



***U.S. Smokeless Tobacco Manufacturing Company, LLC v. City of New York***  
708 F.3d 428 (2d Cir. 2013)

NYC's Law Prohibiting the Sale of Flavored Tobacco Products Upheld

**Background**

In October 2009, a New York City ordinance was enacted, prohibiting the sale of flavored, non-cigarette tobacco 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 was preempted by the Tobacco Control Act. The tobacco company argued that the ordinance set a "tobacco product standard," which is an authority reserved to the FDA under the Act. 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 on March 2010, finding that it was "highly unlikely" that the tobacco company would prevail on the merits of the case, and denied the motion.<sup>1</sup> The tobacco company and NYC 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 party's favor.

**The District Court's Decision**

On November 15, 2011, the court granted NYC's motion, and entered judgment in favor of the city. Judge McMahon found that the language of the Tobacco Control Act indicates no intention to take away state and local authority to regulate the sale or distribution of tobacco products. The court made clear that the Act gives the federal government exclusive control over tobacco product manufacturing standards, while allowing state or local governments to make laws regulating the sale or distribution of tobacco products.<sup>2</sup>

The court also found that the Act allows state and local governments to enact restrictions on tobacco products that are more stringent than federal regulations and thus NYC's restriction on flavored tobacco products was not preempted by the Act.<sup>3</sup>

**The Court of Appeals' Decision**

On February 26, 2013, the U.S. Court of Appeals for the Second Circuit upheld the district court's ruling. This court found that a state or local government regulation imposing a sales prohibition on a class of products was not preempted by the Tobacco Control Act.<sup>4</sup>

Although the NYC ordinance was not a complete prohibition, as it allowed the sale of flavored products in tobacco bars, the court ruled that even a complete prohibition on a class of products would not necessarily be preempted. The court found that a sales prohibition would only be preempted if the regulation imposed a product standard, a power reserved to the FDA. A sales prohibition would only create a product standard if the regulation prohibited the sale of a class of products that was manufactured in a particular way or with particular ingredients. However, a sales prohibition that merely references the characteristics of an end product does not create an impermissible product standard.<sup>5</sup>

### **Litigation Status**

On March 8, 2013, the tobacco companies appealed for a rehearing and a rehearing en banc (a rehearing with the full panel of Second Circuit judges, rather than the three-judge panel that issued the appellate court decision) which was denied on May 1, 2013. No appeal was filed with the Supreme Court by the July 29, 2013 deadline to appeal, rendering the Court of Appeals' decision final.

*Last Updated: September 24, 2014*

### **Notes**

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<sup>1</sup> U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 703 F. Supp. 2d 329, 343 (S.D.N.Y. 2012).

<sup>2</sup> *Id.* at 344.

<sup>3</sup> *Id.* at 345.

<sup>4</sup> U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013).

<sup>5</sup> *Id.* at 435.