

Tobacco Mtg.
LEGAL ISSUES

July 8, 1997

OZC

Takings Issue (To b. Co. Property)

to the extent that fed.
trade secret law gives less
protect. than cot. law, fed.
govt. is stealing trade secrets.

hard ^{most} not too much risk,
to put check into have adopted
a value on this uniform trade secret act.

Out there are variations in language & interpret.

- tillt yfed. rotand. twds.

most protective of law
to minimize liability.

- what demanding registration of Tob. docs. prospectively w/ people in industry?

know they are in a

highly regulated industry.

- Take H.S. mechanism out.

Make sure that the FDA
still has access to the
locus.

Consent Decree (in 1st A context)
(giving up free speech rts.)

- substantial risk to
putting in statute provisions
FCC that ask cos. to give up
League of ^{constit.} protected advertising.
7 voters.

- what could you require
in a straight sett. agreement?

Agree w/ the states. What kind
of speech can you agree to restrict?
- is this a knowing, intelligent, vol.

govt.
has to
show a
legit.
interest +
a nexus (tied
to the litigation)
Does govt. have
to show waiver
is the least
restrictive
means of
advancing
the interest?
waiver
- plea bargain type waiver } looks
more like this.
(there should be some
kind of a nexus)
precedent is minimal
& not well reasoned.

pretty good, lies. there's a Nollan-
type nexus.

- Regis. scheme would take
^{careful} crafting and time compromises
nexus problem - Nollan & Dolan limit ~~the~~ ^{Mon} Santo.

Why does this apply to
settlers & nonsettlers? It prob.
shouldn't, since settlers are
agreeing to the disclosure
scheme?

Should we look at the settle-
ment as a K? If so, then there
is a duress question.

{ It. in Monsanto defined the
prop. int. in a way that was
favorable to the govt - the
int. to confidentiality, not the
value of the one secret. ^{more} general

No cases finding atty-client
& ut. prod. docus. as a source
of a prop. int.

MEMORANDUM TO ELIZABETH DRYE

FROM: HIMA VATTI

DATE: JULY 9, 1997

SUBJECT: SIMPLE LEGAL EXPLANATIONS

I will provide simplified explanations of the following three legal concepts which have been brought up in recent tobacco meetings by the legal group.

1. First Amendment issue implicated by the advertising restrictions
2. Takings
3. Nexus

First Amendment Question

In the June 26 meeting, counsel mentioned that the First Amendment may not allow the government to bar *all* outdoor advertising. Basically, a state cannot require a citizen or entity to contract out of or repudiate a fundamental constitutional right (commercial speech in this case). Lawyers are referring to this rule when they use terms like "state action." The state governments would argue that the tobacco companies are "volunteering" to give up this right, but the courts might not accept this reasoning. Even if they interpret the settlement as a pure contract, the courts could find that the tobacco companies agreed to give up their speech rights under duress and invalidate those provisions of the settlement. The restrictions on the advertising freedom of retailers and distributors may not create state action problems, because those parties would repudiate commercial speech rights in contracts with the tobacco companies, not state governments.

The Takings Clause

Under the Constitution, if the government takes property, it must provide the owner with just compensation. The situation is not always clear as where the state takes Farmer Brown's land to build a highway and reimburses his loss. Most of the litigation in this area centers around the following two questions: "Did the government's action in this case constitute a taking of X's property?" OR "Did X have a compensable property interest in what the government has taken?" Under the settlement, the government must make sure that various actions against the tobacco companies do not constitute the taking of a property interest. For example, in the July 8 meeting, counsel pointed out that where federal trade secret laws protect the companies less than state law, the federal government might be "taking" trade secrets. To ascertain a taking, courts define the scope of what the plaintiff has lost. If courts define the loss narrowly, i.e. the loss of

one trade secret that is hard to price, they are less likely to find a taking. In *Monsanto*, however, the court defined the property right in a broad manner that was favorable to the plaintiff. The court found that the plaintiff had lost its right to confidentiality, not just the value of one secret. Fortunately, no case has ever found that a plaintiff has a property interest in attorney-client and work product documents, so the government "takes" nothing when it appropriates the information contained within them.

What is a Nexus?

In a deal between the government and another party, there must be a nexus or logical relationship between what the parties agree to do for one another (the point of the *Nollan* and *Dolan* cases mentioned). Suppose I apply to the state for permission to expand my beach-front property in violation of an environmental ordinance. The state agrees to grant me permission only if I finance a new roof for city hall. This is unacceptable, because there is no relationship between the nature of the two exchanges. Instead, the state could demand a higher tax to keep the area around my house clean in exchange for permission to expand.

