

Trade Regulation—Tobacco Products

Aggressive Ban on Tobacco Coupons Upheld in First-of-Kind Ruling

Tobacco and cigarette retailers in Providence, R.I., can't offer price discounts on tobacco products, the U.S. Court of Appeals for the First Circuit decided Sept. 30, upholding city ordinances prohibiting coupons and multi-pack discounts on tobacco (*Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 2013 BL 269192, 1st Cir., No. 13-1053, 9/30/13).

Writing for the court, Judge Timothy B. Dyk, sitting by designation from the Federal Circuit, rejected First Amendment and preemption arguments advanced by a national trade association and several leading tobacco companies, including members of the Altria Group Inc., Reynolds American Inc. and Lorillard Inc.

The court's decision appears to give municipalities more leeway in combating youth smoking through pricing regulations. "Finally the local government's real public interest in reducing teen smoking through restrictions on manner of cigarette promotion has survived rigorous judicial scrutiny and federal preemption," Donald A. Migliori, an attorney at Motley Rice LLC, Providence, R.I., who filed an amicus brief on behalf of several public health organizations, told BNA in an e-mail Oct. 3. "The real winners are teens who never start smoking and teens who quit before they get addicted," he said.

The court's decision comes on the heels of a D.C. Circuit opinion temporarily halting enforcement of a portion of the federal Prevent All Cigarette Trafficking Act, which was intended in part to reduce tobacco use among kids (82 U.S.L.W. 100, 7/16/13). That case involved a due process challenge to enforcement of a federal law requiring all out-of-state retailers of tobacco products to collect state sales and use taxes, regardless of whether the retailers had minimum contacts with the state.

Offers for Illegal Activity. In response to evidence indicating that young people are particularly sensitive to the price of tobacco and are more susceptible to flavored smokeless tobacco products, Providence, R.I., passed two ordinances in 2012.

The "price ordinance" bars retailers from accepting price discounts on tobacco products through coupons

or multi-pack discounts, whereas the "flavor ordinance" prohibits the sale of certain flavored tobacco products.

The National Association of Tobacco Outlets and several tobacco companies challenged both ordinances, but the district court ruled in favor of the city. NATO members include several large tobacco companies such as Altria, R.J. Reynolds Co., Lorillard, several cigar manufacturers, pipe manufacturers, snuff companies, and match and lighter manufacturers, according to NATO's website. The group also includes tobacco product wholesalers and distributors, the website says.

Affirming, the appeals court first said that the pricing ordinance does not run afoul of the First Amendment's protection of commercial speech.

Although pricing information is considered protected speech, the court said that the price ordinance here does not actually "restrict the dissemination" of such information.

Instead, the price ordinance is "more limited," in that it only prohibits the retailers from engaging in certain pricing practices, the court said.

It pointed to the U.S. Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), for support, which it said "ma[d]e clear that price regulations designed to discourage consumption do not violate the First Amendment."

Moreover, the court rejected the association's argument that the price ordinance violates the First Amendment because it prohibits retailers from "offering" to accept price discounts.

Offers to engage in illegal activity — namely, the sale of discounted tobacco products — are not protected under the free speech clause, the court said.

Content Neutral. Next, the appeals court said that neither the pricing ordinance nor the flavor ordinance is preempted by federal law.

With regard to the price ordinance, the court said that it is not preempted by the Federal Cigarette Advertising and Labeling Act, 15 U.S.C. § 1334(b).

The act — which established a "comprehensive" federal scheme regarding cigarette labeling and advertising — prohibits laws relating to "the advertising or promotion of any cigarettes."

But even assuming that the price ordinance relates to "promotional" activities, the court said the Labeling Act provides a savings clause that permits some restrictions on such activities.

In particular, content-neutral restrictions on the time, place and manner of advertisements or promotions are not preempted under the act.

The court rejected the association's argument that the price ordinance is not content-neutral because it singles out tobacco products.

The savings clause "cannot be read in this limited fashion," the court said, because "on its face, the preemption exception to the Labeling Act extends to regulations that single out tobacco." It "would make no sense if it were read not to exempt regulations from preemption simply because they were directed toward tobacco use," the court said.

Finding the price ordinance a "time, place and manner" restriction, the court found that it is not preempted by the Labeling Act.

Product Standard. Finally, the court said that the flavor ordinance is not preempted by the Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387p(a)(2)(A), which prohibits laws "relating to tobacco product standards," or "good manufacturing standards."

Relying on *Nat'l Meat Ass'n v. Harris*, 80 U.S.L.W. 4139 (U.S. 2012) (80 U.S.L.W. 955, 1/24/12), the association argued that the flavor ordinance imposes an impermissible product standard by effectively banning flavored smokeless tobacco.

In *Nat'l Meat Ass'n*, the U.S. Supreme Court struck down a California law that prohibited the slaughter of animals unable to stand or walk under their own power. The Supreme Court found that the state law ban created new requirements on slaughterhouse operations that were preempted by the Federal Meat Inspection Act.

But the court said that this case was "easily distinguish[able]" because the federal law at issue here includes a savings clause that expressly permits regulations that relate to "sale" of tobacco products.

The court noted that "a virtually identical" New York City provision was upheld by the Second Circuit in *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013) (81 U.S.L.W. 1229, 3/5/13), under similar reasoning.

Judges Juan R. Torruella and O. Rogeriee Thompson joined the opinion.

Local Ordinance, National Significance. Maggie Mahoney, the deputy director of the Tobacco Control Legal Consortium, St. Paul, Minn., which filed an amicus brief in support of the city of Providence, told BNA Oct. 3 that the court's decision will have a "national impact."

She said that "Providence was the first (and only) jurisdiction to pass a pricing law of the type at issue in this case and, thus, this is the first federal appellate court that has assessed whether this type of law is preempted under the Federal Cigarette Labeling and Advertising Act" or prohibited under the First Amendment.

Based on the appellate court's answer to these questions, Mahoney says that she expects other jurisdictions will follow with similar laws.

Providence Mayor Angel Taveras (D) said in a written statement Sept. 30 that he hopes the court's ruling "inspires other communities to follow our lead and take a stand against Big Tobacco."

Thomas Briant, executive director and legal counsel for the National Association of Tobacco Outlets, Minneapolis, appeared to agree that the decision could have national significance.

In an e-mail Oct. 4, he told Bloomberg BNA that the appeals court reasoned that "First Amendment protections [were] no longer applicable for accepting and redeeming coupons," because "the Providence City Council adopted an ordinance making illegal what had been legal."

"Does this mean that a city can outlaw any legal transaction in order to take away the ability of a person or a company to exercise their First Amendment rights which would otherwise protect what has always been a legal transaction? Briant asked.

He added that the court's decision "threatens the ability of retailers to do what they have done for decades, namely, accept coupons from adult customers who desire to purchase tobacco products."

Brian May, communications manager at Altria, told BNA Oct. 2 that the company had no comment.

Michael J. Edney of Gibson Dunn & Crutcher LLP, Washington, D.C., argued for the National Association of Tobacco Outlets. Anthony Francis Cottone of Providence, R.I., argued for the city.

BY KIMBERLY ROBINSON

Full text at http://www.bloomberglaw.com/public/document/NA_of_Tobacco_Outlets_et_al_v_Providence_RI_et_al_Docket_No_13010.

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