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FEATURED CASE:

Preemption: Federal Tobacco Control Act Does Not Preempt Los Angeles County Ban on Flavored Tobacco Products

***R.J. Reynolds Tobacco Co. v. County of Los Angeles*, no. 20-55930 (9th Cir. Mar. 18, 2022).**

Affirming the district court, the Ninth Circuit holds, in a 2-1 decision, that the Tobacco Control Act's prohibition against state or local regulations which differ from the Act's provisions "relating to tobacco product standards" does not override the County's ban on flavored products. A dissent argues that the majority is falling prey to an analytical construct which has twice resulted in reversal by the Supreme Court.

Origins: State Power Over Tobacco

Over a century ago, the Supreme Court first recognized that states, because of public health concerns, could prohibit the sale of cigarettes. *See Austin v. State of Tennessee*, 179 U.S. 343, 348–49 (1900).

In the intervening century, Congress enacted various statutory provisions focusing on consumer education through advertising and labeling requirements. But these federal statutes never preempted state and localities' traditional power to restrict or ban sales of tobacco products, and it was the states that pursued the tobacco industry after numerous heads of major tobacco companies denied under oath the addictiveness of nicotine, obtaining a massive $206 billion settlement two decades ago.

Federal Law: Tripartite Mechanism Preserving Some State Authority

Federal law reflects the historical backdrop of state and local governments' role as the primary regulators of tobacco products. In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (TCA), Pub. L. No. 111–31, 123 Stat. 1776 (2009), *codified at* 21 U.S.C. § 387 *et seq.*, authorizing the FDA to regulate tobacco products. While it expressly preempted certain contrary state or local regulations, it also preserved from preemption other state and local regulatory

authority over tobacco. Specifically, the TCA sought to "authorize the [FDA] to set national standards controlling the *manufacture* of tobacco products and the identity, public disclosure, and amount of *ingredients used* in such products." Pub. L. No.111-31, 123 Stat. 1778 (2009) (emphasis added). The TCA's "preservation" clause provided that:

> Except as provided in [the preemption clause], nothing in this subchapter . . . shall be construed to limit the authority of a . . . political subdivision of a State . . . to enact, adopt, promulgate, and enforce *any* law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure *relating to or prohibiting the sale*, distribution, possession, exposure to, access to, advertising and promotion of, or use *of tobacco products by individuals of any age*, information reporting to the State, or measures relating to fire safety standards for tobacco products. 21 U.S.C. § 387p(a)(1) (emphasis added).

The TCA follows its broad preservation clause with a "preemption" clause that expressly overrides the preservation clause in the case of any conflict between the two provision's terms. The preemption clause reads:

> No . . . political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter *relating to tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products. *Id.* § 387p(a)(2)(A) (emphasis added).

Immediately following the preemption clause is a "savings" clause which instructs that the preemption clause does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. *Id.* § 387p(a)(2)(B).

The Los Angeles Ban:

In September 2019, Los Angeles County joined at least three states and over 300 local jurisdictions across the country by enacting a prohibition on the sale of flavored tobacco products:

> [I]t shall be a violation of this Chapter for a tobacco retailer/licensee or its agent(s) or employee(s) to sell or offer for sale, or to possess with the intent to sell or offer for sale, **any flavored tobacco product or any component, part, or accessory intended to impart, or imparting a characterizing flavor in any form**, to any tobacco product or nicotine delivery device, including electronic smoking devices. (*emphasis added by IMLA*).

The Tobacco Industry Litigation

R.J. Reynolds Tobacco Company, American Snuff Company, LLC, and Santa Fe Natural Tobacco Company, Inc. (Appellants) sued the County of Los Angeles and various County officials (Appellees), alleging that the TCA expressly and impliedly preempts the County's ordinance. The district court granted Appellees' Rule 12(b)(6) motion.

On appeal, the Ninth Circuit affirmed. Noting that "Under our system of dual sovereignty, courts . . . must strive to maintain the delicate balance between the States and the Federal Government," it found that the TCA reflected such a balance, giving the federal government exclusive power to set "tobacco product standards," while preserving state, local, and tribal authority to regulate or ban sales of those products altogether. Thus, "it would be a mistake to read 'tobacco product standards'

in the TCA's preemption clause so broadly as to encompass the type of sales ban challenged in this case."

While the TCA lets the federal government sets the regulatory floor, the plain text of the preservation clause allows state, local, and tribal governments to go beyond that, including even "*prohibiting the sale* . . . of tobacco products [to] individuals of any age." None of the eight limited exceptions to the preservation clause: "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products" related to sales.

The tripartite structuring of the TCA thus preserved state and local authority over sales:

> In short, the TCA's text sandwiches limited production and marketing categories of preemption between clauses broadly preserving and saving local authority, including any "requirements relating to the sale" of tobacco products. This unique "preservation sandwich" enveloping the TCA's preemption clause reveals a careful balance of power between federal authority and state, local, and tribal authority, whereby Congress has allowed the federal government to set the standards regarding how a product would be manufactured and marketed, but has left states, localities, and tribal entities the ability to restrict or opt out.*United States v. Leon H.*, 365 F.3d 750, 753 (9th Cir. 2004), we decline to assign different meanings to the preemption and saving's clause use of word "requirement."

