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Case Comments E. Constitutional Law Dinh V. Rust International Corporation

whether an attorney is a debt collector under the FDCPA may not involve such clear facts.

E. Constitutional Law

Dinh v. Rust International Corporation

974 F.2d 500 (4th Cir. 1992)

Virginia's statute of repose,[177] which the legislature originally enacted in 1964,[178] prevents a personal injury or wrongful death claim arising out of a defective condition of an improvement to real property if more than five years have passed following the date of the construction.[179] Upon expiration of the five-year period, the statute vests rights of repose in those responsible for the design or construction of such improvements.[180] The statutory rights of repose insulate such manufacturers from liability arising out of a defective design or production flaw.[181]

In *Wiggins v. Proctor & Schwartz, Inc.*,[182] the United States Court of Appeals for the Fourth Circuit held that the 1964 statute of repose protected the manufacturers of a machine that the company had attached to the floor because, as the *Wiggins* court reasoned, the machine was an improvement to real property.[183] In response to the *Wiggins* decision, the Virginia legislature enacted an amendment to the statute of repose in 1973.[184] This amendment excluded the manufacturers of such equipment or machinery affixed to real property from protection of the statute.[185] However, in *Hupman v. Cook*[186] the Fourth Circuit held that if an installation was five years old at the time of the 1973 amendment, then the 1964 statute of repose still protects the manufacturers and installers of such machinery and equipment.[187]

Two other controversial issues with respect to Virginia's statute of repose were whether the statute's protection extends retroactively to improvements before the statute's enactment in 1964, and whether the statute satisfies the Due Process Clause of the United States Constitution. The

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177. Va. Code Ann. § 8.01-250 (Michie 1977).

178. Va. Code § 8-24.2 (1950).

179. Va. Code Ann. § 8.01-250 (Michie 1977).

180. *Id.*

181. *Id.*

182. 330 F. Supp. 350 (E.D. Va. 1971), *aff'd* in an unpublished opinion, No. 71-1952 (4th Cir. Mar. 8, 1972).

183. Wiggins v. Proctor & Schwartz, Inc., 330 F. Supp. 350, 352-53 (E.D. Va. 1971), *aff'd* in an unpublished opinion, No. 71-1952 (4th Cir. Mar. 8, 1972).

184. 1973 Va. Acts c.247; *see also* Cape Henry Towers, Inc. v. National Gypsum Co., 331 S.E.2d 476 (Va. 1985) (characterizing 1973 amendment as correcting Wiggins decision).

185. 1973 Va. Acts c.247.

186. 640 F.2d 497 (4th Cir. 1981).

187. Hupman v. Cook, 640 F.2d 497, 499 (4th Cir. 1981).

Fourth Circuit settled the first issue in *Commonwealth v. Owens-Corning Fiberglass Corp.*,[188] holding that pre-enactment improvements to real property fell within the statute's protection provided that those who had acquired causes of action prior to the 1964 statute had an adequate opportunity to file suit after the statute's enactment.[189] The *Owens-Corning* court, however, refrained from addressing whether the statute may constitutionally extinguish a claim before the cause of action ever accrued.[190] In *Hess v. Snyder Hunt Corp.*,[191] the Fourth Circuit held that the statute, which merely prevents a cause of action from ever arising, does not violate the Due Process Clause.[192] Against this background, the United States Court of Appeals for the Fourth Circuit considered in *Dinh v. Rust Int'l Corp.* the issue of whether Virginia's statute of repose prevented a personal injury claim arising out of an allegedly defective machine that the company installed in 1959, five years prior to the statute's original enactment.

In *Dinh*, the plaintiff, Thuyen Hoang Dinh, worked at a Virginia brick factory. When the company built the brick factory in 1959, the company installed a 13,000 pound conveyor machine which the company secured to the floor by heavy bolts. In November 1989, Dinh suffered severe injuries when the pulley mechanism of the conveyer machine entangled his leg, requiring the amputation of the leg.

Dinh thereafter filed a personal injury claim in the United Sates District Court for the Eastern District of Virginia against the companies responsible for designing, manufacturing, and installing the conveyer machine. The district court granted summary judgment to defendants on the ground that Virginia's 1964 five-year statute of repose vested substantive rights in the defendants prior to the enactment of the 1973 amendment. Thus, the plaintiff never acquired a cause of action against the defendants.

