



Litigation Backgrounder

On the move for economic freedom in Kentucky

(Bruner v. Mathews, et al.)

Among the constitutional rights that Americans have cherished for generations is the right to take a chance: to start a new business and to earn an honest living. Whether they end up becoming wealthy and famous or whether they make a comfortable living running modest businesses in their own home towns, entrepreneurs have long treasured the opportunities that our country's laws afford them.

Unfortunately, many states enforce laws that restrict that freedom of choice and block hardworking people from starting new businesses. Worse, many such laws do not protect the public from dangerous or criminal activities, but only protect established companies against fair competition. Among the worst of these restrictions are "Certificate of Necessity" laws that essentially force new businesses to get permission from their own competitors before they can begin operating.

On August 21, 2012, Pacific Legal Foundation (PLF) filed a federal civil rights lawsuit challenging the constitutionality of Kentucky's irrational and anticompetitive law restricting moving companies, on behalf of Lexington businessman R.J. Bruner. This backgrounder explains why Bruner's case is important to entrepreneurs in Kentucky and throughout the United States.

R.J. Bruner's small business

R.J. Bruner never planned to go into the moving business. But in 2010, after he had helped his sister move, he realized it might be a good way to make a living, and he and a friend posted an ad on craigslist.com. Their business took off, and two years later, Wildcat Moving employs some 30 people and operates five trucks.

"Running your own business demands your full attention most of every day," Bruner says. "It is very hard on my wife who is currently pregnant and just got off bed rest.... It is very stressful." But the rewards of entrepreneurship are worth the hard work. "Providing people with jobs and being a kind and understanding boss is incredibly rewarding. We pay our guys well and they do a great job for us in return. There is a mutual respect within small business that is often lost on corporate culture."

Unfortunately, what Bruner discovered was that Kentucky, like many other states, has a “Certificate of Necessity” law, or “CON law” which makes it illegal to run a moving business if the state’s existing moving companies object.¹

How the Bluegrass State restricts the right to compete

The way the law works is this: to operate a moving company, a person must first apply for a Certificate. But whenever anyone applies for a Certificate, the Kentucky Transportation Cabinet Division of Motor Carriers must notify everyone who already has a Certificate, and give them the opportunity to file “protests” against any new moving company being allowed to compete.² A protest need not prove, or even claim, that the person applying for a Certificate would be incompetent, or a threat to the public, or would operate a criminal enterprise. Existing companies can protest simply because customers would choose to hire the newcomer instead. And once a protest is filed, the applicant is required to attend a hearing, where he must prove that existing moving services in the area are “inadequate,” that a new moving company “is or will be required by the present or future public convenience and necessity,” and that a new moving company would be “consistent with the public interest.”³

These administrative hearings are expensive and time-consuming affairs. A corporation or an LLC, like Wildcat Moving, is legally required to hire a lawyer for any such hearing—the owner may not appear on behalf of the company—and this can cost a lot of money that small businesses cannot spare.⁴ And officials can take a long time to render a decision on whether to grant a would-be moving company a Certificate. Worse, the law does not define words like “inadequate” or “future necessity” or “public interest.” Bureaucrats are practically free to interpret the word however they choose, and applicants have no way of knowing beforehand what kind of evidence the government will consider sufficient to prove that the public “needs” a new moving company.

Taken as a whole, the protest-and-hearing requirement and the vague, anti-competitive rules that the government applies at Certificate hearings create a “Competitor’s Veto” that allows established businesses to block new competition for reasons totally unrelated to public safety. They can use government to outlaw competition.

“It is the perfect system for protecting those already in the industry from new competition,” says R.J. Bruner. “These types of regulations only benefit the companies already operating within an industry. By artificially limiting supply, consumers are forced to pay more.” The law, he adds, “is an excellent example of big business using a flawed regulation system to bully the small businessman.”

“All I want is to be able to compete fairly in the Kentucky intrastate moving market, Bruner explains. He is confident that his lawsuit will bring meaningful change to free the market. “Small business owners can and will stand up and fight for their rights.”

