

**Amerisourcebergen Drug Corp. v New York State
Dept. of Health**

2022 NY Slip Op 34719(U)

December 14, 2022

Supreme Court, Albany County

Docket Number: Index No. 903803-22

Judge: Christina L. Ryba

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

AMERISOURCEBERGEN DRUG CORPORATION;
AMERISOURCE HEALTH SERVICES, LLC (d/b/a
AMERICAN HEALTH PACKAGING); ASD SPECIALTY
HEALTHCARE, LLC; H.D. SMITH, LLC; PHARMEDIUM
SERVICES, LLC; INTEGRATED COMMERCIALIZATION
SOLUTIONS LLC; CARDINAL HEALTH, INC.; THE
HARVARD DRUG GROUP, LLC; MCKESSON
CORPORATION,

DECISION/ORDER
Index No. 903803-22
RJI No. 01-22-141649

Plaintiffs,

-against:

NEW YORK STATE DEPARTMENT OF HEALTH; NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE; OFFICE OF THE NEW YORK STATE
COMPTROLLER; MARY T. BASSETT, in her official
capacity as Commissioner of Health for New York State;
THOMAS P. DINAPOLI, in his official capacity as
Comptroller of New York; and AMANDA HILLER, in her
official capacity as Acting Tax Commissioner of the New
York State Department of Taxation and Finance,

Defendants.

APPEARANCES:

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RYBA, J.,

In an effort to address the financial burden imposed upon the State of New York as the result
of the national opioid public health crisis, in 2018 the New York State Legislature enacted the Opioid

(hereinafter “Fund”) to be utilized to support statewide programs providing opioid treatment, recovery, prevention, and education services (see, Public Health Law § 3323 and NY State Finance Law § 97-aaaaa). The monies held in the Fund were to be derived from six annual assessments of \$100 million each for the years 2017 through 2022, to be imposed by defendant New York State Department of Health (hereinafter “DOH”) on pharmaceutical manufacturers and wholesale distributors that were licensed to sell and distribute opioids in the State of New York (hereinafter “licensees”). Responsibility for each of the six annual \$100 million assessments was to be apportioned among licensees through an annual “opioid stewardship payment”, which was calculated according to each licensee’s pro rata share of all opioid sales made in the State of New York for the previous calendar year as set forth in annual sales reports submitted to DOH. The OSA also contained another provision, known as the “pass-through prohibition,” which prohibited licensees from passing the cost of their respective opioid stewardship payments on to their customers (see, Public Health Law § 3323 [2]). Although the OSA was not effective until July 1, 2018, it assessed an opioid stewardship payment for 2017 that was based upon the amount of opioids sold or distributed by each licensee during the 2017 calendar year and was payable on or before January 1, 2019.

Various licensees who received an invoice for the 2017 opioid stewardship payment commenced separate actions in Federal Court challenging the OSA as unconstitutional and seeking injunctive relief preventing its enforcement. In a consolidated opinion issued December 19, 2018, the United States District Court first found that it could properly exercise subject matter jurisdiction to enjoin the enforcement of the OSA because the opioid stewardship payments imposed thereby could not be classified as a State “tax” under the Tax Injunction Act (see, Healthcare Distribution All. v Zucker, 353 F Supp 3d 235, 249 [2018], rev'd in part sub nom. Ass'n for Accessible Medicines

v. James, 974 F3d 216 [2020]; 28 USC § 1341). Proceeding to address the merits, the District Court found that the pass-through prohibition of the OSA violated the Dormant Commerce Clause of the US Constitution and was therefore invalid. The District Court further determined that the unconstitutional pass-through prohibition could not be severed from the remainder of the OSA despite the existence of a severability clause in the statute. Accordingly, the District Court invalidated the OSA in its entirety and issued a preliminary injunction enjoining its enforcement.

