



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Press Release

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**FEDERAL COURT UPHOLDS CLAIMS
UNDER FEDERAL CONTRABAND CIGARETTE TRAFFICKING ACT
AGAINST CIGARETTE WHOLESALERS FOR SALES OF UNTAXED CIGARETTES**

***RULING PERMITS ANTI-BOOTLEGGING SUIT TO PROCEED
ON FEDERAL CLAIMS AND STATE LAW CLAIMS***

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New York, May 1, 2008 – In a major decision which allows New York City's suit against cigarette wholesalers to proceed, Judge Carol Bagley Amon of the U.S. District Court for the Eastern District of New York late yesterday ruled that cigarette wholesalers that flood the market with untaxed cigarettes can be held liable under the federal Contraband Cigarette Trafficking Act (CCTA), as well as under state law.

The City brought suit under the CCTA, a federal criminal statute that was recently amended to provide for civil liability for entities that sell, ship or distribute any cigarettes that do not bear tax stamps of the state in which the cigarettes are found.

The City's suit alleges that the practice of the defendant cigarette wholesalers selling enormous quantities of untaxed cigarettes to Native American smoke shops located on reservations throughout New York State results in the "bootlegging" of large quantities of cigarettes into the City. Although Native Americans are permitted in appropriate circumstances to purchase cigarettes free of state and local taxes, the City alleges that the wholesalers supply reservation smoke shops with amounts of cigarettes that are vastly in excess of Native American consumption, with the excess supply bootlegged to City residents by various means, including sales over the Internet and bulk shipments from reservation sellers to City stores.

Bootlegged cigarettes deprive the City and State of needed tax revenue and create a market that can be exploited by criminals, according to a recent report by the United States House Committee on Homeland Security, terrorist organizations. (Editor's Note: The report was called "*Tobacco and Terror: How Cigarette Smuggling is Funding Our Enemies Abroad*," U.S. House Committee on Homeland Security.)

The availability of untaxed cigarettes also undercuts a central purpose of imposing taxes on cigarettes, which is to discourage smoking among young people. New York City's programs, particularly the City and State tax increases, contributed over the past six years to a reduction by 20 percent in adult smoking and 50 percent in teen smoking – 250,000 fewer smokers in New York City.

The decision by Judge Amon also upheld the ability of the City to proceed under the state Cigarette Marketing Standards Act, which bars cigarette sellers from selling below a minimum price that includes amounts attributable to State and local taxes, and found that by supplying untaxed cigarettes to reservation smoke shops, the defendants may be liable for causing a public nuisance by creating a condition injurious to public health and safety.

"Taxes are the single most effective way to reduce smoking, still the leading cause of preventable death in our city," said Dr. Thomas R. Frieden, Health Commissioner for New York City. "This decision is an important step towards reducing tax evasion."

"This decision shows that the recent change in federal law now provides a powerful means of halting trafficking in illegal cigarettes, and will play an important role in the efforts to address cigarette bootlegging," said Corporation Counsel Michael A. Cardozo of the New York City Law Department, which litigated the case on behalf of the Health Department. "We are very pleased that Judge Amon concluded that the City's claims may move forward, and we are confident that we will prevail in proving the violations described in the complaint."

New York State has had a long history in implementing a cigarette taxation system applicable to Native American sellers. The U.S. Supreme Court has held on several occasions, including in a case involving one of the defendants in the City suit, that sales by Native Americans to non-members of the seller's tribe are fully taxable by a state or locality.

In the nearly 15 years since that decision, the State has been unable to develop a method of regulating reservation sales. State inaction formed the central defense of the defendant wholesalers in this suit, who claimed that because the State did not require them to collect taxes on sales to reservations, there effectively was no tax for which they could be held liable under the Federal statute. Judge Amon rejected this defense, stating that "the failure of the executive branch to enforce the law is not the same as saying that the legislative branch has repealed it."

Eric Proshansky, Deputy Chief of the New York City Law Department's Affirmative Litigation Division led the legal team, with significant assistance from Affirmative Lit Assistant Corporation Counsel Brad Snyder and Division Chief Gail Rubin.

The defendants, all of which are licensed cigarette stamping agents and wholesalers, are:

- Milhem Attea & Bros., Inc., 1506 Clinton Street, Buffalo, New York.
- Day Wholesale, Inc., 151 Park Street, Tupper Lake, New York.
- Gutlove & Shirvint, Inc., 39-26 23rd Street, Long Island City, New York.
- Mauro Pennisi, Inc., 78-80 West Hoffman Ave., Lindenhurst, New York.
- Jacob Kern & Sons, Inc. 56-60 Nichols Street, Lockport, New York.
- Windward Tobacco, Inc. 34 Sunburst Circle, East Amherst, New York.
- Capital Candy Company, Inc. 32 Burnham Street, Barre, Vermont.

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