



## Tobacco Litigation Update

### Court Upholds NYC's Law Prohibiting Sale of Flavored Smokeless Tobacco Products

*U.S. Smokeless Tobacco Manufacturing Co. v. New York City*

#### Background

In October 2009, a [New York City ordinance](#) was enacted, prohibiting the sale of flavored, non-cigarette products (other than menthol) in all places within the city, except in certain tobacco bars. U.S. Smokeless Tobacco filed a Complaint with the U.S. District Court for the Southern District of New York, arguing that the city's ordinance set a "tobacco product standard" and that, under the [Family Smoking Prevention and Tobacco Control Act](#), that authority was reserved to the federal government. In other words, the company argued that the local ordinance was preempted by federal law. In January 2010, the company filed a motion for preliminary injunction with the court, asking it to put enforcement of the law on hold while the litigation was pending. The court issued a [Decision and Order](#) in March 2010, finding that it was "highly unlikely" that the tobacco company would prevail on the merits of the case, and denied the motion. The tobacco company and the City filed motions for summary judgment with the court, agreeing that there were no factual issues in dispute, and asking the court to rule in each parties' favor.

#### Decision

On November 15, 2011, the court [denied](#) the tobacco company's motion, granted the City's motion, and dismissed the Complaint. Judge McMahon found that the Tobacco Control Act's Preservation Clause indicates that the Act did not intend to take away state and local authority to regulate the sale or distribution of tobacco products. She also found that the Act's Preemption Clause and Savings Clause make it clear that while the federal government has exclusive control over tobacco product standards, state or local sales or distribution regulations are not tobacco product standards. Judge McMahon suggested that exemptions, such as the one allowing sales in certain tobacco bars, are not required to help prove that sales restrictions do not rise to the level of setting product standards. She said, though, that even if an outright ban would in some way amount to a

product standard, the City's ordinance should be upheld because of the existing exemption.

### **Litigation Status**

Altria, which owns U.S. Smokeless, has said that it plans to appeal. This decision would not be binding on other courts if they are asked to review a state or local sales restriction, but it could be persuasive.

*Last updated November 2011*