On appeal, Dinh argued that the statutory rights of repose never vested in the defendant companies because the 1964 statute did not extend retroactively to improvements before the statute's enactment. Furthermore, Dinh contended that the Due Process Clause of the United States Constitution required the continued existence of common-law causes of action. The Fourth Circuit noted that Dinh did not argue on appeal that the 1964 statute of repose did not apply to the type of machine that caused his injury. Nor, as the Fourth Circuit noted, did Dinh allege that the 1973 amendments, which expressly excluded the manufacturers and suppliers of machinery that companies install in their factories, applied retroactively to exclude the defendant companies from the protection of the 1964 statute. Dinh conceded, moreover, that the legislature may not subsequently destroy substantive rights of repose after those rights have vested in potential defendants.

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188. 385 S.E.2d 865 (Va. 1989).

189. Commonwealth v. Owens-Corning Fiberglass Corp., 385 S.E.2d 865, 869 (Va. 1989).

190. *Id.* at 869 n.5.

191. 392 S.E.2d 817 (Va. 1990).

192. Hess v. Snyder Hunt Corp., 392 S.E.2d 817, 821 (Va. 1990).

The Fourth Circuit, therefore, focused only on whether Virginia's statute of repose may apply retroactively to protect the defendant companies in this case, and whether the statute may constitutionally extinguish a common-law cause of action before a plaintiff could acquire a right of action. In addressing the first issue, the Fourth Circuit cited the *Owens-Corning* rule that the five-year statute of repose extended to protect those responsible for improvements before 1964. The Fourth Circuit then cited the *Hess* rule that the United States Constitution does not prevent a state from prospectively redefining or even abolishing a common-law right of action.

The Fourth Circuit examined the facts of *Dinh* in light of the *Owens-Corning* and *Hess* rules. The *Dinh* court held that any cause of action that the plaintiff might have had in this case no longer existed after 1964, five years after the defendants installed the conveyor machine and after the legislature enacted the statute of repose. Thus, the concurrence of the two events, the statutory enactment and the lapse of the five-year period, vested substantive rights of repose in the defendant companies which protected the companies from liability. The Fourth Circuit noted that the fact that the injury occurred after the five-year period is irrelevant to the analysis because the statute of repose simply extinguishes any right to sue the manufacturer upon lapse of the statutory period. Finally, the Fourth Circuit held that the abolition of Dinh's right of action did not violate the United States Constitution. The *Dinh* court stated that the plaintiff has no constitutional right to the continued existence of a common-law right of action, and the state, therefore, may prospectively extinguish the cause of action. The *Dinh* court accordingly affirmed the district court's grant of summary judgment to the defendants.

Dinh v. Rust Int'l Corp. is the first case decided after the 1973 amendment to Virginia's statute of repose in which the Fourth Circuit has applied the 1964 statute retroactively to protect those responsible for the design, manufacture, and installation of a machine which a company installed prior to 1964. Nevertheless, prior Fourth Circuit opinions resolved the key issues in *Dinh*. The Fourth Circuit's holding, therefore, merely represents a logical extension of the case law expounding upon Virginia's statute of repose.

Linton v. Frederick County Board of County Commissioners

964 F.2d 1436 (4th Cir. 1992)

Well established principles of constitutional due process require that adequate notice and an opportunity for response precede an intentional government deprivation of a protected private property interest.[193] The

193. *See* Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436, 1439 (4th Cir. 1992) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), for proposition that due process requires notice and opportunity for hearing as prerequisite to intentional government deprivation of protected property interest).

specific type of notice and opportunity required varies according to the nature of each case.[194] In *Cleveland Board of Education v. Loudermill*,[195] the United States Supreme Court affirmed that this Due Process Clause protection ensures some rudimentary pretermination process to public employees who may be discharged only for cause. At the very least, tenured public employees are entitled to some notice of the evidence supporting specific charges against them and to the opportunity of presenting an informed response before they are discharged.[196]