Of particular significance was the fact that, while the TCA prohibited cigarettes from containing any flavor except tobacco or menthol, it did not expressly require that any flavor must remain available for sale--and expressly preserved local authority to enact sales regulations more stringent than those in TCA. The County's sales ban thus does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" expressed in the TCA. Affirmed.

DISSENT: Circuit Judge R. Nelson saw things differently. Citing the fact that "In the last two decades, the Supreme Court has twice reversed us for failing to find California regulations expressly preempted. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt.Dist.*, 541 U.S. 246 (2004); *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012, he focused on the TCA's preemption clause which provides that "[n]o State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of [the TCA] relating to tobacco product standards." The TCA provides that no cigarette shall have any "artificial or natural flavor (other than tobacco or menthol)," and that requirement is a "tobacco product standard." Therefore, Congress has spoken: "Cigarettes cannot have any flavors except tobacco and menthol, and that requirement is a tobacco product standard. In other words, a flavor ban is a tobacco product standard."

He critiqued the majority's focus on where the Los Angeles's flavor ban occurs—at the point of sale rather than at the manufacturing stage. The majority's argument--that tobacco product standards relate only to the manufacturing process, and not afterwards—is " exactly the argument that the Supreme Court has twice rejected." While the statute in *Engine Manufacturers* was not the TCA, it used the same term—"standard"—and "just like the statute at issue there, nothing in the TCA expressly limits tobacco product standards to manufacturing."

Given that the flavor ban is a tobacco product standard, says Judge Nelson, Los Angeles's ban of sales of certain flavors must also be a tobacco product standard. The only remaining question was whether Los Angeles's ban is a requirement "which is different from, or in addition to, any requirement under the provisions of [the TCA] relating to tobacco product standards."

There was no doubt in Judge Nelson's mind: "There's no dispute that Los Angeles's ban is different from or in addition to the TCA's flavor ban." And it was clearly a "requirement." He pointed to the fact that several other courts have interpreted these provisions of the TCA, and none of them have adopted the majority's reading. In a Second Circuit opinion cited by the majority, *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 434 (2d Cir. 2013), the court upheld a more limited regulation that still allowed sales of flavored tobacco, and just required that they take place in tobacco bars.

He also disagreed with the majority's reading of the preemption/preservation/savings clauses as a "preservation sandwich served up by the TCA."

> [I]ut in holding that Los Angeles's ban is not preempted, the majority has actually folded itself into a pretzel. The majority argues that the preemption clause is "hardly useless," because the federal government is still the only one that can technically set standards. Majority at 30–31. But under the majority's reading, states and municipalities can ban anything made with standards that they don't like, and thus can "opt out of [the federal standards]" entirely. *Id*. This is the very reasoning that the Supreme Court says "make[s] a mockery" of a preemption clause. *Nat'l Meat*, 565 U.S. at 464. By construing the TCA's preemption clause to allow sales bans that defeat its entire purpose, the majority does just that.

20-55930.pdf (uscourts.gov)

Short Summaries:

DC Circuit – Law Schools/Colleges – COVID – Consumer Protection

For those of you weighed down by student debt or otherwise incensed by college and university tuitions that exceed the fair and reasonable, you'll be interested in this case that allows students and parents to pursue a claim against two universities that suspended live classes due to Covid and interrupted the in person experience of the students while not reducing tuition. The Court of Appeals for the DC Circuit reversed a lower court decision dismissing claims holding among other conclusions: "However, we hold that Plaintiffs' complaints plausibly allege that the Universities breached implied-in-fact contracts for in-person education. Plaintiffs' factual allegations, combined with the reasonable inferences drawn from them, suffice to support their claims that the Universities promised to provide in-person instruction in exchange for Plaintiffs' tuition payments."

Shaffer v. George Washington University

6th Circuit – Jails – Deliberate Indifference

Inmate enters jail and denies being on drugs or alcohol. Placed in confinement and eventually appears to fall asleep and later falls to the floor. Guard finds inmate on floor unconscious and inmate later dies of a narcotics overdose. Inmate was not found to be secreting narcotics on his person and denied having narcotics or having taken narcotics upon admission to the facility. Procedures called for duty guard to enter cell area to check on prisoners, but duty guard did not as guards found that doing so agitated prisoners as it disturb their sleep. Guard was suspended for failing to follow written policy. Court concludes that their was no evidence of deliberate indifference and failure to follow the policy was not sufficient basis to create liability as officers had reasonable bases for not following

policy. The panel concluded: “Hyman has not shown that any reasonable officer in Lewis’s position would have known that Lipford’s undisclosed, concealed drugs created an “obvious” and unjustifiably high risk of harm. Britt, 2022 WL 405847 at *2 (quoting Brawner, 14 F.4th at 596–97).” Similarly the Plaintiff failed to show a viable tort claim under Michigan law.

