

Appeals Court Erred In Overturning Bay State's Tobacco Disclosure Law

By John D. Echeverria

Lost in the clamor over the proposed omnibus tobacco settlement is an important Nov. 6 ruling by the US Court of Appeals in Boston in favor of Big Tobacco and against the Commonwealth of Massachusetts.

The decision, which gutted the state's new tobacco ingredients disclosure law, defies common sense and ignores relevant legal principles.

It is relatively easy to explain the court's mistake, but the greater mystery is how this highly regarded federal court could have stumbled so badly.

The nation's largest tobacco companies challenged the 1996 Massachusetts law that requires cigarette manufacturers to report annually to the state Department of Public Health, on a brand-by-brand basis, the ingredients (other than tobacco and water) included in cigarettes. This would disclose such items as ammonia compounds that quicken the absorption of nicotine into smokers' systems. The department is authorized to disclose this information to "reduce risks to public health."

The companies challenged the law on the ground, among others, that it unconstitutionally "takes" their protected property rights in the secret formulas they use to create distinctive brands. US District Judge George A. O'Toole Jr. accepted this argument, and so did the Appeals Court, blocking the state from implementing the ingredient disclosure provision. (Both courts left in place a separate provision requiring reporting of nicotine ratings.)

The mind reels at the absurdity of this result. Governor Weld, who signed the tobacco disclosure bill into law, accurately called it "a common sense, proconsumer bill that will give people all the information they need to make educated decisions about what they put in their bodies."

A quick survey of the family kitchen or the medicine cabinet reveals many consumer products - from cleansers to pain relievers to cookies - that contain labels detailing the ingredients therein. It is incredible that this routine, sound business practice is beyond the power of the Massachusetts Legislature to impose on the manufacturers of cigarettes.

Furthermore, the Appeals Court was wrong on the law. Almost 80 years ago, the US Supreme Court called it "too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold."

Anticipating the precise argument advanced by the tobacco companies in this case, the court continued, "The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth." The Supreme Court has repeatedly affirmed this principle.

How could the lower courts have gotten it so wrong? To be charitable, one possible explanation is that they did not purport to decide definitively the constitutional takings issue. Given the procedural posture of the case - an appeal from a grant of a preliminary injunction by Judge O'Toole - the Appeals Court only had to decide whether the companies had demonstrated a substantial "likelihood" of prevailing on their taking claim. The case is continuing, and there may be an opportunity to review the issue again - and decide the case correctly - in a second round of appeals.

Another potential explanation is that the state was simply outgunned. The decision lists 17 different tobacco company lawyers representing half a dozen different law firms, including some of the largest and most prestigious in the nation as well as many of the most prominent in Boston. Attorney General Scott Harshbarger was aided by only two of his assistants. In the famous legend, Horatio made a courageous - and successful - defense of the bridge leading to Rome. But in war, and in the law, badly outnumbered forces usually get slaughtered.

Finally, the Appeals Court decision simply reflects careless legal reasoning. Rather than cite and discuss the most relevant legal precedent, the judges ultimately rested their ruling on a perception of "increasing concerns" on the Supreme Court about the need to protect property rights and "other signposts (that) point in a direction favoring the tobacco companies' position." A responsible judiciary cannot decide a complex, important case by ignoring relevant precedent and, instead, sticking a finger in the air to find the direction of the prevailing winds.

There is a solution short of further court action. Harshbarger should, as part of any deal with the tobacco companies, require them to drop their challenge to the state's tobacco ingredients disclosure law. If no agreement can be reached on this issue, he should continue to defend the law in court vigorously.