The Constitution and “Certificate of Necessity” laws

Typical occupational licensing laws require extensive training and educational credentials before a person can enter a trade. Such laws are frequently abused to restrict business opportunities and create barriers against the market forces that would otherwise require established companies to lower their prices or improve service. But such laws are at least supposed to protect the public from incompetent or dangerous business practices. The Supreme Court has long recognized that “[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose,”⁵ and it has upheld occupational licensing laws only if they “have a rational connection with the applicant’s fitness or capacity to practice” the profession involved.⁶

But CON laws have no relationship to a person’s skills. These laws are designed to limit competition regardless of whether a business is safe and qualified. They originated during the Nineteenth Century to regulate quasi-monopoly industries like railroads, but were gradually applied even to fully competitive industries like moving companies.⁷ Although economists and specialists in regulation—including even Stephen Breyer, before he was appointed to the Supreme Court⁸—have repeatedly shown that Certificate of Necessity laws are inefficient and harm consumers when applied to competitive industries, such laws remain on the books in most states.

CON laws force potential new businesses first to prove to a board of government bureaucrats that there is a “public need” for a new business. But government officials are no better than industry at predicting public needs or consumer demands. In fact, they have less incentive to do so, because they do not bear the cost of an erroneous prediction of consumer desires the way industry does. Nor do they typically have the same access to information about what consumers want that professionals have. It is simply not possible

for government agencies to determine “public need” more effectively than businesses can, and there is much reason to believe they do a poor job of it. This is particularly true when entrenched industry, or even government itself, exploits the law for self-interested purposes. Perhaps the most shocking example of CON laws comes from the medical industry. Many states require a Certificate before a new hospital may open, and established hospitals sometimes exploit these laws to delay or prohibit new hospitals from opening—at the expense of people who need medical care.⁹

But aside from their harm to consumers, CON laws violate the principles of economic opportunity and freedom that are the cornerstone of the American dream. Entrepreneurs like R.J. Bruner are the engine of economic progress, because they shake up the business world with new ideas. One reason small businesses account for the vast majority of employment opportunities in America¹⁰ is that, motivated by the need to succeed, and not having the luxury of resting on their laurels, start-ups are willing to listen to consumers’ desires and devise innovative new business strategies. In fact, small firms in the U.S. are responsible for more of the nation’s technological growth and innovation than their larger, more established counterparts.¹¹

Kentucky’s CON law stifles entrepreneurship by strangling economic opportunity and progress. The only winners in this protectionist scheme are established moving companies. Ultimately, the state’s consumers are deprived of the untapped potential that a free competitive market provides.

The law and economic freedom

R.J. Bruner’s fight for economic freedom is just one battle in a nationwide conflict. Abusive licensing laws and other restrictions on the right to earn a living are a national epidemic, burdening America’s wealth creators, stifling job creation, and raising the cost of living. Government is supposed to protect the public, but its power is frequently exploited to prevent fair competition with established businesses.

Fortunately, federal and state courts have agreed that government may not allow private interest groups to monopolize entry into a business by preventing entrepreneurs from competing with them.

The right to earn a living in one’s chosen occupation is a constitutional right protected under the U.S. Constitution. The Fourteenth Amendment protects the liberty that the

Supreme Court described as “the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference.”¹² Indeed, in a 2009 case litigated by Pacific Legal Foundation, the Ninth Circuit Court of Appeals ruled that government may not use its licensing requirements simply “to favor economically certain constituents at the expense of others similarly situated.”¹³ While government may regulate businesses to protect the consumer, it may not arbitrarily restrict the right of economic freedom simply to please private interest groups.

