When Public Health Goes to Court: Current Public Health Court Cases

March 5, 2015
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When Public Health Goes to Court: Current Public Health Court Cases

March 5, 2015
Moderator

Abigail Ferrell, Attorney, Contractor, Principal Researcher, Writer, Public Health Law Program (PHLP), Centers for Disease Control and Prevention

- J.D., M.P.A., A.B.J., Georgia State University
- Research interests/areas of expertise:
  - Legal and Policy Research
  - Public Health Law Communications
  - Public Outreach
Presenter Introduction

Jane Perkins, Senior Attorney, Network for Public Health Law — Southeastern Region and Legal Director, National Health Law Program (NHeLP)

- J.D., University of North Carolina, Chapel Hill
- M.P.H., University of California, Berkeley

- Research interests/areas of expertise:
  - Publicly-Funded Health Insurance Programs
  - Health Access and Health Care for Vulnerable Populations
  - Early Intervention Services for Medicaid-Eligible Children
  - Disability and Civil Rights
Presenter

**Linda Chezem,** Professor of Youth Development & Agricultural Education at Purdue University; former Judge for Indiana Court of Appeals

- J.D., Indiana University

- Research interests/areas of expertise:
  - Ethical Issues in Forensic Science
  - Legal Issues in Alcohol Use and Misuse
  - Agriculture Law
Cheryl Harris Bullard, Deputy General Counsel and Chief Public Health Counsel, South Carolina Department of Health and Environmental Control

- J.D., University of South Carolina

- Research interests/areas of expertise:
  - Public Health Services
  - Health Policy, Privacy and Security
  - Regulatory Compliance, Drug Control
  - Public Health Legal Preparedness
Role of Public Health in the Courts

Jane Perkins, JD, MPH
Southeastern Region, Network for Public Health Law
Legal Director, National Health Law Program

March 2015
The Network for Public Health Law

The Network for Public Health Law provides legal assistance, resources and opportunities to build connections for local, tribal, state and federal officials; public health practitioners; attorneys; policy-makers; and advocates. Organizations and individuals committed to improving public health can join the Network.

www.networkforphl.org

The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation.
National Health Law Program (NHeLP)

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state levels.

www.healthlaw.org
Overview to the session

• Debate on the role of the court
• Terminology
• Examples of federal court cases

Thank you to Pam Silberman, DrPH, UNC-Chapel Hill School of Public Health
The Role of Courts

• Arguments against using courts to create public policy:
  • Separation of powers vests elected legislators and executive branch with creating and implementing public policies
  • Courts are not equipped to conduct policy analysis, understand policy/economic impacts of different choices
  • Courts have limited remedies and are not well equipped to enforce decisions

The Role of Courts

- Arguments for using courts to create public policy:
  - Litigation necessary when legislative/executive branches fail
  - Special interests may have “stranglehold” on legislative and executive branches
  - Federal judges serve for life
  - Litigation can offer political “cover” to legislators or officials

Limitation of the Courts’ Role

- Can only act on cases presented to court
- Limited to interpretation of laws or constitution
- Defer to legislate and executive branches of government
- Refrain from involvement in daily operations (details left to policy makers and/or parties)
  - But, occasionally, courts do shape and oversee implementation (e.g., special master, retained jurisdiction)
Terminology: Judicial Forums

- Administrative – involve government agencies
- State & federal trial courts – trier of facts (jury or bench)
  - state court: district court, superior court
  - federal court: district court
- State & federal appellate courts
  - courts of appeals, supreme court

NOTE: Increasing role of mandatory arbitration
Terminology: Parties

- **Plaintiff** - brings the lawsuit, as individual or “class action”
- **Defendant** – the individual or entity sued
- **Amicus** – non-parties filing “friend of the court” briefs
Terminology: Types of Relief

- Declaratory relief
- Injunctive relief
- Damages/Restitution
- Consent decrees
- Settlement agreements
Role of the Courts--Examples

• Compulsory vaccines
• Tobacco-related injuries
• The Affordable Care Act
Compulsory Vaccine Litigation

- **Jacobson v. Massachusetts**, 197 U.S. 11 (1905)
- compulsory smallpox vaccine requirement for adults
- plaintiff: 14\textsuperscript{th} Amendment right to refuse
- held: state can encroach on personal liberties when "the safety of the general public may demand"
- Anti-Vaccination League of America (founded 1908)
Compulsory Vaccine Litigation

  - local ordinance requiring vaccination of schoolchildren
  - plaintiff: 14\textsuperscript{th} Amendment right to refuse
  - affirmed *Jacobson*
- *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015)
  - affirmed *Jacobson*
Tobacco Litigation

- Early cases filed by individuals (or their estates) against tobacco companies decided in favor of tobacco companies
  - Held: plaintiffs responsible for their injury because they “chose” to smoke
- Later, state Attorney Generals made products liability arguments seeking as damages Medicaid repayment
  - Sued the tobacco companies for making “defective product”
  - Sought to recover Medicaid costs for treating tobacco-related illnesses
Tobacco Litigation

