



23-34 94th St. Grocery v. N.Y.C. Board of Health
685 F.3d 174 (2d Cir. 2012)

NYC's Graphic Warning Requirement Struck Down

Background

In 2009, the New York City Board of Health adopted a resolution requiring tobacco retailers to post signs that graphically depict the adverse health effects of tobacco use and provide information about cessation services. The graphic warnings that were implemented focused solely on the adverse health effects of smoking. On June 2, 2010, two cigarette retailers, two trade associations, and three of the country's largest cigarette manufacturers sued New York City in the U.S. District Court for the District of New York, claiming that the resolution was preempted by – or prohibited by – federal law.

Congress included preemption language in the Federal Cigarette Labeling and Advertising Act (FCLAA), which provides, “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this chapter.”¹ This portion of FCLAA was modified in 2009 by the Tobacco Control Act to allow state and local laws that restrict the time, place, and manner but not the content, of cigarette advertisements and promotions.²

The District Court's Decision

The district court found that New York City's signage requirement was preempted by FCLAA.³ The city appealed.

The Court of Appeals' Decision

On July 10, 2012, the U.S. Court of Appeals for the Second Circuit upheld the district court's decision that struck down the Board of Health resolution on the basis that it was preempted – or prohibited by – FCLAA. The city argued that the warning sign requirement was a restriction on the sale, not the promotion, of cigarettes because the resolution required signs wherever cigarettes were sold, regardless of advertising or promotion within an establishment. The appellate court, however, found that the signage requirement affected the display of cigarettes, which is a type of promotion. The court also was concerned that allowing local authorities to

post supplemental warnings on or near cigarette displays risks creating diverse, nonuniform, and confusing regulations in the context of the Tobacco Control Act's graphic warning requirement.

The court clarified that not all state and local regulations related to cigarette promotion are preempted, given FCLAA's exemption for state and local regulations that restrict the time, place, and manner but not content, of cigarette promotion. The court found that the exemption did not apply to the New York City Board of Health resolution because it affected the content of manufacturers' promotional messages and it applied "wherever" tobacco products are sold, which it found was not a lawful restriction on the "place" of tobacco product promotion.⁴

Litigation Status

The New York City Board of Health did not appeal this decision to the United States Supreme Court.

Last Updated: September 24, 2014

Notes

¹ 15 U.S.C. § 1334(b) (2012).

² *Id.* § 1334(c).

³ 23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health, 757 F. Supp. 2d 407 (S.D.N.Y. 2010).

⁴ 23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health, 685 F. 3d 174, 184 n.9 (2d Cir. 2012).