CONTENTS

Preemption

U.S. Code
TITLE 15 > CHAPTER 36 > § 1334

§ 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

FDA Legislation[1]

Solely by being enacted the legislation causes four potentially important actions to occur (assuming the new law is not immediately challenged in court):

1. The FDA must republish within one month the 1996 Rule, which restricts tobacco marketing and sales to youth. This rule must take effect within one year of enactment of the legislation. The rule:

[1] NYBTPC summary sheet

- Bans all outdoor tobacco advertising within 1,000 feet of schools and playgrounds
- Bans all remaining tobacco brand sponsorships of sports and entertainment events
- Bans free giveaways of any non-tobacco items with the purchase of a tobacco product or in exchange for coupons or proof of purchase
- Bans free samples and the sale of cigarettes in packages that contain fewer than 20 cigarettes
- Limits any outdoor and all point-of-sale tobacco advertising to black-and-white text only
- Limits advertising in publications with significant teen readership to black-and-white text only
- Restricts vending machines and self-service displays to adult-only facilities
- Requires retailers to verify age for all over-the-counter sales and provide for federal enforcement and penalties against retailers who sell to minors.

Any of these restrictions could be challenged in court on first amendment grounds and may or may not be overturned or upheld by a court system generally solicitous of the tobacco industry.

2. Pre-emption of state laws regarding tobacco advertising and promotion imposed by the federal Cigarette Labeling and Advertising Act is lifted. Removal of this pre-emption allows states to enact legislation related to the sale, distribution, possession, reporting to states, 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.

State imposed restrictions on advertising and promotion may be challenged on first amendment grounds and may be upheld or overturned by the courts.

On August 11, 1995, the FDA published a proposed rule concerning the sale of cigarettes and smokeless tobacco to children and adolescents. 60 Fed. Reg. 41314—41787. The rule, which included several restrictions on the sale, distribution, and advertisement of tobacco products, was designed to reduce the availability and attractiveness of tobacco products to young people. *Id.*, at 41314.[2]

On August 28, 1996, the FDA issued a final rule entitled “Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents.” *Id.*, at 44396. The FDA determined that nicotine is a “drug” and that cigarettes and smokeless tobacco are “drug delivery devices,” and therefore it had jurisdiction under the FDCA to regulate tobacco products as customarily marketed–that is, without manufacturer claims of therapeutic benefit. *Id.*, at 44397, 44402.

The FDA accordingly concluded that if “the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely ever to begin.” *Id.*, at 44399. Based on these findings, the FDA promulgated regulations concerning tobacco products’

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[2] http://www.law.cornell.edu/supct/html/98-1152.ZO.html (2 of 29) 3/13/2007 — FDA V. BROWN & WILLIAMSON TOBACCO CORP.

promotion, labeling, and accessibility to children and adolescents. See *id.*, at 44615—44618.[3]

Based on these findings, the FDA promulgated regulations concerning tobacco products' promotion, labeling, and accessibility to children and adolescents. See *id.*, at 44615—44618.

The access regulations

- prohibit the sale of cigarettes or smokeless tobacco to persons younger than 18;
- require retailers to verify through photo identification the age of all purchasers younger than 27;
- prohibit the sale of cigarettes in quantities smaller than 20; prohibit the distribution of free samples; and
- prohibit sales through self-service displays and vending machines except in adult only locations. *Id.*, at 44616—44617.

The promotion regulations

- require that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults;
- prohibit outdoor advertising within 1,000 feet of any public playground or school;
- prohibit the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; and
- prohibit a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its brand name. *Id.*, at 44617—44618.

The labeling regulation

- requires that the statement, "A Nicotine-Delivery Device for Persons 18 or Older," appear on all tobacco product packages. *Id.*, at 44617.

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law."

Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco.

