

4TH CIRCUIT ISSUES TWO STANDING OPINIONS ON THE SAME DAY



By Jack Pringle

Introduction

Attorneys and judges burn a great deal of time and energy debating and determining the issue of "standing": broad brush whether there is a "case or controversy" sufficient to invoke the power of a court to hear it. The wildly different factual scenarios in those cases applying standing requirements (compare *Sea Pines v. SCDNR* with *Smiley v. SCDHEC*) sometimes make it difficult to square how and why standing exists in one case, but not in another.

On April 5th, the 4th Circuit Court of Appeals issued a pair of opinions, *Lansdowne on the Potomac Homeowners Association, Inc. v. OpenBand at Lansdowne, LLC* and *Southern Walk at Broadlands Homeowner's Association, Inc. v. OpenBand at Broadlands, LLC*, applying the constitutional standing test to two very similar fact patterns and reaching different conclusions. Comparing the analyses in the two cases may be helpful to practitioners.

It is absolutely untrue that I decided to blog on this topic because of my **ongoing crusade regarding proper office posture**.

Background

Plaintiffs Lansdowne and Southern Walk are homeowners' associations (HOAs) for residential developments in Northern Virginia. Both contracted with OpenBand (and a variety of OpenBand entities) to have OpenBand be the exclusive provider of the vaunted "triple-play" (phone, cable/video, internet) in their communities. (Both entities also conveyed exclusive easements to OpenBand, and covenanted that neither

would grant any utility easement to any entity other than OpenBand).

In 2007, after OpenBand had been providing services to the Lansdowne and Southern Walk communities for several years, the **Federal Communications Commission ("FCC")** issued an Order declaring exclusive contracts between cable operators and "multiple dwelling units" to be anti-competitive and therefore null and void (the Exclusivity Order). The requirements of the Exclusivity Order are codified at **47 C.F.R. Section 76.2000**. (In 2005, the South Carolina General Assembly enacted a similar statute, **S.C. Code Section 58-9-295**).

After unsuccessful attempts to initiate negotiations with competitors of OpenBand, Lansdowne and Southern Walk both filed separate declaratory judgment actions in United States District Court for the Eastern District of Virginia, seeking determinations that their arrangements with OpenBand ran afoul of the Exclusivity Order.

This is where the cases took different directions, based on whether each constituted a "case or controversy," and only one plaintiff remained standing (**Rim Shot**) at the conclusion of the cases.

***Lansdowne* - Individual and Organizational Standing**

Following discovery, District Court Judge **Anthony J. Trenga** considered cross-motions for summary judgment on the claim that the OpenBand arrangements with Lansdowne violated the Exclusivity Order, and issued an order permanently enjoining OpenBand from enforcing any video service exclusivity provision against Lansdowne or its residents.

The 4th Circuit reviewed the determination that Lansdowne had standing in its own right to challenge the Exclusivity Order applying the test originally announced in **Lujan v. Defenders of Wildlife**. In order to have constitutional standing to bring a lawsuit, a party must show 1) an injury in fact that is both a) concrete and particularized and b) actual or imminent, and not conjectural or hypothetical; 2) traceable to the challenged action of the Defendant; and 3) it is likely

that the injury will be redressed by a favorable decision. (For a discussion of the three basic types of standing, see *ATC South, Inc. v. Charleston County, et al.*)

Judge Wilkinson determined that Lansdowne met all three factors:

Injury in Fact.

Lansdowne purchases services directly from OpenBand for its community center and office space, and as a result is *personally* harmed by the exclusivity provisions in its contractual arrangements with OpenBand. Therefore, Lansdowne the HOA suffered an *individual* injury, as opposed to any injury suffered by the members of the HOA who also purchase services from OpenBand. Moreover, Lansdowne also demonstrated *organizational* or *associational* standing to sue on behalf of its members, by introducing affidavits from individual members showing their injuries.

Lansdowne's allegations of its personal injury and those on behalf of its individual members did not exist in Southern Walk, as described below.

Traceable to the Actions of OpenBand (Causation).

OpenBand argued that any injury that Lansdowne might suffer as a result of missing out on video service competition would be caused by the independent "decisions by competing companies not to offer service to Lansdowne." The court disagreed, pointing out that causation in the standing context includes an injury "'produced by [the] determinative or coercive effect' of the defendant's conduct 'upon the action of someone else.'" In other words, "fairly traceable" means just that: you can show the chain of events from OpenBand's actions to Lansdowne's injury, not merely that OpenBand's "conduct is the last link in the causal chain leading to an injury . . ."

Redressability.

The lack of competition caused by the exclusivity provisions in the OpenBand arrangements would be eliminated if Lansdowne had the right to (wait for

it . . .) competitors for the provision of video services.

Southern Walk- No Individual or Organizational Standing

OpenBand filed a motion to dismiss for a lack of jurisdiction, claiming that Southern Walk lacked standing to bring the lawsuit. District Court Judge Gerald Bruce Lee agreed that Southern Walk had failed to plead facts sufficient to establish individual or representative standing, refused to allow Southern Walk to amend its complaint, and dismissed the case with prejudice. (As an aside, the district court cited to a case, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, with ties to South Carolina. This case is another example of tortured facts and torturous procedural history).

Individual Standing.

Southern Walk first alleged that its status as a party to the numerous contractual arrangements with OpenBand containing illegal exclusivity provisions established its standing to maintain suit. Judge Motz disagreed. Although status as a party to a contract or having an interest in a contract may confer standing as a *statutory* proposition (See the *South Carolina Uniform Declaratory Judgements Act*), *constitutional* standing requires a party to meet each prong of the *Lujan* test.

Next, Southern Walk alleged personal harm due to the contract's requirement that it pay OpenBand for services when its members failed to pay. The 4th Circuit conceded that harm is concrete and particularized, but *non-redressable* by any determination voiding the exclusivity provisions. In other words, Southern Walk's obligation to pay OpenBand did not hinge on the exclusivity provisions in its contracts, but would exist "regardless of the outcome of this action." Also, because Southern Walk was not a customer of OpenBand's services (unlike Lansdowne), it could not show any economic injury to itself (as opposed to its members).

Organizational/Representational Standing.

In order to establish standing as a representative of its members, Southern Walk bore the burden of demonstrating 1) its own members would have standing to sue in their own right; 2) the interest the organization seeks to protect are germane to the organization's purpose; and 3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit. The United States Supreme Court clarified this test in *Summers v. Earth Island Institute*, requiring that Southern Walk "make specific allegations establishing that at least one identified member had suffered or would suffer harm." Unfortunately Southern Walk's complaint neither identified any such specific

member, nor attached affidavits containing allegations of specific individual injury. And the court disagreed that Southern Walk met any exception to *Summers*.

Conclusion

The 4th Circuit vacated the district court's dismissal of Southern Walk's complaint with prejudice. (A suit that is dismissed for lack of jurisdiction cannot be dismissed with prejudice because no decision has been reached on the merits). The dismissal of the complaint without prejudice will allow Southern Walk another opportunity to amend its complaint. Southern Walk's subsequent amended complaint may focus on demonstrating its organizational standing.