



## **New York City Graphic Warning Sign Requirement & Litigation**

Point-of-sale advertising has become an increasingly important promotional strategy for tobacco companies because many of their traditional avenues of advertising have been restricted by the Master Settlement Agreement (MSA)<sup>1</sup> and by the federal Family Smoking Prevention and Tobacco Control Act (the Tobacco Control Act) and its accompanying regulations.<sup>2</sup> In fact, the tobacco industry spent over \$240 million on point-of sale promotions in 2006.<sup>3</sup>

Tobacco use is the single most preventable cause of disease, disability, and death in the United States, resulting in medical costs of \$96 billion per year and lost productivity costs of \$97 billion per year.<sup>4</sup> For this reason, some state and local governments are considering point-of-sale interventions, including counter-advertising requirements, to address the tobacco industry's advertising strategies. One type of counter-advertising effort consists of requiring graphic warning signs at the point of sale, to inform consumers about the health risks posed by tobacco use and to reduce youth initiation rates.<sup>5</sup> New York City is the first jurisdiction to require graphic warning signs to be posted in all areas where tobacco is sold in a face-to-face transaction.

### **New York City's Graphic Warning Requirement**

In September 2009, the New York City Board of Health adopted the resolution that became Section 181.19 of the New York City Health Code. That section required that all licensed tobacco retail establishments in the City display graphic signs that would be designed and distributed by the New York City Department of Health and Mental Hygiene. Under Section 181.19, the Department of Health and Mental Hygiene could create signs that included information about tobacco products, information about the adverse effects of tobacco use, pictures illustrating those effects, and information about how to get help to quit using tobacco. The Department created three signs with graphic, color images of cancerous lungs, a decayed tooth, and a brain damaged by stroke. Each sign had "quit smoking" messages, and provided information about tobacco cessation resources. Retailers were required to post a small sign near the cash register or a larger sign near the area where tobacco products were displayed.

## **The Litigation in New York City**

Tobacco manufacturers, retailers, and trade associations (the plaintiffs) sued the City and its health officials (the defendants) in June 2010.<sup>6</sup> The plaintiffs filed a motion with the trial court, asking the court to put Section 181.19 “on hold” while the litigation was pending, which is very common when someone is challenging a law. In their motion, the plaintiffs argued that the Board of Health did not have the authority to adopt the resolution, that the resolution violated the free speech protections offered by the First Amendment of the United States Constitution and a similar provision of the New York Constitution, and that the resolution was preempted – or prohibited – by the Federal Cigarette Labeling and Advertising Act (FCLAA). The plaintiffs argued that the FCLAA does not allow state or local governments to adopt the type of resolution adopted by the New York City Board of Health.

The City filed a cross-motion, a motion for summary judgment, arguing that there were no important factual issues in dispute and that the court could rule on the legal issues. The City agreed to delay enforcement of Section 181.19 until January 2011, and the plaintiffs changed their motion to a summary judgment motion as well. The trial court judge heard both parties’ summary judgment motions in October 2010.

On December 29, 2010, the trial court issued its Opinion, finding that the FCLAA preempted Section 181.19 and declaring Section 181.19 void. Because the court decided the case solely on the FCLAA issues, it did not address the other issues raised by the plaintiffs. The City filed an appeal with the United States Court of Appeals for the Second Circuit, and many public health organizations, including the Tobacco Control Legal Consortium and its partners, filed *amicus curiae* (“friend of the court”) briefs with the Second Circuit, in support of the City and Section 181.19.<sup>7</sup> As of the date of this publication, the plaintiffs have not yet filed their reply brief with the Second Circuit.

## **The Trial Court’s Interpretation of the FCLAA**

In relevant part, the FCLAA’s preemption provisions (in 15 U.S.C. § 1334) state:

- (b) No requirement or prohibition based on smoking and health shall be imposed under State law [or under the political subdivision of a State] with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.
- (c) Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the [Tobacco Control Act] imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.

The court found that Section 181.19 was a requirement “with respect to the advertising and promotion of cigarettes” because it required the signs to be posted near displays of tobacco products and that this violated the FCLAA.

## The Court Decision's Impact on State and Local Tobacco Control Efforts

The City and the public health community believe that the court's interpretation of the FCLAA was much broader than intended by Congress, and are optimistic that the Second Circuit will reach a different conclusion on appeal. It seems likely, however, that the party receiving an unfavorable decision from the Second Circuit will ask the United States Supreme Court to review the case. As a result, it is likely that it will take a long time before there will be a final outcome in this litigation.

Public health professionals at the state and local level might consider the following points when considering adopting graphic point-of-sale warning requirements:

- Regardless of the legal issues, it may be difficult to get political support to adopt requirements similar to those of Section 181.19, due to a fear of litigation.
- If a jurisdiction has the political will to adopt point-of-sale graphic warning requirements, there may be ways to write the requirements differently than Section 181.19 to help reduce the chances that another court will have concerns identical to those of the New York court. For example, another jurisdiction might require the signs to be posted in different areas or to apply to non-cigarette tobacco products (the FCLAA only applies to cigarettes).
- The ruling in the New York City case was issued by the Southern District of New York. Federal district court decisions may be persuasive to courts in other states and federal districts, but are not binding on those other courts. In addition, federal district court decisions generally are not binding on state courts located in the federal district. Thus, other courts could reach different decisions than the court did in the New York City case.
- As with any tobacco control law or regulation, it would be helpful to seek the input – and buy in – of the governmental attorney who would defend the law or regulation (e.g., the City Attorney, the County Attorney, or the Attorney General), since the law or regulation will likely be challenged in the courts.

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<sup>1</sup> Master Settlement Agreement, available at <http://www.naag.org/backpages/naag/tobacco/msa> (last visited May 3, 2011).

<sup>2</sup> Family Smoking Prevention and Tobacco Control Act, Pub.L. 111-31, 123 Stat. 1776 (codified primarily at 21 U.S.C. § 387 *et seq.* (2009)); 21 U.S.C. § 102 (West 2010)); 21 C.F.R. §§ 1140.30, 1140.32 (2010).

<sup>3</sup> Federal Trade Commission, *Cigarette Report for 2006*, at 4 (2009).

<sup>4</sup> Centers for Disease Control and Prevention, Smoking & Tobacco Use Fast Facts, available at [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm) (last visited May 3, 2011).

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<sup>5</sup> According to Henriksen et al., *A Longitudinal Study of Exposure to Retail Cigarette Advertising and Smoking Initiation*, 126 PEDIATRICS 232, 232 (2010), “adolescents’ exposure to widespread cigarette advertising at the point of sale is a risk factor for smoking initiation.” This research suggests that, to prevent youth from smoking, it is vital to reach them in retail establishments where cigarettes are sold.

<sup>6</sup> 23-34 94th St. Grocery Corp. v. N.Y. City Board of Health, No. 10 Civ. 4392 (S.D.N.Y. Dec. 29, 2010).

<sup>7</sup> The brief filed by the Tobacco Control Legal Consortium and its partners can be found on the website for the Public Health Law Center, the Consortium’s parent organization:

<http://publichealthlawcenter.org/sites/default/files/resources/amicus-nybohpos-2011.pdf>.