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. See Brief for Petitioners 35—36; Reply Brief for Petitioners 14. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking

[3] http://www.law.cornell.edu/supct/html/98-1152.ZO.html (4 of 29) 3/13/2007 — FDA V. BROWN & WILLIAMSON TOBACCO CORP.

authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, *post*, at 31, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And " '[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.' " *United States* v. *Article of Drug ... Bacto&nbhyph;Unidisk,* 394 U.S. 784, 800 (1969) (quoting *62 Cases of Jam* v. *United States,* 340 U.S. 593, 600 (1951)). Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority that it seeks to exercise here. For these reasons, the judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

FDA

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The labeling regulation

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This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use.

By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how “important, conspicuous, and controversial” the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, *post*, at 31, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. — Justice O'Connor writing for the majority, March 2000.

Judge Batts (NYC)[4]

In light of this clear guidance, the task at hand is to determine whether Article 17-A is within the domain expressly preempted by Section 1334(b). In other words, the Court must determine whether Article 17-A constitutes 1) a "requirement or prohibition 2) "based on smoking and health" 3) "with respect to the advertising or promotion of any cigarettes." See Vango Media, 34 F.3d at 72 (looking at the "three essential phrases" of Section 1334(b) and the relationship of each with the local ordinance in question).

Article 17-A (NYC 1998)

"Youth Protection against Tobacco Advertising and Promotion Act" (the "Act"). (Jt. 56.1 St. 10.) The Act was part of Local Law 3 of 1998, and was codified as Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code ("Article 17-A").

- prohibits outdoor advertisements for tobacco products within one thousand feet in any direction of a school building, playground, child day care center, amusement arcade or youth center.
- prohibits advertisements for tobacco products inside buildings within the same one thousand foot zone, unless they are placed in such a way that they are either parallel to the street and facing inward, or affixed to a wall perpendicular to the street.
- allows one so-called "tombstone" sign to be placed within ten feet of the entrance to any premises within the proscribed zone that states "TOBACCO PRODUCTS SOLD HERE:" the sign may not be larger than six square feet, and may contain only black text that is no larger than eight inches in height.
- A violation of Article 17-A can result in civil penalties, and repeated violations can lead to the revocation of retail store licenses to sell tobacco. (Jt. 56.1 St. 12.)

[4] http://www.tobacco.org/resources/documents/981215nycbatts.html (2 of 16) 3/12/2007 — US District Judge Batts' New York City Advertising Ban Decision, December 15, 1998

- the stated purpose of the legislation is "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales."

NYC[5]

Article 17-A (NYC Local Law 3 of 1998; Article 17-A to Title 27, Chapter 1, subchapter 7, of the New York City Administrative Code)
"Youth Protection against Tobacco Advertising and Promotion Act"
Stated purpose: "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales."

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…the task at hand is to determine whether Article 17-A is within the domain expressly preempted by [the "three essential phrases" of the 1965 FCLAA] Section 1334(b). In other words, the Court must determine whether Article 17-A constitutes 1) a "requirement or prohibition 2) "based on smoking and health" 3) "with respect to the advertising or promotion of any cigarettes."

…the Court DECLARES that Article 17-A of Title 27 of the Administrative Code of the City of New York is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1334(b), and the Supremacy Clause of the United States Constitution, Article IV, clause 2, and therefore, is without force or effect.[6]

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Dated: New York, New York
December , 1998
Deborah A. Batts
U.S.D.J.

[5] http://www.tobacco.org/resources/documents/981215nycbatts.html (1 of 16)3/12/2007
[6] http://www.tobacco.org/resources/documents/981215nycbatts.html (15 of 16)3/12/2007

Massachusetts

On January 22, 1999, the Massachusetts Attorney General, pursuant to his rulemaking authority, adopted regulations on tobacco advertising and promotions. The regulations "declare certain types of conduct by manufacturers, distributors, and sellers of tobacco products to be per se 'unfair or deceptive acts or practices' prohibited under chapter 93A, section 2(a) of the Massachusetts General Laws."
The regulations do the following:

- ban outdoor tobacco ads within 1000 feet of schools or playgrounds;
- require cigar packages to carry health warnings;
- for stores close to schools or playgrounds, ban in-store tobacco ads that face out;
- ban the handing out of samples of tobacco products;
- ban the distribution of tobacco products by mail, unless there is provided a copy of a government-issued identification showing that the purchaser is 18 or older;
- ban self-service displays of tobacco products except in adult-only establishments;
- require any in-store tobacco ads to be at least 5 feet above the floor.