In 1932, the Supreme Court struck down an Oklahoma law similar to the Kentucky licensing requirement. That law, enacted before refrigerators were widely used, made it a crime to sell ice without first proving that there was a public necessity for a new ice company.¹⁴ The government board that decided that question was staffed by owners of existing ice companies. In *New State Ice Company v. Leibmann*, the Court declared the Oklahoma scheme unconstitutional because private corporations were seeking “to prevent a competitor from entering the business of making and selling ice” rather than actually protecting the public.¹⁵ Under the Constitution, wrote the justices, “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.”¹⁶ For the state to abuse its constitutional power 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.¹⁷

Despite this decision, most states still impose burdensome licensing requirements against entrepreneurs seeking to enter a new line of business. This is because in the years after the *New State Ice* case, courts backed off, giving states vast new powers to regulate economic choice. Under a legal theory called the “rational basis test,” created only two years after the *New State Ice* decision, courts allowed government to interfere with the rights of entrepreneurs with almost no judicial oversight.¹⁸ Although the Supreme Court has never overruled *New State Ice*, judges often ignore the way government abuses regulatory power to protect existing companies from fair competition.¹⁹ In one recent Illinois case, for example, the state supreme court upheld a state law that allows existing car dealerships to veto the opening of new dealerships nearby.²⁰

But the tide is turning, as judges are showing increasing willingness to protect the right to earn a living. In 2002, a federal court of appeals struck down a Tennessee licensing law that required casket retailers to obtain a funeral director’s license in order to sell caskets

and coffins.²¹ The court invalidated this licensing law, finding that using the law to “protect[] a discrete interest group from economic competition is not a legitimate governmental purpose.”²²

The Ninth Circuit Court of Appeals agreed when in 2008 it invalidated a California licensing law for pest control workers. The court found that the law was “irrational,” and ruled that “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

What are other states doing?

In recent years, several states have abolished their anticompetitive CON laws, and replaced them with provisions that only impose protections for public health and safety. For example, in 2007, Minnesota lawmakers passed legislation which eliminated that state’s requirement of notifying existing moving companies, and required only a criminal background check and a promise to obey state safety regulations.²⁴

In 2009, PLF attorneys challenged an Oregon law similar to the Kentucky law involved in R.J. Bruner’s case. That lawsuit involved a Portland college student named Adam Sweet and his moving company, 2Brothers Moving. After a federal judge refused to throw that case out, the State of Oregon repealed the requirement.²⁵ They passed legislation exempting moving companies from the CON law requirement that applies to taxis, limousines, and other services.²⁶

A year later, PLF scored another victory when it filed another lawsuit on behalf of St. Louis entrepreneur, Mike Munie, challenging the constitutionality of Missouri’s Certificate of Necessity law for moving companies. That state also chose to repeal the law before the court issued a ruling.²⁷ Passed in 2012, that state’s law was particularly friendly to free enterprise. It eliminated the CON requirement entirely, and provided that a 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 the provisions of this chapter and the requirements.”²⁸

“As long as a moving company has proof of appropriate insurance and has met U.S. Department of Transportation guidelines,” says R.J. Bruner, “there should be no regulation of moving companies.” Businesses should compete for customers on their own merits—not by making their competition illegal.

PLF believes that it is the constitutional right of every person to earn an honest living without unreasonable government interference. Starting a business has long been an important part of the American dream. America is the “land of opportunity” because of the political and economic freedom that forms the core of American life. But this system requires competition for its health and vigor.²⁹ The law should not be used to exclude entrepreneurs just to benefit the politically powerful.

Pacific Legal Foundation’s Economic Liberty Project

R.J. Bruner and his company, Wildcat Movers, LLC, are represented by PLF attorneys Timothy Sandefur, Joshua P. Thomson, and Chance Weldon, with the assistance of local attorney Kris Collman. Bruner and his company are seeking no damages—only an injunction and declaratory relief to declare the Kentucky statute and regulation 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 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. For more information, or to arrange interviews with PLF attorneys and their clients, please contact:

Harold E. Johnson, Media Director
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Phone: (916) 419-7111
Fax: (916) 419-7747
E-mail: hej@pacificlegal.org