In response to the District Court's decision, the Legislature amended the OSA in April 2019 so that its provisions expired in December 2018, thereby eliminating the opioid stewardship payments scheduled for the years 2019 through 2022. That portion of the original OSA which imposed opioid stewardship payments for 2017 and 2018 remained intact, albeit without the invalidated pass-through prohibition. Simultaneously, the Legislature enacted a new tax law to prospectively replace the OSA commencing in July 2019. The new law, embodied in Tax Law §§ 497 et seq., imposed an excise tax on the sale of opioid products by manufacturers and distributors, but did not contain a pass-through prohibition (see, NY Tax Law §§ 497–99). Notably, the new excise tax has not been challenged.

Meanwhile, DOH appealed the District Court's decision. Notably, DOH did not challenge the District Court's finding that the pass-through prohibition was unconstitutional, and instead raised only the limited argument that the District Court erred in finding that it could exercise subject matter jurisdiction to invalidate and enjoin enforcement of the remainder of the OSA. In a decision and order dated September 14, 2020, the United States Court of Appeals for the Second Circuit found that the District Court lacked such jurisdiction because the opioid stewardship payment was a State "tax" which could not be enjoined by a Federal Court under the Tax Injunction Act (28 USC § 1341). Accordingly, the Second Circuit ruled that the District Court should not have reached the issue of

severability, and should have instead dismissed the challenges to the payment requirement for lack of subject matter jurisdiction (see, Ass'n for Accessible Medicines v James, 974 F3d 216, 221 [2020]). The Second Circuit therefore reversed that portion of the District Court's decision that invalidated and enjoined enforcement of the opioid stewardship payment and all other provisions of the OSA due to their non-severability from the pass-through prohibition. In so doing, the Second Circuit did not address the substantive question of severability or consider any additional challenges to the opioid stewardship payment, as it found that those questions were appropriately matters of State law.

Plaintiffs herein are pharmaceutical distributors who were each assessed under the original OSA with an opioid stewardship payment for the year 2017. However, as that payment was not due until January 1, 2019, plaintiffs had not yet remitted their respective payments when the District Court invalidated the original OSA in its December 19, 2018 decision. After the Second Circuit reversed that decision in part, however, plaintiffs made their respective 2017 opioid stewardship payments under protest.¹ Plaintiffs thereafter commenced this action seeking, inter alia, a declaration that the OSA was invalid in its entirety because the unconstitutional pass-through prohibition cannot be severed from the remainder of the statute, or alternatively because the opioid stewardship payments required by the statute violated due process and were unconstitutional. In lieu of answering, defendants filed the present motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. Plaintiffs oppose the motion and cross-move for an order treating defendants' motion to dismiss as one for summary judgment pursuant to CPLR 3212, and thereupon

¹ Inasmuch as the pass-through prohibition had already been invalidated when these payments were made, plaintiffs were free to pass on the cost of the payments to their customers.

granting summary judgment in plaintiffs' favor as the non-moving party. Defendants oppose the cross motion and cross-move for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint.

Resolution of the parties' competing motions first requires the Court to determine whether the undisputed unconstitutionality of the OSA's pass-through prohibition dictates the invalidation of the remaining provisions of the OSA, or whether the unconstitutional pass-through prohibition may be severed from the statute while leaving the remaining provisions intact. In that regard, it is well settled that "a court should refrain from declaring a statute unconstitutional when only a portion thereof is objectionable", especially where the statute contains a severability clause (Waste Recovery Enters. v Town of Unadilla, 294 AD2d 766, 767 [2002], appeals dismissed 100 NY2d 614 [2003], lv denied 1 NY3d 507 [2004]; see, Loc. Gov't Assistance Corp. v Sales Tax Asset Receivable Corp., 5 AD3d 829, 832, aff'd as modified, 2 NY3d 524 [2004]). In determining whether severing an invalid statutory provision is appropriate, the test is whether the Legislature would have wanted the remaining provisions enforced with the invalid portion removed (see, Matter of Westinghouse Elec. Corp. v Tully, 63 NY2d 191, 196 [1984]; see, Dalton v Pataki, 11 AD3d 62, 101 [2004], aff'd as modified, 5 NY3d 243 [2005]). While the Legislature's decision to include a severability clause in a statute is evidence of such intent, it is not alone dispositive of the severability issue (see, Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation, 75 NY2d 88, 94 [1989]; Dalton v Pataki, 11 AD3d at 101 [2004], aff'd as modified, 5 NY3d 243 [2005]). The Court must also consider the significance of the unconstitutional portion within the overall statutory scheme to determine whether removing the defective provision would destroy the substance of the legislation or the main intent of its enactment (see, People v. Liberta, 64 NY2d 152, 171 [1984], cert. denied 471

