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Mr. Cahill goes to Washington

Holbrook attorney takes waste fight to the Supreme Court

By ROSS DALY

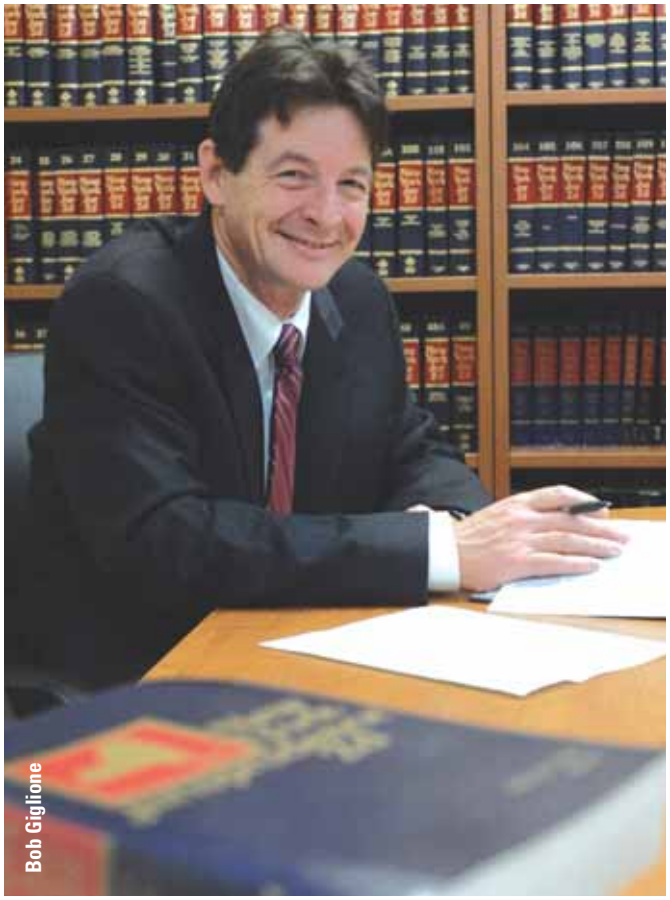
As he waited beneath the marble columns, the seconds dragged one past another. It was a "thrilling and intimidating" moment for Michael Cahill, about to argue his first case before the U.S. Supreme Court.

"The scariest part is the last 20 or 30 seconds," he said. "A chill goes up your spine – this is it!"

Cahill was representing New York's Oneida and Herkimer counties and the Solid Waste Authority the state formed on their behalf.

The Mohawk Valley counties had created a system in 1989 that stressed recycling and composting and reduced landfill dumping. To fund these efforts and the construction of an up-to-code landfill, the relatively poor counties had adopted "flow control" ordinances that created new waste stations – and new fees whenever trash haulers dumped non-recyclable materials.

In 1995, a group of haulers filed a complaint, noting it would be cheaper to dispose trash out of state and contending that the flow control laws discriminated against interstate commerce. Twelve years of legal wrangling followed, leading to Cahill's Jan. 8 trip to the chambers of the U.S. Supreme Court.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Cahill's opponent – Evan Tager, a partner at a Washington law firm with the largest Appellate and Supreme Court practices in the United States – went first. This was to Cahill's advantage; as Tager squared off with the justices, Cahill began to think he wouldn't have to poke holes in the other side's case. The justices were doing it already. They saw the weaknesses.

"I started to think, 'This may not be so bad," said Cahill.

Then his turn came.

Litigating at light-speed

Cahill started to speak, but Justice Samuel Alito quickly cut him off. Cahill had read that attorneys average about 50 words before a justice interrupts; he'd managed 35.

"I got my first two sentences out, and I didn't have to worry about any kind of a speech because the questions started right there," Cahill said.

Now time was speeding up, as the justices peppered Cahill with queries. "They're ready," he said. "Prepared. And firing questions left and right. And the fact that there's nine of them … you find yourself kind of spinning from the left to right."

The transcript of Cahill's first Supreme Court appearance reveals a freewheeling, rapid-fire exchange that would make any veteran mouthpiece pause.

Cahill: This court held that … a 'user fee' is constitutionally limited; there has to be a relationship between the cost of a service and the amount that's charged.

Justice Antonin Scalia: So don't call it a 'user fee.' Call it something else.

Cahill: Your honor, if we…

Scalia: Call it a 'tax rip-off'. (Laughter) Then you can charge whatever you want, so long as you don't call it a 'user fee,' right?

