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HEALTH LAW

Oreos, Big Gulps, and Nicotine: Legal Challenges to Government Lifestyle Interventions

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The battle to improve the American public's health is often staged in the courts, as legislators, political figures, and activists look to law as a primary way to regulate and curtail unhealthy behaviors. The legislative efforts typically come in either of two forms: (1) bans that proscribe a particular substance or activity (e.g., trans fat and soda bans or bans on smoking indoors) and (2) labeling requirements that seek to indirectly discourage an activity or use of a particular substance by raising awareness about potential harms (e.g., calorie counts posted on menus or graphic warnings on cigarettes packages). Both bans and label requirements face strong legal opposition from industry and ignite furious public debate about the role and limits of government intervention in American lifestyles. This article highlights two of the most recent controversies: the infamous "soda ban" in New York City and the new Food and Drug Administration (FDA) law requiring graphic images on cigarette cartons.

Bans on Sugary Drinks in New York City

In 2012, New York City's Board of Health approved a law that a "food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces" [1]. (The industry standard that you currently see lining the shelves is 16.9 ounces). The law does not apply to alcoholic beverages, beverages with greater than 50 percent milk or milk substitute (think Starbucks or milkshakes), or beverages with fewer than 25 calories per 8 ounces; and it does not stop an individual from buying more than one 16-ounce beverage at a time [1]. The law, controversially, does not apply to convenience stores that sell both packaged foods and foods for immediate consumption because these are under the authority of the state and not the city [2]. Thus, under this law, the 7-Eleven "Big Gulp" lives on.

Lauded by some as a heroic measure against the rising tide of obesity or at least a good first step, the law was criticized by others for being an infringement of citizen rights or, at the very least, likely to be ineffective at reducing obesity rates given its many loopholes.

A disparate crew of plaintiffs (ranging from the National Restaurant Association and American Beverage Association to soft drink worker unions, Korean grocer organizations, the Hispanic Chamber of Commerce, and movie theater owners) challenged the law in the New York courts for targeting local and small businesses,

overstepping the city's authority, and infringing on individual rights [3]. Specifically, they argue that the City Board of Health cannot implement social policy (because this is the role of the state legislature)—comparing it to *Boreali v. Axelrod*, in which the New York Court of Appeals held that the State Public Health Council did not have the authority to establish smoking bans in public areas [3]. Thus the new rule violates the separation of powers (a constitutionally mandated division of labor between executive, judicial, and legislative branches) and the city has overreached its authority. Moreover, the plaintiffs argue that the ban is arbitrary and capricious (or basically an unjustified abuse of power by the city) [3]. To support this stance, they point to the many high-calorie beverages the law doesn't reach (e.g., milkshakes, alcohol, high-calorie coffee drinks), the wide range of environments it does not apply to (such as convenience stores), and the lack of scientific evidence to support drawing the line at 16 ounces of 25 or more calories per ounce [3]. Soft drink makers also argue that the alteration of the industry standard (from 16.9 ounces per container to 16 ounces) will create expensive and unjustified burdens, such as the need to generate new factory equipment and new bottles for one small geographic piece of the soft drink market [3].

The city disagrees that its action is an overreach of power, arguing that the New York State legislature granted New York City's Board of Health the authority to regulate all health-related matters (including control of chronic disease and oversight of the city's food supply) and that, unlike the State Public Health Council in *Boreali*, the city board is quasi-legislative, meaning that it has been granted some power to make social policies [2]. Further, the city responds that its reasons for enacting the law are reasonable and not arbitrary or capricious and cites scientific data in support of the claim that, where larger portion sizes are available, consumers will select them [2]. Moreover, the consumption of sugary drinks offers no nutritional benefit, people who drink sugary drinks do not adjust by consuming fewer calories at meals, and sugary drinks are a known leading contributor to the obesity epidemic [2]. The city also highlights the particular overconsumption of soft drinks by socioeconomically marginalized groups [2].

While loopholes exist in the ban, they mainly allow for drinks that have nutritional value (like milk-based drinks) or drinks that are outside of the city's authority (like alcohol and convenience store sales). And while consumers could buy more than one 16-ounce beverage at a time, data show that most consumers gravitate towards a default option and often choose convenience, so this limit would mean consumers would have to make an effort to consume more than 16 ounces [2].