The concept of nexus relates to the consent decree portion of the settlement in which the tobacco companies would agree to give up certain free speech rights. Counsel speculated that the consent decree might pass the First Amendment test if it was formulated as a plea bargain-type waiver of rights. This would require the government to show that a legitimate governmental interest warrants the speech restrictions, and that a nexus exists between the speech restrictions and the arguments for threatening litigation against the tobacco companies.

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Legal Issues:
7-2-97

Next Mtg Wed.

- ③ Pro-Cons Liabilities/Damages
- ④ Consent Decree & 1st cmdt

Work products - Justice - several works in progress.

- ① Pre-emption. ② Penalties. - Mtg - Thurs./Mon.

- ⑤ Documents - Privilege Att'y-Client
Evidence of company abuse.

- ⑥ Licensing - Threshold → is it a good idea?
Does it work? Is it feasible? Cost-effective?

Legal 2/2/97

- Elena Reg group -

Next mtg. on [preemption; penalties] -
Currently set up for tomorrow am. -
Laura will set it up w/legal; reg groups.

- Legal next mtg. Tues/Wed.

- plus on liability issues (DAS reach next time)

Harriet - Uxum is looking at mechanism for dispensing
\$ under Chris' group.

Richard - AC - three weeks in progress. -

- ① - Consent decree - can argue that it takes agreement out of 1st Amendment analysis
- ② - if 1st Amend applies - what are concerns
- ③ - raising issues

Elena - wants consent decree piece first when ready.

* This group meets again Wed. Consent
decree, policy piece ready by

Pattz Minnesota Court

- 60 million unpledge
\$30,000 that a special master is reviewing

Elena

Re. Attys - Client Privilege

(A) Do you want to cut into it

(B) If you do, what is the mechanism.

Options - extent to which we respect privilege
- options for clearance mechanism.

→ assigned to John Dwyer for next week.

- "all
- Any precedent for Attys client privilege
on a particular subject area"

- In Min - using crime/fraud exception.

Agmt. goes to Trade Secret

Thirolt - ~~at~~ not clear line b/w

business practices / A-C privileged

~~Reviews~~

Dwyer will pull subgroups together on this

* - ~~Hansen~~, Patty, John ^{Dwyer} — get ~~Waxman~~ report. —

- Licensing — ~~HO~~
Next steps — Mitch looking at state/local.

Neil will do follow up

— liquor licensing —

- Options no scheme

other options. —
Bill Schultz — (Treasurer) ^{state} - administered but
Feds can revoke licenses.

Tomorrow or Monday — ^{Dwyer} ~~TCC~~
~~Legal/Reg~~ — ~~liability~~; consent decree / 1st amendment;
— following int. — document disclosure
options paper pros/cons licensing

Hatch ~~hearing~~
— 17th Legal issues —

~~James M. H.~~

7/7/97

~~At St. Louis Conference~~

Thurloff

Penalties —

- Not clear what happens to state authority not explicitly mentioned.
- Which are removable to Fed Ct? (P 26) —
If states are doing field-level enforcement, who follows through if removed to Fed Ct.

- Look back —

"good faith" easy std. for firm to meet. (loser 250% & is penalties)

"bad faith" is essentially means to prove criminal case.

Consent decree — want central venue — eg. DC.

National Protocol — still don't know what it means

Gene — want to have a criminal provision protecting authority under 18 of FDA. —

Gene — What definitely ↓ FDA authority?

— w/ explicit maintenance of FDA auth.

— retailer penalties

— criminal cases.

— look back provision — can't obtain penalty w/ standard of proof.

— consent decrees limit penalties under existing law.

Elena - what's helpful?

Schultz - adding revocation retailers' licenses.

In the area of med devices - very good authority -
civil penalties effective.

Gene - new disclosure req seems to go beyond what one
would expect.

Elena - can we draft language to [fix]
to Schultz - if you draft tell us what you
want, we'll draft.

Licensing -

Schultz - wants Fed Floor; states
can go beyond that, give FDA
authority to revoke license.

[400,000 retailers]

Lookback - E - other standards besides good faith?