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, Mass. Gen. Laws, ch. 93A, §2 (1997), the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age .... [and] in order to prevent access to such products by underage consumers." 940 Code of Mass. Regs. §21.01 (2000). The similar purpose of the cigar regulations is "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts [so that] ... consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes ... [and so that] the incidence of cigar use by children under legal age is addressed ... in order to prevent access to such products by underage consumers." Ibid. The regulations have a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the tobacco industry not covered by the agreement. The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.[7]

The U.S. Court of Appeals for the First Circuit found that cigarettes, smokeless tobacco and cigars present a real harm, and that regulating advertising of such products strongly affects use. The Court of Appeals also concluded that the 1000-foot zone effectively advances the government's interest in protecting youth from being targeted via tobacco advertising. Noting that the tobacco companies had voluntarily agreed to keep their billboards 500 feet from schools, the Court of Appeals ruled that the 1000- foot zone does not violate the tobacco companies' commercial speech rights under the First Amendment. However, the US Supreme Court found that the

[7] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (9 of 67) 3/6/2007 — Supreme Court strikes MA tobacco advertising regulations - Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)

Massachusetts regulations restricted more speech than necessary, running afoul of the fourth part of the Central-Hudson test.[8] (June 28, 2001.)

Accordingly, we hold that the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA.[9]

We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the Central Hudson analysis. A regulation cannot be sustained if it " `provides only ineffective or remote support for the government's purpose,' " Edenfield, 507 U. S., at 770 (quoting Central Hudson, 447 U. S., at 564), or if there is "little chance" that the restriction will advance the State's goal, Greater New Orleans, supra, at 193 (internal quotation marks omitted). As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.[10]

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U. S., at 161. From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States. [156]
In this case, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth. The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.[11]

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, the regulations do not satisfy Central Hudson's fourth step. Their broad sweep indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed."[12]

…the regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such a product withstand First Amendment scrutiny. The State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest. See e.g., O'Brien, supra, at 382. Because unattended displays of such products present an opportunity

[8] http://www.tobacco.neu.edu/litigation/cases/Backgrounders/Lorillard_v_Reilly_scotus.htm (3 of 4)3/6/2007. Media Backgrounder for Decision on Lorillard v. Reilly at the US Supreme Court
[9] http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=us/000/00-596.html (17 of 54)
[10] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (35 of 67)
[11] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (38 of 67) 3/6/2007 — Supreme Court strikes MA tobacco advertising regulations - Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)
[12] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (5 of 67) 3/6/2007 — Supreme Court strikes MA tobacco advertising regulations - Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)

for access without the proper age verification required by law, the State prohibits self-service and other displays that would allow an individual to obtain tobacco without direct contact with a salesperson. It is clear that the regulations leave open ample communication channels. They do not significantly impede adult access to tobacco products, and retailers have other means of exercising any cognizable speech interest in the presentation of their products.[13]

Lindsey v. Tacoma-Pierce County Health Department, 195 F.3d 1065 (9th Cir. 11/19/1999)[14]

In 1996, the Tacoma-Pierce County Health Department Board of Health adopted a resolution that bans outdoor tobacco advertising within Pierce County, Washington. The Board adopted the ban in an attempt to reduce underage tobacco use in the county. The Lindseys, owners of convenience stores who are licensed to sell tobacco products in the State of Washington, filed this action against the Board of Health and other defendants alleging that the Board's resolution was (1) an unconstitutional regulation of commercial speech under the First Amendment; (2) preempted by the Federal Cigarette Labeling and Advertising Act; (3) preempted by the Washington Tobacco Access to Minors Act; and (4) beyond the Board's statutory authority. The district court granted the Board's motion for summary judgment and entered a judgment in its favor. The Lindseys appeal from the district court's final judgment in favor of the Board. We have jurisdiction under 28 U.S.C. S 1291 and reverse because a local ban on outdoor tobacco advertising is preempted by the Federal Cigarette Labeling and Advertising Act.[15]