On the eve of the soda ban becoming enforceable, the judge struck down the law as arbitrary and capricious because its many loopholes effectively defeat its purpose—it does not apply to many high-calorie beverages or to a variety of suppliers, and it would be unevenly enforced “within a particular City block, much less the City as a whole” [4]. Moreover, the judge opined, the city overreached its powers [4]. The judge reviewed historical examples in which the Board of Health was granted more expansive powers, and concluded that these were all related to control of

communicable, infectious, and pestilent diseases, not chronic disease [4]. The city has already filed an appeal, suggesting that a resolution to this case could be long in the making [5].

When compared with the soda ban case, it is important to note that long and drawn-out legal battles are not the only way to bring about changes in food industry practices. Sometimes the threat of legal and public relations problems can be enough. In 2005, for example, an activist group brought suit against Kraft, demanding that it lessen or remove trans fats from Oreo cookies or desist from marketing and selling them to children under the age of ten. Kraft quickly settled the suit by agreeing to remove trans fat from its cookies and replace it with nonhydrogenated vegetable oil [6]. (Oreos are also vegan!) Kraft then launched a healthful food marketing campaign, ensuring and advertising that Wheat-Thins, Jello pudding snacks, pizza crusts, crackers and many of its other products were made without trans fats [6].

Graphic Warnings about Nicotine

Restrictive labeling aims to achieve the same goal of changing behavior, but by educating consumers rather than banning products.

One of the more recent and dynamic examples of controversy about labeling was a legal challenge to a new FDA rule mandating that all cigarette packages and advertisements bear one of nine warning labels, all of which contain text warnings, graphic depictions of the harmful health consequences of smoking, and the National Cancer Institute's tobacco cessation quit line telephone number [7]. The ads must cover 50 percent of a cigarette package or 20 percent of a cigarette ad and depict images of mourning family members and persons suffering the ill effects of smoking [7, 8]. The images were selected following an 18,000-person Internet study commissioned by the FDA to determine which photos were most effective in (1) educating the consumer and (2) encouraging quitting or refraining from smoking [9]. A notable number of countries have also included graphic labels on cigarettes, among them Australia, Belgium, Brazil, Canada, Switzerland, the United Kingdom, Turkey, and Thailand [9].

Several challenges to the constitutionality of the mandate were heard in federal courts, which were split in their decisions. In one case, a number of tobacco manufacturers and sellers sued the FDA for violation of First Amendment free speech in the U.S. Court of Appeals Sixth Circuit [10]. Free speech is the right to speak or to refrain from speaking, and the government can only mandate certain speech (e.g., a compulsory warning label) if it has a substantial interest in regulating that speech and evidence that the regulation directly advances that interest [9]. In holding that the graphic warning label was constitutional and not a violation of free speech, this court emphasized that the purpose of the First Amendment is to protect the flow of accurate information—companies have an interest in conveying truthful information about their legal products, and adult consumers have a corresponding interest in receiving truthful information [10]. Thus a company's constitutionally protected interest in not providing factual information is minimal. The text of the

graphic warnings is factual—it relates the proven medical harms of tobacco. The government’s use of labels that convey factual information about the harms of tobacco are reasonably related to a goal of preventing consumer deception [10]. Even facts which might disconcert or provoke a strong emotional response, remain facts and not opinions, and the question turns on whether the labels are providing facts for the public, not on whether they are controversy-provoking [10]. Thus, to the Sixth Circuit court, the graphic image law is constitutional [10].

In a case with the opposite outcome, RJ Reynolds Tobacco Company sued the FDA, arguing that the new labeling requirement violated its First Amendment right to free speech, and the U.S. Court of Appeals for the D.C. Circuit sided with the tobacco company [9]. While the FDA might have a substantial interest in reducing smoking rates among Americans (and particularly youth), the court did not believe the FDA had adequate evidence to show that these graphic warnings would actually reduce smoking [9]. The labels might increase thoughts about quitting smoking, but the court was not convinced that those thoughts necessarily translated into actual quitting [9]. The court pointed to evidence that, while smoking rates dropped in Canada after the introduction of graphic warnings, there was not sufficient proof of a causal link between the warnings and smoking reduction [9]. Thus, the FDA did not provide the compelling evidence needed to trump First Amendment free speech rights and allow certain images and information on cigarette labels and ads [9]. The FDA has decided not to appeal this latter case, which struck down the graphic label warning. Instead the FDA intends to “undertake research to support a new rule-making consistent with the Tobacco Control Act” [11].

Whether through bans or labeling requirements, regulating American health behaviors remains a legally challenging (and somewhat unpredictable) activity. And as evidence linking lifestyle choices to chronic disease mounts, the challenges will only intensify.

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