• Discovery: state Attorney Generals uncovered damaging documents
  • tobacco companies knew their products caused cancer
  • companies trying to purposely mislead the public
  • disclosure of companies’ ‘duplicity, manipulation, and deception”
**Tobacco Litigation**

Public health advocates got AGs to focus on policy-related relief:

- Ban on marketing materials targeting youth (*e.g.*, cartoons)
- Ban on sponsoring events, teams where audience includes significant percentage of youth
- Elimination of outdoor advertisement
- Ban on youth access to free tobacco products
- Dissolution of Tobacco Institute, Council for Tobacco Research, and Center for Indoor Air Research
- Prohibition on agreements to suppress research about tobacco and health
- Created national foundation to support research and prevention of youth tobacco use
Affordable Care Act in the Courts

4 Cases filed on day ACA signed
30+ Federal district court cases
11 Federal court of appeals cases
7 Petitions for Certiorari to SCOTUS
11th Circuit case to SCOTUS

6 Hours of argument
140+ Briefs


Source: NHeLP, ACA Litigation Docket (2-27-15)
Affordable Care Act in the Courts

  - “Individual mandate” (& ACA) upheld
  - Medicaid expansion unduly coercive & state option
- Post-NFIB
  - 90+ Federal district court cases
    - 70+ Contraceptive coverage
  - ~50 Federal courts of appeals cases
  -- closely held for-profit entity a “person” under RFRA
  -- no-cost contraceptive coverage unreasonable burden

Source: NHeLP, ACA Litigation Docket (2-27-15)
Affordable Care Act in the Courts


- Issue: Are health insurance subsidies available to residents of the 34 states where the federal government is operating the health insurance exchange?
- Oral argument: March 4, 2015
- Outcome:
  - continued implementation of ACA v. premium death spiral?
  - continued role of the courts to challenge the ACA?
Contact information

Network for Public Health Law
www.networkforphl.org
National Health Law Program
www.healthlaw.org

Jane Perkins, perkins@healthlaw.org, (919) 968-6308 (x101)
The State of Current Public Health Law

- Linda L. Chezem, JD
- Youth Development and Agricultural Education, School of Agriculture, Purdue University

Indiana Alcohol Research Center, Indiana University School of Medicine
How We See the Systems

- Equal Access to Justice
- Healthy Population
What Differences in Focus?

- Rights of Individual
- N does not matter
- All sizes of community
- Health of A Community
- Big N for Epi
- Large Community
Shared Aims: Safety and Health
Shared Aims: Safety and Health

• Past Public Health Court
  • Immunizations
  • Isolation and Quarantine Orders - Epidemics
  • Safe Water
  • Sanitary Sewers and Septic Systems
  • Safe Food
  • Safe Food Preparation
## Expanding Scope of Public Health Law

<table>
<thead>
<tr>
<th>PAST</th>
<th>Today</th>
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<tbody>
<tr>
<td>• Immunizations</td>
<td>• Vaccinations</td>
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<td>• Isolation and Quarantine Orders- Epidemics</td>
<td>• Preparedness</td>
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<td>• Safe Water</td>
<td>• Safe Water/Environmental Waste</td>
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<td>• Sanitary Sewers and Septic Systems</td>
<td>• Food Safety</td>
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<td>• Safe Food</td>
<td>• Nutrition</td>
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<td>• Safe Food Preparation</td>
<td>• Injury Prevention (including violence)</td>
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<td>• Population Health</td>
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<td>• Addictions and Misuse</td>
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*When Public Health Goes to Court*
Increasing Work

Confine/Place on Electronic

Justice Entry/Reentry Diagnosis

Where is Health System?

Punish Addiction

Treatment of Addiction

When Public Health Goes to Court
JUSTICE

Defendant
1. Crimes to possess or use
2. Crimes committed while impaired

Probation

PUBLIC HEALTH

Patient
1. Reduce injury
2. Prevention
3. Screening
4. Treatment

When Public Health Goes to Court
Alcohol Use and Misuse

- Alcoholic beverage use is a product of culture; producing some benefits and causing some harm.
- Alcohol may be used without harm yet unaddressed alcohol use disorders cause both chronic health as well as acute health problems.
- Until recently, alcohol misuse was regarded as a justice system concern only – not a public health issue.
Where might we bring Health and Justice Together?

- More Attention to Preparedness
- Criminalization of Pathogen (not just TB or HIV) Exposure in the United States
- Medical care,
- Infectious diseases
- Occupational safety

How effective or efficient is litigation as a tool to protect and promote the public’s health?
Rural Public Health Law

How can rural lawyers use public health research and practices to improve their client outcomes, improve their own satisfaction with the practice of law, and benefit the community as a whole?

59 S.D. L. Rev. 529

When Public Health Goes to Court
Public Health Emergency Law:
Planning, Implementation, and Evaluation of the CDC Foundational Course
The Public Health Emergency Law foundational course is an effective training tool when adapted with specific local laws and case study scenarios that reinforce learning.
Working in partnerships with local legal and public health officials to present the course ensures that the materials meet audiences’ identified training needs.