The Board justified its adoption of the Resolution based on its findings that "[t]obacco advertising, whether intended to promote tobacco use or only compete for market share, has the consequence of promoting tobacco use" and that "[t]obacco advertising induces children to initiate tobacco use."[16] The Board specifically targeted all outdoor tobacco advertisements because it believed that outdoor advertisements intrude into public spaces and induce minors to use tobacco. The Board, therefore, banned all tobacco advertisements that can be seen from the street unless the advertisements are presented in a tombstone format.

Under the Resolution's tombstone exception, licensed tobacco retailers can post price and availability information outside their businesses so long as the advertisements are in plain black type on a white field without adornment, color, opinion, artwork, or logos. The Resolution does not otherwise regulate the content of tobacco advertisements. No tombstone advertisement can be displayed, however, if it is visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to

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[13] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (6 of 67) 3/6/2007 — Supreme Court strikes MA tobacco advertising regulations - Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)

[14] http://biotech.law.lsu.edu/cases/tobacco/Lindsey_v_Tacoma-Pierce_review.htm 3/15/2007 — Brief - Court Bans Local Regulation of Tobacco Advertising - Lindsey v. Tacoma-Pierce County Health Department, 195 F.3d 1065 (9th Cir. 11/19/1999)
http://biotech.law.lsu.edu/cases/tobacco/Lindsey_v_Tacoma-Pierce.htm 3/15/2007 — Lindsey v. Tacoma-Pierce County Health Department, 195 F.3d 1065 (9th Cir. 11/19/1999)

[15] http://biotech.law.lsu.edu/cases/tobacco/Lindsey_v_Tacoma-Pierce.htm (2 of 17) 3/15/2007 — Lindsey v. Tacoma-Pierce County Health Department, 195 F.3d 1065 (9th Cir. 11/19/1999)
..\Brief - Court Bans Local Regulation of Tobacco Advertising - Lindsey v. Taco.pdf

[16] http://biotech.law.lsu.edu/cases/tobacco/Lindsey_v_Tacoma-Pierce.htm (4 of 17) 3/15/2007 — Lindsey v. Tacoma-Pierce County Health Department, 195 F.3d 1065 (9th Cir. 11/19/1999)

school or within one thousand feet of a school, playground, or public park. The Resolution does not regulate tobacco advertisements located inside retail establishments unless the advertisements can be seen from the street. A retailer who violates the Resolution can be fined one hundred dollars per day for each advertisement that violates the regulation.

Baltimore

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
PENN ADVERTISING OF BALTIMORE, INCORPORATED, v. MAYOR AND CITY COUNCIL OF BALTIMORE
OPINION
NIEMEYER, Circuit Judge:
We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of N.Y. , 447 U.S. 557 (1980). We affirm.[17]

in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," i.e. on "outdoor billboards, sides of building[s], and free standing signboards." 1 The prohibition contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City. (Penn Adv v Baltimore.pdf, p. 5 of 18)

Brief - Court Allows Local Regulation of Tobacco Advertising — Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 10/25/1999)

U.S. Court of Appeals, Second Circuit (1999)

This case deals with a New York City ordinance that prohibits outdoor tobacco advertising within 1000 feet of schools or other places where children congregate. It also prohibits indoor advertising within this zone if it can be seen from outdoors. It does allow a simple "tobacco products sold here" sign on businesses within the regulated zone. Plaintiffs sought to enjoin enforcement of this ordinance on the basis that such

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[17] http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=4th/942141p.html (Penn Adv v Baltimore.pdf pp. 4 of 18)

advertising constitutes protected commercial speech and that such regulation is prohibited by the Federal Cigarette Labeling Act and Advertising Act (FCLAA), which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. 15 U.S.C. §1334(b).

