Tobacco Case Reaffirms Confidentiality of NAAG Legal Advice

OLEG KOBELEV, TOBACCO PROJECT COUNSEL

In Tobaccoville USA v. McMaster, the South Carolina Supreme Court reaffirmed April 12 the attorney-client privilege between the state Attorneys General and the National Association of Attorneys General (NAAG). The Court also found for the first time that under South Carolina law the common interest doctrine protects exchanges of privileged information between NAAG and state Attorneys General.

Tobaccoville USA v. McMaster concerned an importer of cigarettes manufactured by a Canadian tobacco manufacturer that did not join the Master Settlement Agreement (MSA). The MSA is a landmark agreement between the Attorneys General of 46 states and all major tobacco companies to settle suits brought by the states to recover medical costs associated with smoking-related illnesses. Under the MSA, the states agreed to release permanently all claims for damages against the tobacco companies. In exchange, the tobacco companies agreed to a broad array of restrictions on the advertising, marketing and promotion of cigarettes. The companies also agreed to make annual payments to the states based on the number of cigarettes they sold during the prior year.

Like all other states that have signed the MSA, South Carolina enacted legislation requiring cigarette manufacturers who did not join the MSA (Non-Participating Manufacturers or NPMs) to make escrow payments. These payments are held in escrow accounts for the benefit of the state to satisfy potential judgments or settlements for smoking-related health care costs. Under other South Carolina legislation, cigarette manufacturers may sell cigarettes in the state only if the South Carolina Attorney General certifies them as a tobacco product manufacturer. If an NPM certified to sell cigarettes in South Carolina does so, it must make escrow payments for the cigarettes it sells in the state.

Between 2004 and 2006, Tobaccoville received this certification and made escrow payments to South Carolina in respect of the Canadian cigarettes it imported. In early 2007, however, the South Carolina Attorney General determined that Tobaccoville no longer qualified as a tobacco product manufacturer. Tobaccoville challenged that determination in South Carolina administrative law court. As a part of that lawsuit, Tobaccoville sought discovery of numerous confidential documents shared among NAAG, the South Carolina Attorney General, and other state Attorney General offices. Tobaccoville argued that these documents were not covered by attorney-client privilege because neither NAAG nor other state Attorney General offices were retained as counsel for South Carolina.

On appeal, the South Carolina Supreme Court held that “while the relationship the AG has with NAAG is not a traditional attorney-client relationship . . . these communications may be covered by the attorney-client privilege.”

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The Court noted that as a paying member of NAAG, the South Carolina Attorney General has in the past sought legal advice and consultation from NAAG attorneys regarding tobacco enforcement matters. The Court also found instructive a determination by a federal district court in Grand River Enterprises Six Nations v. King that similar NAAG documents were protected by attorney-client privilege. The Court held that in “in this very narrow factual scenario” the documents shared between NAAG’s attorneys and South Carolina Attorney General were privileged.

The court next turned to whether the South Carolina Attorney General waived the attorney-client privilege by sharing privileged documents with other states. The South Carolina Attorney General argued that under the common interest doctrine, exchanges of privileged information among parties with shared interests – as occurred with the documents the South Carolina Attorney General had shared with other states – should not waive the privilege. As evidence of their shared interest, the Attorney General submitted a Common Interest Agreement between the states that memorialized their common interest and their intent to maintain confidentiality of information shared among them.

The South Carolina Supreme Court recognized that application of the common interest doctrine was an issue of first impression in South Carolina. The Court held the doctrine applicable “for the narrow factual scenario where several states are parties to a settlement agreement, the state laws that regulate and enforce that settlement all have the same provisions, the attorneys general of those states are involved in coordinating regulation and enforcement, and the settling states have executed a common interest agreement.” The Court noted that the South Carolina Attorney General shared a common interest with other state Attorneys General in matters related to the MSA. The Court found that the state Attorneys General and NAAG “are working together to have uniform tobacco regulations and enforcement of the MSA.” Based on these circumstances, the Court concluded that the attorney-client privilege was not
waived when the South Carolina Attorney General shared documents with other state Attorneys General.

Like the similar decision in Grand River Enterprises Six Nations, this case reaffirms and protects the confidentiality of legal advice provided by NAAG to its members, thus enabling NAAG to perform its core mission: “To facilitate interaction among Attorneys General as peers and to facilitate the enhanced performance of Attorneys General and their staffs.” The decision recognizes the value of interstate cooperation on issues related to tobacco enforcement and the important role NAAG plays in facilitating this cooperation. Finally, Tobaccoville establishes a new legal precedent in South Carolina by adopting the common interest doctrine as an exception to the waiver of an existing privilege.

