

September 8, 1998

OPINION 98-007

TO: Mayor Susan J.M. Bauman
FROM: Eunice Gibson, City Attorney
SUBJECT: Regulating Billboard Advertising of Tobacco Products

I have been asked to give an opinion on how the decision of the Federal Court in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 1998 WL 429879 (N.D. Ill. 1998) affects a proposed City of Madison ordinance regulating billboard advertising of tobacco products. In my opinion, such an ordinance should be delayed at least until the 7th Circuit acts on any appeal.

Before looking at the *Federation* court's decision, I want to briefly outline the existing statutory and case law. The Federal Cigarette Labeling and Advertising Act (FCLAA) preempts states from regulating advertising of tobacco products for health reasons.¹ In 1994, a Federal District Court in Maryland upheld a Baltimore, Md. ordinance that prohibited cigarette advertising on billboards in certain areas of the city. *Penn Advertising of Baltimore, Inc. v. City of Baltimore*, 863 F. Supp. 1402 (D. Md. 1994). The stated purpose of the Baltimore ordinance was to decrease the number of illegal transactions involving sales of cigarettes to minors. *Id.* at 1406. The *Baltimore* court held that the purpose underlying the state law prohibiting sales to minors was irrelevant. Looking to the legislative history of the FCLAA, the court determined that the ordinance was not preempted because the intent of the FCLAA was not to affect the power of the states with respect to the sale of cigarettes to minors. *Id.* at 1417. The court agreed with the City of Baltimore that the ordinance focused on illegality, not smoking and health. *Id.*

The U.S. Court of Appeals for the 4th Circuit affirmed the district court's decision. *Penn Advertising of Baltimore v. City of Baltimore* 63 F.3d 1318 (4th Cir. 1995). The U.S. Supreme

¹ FCLAA 15 U.S.C. §1334(b):

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.

Court, however, vacated the 4th Circuit's decision and remanded the case in light of their own decision in *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996).² On remand, the 4th Circuit again affirmed the District Court's decision upholding the ordinance. *Penn Advertising of Baltimore v. City of Baltimore*, 101 F.3d 332 (4th Cir. 1996). The U.S. Supreme Court denied review.

Federation of Advertising Representatives, Inc. v. City of Chicago involved a Chicago ordinance that imposed numerous prohibitions on the advertising of cigarettes and alcohol in publicly visible places. *Federation* at 1. The Illinois district court struck it down on the ground that it was preempted by the FCLAA. *Id.* at 6. The City of Chicago argued that it based the ordinance on an old (1887) law prohibiting the sale of cigarettes to those under 18, and that this law predated the more recent health concerns of tobacco use by minors. *Id.* at 4. Disagreeing with the *Baltimore* court on the importance of the purpose underlying legislation pertaining to minors and tobacco, the court found the argument that the regulation of tobacco advertising is based on the concern with preventing illegal activity by minors to be nothing more than a "smoke screen" for health-based regulation. *Id.* Furthermore, the court determined that the legislative history of the 1887 law clearly showed that health concerns were in fact important to the legislators. *Id.* at 5.

The second important way in which the *Federation* court diverged from the 4th Circuit in *Baltimore* concerns the failure of the *Federation* court to make a distinction between 'content' and 'location'. The court dismissed the City of Chicago's argument that its partial ban was based on location, not content, stating that the distinction between location and content is a false dichotomy not found in the FCLAA. *Id.* at 3-4.

Neither the *Baltimore* nor the *Federation* decision is controlling in Wisconsin. The U.S. Supreme Court has not ruled on this issue. Its decision in *Liquormart* concerned alcohol and did not address the type of preemption issue involved in the tobacco cases. It denied review of the second *Baltimore* decision. The decision in *Federation* presents serious concerns for the City of Madison. The district court's analysis may have been based on an Illinois statute; however, the reasoning can be broadly applied to other laws prohibiting sales transactions involving tobacco and minors. The legislative history of §134.66, Stats., **Restrictions on sale or gift of cigarettes or tobacco products**, and §938.983, Stats., **Purchase or possession of tobacco products prohibited**, contains evidence that health concerns were important to the legislators.

The *Federation* decision may be appealed to the 7th Circuit Court of Appeals and that decision would be controlling in our jurisdiction. Citing concerns over an "all but certain lawsuit", the

² Using a First amendment freedom of speech analysis, a very divided court struck down a Rhode Island statute prohibiting the advertising of liquor prices.

Page 3

September 8, 1998

City of Milwaukee has decided not to enforce their recently passed tobacco billboard ordinance, which had been due to take effect Sept. 25, 1998.³ Given the above legal concerns about the *Federation* decision, I believe it would be in the City of Madison's best interests to put any tobacco billboard ordinance on hold at least until any appeals to the 7th Circuit have been heard and decided.



Eunice Gibson
City Attorney

EG:KCN:jmb

Caption: Regulating billboards advertising tobacco products in light of a recent federal district court decision from northern Illinois.

³ Milwaukee Journal Sentinel, Sept. 2, 1998.