Based on this language, and without reaching any first amendment claims, the district court granted summary judgment for plaintiffs and permanently enjoined the enforcement of the law.

The FCLAA provision is so broad that, in the example from another case construing the provision, it could be claimed to prevent a state from stopping a cigarette company from handing out samples at an elementary school because this would be interfering with the promotion of cigarettes. The court found that what Congress was trying to avoid was state laws that might interfere with the warning labels specified by Congress, not with state attempts to control the general advertising of cigarettes. In the instant case… except for specifying the content of the sign allowed for business in the zone, the ordinance was neutral as to the content of the ads, banning all of them equally. The court found that the complete ban was not preempted, but that the specified language for the store sign was. Thus it allowed the city to ban all advertising within the 1000-foot zone near places where children would congregate, but did not allow it to specify what type of sign would be permitted within the zone.[18]
…

Appeal from a judgment of the United States District Court for the Southern District of New York (Batts, J.), enjoining the enforcement of a New York City ordinance, the "Youth Protection against Tobacco Advertising and Promotion Act," and declaring the ordinance preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, et seq., and the Supremacy Clause of the United States Constitution.[19]

We have considered the parties' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court insofar as it held that the tombstone provision of Article 17-A is preempted under the FCLAA, REVERSE insofar as it held that the remaining provisions of Article 17-A are preempted, and REMAND for further proceedings consistent with this opinion.[20]

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[18] http://biotech.law.lsu.edu/cases/tobacco/tobacco_ordinance_195_F3d_100_review.htm (1 of 2) 3/15/2007
Brief - Court Allows Local Regulation of Tobacco Advertising - Greater New ...ropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 10/25/1999)
[19] http://biotech.law.lsu.edu/cases/tobacco/tobacco_ordinance_195_F3d_100.htm (3 of 14)3/15/2007 — Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 10/25/1999)
[20] http://biotech.law.lsu.edu/cases/tobacco/tobacco_ordinance_195_F3d_100.htm (14 of 14)3/15/2007

Year introduced	Title	Regulation	Final Ruling body	Year of final ruling	Ruling	Additional comments
1994	City of Baltimore	Ordinance 307 prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," i.e. on "outdoor billboards, sides of building[s], and free standing signboards."[21] Exceptions: on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums, and in certain commercially and industrially zoned areas of the City.	U.S. Court of Appeals 4th Circuit	1995.08	neither federal nor state law preempts the operation of Baltimore's ordinance and … the ordinance is a permissible regulation of commercial speech under the four-part test announced in Central Hudson.	All billboard advertising for tobacco banned by the MSA in 1998
1998	NYC Local Law: Article 17-A[22]	prohibits outdoor advertisements for tobacco products within one thousand feet in any direction of a school building, playground, child day care center, amusement arcade or youth center. prohibits advertisements for tobacco products inside buildings within the same one thousand foot zone, unless they are placed in such a way that they are either parallel to the street and facing inward, or affixed to a wall perpendicular to the street. allows one so-called "tombstone" sign to be placed within ten feet of the entrance to any premises within the proscribed zone that states "TOBACCO PRODUCTS SOLD HERE:" the sign may not be larger than six square feet, and may contain only black text that is no larger than eight inches in height.	U.S. District Court, Southern District of NY	1998.12	…the Court DECLARES that Article 17-A of Title 27 of the Administrative Code of the City of New York is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1334(b), and the Supremacy Clause of the United States Constitution, Article IV, clause 2, and therefore, is without force or effect.	"Youth Protection against Tobacco Advertising and Promotion Act" Stated purpose: "to strengthen compliance with and enforcement of laws prohibiting the sale or distribution of tobacco products to children and to protect children against such illegal sales."

