Why the Vaping Industry Should Utilize Litigation as a Deterrence (part 2)

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Vapers in San Francisco and Oakland are being cautioned to avoid litigation; they are being urged to continue talking with the supervisors, keep the communication lines open and work the referendum option. Of course, we already have seen the deterrent effect of the threatened referendum. Oakland had shelved its ordinance while it watched to see what happened in its Bay neighbor. When the groups that had threatened a lawsuit against the San Francisco Supervisors backed down in favor of a petition for a referendum, within days Oakland dusted off its ordinance and passed it. So much for deterrence by the "fear" of a referendum election.

Then to add insult to injury, the vaping industry has junior litigators, that have not properly invested the time or resources to see if there is a viable path for litigation in the cases of Oakland and San Francisco, openly commenting that there is no case without giving any specifics of how they arrived at making those assertions.

Any such investigation would not be complete without consideration of the equal protection clause of the fourteenth amendment to the United States Constitution. The equal protection clause protects the interests of Americans wholly apart from any state, county, or municipal, statute of uniformity. Equal protection does not require identity of treatment. It only requires that **classifications** rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

The federal equal protection clause, in general, does not contain a rule of universality, it only requires a uniformity within classes. For example, in *Heisler* v. *Thomas Colliery Co*, decided in 1922, the court sustained a Pennsylvania special ad valorem tax on hard coal, although no similar tax was laid on soft coal or other personal property. Why? There is a substantive difference between hard coal and soft coal and that, my friends, meets the litmus test of being in different classes. But, for example, in *Wheeling Steel Corporation* v. *Glander*, decided in 1949, the court held invalid that part of the Ohio ad valorem property tax which levied the tax on accounts receivable owned by foreign corporations, but exempted accounts receivable of an identical nature which were owned by residents and domestic corporations. This did not meet the burden of being identified as a separate class because the product upon which the tax was based was the same, just the owners of the product were different. In the cases of these recent flavor bans in California and elsewhere,

local companies are banned from selling flavored tobacco yet, a similar ban is not made on online sales within the same jurisdiction for exactly the same products, the law exacts a toll just for the different owners, online sales versus local establishment sales, exactly the same as in the *Wheeling Steel Corporation* v. *Glander*, case.

> ***It is not a huge leap to realize that the vaping industry doesn't have just a case, but it has a very strong case.***

The equal protection clause is also applicable to the flavors themselves, as the flavors were banned but not the underlying product. Therefore, if the flavoring product is identical to that used in, say that of flavored alcohols, it too would have to be banned under the equal protection clause or risk being held invalid by the courts. The federal equal protection clause stands as a barrier to "unreasonable" classifications in municipal, county, and state legislation.

The people harmed by the San Francisco Supervisors banning of flavored vaping liquids take heed!

Did you notice evidence of the opportunity to meaningfully talk with the county Supervisors to change their minds? I didn't witness much meaningful communication related to any idea of them changing their minds during the hearings or in conversations within their offices. The chairwoman announced from the outset that her ordinance must pass, and that vaping had to be banned as well as tobacco because of marketing that targeted youth. She made no effort to pretend that she would be patient and open during the hearings. In fact, often when an opponent got a little testy the chairwoman took the witness on harshly. And even more often the testiness and arrogance came directly from, and started with, the chairwoman.

Given that bias, where exactly is the hope that "continuing to talk" will solve a problem the San Francisco Supervisors believe they already have solved as of the date of effectiveness of their ordinance.

The problem with simply relying on "continuing to talk" is that it gives your opponent what it needs---- passage of time toward open and full enforcement of the ordinance. And, in the long run if the "continuing to talk" does not work, when the effective date arrives, the end has come and the industry closes without a whimper. If litigation is not filed until the ordinance becomes effective in 2018 the chances of a court granting a stay are zero and none. By that time, the courts will take the position that the vaping community accepted the ordinance's existence for over a year without suing, so will believe that litigation is just a last minute "hail Mary". Cities like San Francisco do not want to protect vaping because to do so threatens to reduce their tobacco settlement money. With the large cities as with the states, money is the driving force behind the anti-vaping movement. As vaping increases, tobacco sales will go down. As they go down, tobacco settlement money will go down. And these large cities, like the states, have come to rely on tobacco money to fund their budgets. On the lives of tobacco addicts these metropolitan areas are funded. They have become addicted to the tobacco dollars and must have them to fund their bloated budgets.

With these dynamics of movement in the Bay Area in mind, other towns and cities are considering ban ordinances up and down the Pacific coast and clear into the Intermountain area. The industry needs to deter

development of these other ordinances. The danger of a tsunami of ban ordinances is that if the legislative or referendum remedies are not successful, the industry surrounding vaping is dead in all those towns and cities. If the spread of the ban ordinances can be stopped, then there is still time to develop other strategies to prevent passage of the ordinances.

How do we stop them? We deter them by filing a lawsuit to challenge the San Francisco ban. And now we join Oakland in that lawsuit. Now, if you are the mayor or administrator of a town thinking about a ban ordinance and you see that San Francisco and Oakland are going to have to bear the cost and the burdens of litigation, why would you rush to pass an ordinance and become party to the same costs and burdens. Would you do that or would you sit back to watch the Bay Goliaths fight the battle, knowing that the outcome would be your outcome at the same time.

There are those who say that the referendum on the ordinance is the key to defeat of the ordinance. What they are asking you vapers to do is count on and have faith in the voters of San Francisco to do right by you----to leave you with your free choice to seek health and life. We have seen the deterrent effect of an election on Oakland. Would the meaningful threat of litigation have deterred Oakland's action? We can never know the true answer because it is deep within the minds of those supervisors. But we do know that while the specter of a lawsuit loomed in San Francisco, Oakland held its peace. When the threat of the lawsuit slipped into limbo, Oakland struck and passed its ban.

Coincidence? Maybe, but again, as an old trial lawyer I don't put much stock in such factual instances being "coincidental". I fully believe Oakland was deterred if its Supervisors feared that San Francisco would be sued.