The FBI Investigation handbook has been developed to facilitate the use of resources and to maximize communication and interaction among law enforcement and public health officials ....
Public Health Law Resources

• NIAAA-NIH
• NACCHO http://nacchopreparedness.org/?p=1960
• POLICE EXECUTIVE RESEARCH FORUM funded by the Bureau of Justice Assistance https://www.ncjrs.gov/pdffiles1/bja/214333.pdf

• BENCH BOOKS for the States
Public Health in the Courts

Cheryl H. Bullard
Deputy General Counsel
SC Department of Health and Environmental Control
Public Health Cases

• Civil or criminal cases
  • Civil cases
    – Commitments
    – Isolation and Quarantine
    – TB; other communicable diseases
    – General liability cases
  • Criminal actions
    – Violation of public health orders
    – Regulatory violations
    – Felony exposure to HIV
• Jurisdiction
  – Courts:
    • Federal
    • State
      – Administrative
      – Probate
      – General jurisdiction state courts: Civil or Criminal
Recent Public Health Cases

- Phillips case NY
- Other jurisdictions
- Negligence/general liability cases
  - TB exposures in primary school in SC
  - Family planning – wrongful death
- Immunization cases
  - Exemptions
  - School exclusions
  - Vaccine injury
- Involuntary commitments
  - Isolation or quarantine for communicable diseases
  - TB; other emerging infectious diseases
Legal Continuum for Communicable Disease Cases

• Contagious disease diagnosis
• Agreement – consent to isolation or quarantine; conditions
  – Refuse to agree to conditions
  – Violate agreement
• Public health order
• Violation
• Emergency public health order; detention
• Initiate court action
• Hearing
• Order
• Confinement for contagious period
• Release from confinement; conditions
Public Health Practitioners as Legal Partners

• Essential to successful outcome in court
• Efforts to achieve compliance with public health instructions
• Disease and treatment expertise
• Necessary to court process
  – Affidavits for petition/pleadings
  – Testimony
  – Monitoring for compliance post-hearing and post-confinement
• Counseling and documentation
• Understanding practitioner’s role
• Understanding the law and role of the lawyer
  – Public Health Law 101: A Foundational Course for Public Health Practitioners
• Building relationship of trust prior to litigation
Other Partners

- Attorneys – private practice and other government attorneys
- Schools and legal counsel
- Law enforcement
- Hospitals and in-house counsel
- Court: Judges, law clerks, administrative personnel
- Emergency preparedness
- CDC
Readiness for the Court Proceeding

• Tools to assist with educating judiciary and legal counsel
  – Bench/bar manuals
    (currently 18 posted)
• Role of law enforcement – transport, security
• Counsel for respondent
• Location for confinement/treatment- security
• Compensation for counsel/payment for treatment facility
• Release and monitoring
Public Health
Legal Preparedness Resources

• Bench/Bar Manuals
• Public health lawyers: local, state, and national
• Legal process experts; other jurisdictions
• Forms
  – Pleadings/Petitions
  – Affidavits
  – Orders
    • Confinement
    • Release from confinement
    • Conditions
Other Resources

• Emergency Preparedness one of top 10 issues in Health Law in 2015 (AHLA)
  – Caring for patients with infectious diseases (Ebola)
  – Emergency preparedness checklist
  – Lessons learned post-Katrina

• Network for Public Health Law

• CDC Public Health Law Program
  – Bench books
  – Articles
  – Presentations
  – List-serve
Preparing for Litigation

- Filing petition in appropriate forum
- Affidavits
- Preparing for testimony; direct and cross examination
  - Qualifying as an expert
  - Documentation in record
- Post trial
  - Monitoring for compliance with court order
  - Testing
  - Conditions for release
Public Health Law
Training Curriculum for Judges/Lawyers

• Epidemiology primer
  – Infectious diseases
  – Disease process
  – Transmission risks to public
  – Need for isolation and quarantine – when indicated

• State public health laws
  – Public health agency enabling legislation
  – Agency roles and responsibilities
  – Authorized actions
  – Strategies for control measures – progressive actions
  – Penalties for violation of public health orders
  – Emergency detention in treatment facility
  – Law enforcement’s role

• Court proceeding/process
Court Process for Public Health Cases

- Respondent violates public health order
- Emergency detention and transport to inpatient treatment facility
- Petition for continued confinement
- Appointment of counsel for Respondent
- Hearing; testimony; transcript
- Order for confinement
- Order for release from confinement
Tips

• Provide CLE/training on public health law
  – Practitioners
  – Local bar organizations
  – State bar meeting
  – Judiciary; annual meeting or sponsor judicial CLE
  – Law enforcement
  – School counsel

• Recruit current and retired attorneys to represent respondents in public health actions

• Pre-arrange confinement location; MOA/MOU with hospitals for treatment of persons confined by court order

• Security concerns
Please type your questions in the Q&A panel.
Thank you for attending

Please join the Network for this upcoming webinar:

Shared-Use Agreements to Support Public Health: Evidence-Based Best Practices and Lessons from the Field
Thursday, March 19—1 p.m. (ET)

More information: networkforphl.org/webinars