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Commerce Clause: County Ordinance Requiring Pharmaceutical Manufacturers to Collect and Dispose of Unwanted Drugs Does Not Violate Dormant Commerce Clause

Pharmaceutical Research and Manufacturers of America v. County of Alameda, No. 13-16833 (9th Cir. Sept. 30, 2014).

A first-in-the-nation ordinance requiring pharmaceutical manufacturers selling products in Alameda County, California to provide a program for the collection and disposal of unwanted drugs has been found not to violate the dormant Commerce Clause. Upholding a lower court, the Ninth Circuit found no substantial burden on manufacturers, potentially significant benefits to County residents, and no impact beyond County borders.

In July 2012 Alameda County, California enacted a program requiring pharmaceutical manufacturers that sold products within the County to provide for the collection, transport, and disposal of unwanted drugs. The ordinance mandated that manufacturers – independently or jointly – provide conveniently located disposal kiosks throughout the County, as well as educational and outreach materials for the public. Non-profit trade organizations representing pharmaceutical manufacturers filed suit, alleging the ordinance violated the dormant Commerce Clause. The District Court found no violation.

HELD: The Ninth Circuit affirmed the District Court.

DISCUSSION: The Circuit Court evaluated whether the ordinance "impose[d] commercial barriers or discriminate[d] against an article of commerce by reason of its origin or destination out of State." (citation omitted). The manufacturers argued that the ordinance's "real world effect" was "indistinguishable from a tariff" since it shifted costs to out-of-state jurisdictions. The court disagreed, pointing out that the ordinance applied across-the-board to all manufacturers

selling or providing prescription drugs in the County, resulting in no geographic advantages for any manufacturer and no tariff-like traits.

The court also found that the law did not directly regulate interstate commerce because its practical effect was not to control conduct beyond the County borders. While the plaintiffs argued that the law regulates "manufacturers whose only connection to Alameda is interstate commerce," the court found "there is nothing unusual or unconstitutional per se about a state or county regulating the in-state conduct of an out-of-state entity when the out-of-state entity chooses to engage the state or county through interstate commerce." The plaintiffs also argued there was direct regulation since the law shifted the costs of the County's disposal program from local government to the manufacturers. Again the court pointed out that the manufacturers inappropriately applied this argument, which relates to whether a law discriminates against interstate commerce, not whether it directly regulates it.

Examining the second tier of the dormant Commerce Clause analysis, the court asked whether the burden the ordinance imposed was excessive in relation to the putative local benefits. To win under this analysis the manufacturers had to show that the ordinance imposed a substantial burden. They failed, only stating "the County cannot dispute that the Ordinance imposes some burdens on [manufacturers] engaged in interstate commerce." The court also looked at the local benefits of the ordinance, noting the Supreme Court admonition that "regulations that touch upon safety . . . are those that the Court has been most reluctant to invalidate. Indeed, if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." It pointed out the parties had jointly stipulated that the ordinance's environmental, health, and safety benefits were not contested, which created a "strong presumption for validity."

The court closed by noting that this is a first-in-the-nation law and while opinions could vary about the value of such a provision, that question was for lawmakers and the public. The court's task had been to review the ordinance for compliance with the dormant Commerce Clause, and it passed such scrutiny.

LINK (last accessed Oct. 22, 2014)

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/30/13-16833.pdf (last accessed Oct. 22, 2014)

Qualified Immunity: Absence of Specific Precedent in State-Created Danger Case Does Not Prevent "Clearly Established" Finding

Estate of Frank P. Lagano v. Bergen County Prosecutor's Office, No. 13-3232 (3d Cir. Oct. 15, 2014).

Where law enforcement officers allegedly revealed the identity of a confidential informant to organized crime, resulting in the informant's murder, they cannot avoid a finding that their behavior violated a "clearly established" constitutional right merely because the specific fact pattern had not yet been the subject of a judicial determination.