

The Battle of the Beverage: New York Court lets New Yorkers keep their super size sprites and venti mochas while limiting the power of the Department of Health and Mental Hygiene.

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New York City was abuzz Monday, March 11, 2013 when a New York State Supreme Court justice ruled against the New York City Department of Health and Mental Hygiene, striking down a health regulation mandating all sugary drinks sold by food service establishments in New York City be limited to 16 ounces or less. On its face, the issue seems simple: the regulation seemed arbitrary, as it did not limit regulation on sugary beverages at establishments such as 7-11, did not prevent an individual from obtaining endless refills of their 16 ounce cup at their favorite fast food joint, nor did it prevent an individual from adding additional sugar provided by the establishment to their beverage. While that is one of the very reasons that the law was struck down, the decision rendered by Judge Tingling has much farther stretching consequences for the Department of Health and Mental Hygiene's powers to enact regulations in connection with the health and safety of the residents of the City of New York.

The various national and state business associations which brought the action against the Department of Health and Mental Hygiene (DOH) attempted to ban the new regulation through two avenues. First, the petitioners stated that the statute is unconstitutional and a violation of the separation of powers doctrine. Second, the petitioners sought to restrain implementation of the regulation because it is arbitrary and capricious (this argument highlights the fact that the law does not actually prevent individuals from obtaining more than 16 ounces of sugary drinks from a multitude of establishments). Although this second avenue would have been sufficient to set aside the regulation, Judge Tingling's opinion stated that under both arguments, the regulation is improper. In doing so, Judge Tingling corrals the DOH, limiting the manner in which they may set forth future regulations.

In a nutshell, the separation of powers doctrine generally prevents executive administrative boards from enacting regulations; as such enactments are within the legislature's jurisdiction. Thus, similar to our federal separation of powers, the City of New York maintains a similar separation of powers, which can only be circumvented in limited circumstances. Rather than proposing the sugary drink regulation to the City's legislature, the DOH utilized a section of the New York City Charter which stated that the DOH has authority to "regulate all matters affecting the health in the City of New York, and to perform acts as may be necessary and proper." Due to this fact, the DOH left itself open to the argument that creating the regulation may overstep the boundaries of the separation of powers.

The Court used a four prong test set forth by the Court of Appeals (New York State's highest court) in *Boreali v. Axelrod* to determine if the creation of this regulation constitutes a violation of the separation of powers. If any of the four following provisions are violated, the regulation is violates the separation of powers: (1) the regulation must not be based on factors unrelated to the purpose of the regulation, such as economic or political concerns; (2) the regulation must not be created on a "clean slate" with its own set of rules without the benefit of legislative guidance; (3) the regulation must not be a matter either previously or currently up for debate by the legislature; and (4) the regulation must require the exercise of expertise or technical competence on behalf of the body which passes the regulation.

The Court went through each of the four prongs of the test and determined that the regulation violated the separation of powers. First, the Court found that the regulation was related to matters of both political and economic concern. In the DOH's argument for enacting the statute, the DOH included reasoning that obesity related illnesses in New York City cost \$4.7 billion annually and 60 percent of those costs were funded by Medicare and Medicaid. Additionally, the DOH did not attempt to work with the Department of Agriculture and Markets on the regulation so that it would include entities such as 7-11, bodegas and markets. Based on these factors, the Court found that there were both political and economic concerns motivating the regulation more so than the threat of a chronic epidemic.

Discussing the second prong, the Court explained that a "clean slate" is one in which a regulation does not merely fill in the details of broad legislation, but instead creates its own set of comprehensive rules without the benefit of legislative guidance. Thus, if the DOH did not utilize any legislative guidance, but enacted the law entirely of their own volition, the regulation is improper. Therefore, the DOH argued that its powers bestowed by the New York City Charter to enact regulations which affect the public health was the broad legislation utilized to create the regulation. However, after an exhaustive overview of the history of the DOH's powers enumerated in the New York City Charter throughout *centuries*, Judge Tingling ruled that the regulation of sugary drinks was not within the DOH's power as enumerated in the New York City Charter. Instead, Judge Tingling rules that the DOH only has power to enact laws or regulations that prevent and protect against communicable, infectious, and pestilent diseases. As the health risks associated with sugary drinks are not of this nature, the DOH did not fill in details of broad legislation, but instead was creating legislation from a clean slate, clearly in violation of the separation of powers.

The third prong states that the DOH may not enact regulations regarding issues that have been or are currently before another legislative body for consideration. This prong was clearly violated, as numerous resolutions and bills regarding the regulation of have been before both the New York City Council as well as the New York State Assembly. Lastly, although the judge found that the fourth prong, which states that the regulation must require exercise and expertise of the body which passes the regulation, had not been violated, the statute is nonetheless unconstitutional, because it violates the first three prongs of the test. For these reasons, the Court ruled that the statute was unconstitutional and in violation of the separation of powers doctrine.

The most important lesson to be taken away from the DOH's attempt to regulate sugary drinks is not that it is impossible for such regulation to ever be properly upheld, but that the DOH does not have the power alone to mandate public policy. The Court made it very clear that that power resides with the legislature, which is made up of elected officials whose duty it is to enact rules and regulations which coincide with the ideals of the people they represent. Although Mayor Bloomberg has indicated his intention to appeal this decision, it is not likely that the DOH would be successful. Not only does the regulation fail because it violates the doctrine of separation of powers violating 3 of the 4 prongs of the *Boreali* test, but it is also obvious to anyone tracking this story that the action taken by DOH was entirely arbitrary. The best way for the DOH to pursue the battle of the beverage is through the legislature, as such broad reaching cannot be unilaterally mandated by one lone agency.

About the Author

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