



National Association of Tobacco Outlets, Inc. v. City of New York

No. 14 CV577 (TPG)(JCF), 2014 WL 1354901 (S.D.N.Y. Jun. 18, 2014)

NYC Ordinance Prohibiting the Use of Coupons and Discounts for Tobacco Products Upheld

Background

In November 2013, New York City enacted an ordinance regulating the tobacco industry's use of promotional pricing strategies. Among other prohibitions, the law restricts the sale of tobacco products below the advertised price, sets a price floor for cigarettes and little cigars, and prohibits multi-pack discounts. In January 2014, three tobacco retail store associations and six tobacco product manufacturers filed suit against the City of New York with the U.S. District Court for the Southern District of New York, challenging the ordinance's prohibition on the sale and offer to sell tobacco products below the listed price. The industry argued that the ordinance violated their First Amendment right to commercial speech and that it was preempted by both federal and state law.

Both parties filed a stipulation which stayed enforcement of the challenged provisions in the ordinance until May 23, 2014, which the court later extended until June 20, 2014. Both parties also filed for summary judgment. The industry argued that the ordinance unlawfully restricts its First Amendment right by restricting its ability to communicate discount pricing and deal information to consumers. It also contended that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted the ordinance's restriction on pricing content in advertisements and promotions.¹ Finally, the tobacco industry claimed the New York State Public Health Law preempted the ordinance, arguing the statute sanctioned its pricing strategies and reserved the right to regulate the distribution of free tobacco products.²

The District Court's Decision

The district court granted the City of New York's motion for summary judgment in its entirety. Judge Thomas Griesa held that the ordinance did not violate the First Amendment, and that neither federal nor state laws preempted its enactment.

The court ruled the ordinance merely regulated an economic transaction; to violate the First Amendment, the ordinance would have to restrict the dissemination of pricing information. In determining this, the court relied on the First Circuit's decision in *National Association of Tobacco Outlets, Inc. v. City of Providence*, which came to a similar conclusion.³

The court also held the ordinance did not violate either FCLAA or the New York State Public Health Law. Relying on Congress' 2009 amendment to FCLAA, which allows states and localities to pass restrictions on the "time, place, and manner, but not the content, of the advertising or promotion of any cigarettes," the court found that the ordinance lawfully regulated only the manner of such promotion and did not apply to promotional content.⁴ The court also noted that FCLAA only addressed regulation of health information in advertisements and promotions, not pricing information.⁵ Judge Griesa also found the New York State Public Health Law did not preempt the city's ordinance because the state law was not intended to sanction the industry's coupon and discount strategies, nor did it pertain to the regulation of free distribution of tobacco products. The ordinance thus withstood each challenge from the tobacco industry.

Litigation Status

The case was decided on June 18, 2014. The industry may appeal the decision to the Second Circuit Court of Appeals within 30 days of the judgment's entry.⁶ If no such appeal is filed within that time, the district court's decision is final.

Last Updated: September 24, 2014

Notes

¹ 15 U.S.C. § 1334(c).

² New York State Public Health Law Article-F-Regulation of Tobacco Products, Herbal Cigarettes and Smoking Paraphernalia; Distribution to Minors, § 1339-bb.

³ Nat'l Ass'n Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013).

⁴ 15 U.S.C. § 1334(c).

⁵ 15 U.S.C 1339.

⁶ FED. R. APP. P. 4(a)(1)(A).