US 1020 [1985]). Thus, where severance of the offending provision would “pervert the legislature’s intent in the enactment of the statute” (CWM Chemical Services, LLC v Roth, 6 NY3d 410 [2006]), or where “the balance of the legislation is incapable of functioning independently [because] the valid and invalid provisions are so intertwined” (National Adver. Co. v Town of Niagara, 942 F2d 145, 148 [1991]), the entire statute must be stricken (see, People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60 [1920], cert. denied 256 US 702 [1921]).

In the present case, the OSA contains a severability clause expressly stating that the Legislature did not want the entire statute to be invalidated if any provision thereof were declared to be unconstitutional. Specifically, the OSA provides:

If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which the judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein. [emphasis supplied].

Inasmuch as this language clearly reveals the Legislature’s intent to sever any potentially invalid portion of the OSA, the Court will give effect to that intent by severing the pass-through prohibition and enforcing the balance of the OSA, including the opioid stewardship payment, unless doing so would result in a statutory scheme that could not function independently or would undermine the entire purpose for its enactment (see, CWM Chemical Services, LLC v Roth, 6 NY3d 410 [2006]).

Plaintiffs contend that the pass-through prohibition may not be severed from the remainder of the OSA because enforcing the opioid stewardship payment without the pass-through prohibition, would allow licensees to pass on the cost of the payments to its customers. Plaintiffs argue that such a result would negate the Legislature’s entire purpose in enacting the OSA, i.e., to hold opioid

licensees financially accountable for their culpable role in creating the national opioid epidemic. The Court disagrees. While the Legislative history of the OSA reveals that lawmakers placed great importance on preventing opioid licensees from passing the cost of the stewardship payments onto their customers, punishing opioid manufacturers for their role in the opioid epidemic was by no means the primary purpose of the OSA's enactment. The Second Circuit previously rejected this notion in the context of the underlying appeal, expressly finding that "the primary purpose of the opioid stewardship payment is to raise revenue, not to punish or regulate the plaintiffs and other licensees who are required to make the payment" (Ass'n for Accessible Medicines v James, 974 F3d at 227 [2d Cir. 2020], cert. denied sub nom. Healthcare Distribution All. v James, 211 LEd. 2d 20 [2021]). Indeed, the Legislature confirmed that its paramount goal was raising revenue for opioid treatment and prevention, regardless of whether the cost would be passed to consumers, when it replaced the OSA with a new opioid tax statute that did not include a pass-through prohibition (see, NY Tax Law §§ 497-99).

In sum, there is absolutely no evidence to suggest that the Legislature would have abandoned its intended goal of raising revenue for the prevention and treatment of opioid addiction simply because it could not prevent licensees from passing on the cost of the stewardship payments to their customers. At the same time, the primary purpose of the OSA, i.e., to raise significant revenue, would be furthered by severing only the pass-through prohibition and enforcing the balance of the OSA. Under these circumstances, and especially in light of the strong preference in favor of the severability of statutes, the Court finds that the pass-through provision is severable from the remainder of the OSA.

