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PROPOSED DEAL FACES CONSTITUTIONAL PROBLEMS ALSO [07.03.4]
Read About Some of the Legal Problems Any Legislation Would Face

The following are excerpts from IF SMOKE CLEARS, TOBACCO DEAL STILL FACES FIRE by Judy Peres, Chicago Tribune

First a skeptical White House has to sign off on the $368 billion tobacco settlement.

Then Congress can be expected to tinker with the deal announced recently by state attorneys general, plaintiffs' lawyers and the tobacco industry.

But if the settlement clears those obstacles and is enacted into law, it will face a more formidable hurdle: the U.S. Constitution.

The deal, which would impose limits on cigarette manufacturers' ability to advertise their products and on smokers' ability to sue for damages, might well violate the 5th Amendment guarantee of due process and the 10th Amendment, which says the states have any powers not given to the federal government under the Constitution, legal experts said.

"Nobody knows for sure, because it (the accord) hasn't been contested," said Clifford Douglas of Evanston, a tobacco litigator. "But it's as sure as the sunrise that (court) challenges will be made."

Some observers have predicted a challenge to the ad curbs on 1st Amendment free speech grounds. But the curbs likely would be contained in consent decrees between the states and the tobacco companies, not in federal legislation, so the companies would waive their free speech rights voluntarily.

Douglas and others foresee constitutional challenges to any legislation that limits an individual's right to sue and be compensated for damages. The proposed settlement would do this by banning class actions, putting a ceiling on compensatory damages and eliminating punitive damages in many cases.

Others, especially those who oppose the settlement for being too generous to tobacco companies, would go further. Some lawyers argue that any deal that makes it very hard to win a suit is inherently unfair and, arguably, violates the due process clause. That clause says "no person shall . . . be deprived of life, liberty or property without due process of law," and the right to sue for damages may be seen as a form of property.

"If an attorney can't seek punitive damages and can't spread the costs of bringing a case among a number of clients, he's likely not to take the case," said John Banzhaf, a law professor at George Washington University and head of Action on Smoking and Health.

He offered an example: "Suppose someone has lung cancer. As an attorney, I know from experience he can collect maybe $1 million--that's roughly what a life is worth. The standard contingency fee would give me about $300,000.

"Lawyers can earn $200 to $300 an hour, so that's 1,000 hours. But the tobacco industry uses a scorched-earth litigation policy--they file endless motions, take endless depositions, appeal everything. They paper you to death. You'd have to spend far more than 1,000 hours."

In other words, the right to sue would be preserved on paper, but not in practice.

Richard Daynard, a law professor at Northeastern University and chairman of the Tobacco Products Liability Project in Boston, believes the proposed settlement, if enacted, might violate constitutional guarantees of state sovereignty. The 10th Amendment says all powers not delegated to the federal government by the Constitution "are reserved to the states . . . or to the people."

The deal "would essentially be an attempt by Congress to change the law of civil procedure in every state of the union. Congress would be telling state courts they can't consolidate claims or certify class actions or award punitive damages," said Daynard. "That's outrageous as well as unconstitutional."

Lawrence Gostin, a professor of law at Georgetown University, agrees the deal could be vulnerable to challenges on due-process and states-rights grounds.

"The Supreme Court has been adamant in recent years that Congress can't limit the rights of states," said Gostin. "And it closely scrutinizes decisions to impede the rights of future litigants, including the kinds of damages they might get. Congress has no power to take away the full rights of potential litigants to sue and collect both compensatory and punitive damages."

MEMORANDUM FOR ELIZABETH DRYE

FROM: HIMA VATTI

DATE: JULY 24, 1997

SUBJECT: TOBACCO LEGAL MEETINGS OF JULY 18 AND JULY 24

JULY 18- FIRST AMENDMENT ISSUES INHERENT IN AD RESTRICTIONS

The legal group divides the ad restrictions into two categories: those that mirror the FDA regulations and those that go beyond them. The group recommends placing the FDA regulations into the statute. The others are too constitutionally vulnerable to survive court scrutiny. This is not to say, however, that the FDA regulations are clearly constitutional. For example, a court could strike down the prohibition on billboards within 1000 feet of a school, since many billboards may not be visible from a school at 500 feet. By narrowly tailoring this provision to prohibit a billboard from being visible from schools, the FDA will maximize its chances of passing constitutional muster. FDA agreed to look into which other provisions could be narrowly tailored.

