Litigation Backgrounder

Economic Liberty is the Keystone of Liberty

(*Losco v. Powelson*)

One of the central components of the American Dream is the right to earn a living. Many people see starting their own businesses, to provide for themselves and their families, as central to the "pursuit of happiness." This spirit of entrepreneurship has helped to make America the dynamic and diverse society that it is. Yet, sadly, in many states—including the same state where the phrase "pursuit of happiness" was first written—the law often forbids people from starting a new business. Amazingly, these laws have nothing to do with protecting the public from dangerous or criminal activities. Instead, these laws forbid people from starting new businesses *unless they first get permission from their own competitors*. We call these laws the "Competitor's Veto."

On May 4, 2015, Pacific Legal Foundation (PLF) filed a federal civil rights lawsuit on behalf of Cosmo and MaryAnne Losco, who would like to start a moving company in Pennsylvania. After working for many years for other people, the Loscos decided to start their own company—a small moving company in their home town of Telford, a suburb of Philadelphia. But they soon learned that Pennsylvania law allows all of the state's existing moving companies to veto their application for a business license. This backgrounder explains why the Loscos' case is important in the Keystone State and throughout the nation.

The Loscos' small business dream

After years of working for other people—Cosmo as manager of operations for a medical device manufacturer, and MaryAnne in human resources departments for several companies—the Loscos decided that they wanted to start a business of their own. "I was looking for a new challenge" explains Cosmo, "and an opportunity where I could be my own boss and also help to develop young talent."

Cosmo decided to start a franchise of a nationwide moving company called College Hunks Moving. College Hunks franchises throughout the country employ hardworking young people, and also allow experienced business managers like the Loscos the opportunity to lead a new company and mentor new workers. "I feel like

our business can have a positive impact on future leaders and our community," says Cosmo, a native Pennsylvanian. "I was born locally and have lived here all my life. I have given back to my community in various ways, including coaching sports for over 30 years. Moving is stressful for people. Providing top notch service during a stressful time was appealing to me."

In February, 2015, he bought a franchise and began the process of getting the required government licenses. That was when they learned that Pennsylvania law forbids a person from running a moving company without first having a Certificate of Public Convenience, or CPC. And whenever a person applies for a CPC, officials with the state's Public Utility Commission notify the state's existing movers and give them the opportunity to object to any new moving business starting up.

"I heard about the difficulties one of our franchise partners was having obtaining his license," says Cosmo. "It didn't make sense to us that all the other licensed moving companies get a 'vote' on who is granted a license. And it's clear that there is a system in place that makes it nearly impossible to be approved for the license. It's frustrating and just seems unfair and unconstitutional."

How the Keystone State blocks the road against entrepreneurs

Under Pennsylvania law, any person wanting to run a moving company must first get a CPC.[1] But whenever a person applies for a CPC, state officials publish a notice of the application in a newsletter called the *Pennsylvania Bulletin*. Once the notice is published, the state's existing moving companies are given 15 days to file "protests" against the application.[2]

A company can protest, not because the applicant is unsafe, unqualified, or dishonest, but simply because it does not want competition. In fact, the law requires any protesting company to identify the "adverse impact which approval of the application can be expected to have" on the protesting company and "any restrictions to the application which would protect the protestant's interest, including a concise statement of any amendment which would result in a withdrawal of the protest."[3] In simpler language, the protesting company must explain how much competition it expects the applicant will cause, and explain how the applicant can narrow down its proposed operations in a way that will satisfy the protesting company.

Whenever a protest is filed, two things happen. First, the state puts a 20-day waiting period on the application, during which the applicant and the protesting company are expected to negotiate their territory of operations.[4]

Second, if the applicant refuses, and insists instead on the right to compete against the existing companies, the Public Utility Commission must then hold a hearing, where the applicant is forced to prove that he or she should have the right to compete.[5] If the applicant is organized as a corporation—like CD Losco, LLC—they are required to hire a lawyer; the owners are not allowed to represent the business on their own.[6]

At the hearing, the applicants are required to prove, among other things, that a new moving company "is necessary or proper for the service, accommodation, convenience, or safety of the public,"[7] that the new company would "serve a useful public purpose,"[8] and that a new moving company will not "endanger or impair the operations of existing [movers]" to a degree that bureaucrats consider "contrary to the public interest."[9]

There's no law or regulation or court precedent that defines such vague terms as "endanger the operations" or "proper for the convenience of the public." In short, the law allows bureaucrats at the Public Utility Commission to decide when competition should be allowed and not allowed.

Together, the notice, protest, and hearing requirement, and the vague, anti-competitive language in the law, create a "Competitor's Veto" that allows existing moving companies to block new competition, or at least to impose expensive and time-consuming burdens on them. The law gives established businesses a tool that they can use to outlaw their own competition.

"It just doesn't seem fair to not be allowed to secure a moving license in the state of Pennsylvania," says Cosmo. "The state should allow open competition and give people the right to earn a living."