Cahill: In New York, your honor, you either have to call it a 'user fee' or a 'tax' or something else.

Chief Justice John Roberts: Call it a 'cable TV franchise fee.' I mean, isn't that the way municipalities used to make a lot of money?

The questions and twisting hypotheticals rained down, and after 20 minutes Cahill was done. Caitlin Halligan, the solicitor general of New York, took another 10 minutes to support the counties as a friend of the court; then it was just a matter of waiting for the ruling.

After 12 years, Cahill could wait.

Going against the flow

Flow control ordinances were thrown into question in 1994 – a year before the haulers filed against the Oneida-Herkimer law – by a Supreme Court ruling on another upstate New York case, this originating in Rockland County. In the case of C&A Carbone Inc. v. Clarkstown, the court knocked out an ordinance that directed all trash to a private facility, ruling the ordinance favored one owner over competitors both in-state and out.

Soon, flow control laws were being challenged across the country. At the time, Cahill was working for a small firm on a flow control case involving Smithtown; this lead him to Oneida-Herkimer and vice versa, and he's been lead attorney on their case ever since.

He was no stranger to high-profile waste cases. Cahill's first big case was the infamous Islip "garbage barge" saga in 1987; he was working with the town's waste authority when the barge began wandering the seas without a destination port willing to accept its load. Cahill helped broker a deal that ended the seaborne impasse, with the trash – which had sailed as far as Belize – eventually burned in Brooklyn.

The barge's six-month voyage may have seemed like a long odyssey, but it was nothing compared to the Oneida-Herkimer case – which, through various charges and appeals – hinged on whether the Carbone decision applied to facilities run by the government, rather than private enterprises.

The haulers – backed by the National Solid Waste Management Association, a Washington-based industry group – won their original case in 2000. That decision was reversed by the 2nd Circuit Court of Appeals in 2001 and sent back to the lower court. Now the counties were victorious, a decision affirmed in 2006 by a federal appeals court.

Undaunted, the haulers appealed again – this time to the Supreme Court. Over a dozen years, Cahill, now a member of the three-man Holbrook firm Germano & Cahill P.C., had come to admire his upstate clients as both "dedicated and stubborn," so he was not at all surprised to find himself standing in the Supreme Court's august halls in January.


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Tager made his case. Cahill made his. And then, once again, everyone hurried up and waited.

Split decision

For Herkimer and Oneida counties, a win would mean continuation of a system that has "recycling, and the whole range of environmental benefits, at heart," according to Hans Arnold, executive director of the Solid Waste Authority. "That's what was really at risk."

For Cahill, of course, a win would mean an undefeated record before the highest court in the nation – and a victory against a powerhouse Washington law firm with nearly 200 Supreme Court cases under its belt.

Like those seconds before his Supreme Court appearance, the waiting dragged – until April 30, when it abruptly ended. A decision was rendered.

Chief Justice Roberts wrote for the 6-3 majority:

"Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas – but treat every private business, whether in-state or out-of-state, exactly the same – do not discriminate against interstate commerce for purposes of the Commerce Clause."

And the Solid Waste Authority's programs "increase recycling … conferring significant health and environmental benefits upon the citizens of the counties," Roberts added.

Cahill and his counties had won.

The ruling, now seen as precedent-setting for flow control ordinances, may have even broader implications, given its strong nod to state's rights.

"The dormant Commerce Clause," Roberts wrote, "is not a roving license for federal courts to decide what activities are appropriate for state and local governments to undertake, and what activities must be the province of the private sector."

"He's telling the lower courts that if voters decide to establish a program, that's their business," Cahill said. "It's not for courts to second-guess legislatures on these things."

The court's decision comes as a big relief for Oneida and Herkimer, Arnold said, and could boost similar programs across the country. Cahill isn't sure what effect the ruling will have on Long Island, where many municipal flow control ordinances have been allowed to lapse, "but it's a tool that's back in the tool box," he said.

After his 12-year case (and 1-0 Supreme Court record), the Holbrook attorney looks back and appreciates the "good friends" he made, as well as a job well done.

"It's particularly satisfying to get a win," Cahill said. "It would have been that much worse to get a loss after this much time."

For more information contact

Germano & Cahill
4250 Veterans Memorial Highway, Suite 275
Holbrook, New York 11741
Telephone: 631-588-8778 / Fax: 631-588-2550
www.germanocahill.net