
Court Strikes Down Another Attempt at State Regulation of Electronic Commerce

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A federal court recently ruled that New York's ban against purchasing cigarettes over the Internet is unconstitutional. This decision continues a line of cases declaring unconstitutional many state statutes that attempt to regulate electronic commerce over the Internet. (See our [July 24, 2000 Internet Alert](#)).

In *Brown & Williamson Tobacco Corp. et al. v. Pataki, et al.*, several tobacco companies challenged New York's recently enacted [Public Health Law, § 1399-LL](#). The New York statute prohibited cigarette sellers and common carriers from shipping or transporting cigarettes directly to New York consumers — and specifically prohibited cigarette sales over the Internet — thus restricting retail sales of cigarettes in New York to face-to-face transactions at in-state retail stores. The New York statute's stated purpose was to reduce youth smoking by restricting minors' access to cigarettes. (There was evidence, however, that another major purpose was to protect in-state cigarette retailers from having to compete with out-of-state cigarette vendors that did not charge New York's heavy cigarette tax.) The tobacco companies argued that the New York statute excessively burdened interstate commerce in violation of the U.S. Constitution.

The court agreed with the tobacco companies and held that the New York statute violated the U.S. Constitution's so-called "dormant" Commerce Clause.

The Commerce Clause to the U.S. Constitution gives Congress the power "to regulate commerce... among the several states." The U.S. Supreme Court recognized long ago that the Commerce Clause's affirmative grant of power to Congress carries with it a "negative" or "dormant" aspect that limits the power of states to erect barriers to interstate trade. This limitation imposed by the Commerce Clause is by no means absolute, and the states retain the authority to regulate matters of legitimate local concern.

In evaluating a state statute under the Commerce Clause, a court must distinguish statutes that directly discriminate against interstate commerce from those statutes that burden interstate commerce only incidentally. If a statute is, on its face, discriminatory against interstate commerce, a court must apply a "strict scrutiny" analysis. Under this analysis, a state statute will be held invalid unless the state has no other means to advance a legitimate local interest. On the other hand, if a

state statute is non-discriminatory against interstate commerce, a court must apply a balancing test, under which state statute is invalid only if the burden imposed on interstate commerce is clearly excessive in relation to the statute's putative benefits.

The court held that New York's ban against purchasing cigarettes over the Internet was discriminatory against interstate commerce on its face because the statute prohibited direct sales of cigarettes from out-of-state vendors via the Internet or other means. Under strict scrutiny, the statute failed to pass Constitutional muster because New York could not show that minors used direct Internet sales channels to any significant degree. Further, the court reasoned that, rather than a complete ban on Internet cigarette sales, New York could have required (1) the purchaser to verify his age; (2) the purchaser to use a credit card; or (3) an adult signature for delivery of the cigarettes. Therefore, New York could not demonstrate that it had no other means to advance its interest in reducing youth smoking.

The court also held that New York's statute failed even under the more lenient balancing test for nondiscriminatory statutes. The court reasoned that although New York has a legitimate interest in reducing minors' access to cigarettes, New York's ban on all sales of cigarettes over the Internet was excessive.

More frequently than not, state statutes that attempt to regulate the commercial use of the Internet are called into question. Many state statutes, such as those that regulate spam, for example, have been declared unconstitutional, as discussed in our [November 29, 2000 Internet Alert](#). Due to the multi-jurisdictional nature of the Internet, it appears that Congress is the only governmental body with the authority to regulate the commercial use of the Internet in the United States. Whether it will do so to any significant degree remains to be seen.