How the "Competitor's Veto" harms consumers and entrepreneurs

Many jobs require some sort of license—from a simple business license to a doctor's license that requires extensive education and training. But CPC laws are different. Unlike licensing laws that assess whether a person is competent and honest, CPC laws block competition that the government deems undesirable.

Competitor's Veto laws originated in the nineteenth century in order to regulate railroads. Sections of Pennsylvania's law, in fact, still mention railroads specifically.[10] But they were never updated as technology advanced and moving services began to be provided by automobile. And existing businesses found it advantageous to keep these laws in place to block competition.[11]

In the years since, many economists and experts in regulation, including Stephen Breyer, before he joined the Supreme Court, have warned that these laws are economically inefficient—encouraging existing businesses to waste time and money seeking political favors and blocking competition, all of which ultimately hurts consumers.[12] Worse, these laws block entrepreneurship in an industry that is an ideal opportunity for entry-level workers—doing violence to the values of entrepreneurship and initiative that our nation has so long cherished.[13]

In economic terms, Competitor's Veto laws raise two primary problems: "rent-seeking" and the "knowledge problem." Rent-seeking occurs when existing businesses lobby the government to give them special favors: the more those favors are worth, the more the businesses will devote to scrambling for government benefits. Thus, if the government can prohibit competition against one company, which enables that company to raise its prices by a certain amount, the company can be expected to invest about that amount in its efforts to persuade the government to keep that exclusion in place. The second problem—the "knowledge problem"—holds that government cannot possibly know all the information necessary to plan out an economy. Pennsylvania law requires entrepreneurs to prove to a government agency that a new moving company would be "advantageous"—but nobody knows what sorts of businesses will be "advantageous" to the public before that business opens its doors. Certainly government officials have no incentive to get such a difficult prediction right, since they bear none of the cost of an erroneous prediction. And government officials rarely do

the sort of market research necessary to predict what sorts of prospective businesses will succeed.

But worse than these effects are the consequences for entrepreneurs. Although relatively little research has been done on this front, two recent cases in Missouri[14] and Kentucky[15] demonstrate how Competitor's Veto laws typically block competition for the private benefit of existing companies. In both of those states, members of the general public never opposed the issuance of new moving licenses—only existing companies did, and none ever suggested that the applicant would be a danger to the public. As a result, in both states, potential entrepreneurs were often forced to abandon their plans to develop new companies—all to perpetuate monopolies in the hands of existing businesses.

"Competitor's Veto" laws are unconstitutional

Every time the Supreme Court has addressed the question, it has struck down Competitor's Veto laws as unconstitutional. In 1889, in its very first decision on the question of occupational licenses, the Court explained that while the government may impose licensing requirements to ensure that people who practice a trade are honest and skillful, the government may not arbitrarily block people from entering a business for no good reason.[16] In the 1920s, it struck down laws very similar to Pennsylvania's, holding that the laws' "primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition."[17]

The Court most directly addressed the question in 1932, when, in *New State Ice Company v. Liebmann*,[18] it struck down an Oklahoma law which required a license to operate an ice-delivery business—but allowed existing businesses to block any new license from being issued. The Court explained that under the Constitution, "it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."[19] For the state to "shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments" violated the Constitution's guarantee of due process of law.[20]

Sadly, within a few years of the *New State Ice* decision, federal courts began scaling back protections for economic freedom. Under a legal theory called the

"rational basis test," courts gave state and federal officials virtually limitless power to restrict economic freedom.[21] The Court has never overruled *New State Ice*, but today, judges often ignore the many ways government exploits its power to regulate—which is supposed to protect the public health and safety—for the private benefit of the politically powerful. In 2004, for example, the Tenth Circuit Court of Appeals held that the Constitution allows lawmakers to "dish[] out special economic benefits to certain in-state industries" even where doing so has no connection to protecting public safety.[22] Some courts have disagreed, however. In 2008, the Ninth Circuit Court of Appeals rejected that approach, declaring that while government has broad discretion to regulate in the interest of the public, "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest."[23]

In 2014, a federal district court in Kentucky struck down that state's licensing law for moving companies, declaring that it allowed "an existing moving company [to] essentially 'veto' competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs."[24] The court noted that the law, "in essence, is providing an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements."[25] This violated the constitutional right to earn a living without unreasonable interference by the government. Noting that the case set important precedent protecting economic freedom, columnist George Will declared the decision the "year's most encouraging development in governance."[26]

What are other states doing?

PLF has been fighting Competitor's Veto laws since 2009, when it filed suit against Oregon officials on behalf of Portland business owner Adam Sweet, and his company, 2Brothers Moving. Oregon lawmakers reacted to the lawsuit by swiftly repealing the law.