Attorneys General Meet to Discuss Coastal Environmental Issues

PAULA COTTER, ENERGY & ENVIRONMENT COUNSEL AND STEVE RUCKMAN, HONORS ATTORNEY, EXECUTIVE DIVISION, MARYLAND ATTORNEY GENERAL’S OFFICE


Former Maine Governor Angus King kicked off the day’s discussions with a dynamic talk about the potential for offshore wind energy development in the North Atlantic. Governor King emphasized that developing parts of the world are rapidly increasing their energy use, and predicted that competition for power will increase accordingly. Laying out a series of facts about current energy needs and capacity in the United States, he made a case for shifting to a mix of renewable energy sources, and traditional fossil fuels, while pursuing more robust energy conservation measures.

The morning’s first panel featured Lois Schiffer, general counsel for the National Oceanic & Atmospheric Administration (NOAA), and Captain Vince O’Shea, executive director of the Atlantic States Marine Fisheries Commission, each of whom discussed different strategies for protecting and preserving aquatic resources along the Atlantic coast. Schiffer outlined NOAA’s multiple aquatic species preservation programs, and highlighted the areas where states and the federal government can play complementary parts in enforcing aquatic preservation regulations. Captain O’Shea provided in-depth examples of aquatic species preservation, such as regulations designed to foster “catch shares” programs, which enable commercial fishermen to fish in ways that preserve the fish population equilibrium and allow for future fishing.

The topic of the next panel discussion was No Discharge Zones (NDZs), areas in water bodies and along coasts where discharge of sewage from boats...
is prohibited by the federal Environmental Protection Agency (EPA). Ann Rodney, environmental pollution specialist from EPA Region I, explained the federal support for a variety of NDZ efforts, and how varying types of NDZs have been adopted in different New England states. Erin Fitzsimmons, special assistant for the environment in the Maryland Attorney General’s Office, discussed lessons learned in Maryland’s recent attempt to pass legislation aimed at making all Maryland waters a No Discharge Zone. Finally, Pamela Parker, the Boatyard & Marina Compliance contact at the Maine Department of Environmental Protection, outlined that state’s experience in implementing No Discharge Zones along its coast, harbor by harbor.

The conference’s keynote speaker was Donald Boesch, PhD, president of the University of Maryland Center for Environmental Science. In his remarks, he linked scientific knowledge of carbon and nitrogen to the current environmental initiatives going forward in the Eastern states. Dr. Boesch traced the management and effects of those two elements as they relate to the health of the Chesapeake Bay and to global climate change, emphasizing, for example, the environmental impact of human population growth along the Bay, which is correlated with increased use of nitrogen-based fertilizers and increased carbon dioxide in the air.

The first afternoon panel focused on the regulation of – and subsequent litigation over – liquefied natural gas (LNG) terminals, which have been built or proposed to be built at several locations along the Eastern seaboard. The legal process for approving or denying the construction of LNG terminals is complex, given the safety, energy, and environmental issues involved. Carol Iancu and Adam Snyder, assistant attorneys general from Massachusetts and Maryland respectively, spoke about LNG terminal litigation that illustrates the complex regulatory framework for such installations. They also stressed that, while much of the LNG terminal approval process resides with the Federal Energy Regulatory Commission (FERC), states have an opportunity to make their voices heard at many points during the process, given the need for FERC to coordinate with state agencies and comply with relevant state laws.

The final conference panel focused on offshore wind energy development and the unique political, practical, and legal challenges it poses. Brian Goldman, chief counsel for the Rhode Island Coastal Resources Management Council, discussed Rhode Island’s proactive approach to offshore wind energy development, embodied in its creation of the Rhode Island Ocean Special Area Management Plan (SAMP). The Ocean SAMP has been put in place to direct a balanced approach to development, protection, and, where possible, restoration of the state’s coastal resources. Ken Kimmell, general counsel for the Massachusetts Executive Office of Energy and Environmental Affairs, explained his efforts to assist Governor Deval Patrick with the controversial Cape Wind project, a wind farm off the coast of Cape Cod that will be the nation’s first offshore wind farm if approved.
All in all, the attendees came away from the conference better informed about ongoing efforts to regulate and improve the coastal environment in the Eastern states, and better prepared to tackle aquatic issues ranging from preservation to enforcement to energy regulation.

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Get To Know: National Association of State Charities Officials

ERIC CARRIKER, NASCO PRESIDENT

The National Association of State Charities Officials (NASCO) was formed in 1979 as an association of assistant attorneys general and other state charity regulators to enhance the effectiveness of state charity regulation by providing a forum for exchanging views and fostering interstate cooperation.