Relying on consent decrees to legitimize as "voluntary" concessions of constitutional rights extracted from the tobacco industry is a vulnerable strategy. Only regulations that have been tailored to conform to the dictates of the constitution should go into the statute.

One participant expressed concern over advertising on the Internet. The settlement apparently precludes cigarette ads from electronic media under federal regulation. The FCC does not as yet have jurisdiction over the Internet.

JULY 24- ISSUES OF FEDERALISM AND THE CLASS ACTION BAN

The legal group identified four areas of conflict between state and federal power in the settlement:

1. licensing- Can a federal statute require states to license tobacco manufacturers?
2. Does the federal government have the power to ban smoking in all public facilities, where a public facility is defined as a place where 10 or more individuals enter each week? This definition is extremely broad and, according to Professor Tribe, could cover residences.
3. Does the 10th Amendment allow the federal government to ban class actions/multi-party suits in state court? In general, federal courts can not structure a state court's procedural rules.
4. Do federal courts have removal jurisdiction over tobacco suits filed in state court? In other words, will the tobacco industry have the right to move state court suits to federal court where rules agreed to in the settlement would operate?

The legal group enumerated two restrictions on the tobacco industry's civil liability:

1. annual aggregate cap of $5 billion- The Administration needs to make sure that this cap pertains to products-based lawsuits only, because the settlement language indicates that the industry's liability for all lawsuits is capped at this amount. Another concern is how to manage the cap or ascertain when it is reached.
2. ban on class actions- Professor Tribe sees this restriction as a big problem, because Congress never imposes procedural rules on state courts to apply in state cases. Congress can not commandeer state officials. If Congress' authority to ban class actions in state court is struck down, the tobacco industry must have the right to remove suits against them to federal court if they are to avoid class actions. Due to its extreme constitutional vulnerability, this part of the statute needs to be severable from the rest of it or the whole statute may be lost.

In order for the tobacco industry to remove a case from state to federal court, the federal court must have a basis for jurisdiction over the plaintiff's claim. The legal group has crafted three bases for federal court jurisdiction:

1. **2-Part Solution**

   a. Congress creates a substantive rule of recovery- Because the industry's liability is capped annually, Congress must ensure that the funds go to those who truly need them. Therefore, Congress could make it a federal prerequisite that a plaintiff in a class action must have proven his damages/injuries as an individual to be entitled to settlement funds.
   b. All state and federal causes of action (justifications for lawsuits) that do not qualify under the recovery rule are banned.

2. **Traditional Federal Jurisdiction**

   (a) federal question- The recovery rule alone establishes a basis for a federal question, so the industry defendants can remove the case to federal court. (Under the Federal Rules of Civil Procedure, a federal court can hear a case filed in state court if the suit involves a question or interpretation of a federal statute. This is known as jurisdiction based on a federal question.)

   (b) diversity- When the opposing parties come from different states, there is diversity between them. Let's say Sam of NY sues Mary of CT in NY state court. Mary can remove the case to federal court, because NY does not have the total right to hear and rule on the case of a CT citizen. Under current rules, a federal court can not hear a class action or multi-party (more than one plaintiff) suit filed in state court unless there is complete diversity between the parties. This means that the defendant should be from a different state than each of the plaintiffs. Complete diversity, however, is not constitutionally required. The legal group suggests adopting a rule of minimal diversity for tobacco claims, meaning that at least two plaintiffs or the named plaintiffs (those whose names are written on the court documents) must be from different states than the defendant. Since there would be minimal diversity between the parties in most multi-party suits, this would be an easy basis for federal jurisdiction in most cases.

3. **Federal Adoption of a State Law Cause of Action-** By adopting relevant state law as federal law, the federal government would create federal court jurisdiction over tobacco suits based on federal question. There is precedent for this tactic. For example, it is a federal crime to break state laws on military bases.

* The legal group continues to discuss and rework these three solutions. Elena cautioned them to avoid Due Process problems by being mindful of plaintiffs' freedom to file cases where they wish