Notes:

1. KRS § 281.615, *et seq.*
2. KRS § 281.625(1); 601 Ky. Admin. Regs. 1:030(2).
3. KRS § 281.625(2).
4. *Ky. State Bar Ass'n v. Henry Vogt Machine Co., Inc.*, 416 S.W.2d 727 (Ky. 1967).
5. *Dent v. West Virginia*, 129 U.S. 114, 121 (1889).
6. *Schware v. Bd. Of Examiners*, 353 U.S. 232, 239 (1957).
7. William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 70 Colum. L. Rev. 426 (1979); Paul H. Gardner, Jr., *Entry and Rate Regulation of Interstate Motor Carriers in Missouri: A Strategy for Reform*, 57 Mo. L. Rev. 693 (1982).
8. Stephen Breyer, *Regulation and Its Reform* 30 (1982).
9. John E. Schneider & Robert L. Ohsfeldt, *The Role of Markets and Competition in Health Care Reform Initiatives to Improve Efficiency and Enhance Access to Care*, 37 Cumb. L. Rev. 479, 501-02 (2007); Patrick John McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System*, 23 Fla. St. U. L. Rev. 141, 167 (1995); Laretta Higgins Wolfson, *State Regulation of Health Facility Planning: The Economic Theory and Political Realities of Certificates of Need*, 4 DePaul J. Health Care L. 261 (2001).
10. U.S. Small Business Administration, Fact Sheet, August 2007; available at <http://www.sba.gov/advo/stats/sbfaq.pdf> (last visited May 8, 2008) (Small businesses represent 99.7% of all employer firms, employ about half of all private sector employees, and have generated about 60 to 80% of net new jobs annually over the past decade.).
11. *Id.* (Small firms "produce 13 times more patents per employee than large patenting firms," and their patents are "twice as likely as large firm patents to be the [] most cited.").
12. *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (citing *Dent v. West Virginia*, 129 U.S. 114 (1889)); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Peters v. Hobby*, 349 U.S. 331, 352 (1955) (concurring opinion *cf. Slochower v. Board of Higher Education*, 350 U.S. 551 (1956)); *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888).

13. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).
14. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 272 (1932) (“The portion of the section immediately in question here is that which forbids the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorizes a denial of the application where the existing licensed facilities ‘are sufficient to meet the public needs therein.’”).
15. *Id.* at 278.
16. *Id.*
17. *Id.*
18. See Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday’s Rationality Review Isn’t Enough*, 24 N. Ill. U. L. Rev. 457, 474 (2004) (“[S]ome courts have held that the rational basis test does not require that the state’s asserted basis for the law be the actual basis on which the legislature passed the law. Further, some courts have held that the law does not actually have to be a rational solution in order to pass the test; . . . since the court asks only whether a legislator could have believed the policy would be effective.”).
19. Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society’s Values*, 26 ND J. L. Ethics & Pub. Pol’y 381, 410-16 (2012).
20. *General Motors Corp. v. State Motor Vehicle Review Bd.*, 862 N.E.2d 209 (Ill. 2007).
21. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).
22. *Id.* at 224.
23. *Merrifield*, 547 F.3d at 991, 991 n.5.
24. House File No. 1713 (2007).
25. Timothy Sandefur, *Oregon Stops Sideswiping New Moving Companies*, available at <http://www.pacificlegal.org/page.aspx?pid=980>.
26. HB 2817 (2009), available at <http://www.pacificlegal.org/document.doc?id=310>.

27. PLF Press Release, July 11, 2012, *available at* <http://www.pacificlegal.org/releases/Missouris-moving-business-cartel-challenged-by-PLF-is-now-officially-repealed>.
28. HB 1402 (2012), *available at* [http://www.house.mo.gov/billtracking/bills121/biltxt/truly/HB1402T .htm](http://www.house.mo.gov/billtracking/bills121/biltxt/truly/HB1402T.htm).
29. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 262 (1972).