A year later, PLF lawyers sued Missouri over its anticompetitive licensing law for moving companies, representing St. Louis business owner Michael Munie. There, too, officials chose to repeal their Competitor's Veto law rather than defend it in court. Missouri's new licensing law, passed in 2012, was particularly friendly to free enterprise. It eliminated the requirement entirely, and declared instead that any person

wanting to enter the moving business would be entitled to a permit so long as he "is fit, willing and able to properly perform the service proposed and to conform to [safety regulations]."[27] As a result, the waiting time to obtain a moving company license in the Show Me State has dropped from an average of 319 days to an average of 19 days.[28] PLF's victory in Kentucky also resulted in a major win for free enterprise when state officials declared that they would apply the court's ruling not just to the moving industry, but to all transportation markets.[29]

Today, PLF is challenging Competitor's Veto laws in Montana and Nevada, as well as Pennsylvania.

Cosmo and MaryAnne Losco believe that it is the constitutional right of every person to earn an honest living without unreasonable government interference. "I am bringing this lawsuit in an effort to have the law in Pennsylvania changed and to allow people like me the right to compete and earn a living," says Cosmo. "It just doesn't seem fair to not be allowed to secure a moving license in the state of Pennsylvania."

The legal team

Cosmo and MaryAnne Losco, and the company, CD Losco, LLC, are represented by PLF attorneys Timothy Sandefur and Anastasia Boden, with the assistance of Pennsylvania attorney Mark Jakubik. The Loscos are seeking no damages—only an injunction and declaratory relief to declare the Pennsylvania Competitor's Veto law unconstitutional under the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses.

Pacific Legal Foundation (www.pacificlegal.org) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and maintains offices in Washington state, Washington D.C., and Florida. Its Economic Liberty Project is led by PLF Principal Attorney Timothy Sandefur, whose book, *The Right to Earn a Living: Economic Freedom and the Law*, was published in 2010 by the Cato Institute. Through the Project, PLF defends the fundamental right of all Americans to earn a living through an honest trade.

This backgrounder was prepared by Timothy Sandefur and Anastasia Boden. For more information, or to arrange interviews with PLF attorneys and their clients, please contact:

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Notes

1. 52 Pa. Code § 3.381(b).

2. *Id*. §§ 5.201(a); 3.381(c)(1)(i)(A); 3.381(c)(1)(ii).

3. *Id*. § 3.381(c)(1)(i)(A).

4. *Id*. §§ 3.381(d)(1)(i); 5.235.

5. *Id*. § 3.381(d).

6. *Id*. §§ 1.21, 1.22. Although CD Losco, LLC, is a "limited liability company," not technically a corporation, the same rule applies.

7. 66 Pa.C.S.A. § 1103(a).

8. 52 Pa. Code § 41.14(a).

9. *Id*. § 41.14(c).

10. *See, e.g.,* 66 Pa.C.S.A. § 1102(b).

11. For a history of CPC laws, see William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 70 Colum. L. Rev. 426 (1979), and Paul H. Gardner, Jr., *Entry and Rate Regulation of Interstate Motor Carriers in*

Missouri: A Strategy for Reform, 57 Mo. L. Rev. 693 (1982).

12. Stephen Breyer, *Regulation and Its Reform* 30 (1982); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 611-12 (1969).

13. Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 N.D. J. L. Ethics & Pub. Pol'y 381, 410-16 (2012).

14. Timothy Sandefur, *A Public Convenience and Necessity And Other Conspiracies Against Trade: A Case Study from The Missouri Moving Industry*, 24 Geo. Mason U. Civ. Rts. L.J. 159 (2014).

15. Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, Mercatus Center Working Paper, avail. at http://mercatus.org/publication/state-competitor-veto-laws-right-to-earn-a-living-federal-reform

16. *Dent v. West Virginia*, 129 U.S. 114 (1889).

17. *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925).

18. 285 U.S. 262 (1932).

19. *Id.* at 278.

20. *Id.*

21. *See* Timothy Sandefur, *The Right to Earn a Living* ch. 7 (2010).

22. *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

23. *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008). *See also St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir.) *cert. denied*, 134 S. Ct. 423 (2013) ("neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

24. *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700 (E.D. Ky. 2014).

25. *Id.* at 699.

26. George F. Will, "A Strike Against Rent Seeking," *Washington Post*, Dec. 31, 2014, avail. at http://www.washingtonpost.com/opinions/george-will-a-strike-against-rent-seeking/2014/12/31/ba5a1686-9109-11e4-ba53-a477d66580ed_story.html

27. HB 1402 (2012), avail. at http://www.house.mo.gov/billtracking/bills121/biltxt/truly/HB1402T.htm

28. Timothy Sandefur, "What Abolishing Missouri's Mover Licensing Cartel Has Meant," *PLF Liberty Blog*, Mar. 14, 2013, avail. at http://blog.pacificlegal.org/2013/what-abolishing-missouris-mover-licensing-cartel-has-meant/

29. Timothy Sandefur, "PLF Opens The Road for Free Enterprise in Kentucky!," *PLF Liberty Blog*, Aug. 19, 2014, avail. at http://blog.pacificlegal.org/2014/plf-opens-road-free-enterprise-kentucky/