reducing the inquiry to whether the impact of the regulatory action is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[80]

In *Smith v. Town of Mendon,* the New York Court of Appeals analyzed whether requiring a landowner to accept a conservation restriction "consistent with the municipality's pre-existing conservation plan," for site plan approval was an unconstitutional

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[74] 125 S. Ct. 2074, 2081 (2005).
[75] *Id.*
[76] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).
[77] *Id.* (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)).
[78] *Lingle*, 125 S. Ct. at 2081. *See Penn Central,* 438 U.S. 104 (1978).
[79] *Id.* at 2082 (quoting *Penn Central*, 438 U.S. at 124).

taking.[81] The Court began by defining exactions "as land-use decisions conditioning approval of development on the dedication of property to public use,"[82] and relied on *Nollan* and *Dolan* in determining the appropriate inquiry for deciding whether a proposed condition constitutes an exaction.[83] This two-part inquiry first asks whether the condition demonstrated an " 'essential nexus' with the stated purpose of the underlying land-use restriction," and then questions whether the condition "furthered the purpose of the underlying development restriction and there was a rough proportionality between the condition and the impact of the proposed development."[84] However, the court declined to apply this analysis because requiring the landowners to file a conservation restriction does not constitute a dedication of property to public use.[85] The Court of Appeals concluded by noting that its exaction analysis was confined to "real property cases . . . involv[ing] the transfer of the most important 'stick' in the proverbial bundle of property rights, the right to exclude others," and where "a fee [is] imposed in lieu of the physical dedication of property to public use."[86]

Consistent with *Nollan*, *Dolan*, and *Town of Mendon*, the Court of Appeals in *Consumers Union* declined to extend the

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[80] *Id.*

[81] *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1215 (N.Y. 2004).

[82] *Id.* at 1217-18 (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999)).

[83] *Id.* at 1218.

[84] *Id.*

[85] *Id.* at 1219.

[86] *Town of Mendon*, 822 N.E.2d at 1219.

"exaction analysis beyond the realm of land-use regulation."[87] Nevertheless, it posited that Chapter 1 "passes both the 'essential nexus' and 'rough proportionality' tests."[88] First, the court determined that there existed "a direct correlation between the State's interest in enacting Chapter 1 – allowing Empire to continue to carry out its dual historic mission – and the condition imposed – that Empire's not-for-profit assets be used for the public health purposes specified in Chapter 1."[89] Since "Empire began as a captive of hospitals, and has always inhabited a borderland between a government-sponsored entitlement program . . . and a commercial insurer," and "traditionally functioned as both a financing device for hospitals and a means to make economical health care available to as many New Yorkers as possible," the court concluded that Chapter 1 was "wholly consistent" with Empire's historic purpose.[90] Next, the court stated that because "Chapter 1 place[d] conditions on Empire's property similar to those that could have been imposed" by any other conversion mechanism that it was "roughly proportional to the impact of Empire's conversion."[91]

Next, the court addressed the plaintiffs' claim that Chapter 1 affected a regulatory taking.[92] In accordance with *Lingle*, the court considered the primary *Penn Central* factors and concluded that

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[87] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *38.

[88] *Id.*

[89] *Id.*, at *39.

[90] *Id.*

[91] *Id.*, at *43. The court discusses Not-For-Profit Corporation Law 1005(a)(3)(A), "which calls for distribution of a Type B not-for-profit's assets upon dissolution to 'one or more domestic or foreign corporations or other organizations engaged in activities substantially similar to those of the dissolved corporation.' " *Id.*, at *40.

[92] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *43-44.