Hymen v. Lewis

Learning lesson from this case ought to be that in representing a client, you should convince the client to do regular legal audits to see if policies merge with practice or vice versa. Here the policy provided for regular in cell checks, but the policy was routinely if not always violated in favor of what seemed to be a reasonable basis. If people do not see a policy as workable, they will not follow it, so having the policy in place, only offers an opportunity for a Plaintiff to assert its violation creates liability. In this case the county overcame that result, but in other cases, courts are likely to find violation of policy a basis for liability.

ND Illinois – Fines and Fees – Ouch

This case was reported on the Volokh Conspiracy blog and frankly, makes local government look really bad. Bear in mind however that the case is at the pleading stage and the facts may turn out to be quite different. I hope so. From the court’s opinion:

"The Village of Melrose Park decided that it would be a good idea to issue 62 tickets to an elderly couple for having lawn chairs in their front yard. The Village issued ticket after ticket, imposing fine after fine, to two eighty-year-old residents, Plaintiffs Vincent and Angeline Cozzi.

The fines were not small potatoes. Each ticket cost $500, so the Village tagged them with fines totaling about $30,000. And when it was all said and done, the Village slapped them with a lien on their house, for good measure.

The tickets faulted the Cozzis for creating a nuisance and for "unsanitary conditions." The tickets did not explain what was unsanitary about the plastic lawn chairs. But the Village claimed that they were receiving anonymous calls about "clutter" on their front lawn.

The Cozzis, for their part, didn't view their lawn furniture as wasteful clutter. In fact, they regularly used the furniture to sit outside, and visit with loved ones in a socially distanced manner during the pandemic. The fresh air and companionship apparently cost them $30,000.

A reader might be wondering how things could have gone so dramatically off the rails. The Village of Melrose Park, it seems, reacted poorly when Plaintiff Michael Cozzi (the adult son of Vincent and Angeline) complained about the first two tickets, and about the mistreatment of his parents more generally. Michael Cozzi attended public meetings in Melrose Park, and he expressed his concerns on social media about the Village harassing his elderly parents.

That free expression led to an avalanche of tickets. The Village issued the Cozzis a $500 ticket nearly every business day from December 3, 2020 to March 3, 2021. Christmas Eve was no exception. The tickets would financially cripple the Cozzis, an elderly couple on a fixed income.

{The fact that the Village wasn't ticketing anyone else wasn't for lack of opportunities. The complaint is chock-full of pictures of other houses in the neighborhood. The surrounding lawns are adorned with used mattresses, a 15-foot skeleton with a Santa hat, garbage, and trampolines. There are

reindeer, swans, candy canes, stars, pergolas, tchotchkes, and Christmas decorations at various degrees of garishness. Not to mention plenty of lawn furniture.
What were those lawns missing [according to the Complaint]? *Tickets*.}

The retaliation stretched beyond the tickets. Michael Cozzi received a handwritten note from a police officer warning him about supposed parking violations. Several parking tickets soon followed.

And that's not all. The police surveilled the home several times a day. Michael Cozzi received threatening text messages from unknown or restricted phone numbers. Someone broke his car window. And on one occasion, the Mayor of Melrose Park, Ronald Serpico, drove by and verbally threatened Michael Cozzi with violence.

If the reader is thinking that things have, at this point, gone completely off the rails, buckle up, because the ride is not yet over. In January 2021, as the deluge of tickets rained down, Michael Cozzi went to a public meeting at the Village of Melrose Park to express his concerns. The meeting, it turns out, was recorded. And to put it mildly, Mayor Serpico responded poorly. He unleashed what can only be described as a filthy, profanity-laden tirade with racial overtones. He told him where to go, and then some.""

The facts that followed might make some blush due to the profanity allegedly used by the Mayor during public meetings, but I'll not burden this email with more. I'll only end by noting that the court concluded that the Mayor's actions were sufficient for the Plaintiffs to assert a *Monell* claim against the Village.

Cozzi v. Village of Melrose Park

Washington Court of Appeals – Public Records Act

In a decision that points out the legislative lack of spine when it comes to public records legislation, an intermediate appellate court in Washington reversed a lower court decision requiring a frequent PRA litigator to submit to discovery. By way of description, the appellant was identified as: a "disingenuous PRA litigator motivated by profit, not by a true desire to obtain records, and this motive is an appropriate factor for trial courts to consider when imposing a per diem penalty." But alas, the court concluded that the penalties in the Act apply to government failures not to people who abuse the system by seeking records disingenuously. So, as in most states, legislators fearful of the press, refuse to balance the PRA in ways that protect the taxpayers from abusive PRA requests. I believe that communities should include a line item in their budgets for Public Records Act requests to detail the costs they must bear in responding to requests. By doing so, the public will understand what an impact frivolous requests have on their tax dollar. Clearly we need open government and our operations need to be transparent, but when someone abuses the process to either make a point or a profit, the law should also protect the public from abuse. Just saying.

Hood v. Columbia County