Michael - preemption {design / manufacturer preemption
of FDCA would hold. -

Schultz - having less preemption in this area would be great.
Can live w/ where we are - just don't want
more preemption.

shultz - Need sentence: "This does not preempt tort actions that leaves regulation."

Mich - the way we're caregiving Lohr - not preempting less-restrictive provisions.

p. 3 memo - not "unduly burdening interstate commerce."

p. 26

Gene Title III A - States can't go beyond legislation but p. 32 - legislation - preserves to max. extent further restrictions.

No preempt state tort laws

Not more preemptive than now

but more we're reg tobacco
more we preempt

* Should we set a Federal floor.

* Gene will right this

penalties -

- Doesn't preempt FDA and group
- Some provision to provide licenses
- our penalties become floor
- Look back -
- diff. in treatment for signers/non-signers.

Erikson - ^{info - etc.} labeling/advertising ^{promotional} - preemption
this maintains by this agreement.

FTC - ^{state} ~~AG~~ AG's share ad enforcement for all AG's.

exemption in other laws — CPSC (proposed
fire safe cigarette)

— Inds. candidate —

Legal mtg. Wed.

Reg mtg. Thurs.

7/9/95 Legal Mtr.

Self OLC - uniform federal review ~~of~~ tobacco companies
documents - trade secrets, attorney-client privilege

Monsanto Pesticides Supreme CO. decision - ~~quality~~ case
and disclosure can be the price of registration. -

No case law treating A.C. privilege documents as a source of
property - so less "takeless" risk for state than trade
secrets.

E. Sum - if by statute -

- strong trade secret claim
- use T. Sec. Standard (states) most friendly
- take T.S. out
- require reg of tobacco producers - use as a book

All of this applies only if disclosure to public
wherever ~~is~~ have no issue FROA has still authority

w/contract

- concerns only non-settling
- settling parties - logic is - enter into contract and
gave up property

Smoking Cessation

Consent Decree - speech rights (rather than trade)

- substantial risk in including ~~guarantee~~ ^{forfeiture} speech ~~up~~ ^{up} ~~consent~~ rights

- Consent Decree → same analysis applies

- What you could require in "settlement"

- what kind of speech limits can you agree to?

- ~~could~~ is it a knowing or waiver?

Showing - interest you're asserted is legitimate, related to underlying -

Elana
what would
you want?

- To establish Nexus - scope of claims being settled,
looks a lot like agreed-to provisions

- terms clear

- The more we don't care about Fed Speech
restriction the better. -

Elana - so - here's how to structure this things
to minimize risk.

* Federal Antitrust
 State Antitrust
 Act
 HHS Antitrust
 NGF / HHS
 passed

Legal Issues

8/27/97

- State minimum purchase laws.
- Licensing of retail establishments -

Re: ① Elimination of punitive damages

② Restrictions on class actions / due process

- No serious constitutional concerns. - didn't review for policy.
- Post among long - what your
 much - going away - don't know.

③ Enforcement.

Ads - What's difference bet. signatures / non-signatures.

Gene - if provisions are in legislation - ^{only} in current
 decrees - would you still have the problem.

Doj - clearly state action here

Gov't largess in return for giving up constitutional rights.

Dyer - penalties can't become criminal in
 nature. -

Fennell - Whether failure to disclose all facts is a dealbreaker
 - repository kept by companies, how to

- keep them honest
- documents at FDA claimed for non-disclosure
 - damage
 - work product
 - a-c privileged - other terms used sometimes singularly or in combinations
- "from files of the tobacco industry"
 - is that limiting
 - are listings of kinds of documents
 - p. 65 - all references to smoking should reference chew as well
- admissibility decided case by case

How should we think about failure to disclose all documents.

Minn has 150,000 - 500,000 of the best pages of documents.

Elena assignments

on paper -

Documents - Analysis of how protections back up against FDA authority to review documents.

- What ^{documents} matters and why ~~it~~ matters
- better alternatives to 3 judge panel

Richard

Flexibility - pros and cons on the policy

Enforcement - problems
- how could you get around these problems.

re. consensus document
Gene - "I don't know what it is but I
think it plays a very important role."

Neal - licensing stuff -

Sign-Up Legal Group 7-7-97

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Judith Wilkenfeld	FDA
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Eleni Constantine	Treasury / GC
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Wendy Taylor	OMB-OIRA
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Elizabeth Dye	DPC
Bill Shultz	COA
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Jennifer O'Connor	DOL
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Legal 7/2/97 11:00

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