***As published in the November 24, 2014 issue of the* Daily Journal**

A new commerce clause approach?

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The 9th U.S. Circuit Court of Appeals, sitting en banc, has agreed to consider whether the California Resale Royalty Act survives a challenge under the dormant commerce clause. *Sam Francis Found. v. Christie's Inc.*, 769 F.3d 1195 (9th Cir. 2014). However, the path of this case to en banc review strongly suggests that the 9th Circuit may extensively reconsider its commerce clause jurisprudence.

The California Resale Royalty Act requires that whenever a California resident sells fine art at a profit and for more than $1,000, the seller or his agent must pay a 5 percent royalty to the artist. The act does not apply only to sales that occur in California. For example, the act applies when a California collector takes a painting by a New York artist from the collector's New York pied-à-terre, and auctions it at Sotheby's, in New York to a New York resident.

Artists brought a putative class action against Christie's, Sotheby's and eBay seeking unpaid royalties under the Royalty Act. The district court dismissed the action, holding that the act violates the dormant commerce clause because it directly controls commerce occurring wholly outside the boundaries of California. The plaintiffs appealed.

The case was first argued on appeal before Judges Ferdinand Fernandez, N. Randy Smith, and Mary Murguia. The panel's tough questioning of plaintiffs' counsel during oral argument suggested that the panel strongly leaned towards affirming.

But after argument and before the panel issued a decision, the panel took the unusual step of ordering the parties to brief whether the case should be heard en banc. The panel

also ordered the parties to address whether there was a conflict in the 9th Circuit's law regarding the applicability of *Healy v. Beer Institute Inc.*, 491 U.S. 324 (1989), a case which applied the dormant commerce clause to strike down a Connecticut statute that required out-of-state shippers to affirm that their Connecticut beer prices were no higher than prices in the bordering states.

The panel illustrated the potential conflict by citing two recent decisions. One decision, upholding California regulations aimed at deterring carbon emissions, quoted *Healy* for its view that "the dormant Commerce Clause holds that *any* 'statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority.'" *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) (emphasis added). But another decision, upholding California's ban on foie gras from force-fed birds, viewed *Healy* much more narrowly. That decision reasoned that the Supreme Court decision in *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), held *Healy* to be inapplicable unless the statute at issue dictates a price or ties one state's prices to out-of-state prices. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013).

The en banc panel hearing the *Christie's* case should not follow *Harris*. *Harris* relies on language taken out of context from *Walsh* and misconstrues its holding. In *Walsh*, the petitioners challenged Maine's prescription drug program, which aimed to reduce prescription drug prices for residents of Maine. Petitioners claimed that Maine's prescription drug program also affected their out-of-state pricing, but *Walsh* held that *Healy* was "not applicable to this case" because the Maine statute under review "'does not regulate the price of any out-of-state-transaction'" or "t[ie] the price of its in-state products to out-of-state prices." In other words, *Walsh* viewed *Healy* as distinguishable because the statute in *Walsh* did not affect out-of-state prices. However, the reach of the dormant commerce clause as discussed in *Healy* clearly extends beyond price controls, and *Walsh* said nothing about *Healy*'s application to a case where a statute did control interstate commerce, albeit not through price restrictions.

Nevertheless, resolving the conflict between *Harris* and *Rocky Mountain* is unnecessary to assessing the constitutionality of the Royalty Act. Harris discussed *Healy* only in assessing the *practical effect* of California's statute, as distinguished from its explicit reach. Even *Harris* acknowledged that "a statute violates the dormant Commerce Clause per se when it '*directly* regulates interstate commerce.'" Regarding the Royalty Act, the original three-judge panel in the *Christie's* case did not need to assess the practical effect of the act because the act explicitly governs commercial transactions occurring entirely in other states and, therefore, should violate the commerce clause even under *Harris*.

So why would the *Christie's* panel request en banc review after appearing at oral argument so ready to affirm? One possibility is that the panel is attempting to follow *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc), which advises that a panel faced with an irreconcilable conflict in circuit precedent should call for en banc review to maintain the uniformity of the circuit's decisions. But since *Christie's* is not controlled by the resolution of the conflict between *Harris* and *Rocky Mountain*, the panel would have been free to avoid the issue. *United States v. Swank*, 676 F.3d 919, 921-22 (9th Cir. 2012)

(recognizing an intracircuit conflict regarding standard of review and declining to address it because it did not affect the outcome).

Another possibility is that the panel felt strongly that the dormant commerce clause has not been correctly applied by their colleagues. Dormant commerce clause cases do not come along every day, and the panel may have viewed an en banc hearing as an opportunity for the 9th Circuit to write on a clean slate. Although in *Christie's* the panel portrayed *Rocky Mountain* as a case that stood for a strong dormant commerce clause, Judge N.R. Smith had previously joined a scathing dissent from the denial of rehearing en banc in *Rocky Mountain*, which accused the decision of rendering the dormant commerce clause "toothless in our circuit" and "in open defiance of controlling Supreme Court precedent" because it upheld environmental regulations that sought to influence out-of-state land use decisions and production methods. And Judge Murguia had partially dissented in *Rocky Mountain*.

In this case, where global warming or bird abuse are not directly at issue, the panel may believe that the 9th Circuit judges will feel freer to move the circuit's dormant commerce clause jurisprudence back to where the panel believes it should be. After all, the request for en banc review failed in *Rocky Mountain* and succeeded here even though the environmental regulations at issue in *Rocky Mountain* had a much broader reach. But whatever the panel's motivations for requesting en banc review, the court's decision to hear the case en banc strongly suggests that the court will look to determine much more than the royalties available to fine artists.

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