NASCO was born of necessity because of the patchwork of state laws governing charities. Most Attorneys General have inherent parens patriae powers under common law to prevent the misuse of charitable assets and to ensure that trustees of charitable trusts and fiduciaries of charitable corporations fulfill their duties of loyalty and care to the charities they govern. Some states also have statutory schemes requiring charities to register and file annual financial reports with Attorneys General and other state officials, who oversee and regulate a variety of charitable activities including fundraising, bequests, asset transfers, nonprofit conversions, mergers, and dissolutions.

Although NAAG provided a forum for state Attorneys General with charity oversight responsibilities, that forum did not include Secretary of State offices and other state officials with some of the same charity oversight responsibilities. NASCO therefore was organized to represent all such charity officials. NAAG’s Charitable Trusts and Solicitations Committee operated independently from NASCO for several years, but in 1984 NASCO informally merged its activities with NAAG’s.

NASCO members communicate through a list serve, a members-only portion of a NAAG-hosted Web site, www.Nasconet.org, and through an annual educational conference co-sponsored with NAAG. NASCO has taken a leadership role in promoting uniform state charity registration and filing requirements, amicus briefs, and multistate lawsuits targeting fundraising deception. NASCO also has drafted model state solicitation laws and jurisdictional guidelines for state regulation of charitable solicitation on the Internet.

NASCO also strives to provide a national, unified voice for state regulators to communicate with the IRS, the U.S. Senate Finance Committee, and other constituencies regarding national charity issues. For example, NASCO members have participated in drafting the Uniform Law Commission’s Oversight of Charitable Assets Act, which is nearing approval and seeks to articulate and clarify the common law authority of state Attorneys General to protect charitable assets.

NASCO’s most significant activity is its annual educational conference. This year’s conference will be held in Silver Spring, Md., on Oct. 3-4 with regulator-only training on Sunday, Oct. 3, and a public day on Monday, Oct. 4. The theme of the public day is: “Charities & Regulators, Doing More With Less During Hard Economic Times,” and it will include an “Inside the Beltway” update of nonprofit initiatives from federal regulators and the U.S. Senate Finance Committee as well as panels addressing the role of government in oversight of nonprofit governance, how best to measure what makes an effective charity, and the creation and regulation of innovative fundraising strategies.

Eric Carriker is an Assistant Attorney General in the Massachusetts Attorney General’s Non-Profit Organizations/Public Charities Division.
Seattle in the Summer: Last Chance to Register for June Meeting

The 2010 Summer Meeting promises to be one of NAAG’s best! Our theme for the June 14 – 16 meeting is “Using Technology to Protect the Public” and will feature several panel discussions focused on technology, crime, and consumer protection. Hosted by Attorney General Rob McKenna in beautiful Seattle, Wash., we will take advantage of the location and convene an afternoon session and evening dinner on the Microsoft campus. Governor Christine Gregoire, U.S. Federal Trade Commissioner Julie Brill, U.S. Food and Drug Administration Commissioner Margaret Hamburg, MD, and U.S. Department of Justice Acting Deputy Attorney General Gary Grindler are just a few of the prominent meeting speakers.

The Business Session will have Attorneys General elect the NAAG officers for 2010-2011. The meeting concludes with a special State Dinner, focusing on our annual awards ceremony, a farewell to our president, Nebraska Attorney General Jon Bruning, and welcoming our newly-elected president.

NAAG will also offer a social program for family members in attendance. The Seattle Sky Needle, Frye Art Museum and Pike Place Market await. Please join us and register now! Registration forms and hotel information are on the Web, http://www.naag.org/naag-2010-summer-meeting.php.

Water Law is Focus of Western Attorneys General

The Conference of Western Attorneys General (CWAG) Chair, Colorado Attorney General John Suthers, hosted Western Attorneys General and distinguished legal experts from across the country April 29 and 30 to discuss major issues in water law at The Broadmoor hotel in Colorado Springs, Colo.

“Protecting the state’s water resources and safeguarding its rivers is among the most important jobs of Colorado’s Attorney General. Water is the lifeblood of Colorado and the West,” General Suthers said. It is a topic he chose to focus on during his tenure as CWAG chair. General Suthers’ peers elected him CWAG chair at their August meeting last year. He previously served as the organization’s vice chairman.

Conference speakers included Colorado Supreme Court Justice Gregory J. Hobbs, U.S. Department of Agriculture Undersecretary Harris Sherman, Alaska Attorney General Daniel Sullivan and U.S. Bureau of Reclamation Deputy Commissioner Bill McDonald as well as a variety of experts on water reuse and treatment. The conference featured discussions on a wide array of topics, including the Colorado River Compact, the Clean Water Act, water reuse, desalination and transbasin diversions.

For more information on the conference or CWAG, visit http://www.cwagweb.org/.