[21] http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=4th/942141p.html [Penn Adv v Baltimore.pdf accessed 3/14/2007]
[22] http://www.tobacco.org/resources/documents/981215nycbatts.html (16pp) 3/12/2007

Year introduced	Title	Regulation	Final Ruling body	Year of final ruling	Ruling	Additional comments
1998	Article 17-A (NYC)	Appeal by the City (See above)	U.S. Court of Appeals 2nd Circuit	1999.10	We have considered the parties' remaining contentions and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court insofar as it held that the tombstone provision of Article 17-A is preempted under the FCLAA, REVERSE insofar as it held that the remaining provisions of Article 17-A are preempted, and REMAND for further proceedings consistent with this opinion.[23]	Supreme Court ruling against Atty General of Mass (Lorillard v Reilly) in 2001 overrules.
1996	Tacoma-Pierce County [WA] Health Department BOH	banned all outdoor tobacco advertising, or indoor tobacco advertising visible from outdoors all tobacco advertisements that can be seen from the street unless the advertisements are presented in a tombstone format No tombstone advertisement can be displayed, however, if it is visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park. The Resolution does not regulate tobacco advertisements located inside retail establishments unless the advertisements can be seen from the street. [24]	U.S. Court of Appeals 9th Circuit	1999.11	a local ban on outdoor tobacco advertising is preempted by the Federal Cigarette Labeling and Advertising Act.	

[23] http://biotech.law.lsu.edu/cases/tobacco/tobacco_ordinance_195_F3d_100.htm (14 of 14)3/15/2007
[24] http://biotech.law.lsu.edu/cases/tobacco/Lindsey_v_Tacoma-Pierce.htm (2 of 17) 3/15/2007 — Lindsey v. Tacoma-Pierce County Health Department, 195 F.3d 1065 (9th Cir. 11/19/1999)
..\Brief - Court Bans Local Regulation of Tobacco Advertising - Lindsey v. Taco.pdf

Year introduced	Title	Regulation	Final Ruling body	Year of final ruling	Ruling	Additional comments
1996	FDA Ruling: Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents.	require that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults; prohibit outdoor advertising within 1,000 feet of any public playground or school; prohibit the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; prohibit a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its brand name. *Id.*, at 44617—44618.	U.S. Supreme Court	2000.03	not authorized by congress to regulate tobacco: "...an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."	This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use. By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. —Justice O'Connor, writing for the Majority

Year introduced	Title	Regulation	Final Ruling body	Year of final ruling	Ruling	Additional comments
1999	Attorney General of Massachusetts	ban outdoor tobacco ads within 1000 feet of schools or playgrounds; require cigar packages to carry health warnings; for stores close to schools or playgrounds, ban in-store tobacco ads that face out; ban the handing out of samples of tobacco products; ban the distribution of tobacco products by mail, unless there is provided a copy of a government-issued identification showing that the purchaser is 18 or older; ban self-service displays of tobacco products except in adult-only establishments; require any in-store tobacco ads to be at least 5 feet above the floor.	U.S. Supreme Court	2001.06	the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA. the US Supreme Court found that the Massachusetts regulations restricted more speech than necessary, running afoul of the fourth part of the Central-Hudson test.[25] We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." … it is understandable for the States to attempt to prevent minors from using tobacco products… Federal law, however, places limits on policy choices available to the States. In this case, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and preempted state regulation… that attempts to address that same concern, even with respect to youth. The First Amendment also constrains state efforts… because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.[26]	The regulations "declare certain types of conduct by manufacturers, distributors, and sellers of tobacco products to be per se 'unfair or deceptive acts or practices' prohibited under chapter 93A, section 2(a) of the Massachusetts General Laws." Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture."[27]

[25] http://www.tobacco.neu.edu/litigation/cases/Backgrounders/Lorillard_v_Reilly_scotus.htm (3 of 4) 3/6/2007. Media Backgrounder for Decision on Lorillard v. Reilly at the US Supreme Court

[26] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (38 of 67) 3/6/2007 — Supreme Court strikes MA tobacco advertising regulations - Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001)

[27] http://biotech.law.lsu.edu/cases/tobacco/consolidated_cigar_v_reilly_sc.htm (31 of 67) 3/6/2007