"Chapter 1's dedication of Empire's not-for-profit assets to public health purposes [did not] unduly interfere[] with Empire's legitimate property interests or 'investment-backed expectations.' "[93] Initially, the court noted that "the compulsion normally present in a takings claim [] is not present in Chapter 1" because Chapter 1 merely authorizes Empire to convert.[94] The court rejected the plaintiffs' contention that "conversion under Chapter 1 was compelled because it was Empire's only realistic option for survival," stating that Empire's plan to convert dated back to 1997.[95] Because Chapter 1 is consistent with Empire's historic purpose, and "allows Empire to continue as a for-profit corporation, placing it in a better competitive position than otherwise would have been its lot," the court held that it did not affect a regulatory taking.[96]

Finally, the court concluded that Chapter 1 did not effect a per se taking.[97] The plaintiffs asserted that Chapter 1's dedication of 95% of the proceeds of the stock sale to a public asset fund was a " 'direct physical invasion' of Empire's property."[98] Because Empire's conversion under Chapter 1 was voluntary, the court concluded that there was no direct physical invasion of Empire's property.[99]

Judge R.S. Smith's dissenting opinion in *Consumers Union* focused on the majority's application of takings jurisprudence. First, Judge Smith disagreed with the majority's refusal to extend the

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[93] *Id.*, at *45 (quoting *Penn Central*, 438 U.S. at 124).
[94] *Id.*, at *44.
[95] *Id.*, at *45.
[96] *Id.*
[97] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *46.
[98] *Id.*

exaction analysis propounded in *Nollan* and *Dolan* outside the realm of real property, stating that "[n]othing in the Supreme Court's exactions decisions suggest that their rationale is limited to real property."[100] In disputing the majority's application of the exaction analysis, Judge Smith indicated that a preliminary step to an exactions analysis should be consideration of whether Chapter 1 "would have been a taking if the State had simply required Empire to distribute its assets as Chapter 1 provides, without offering Empire [the option to forgo conversion]."[101] Judge Smith stated that this question turned on "whether Chapter 1 is consistent with Empire's reasonable expectations for the use of its property," and concluded that the dedication of 95% of Empire's assets to the public fund appeared to be inconsistent with Empire's mission.[102] He noted, however, that the State might be able to demonstrate that the "specific purposes for which the Public Asset is to be spent" bore enough of a reasonable relationship to Empire's reasonable expectations.[103] For this reason, Judge Smith believed that the majority's exaction analysis was unnecessary.[104] "[I]f Empire's assets are being used in a way consistent with Empire's reasonable expectations, the legislation would be valid."[105] He also believed that the majority's exaction analysis was wrong.[106] While the majority

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[99] *Id.*, at *46.
[100] *Id.*, at *92 (R. S. Smith, J., dissenting).
[101] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *95-96.
[102] *Id.*, at *100-02.
[103] *Id.*, at *102-03.
[104] *Id.*, at *107.
[105] *Id.*
[106] *Consumers Union*, 2005 N.Y. LEXIS 1433, at *107.

declared an "essential nexus" must exist "between the condition imposed by the State and its purpose in enacting the legislation," Judge Smith felt that the "[t]he issue is whether 'the condition substituted for the prohibition . . . furthers the end advanced as a justification for the prohibition.' "[107]

In conclusion, New York courts apply the same analysis as the United States Supreme Court when determining whether a legislative act constitutes a taking. Both the federal and New York State courts limit their exactions analysis to land-use cases; both apply a two-prong test that inquires whether the land-use regulation has an " 'essential nexus' with the state interest for which it is imposed" and whether the condition is " 'roughly proportional' to the impact of the proposed development."[108] Moreover, both federal and state courts analyze a claim of regulatory taking based on a series of factors identified by the Supreme Court in *Penn Central.* This inquiry turns on the extent to which the challenged regulation has interfered with the claimant's "distinct investment-backed expectation."[109] Purely voluntary action under a statute will not constitute the basis for a claim of exaction, regulatory taking, or per se taking. If a statute merely authorizes, and does not compel, action by the claimant, federal and state courts will likely reject a takings claim. Hence, Chapter 1, which merely authorized Empire's

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[107] *Id.* (quoting *Nollan*, 483 U.S. at 837).

[108] *Id.*, at *37 (majority opinion) (internal citations omitted).

[109] *Lingle,* 125 S. Ct. at 2081 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. at 1019).

voluntarily conversion to a for-profit organization, is constitutionally valid.

Daphne Vlcek