Until recently, no federal court had addressed whether the inclusion of unspecific, generic allegations renders constitutionally deficient a notice that adequately details other charges justifying termination. The United States Court of Appeals for the Third Circuit, in *Fraternal Order of Police Lodge No. 5 v. Tucker*,[197] came the nearest to addressing that issue. The Third Circuit reinforced that a *Loudermill* "meaningful pretermination hearing" requires an explanation of the employer's evidence sufficient to allow the employee to clarify or rebut that evidence, and held that the defendant Police Commissioner's unspecific reference to "a complaint of drug use involving police officers" fell short of *Loudermill*'s minimum notice requirements.[198] The Third Circuit reached this conclusion notwithstanding its express acceptance of the trial court's finding that plaintiff police officers were discharged not for their suspected drug use, but for disobeying an order to undergo urinalysis.[199] The court found that the Commissioner's vague drug use allegations overshadowed the proffered termination justification—disobedience.

In *Linton v. Frederick County Board of County Commissioners*,[200] the United States Court of Appeals for the Fourth Circuit squarely confronted the question of whether a notice of dismissal that adequately details charges sufficient to justify termination is rendered fatally defective by the inclusion of unspecific, generic allegations. The *Linton* court evaluated a discharged county employee's claim under 42 U.S.C. section 1983.[201] The employee argued that defendant Frederick County Highway Department (Department) had violated his right to pretermination process by serving him a written notice of dismissal which he said he did not understand. The parties agreed on the basic facts underlying Linton's termination: Linton, a longtime employee of the Department, performed work on several occasions without securing a permit required by the Maryland Department of Natural Resources (DNR). The DNR reprimanded the Department for each of these violations. After Linton admitted responsi-

194. *Id.*
195. 470 U.S. 532 (1985).
196. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).
197. 868 F.2d 74, 80 (3d Cir. 1989).
198. Fraternal Order of Police Lodge No. 5 v. Tucker, 868 F.2d 74, 80 (3d Cir. 1989).
199. *Id.*
200. 964 F.2d 1436 (4th Cir. 1992).
201. 42 U.S.C. § 1983 (1988).

bility for the last of these infractions, his supervisor handed him a memorandum styled Notice of Dismissal (Notice) and offered him the alternative of resignation instead of discharge. The following day, Linton refused to resign and was fired.

Linton argued in the United States District Court for the District of Maryland that the notice given him was constitutionally inadequate because it neither provided him with an explanation of the evidence substantiating the charges it contained nor a meaningful opportunity to respond to those charges. The district court rejected these allegations, granting summary judgment in favor of the county officials, and Linton appealed.

The Fourth Circuit acknowledged that Linton's state-granted status insulated him from arbitrary dismissal, and thus was a property right meriting the procedural safeguards insured by *Loudermill*. This threshold property interest requirement satisfied, the dispute centered on the amount of process due, and whether the Notice comported with that minimum standard.

The court first noted that the supervisor's oral inquiry and Linton's response satisfied one goal of the pretermination process guaranty: to avoid factually mistaken decisions. Next, the court observed that due process in such situations does not require exhaustive documentary disclosure of the employer's evidence. All that is required, the court held, is an explanation descriptive enough for the employee to identify the conduct giving rise to the dismissal so that the employee will be able to respond intelligently.

The Fourth Circuit found that the supervisor here had provided a sufficiently specific accounting of the DNR-connected incidents and that Linton's discharge was based on these episodes. Therefore, even though the Notice included the very vague assertion that unspecified "other incidents" also justified Linton's termination, the court found that the minimum standards of due process had been met. It held that the inclusion of generalized language does not render notice constitutionally defective as long as the core charges giving rise to the termination are adequately detailed.

The court stopped short of stating a rigid rule, pointing out that if the real cause of termination were hidden in generalized accusations, and specific charges were included in a pretermination notice only to disguise that real motive, an employee would have insufficient information to recognize the criticized conduct and respond to it. Such notice would be constitutionally deficient. But if notice explains sufficient charges on which termination is actually based, the constitutional demand for due process is satisfied whether or not less specific catch-all allegations are added.

The Fourth Circuit here reached a facially different outcome than the Third Circuit did in *Tucker*. However, in view of significant contextual distinctions between the two cases, these courts' applications of *Loudermill* can be comfortably reconciled. The vague drug abuse allegations in *Tucker* appeared inextricably entangled with the straightforward charge of resis-