The Court will next consider plaintiffs' alternative argument that the OSA should be

invalidated because the opioid stewardship payment is unconstitutionally retroactive in violation of due process. Legislative enactments are entitled to strong presumption of constitutionality, and plaintiffs challenging a duly enacted statute face the initial burden of demonstrating invalidity beyond a reasonable doubt (see, White v Cuomo, 38 NY3d 209 [2022]; Hynes v Tomei, 92 NY2d 613, 628 [1998]). This substantial burden is satisfied only by proof “that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment” (Matter of Moran Towing Corp. v Urbach, 99 NY2d 443, 448 [2003]; see, ES v PD, 8 NY3d 150, 158 [2007]). Courts will strike down a statute as unconstitutional only as last resort after every reasonable attempt to reconcile the statute with Constitution has proven unsuccessful (see, White v Cuomo, 38 NY3d 209 [2022]).

Plaintiffs claim that the OSA is unconstitutionally retroactive because when it took effect in August 2018, it imposed a retroactive assessment upon licensees for opioid sales that occurred during the 2017 calendar year. However, it is well settled that “[r]etroactivity provisions in tax statutes, if for a short period, are generally valid” (Replan Dev., Inc. v Dep’t of Hous. Pres. & Dev. of City of New York, 70 NY2d 451, 455 [1987]; see, Matter of Regina Metro. Co., LLC v NY State Div. of Hous. & Cmty. Renewal, 35 NY3d 332, 375 [2020]). Such retroactivity is generally permissible because “[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process” (Welch v Henry, 305 US 134, 146-147 [1938]; see, James Sq. Assoc. v Mullen, 21 NY3d 233, 246 [2013]). Determining whether a retroactive tax is unconstitutional requires a balancing of the

equities and requires consideration of (1) the length of the retroactive period, (2) the public purpose for the retroactive application, and (3) the extent to which a taxpayer was forewarned of a change in the legislation and justifiably relied to his or her detriment on the old law (see, James Square Assocs. LP v Mullen, 21 NY3d at 246 [2013]). “While retroactive legislation challenged on due process grounds does have to meet a burden not faced by legislation that has only future effects, that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose” (Caprio v New York State Dep’t of Tax’n & Fin., 25 NY3d 744 [2015]). Thus it is insufficient to merely show that the “taxing event” occurred prior to the statute’s enactment, but rather a plaintiff must demonstrate that the retroactive application of a tax is arbitrary and irrational (see, United States v Carlton, 512 US 26, 35 [1994]; Caprio v New York State Dep’t of Tax’n & Fin., 25 NY3d 744 [2015]).

Here, the Court finds that the relatively short period of retroactivity for the opioid stewardship payment challenged by plaintiffs cannot be considered to be excessive under the circumstances (see, Caprio v NY State Dep’t of Taxation & Fin., 25 NY3d 744, 757 [2015]). Moreover, the stated public purpose for the retroactive application, i.e., to generate immediate revenue for use against opioid addiction, is a legitimate one and the brief period of retroactivity is rationally related to achieving that goal (see, Varrington Corp. v City of New York Dep’t of Fin., 85 NY2d 28 [1995]). Finally, while plaintiffs did not have advance notice that their 2017 opioid sales would form the basis of a tax that would be imposed in 2018, plaintiffs have not demonstrated that they justifiably relied to their detriment on the continued absence of a tax (see, Varrington Corp. v City of New York Dep’t of Fin., 85 NY2d 28 [1995]; Matter of Replan Dev. v. Department of Hous. Preserv. & Dev. of City of N.Y., 70 NY2d at 456 [1987]). It is well settled that a taxpayer has no

vested right to avoid changes in prior law and “should be regarded as taking his chances of any increase in the tax burden” which might occur (Milliken v United States, 283 US 15, 23 [1931]; see, United States v Carlton, 512 US 26, 34 [1994]). Having concluded that the brief retroactive application of the OSA is not excessive or irrational, and that plaintiffs have not demonstrated justifiable reliance on the continuation of prior law, the Court concludes that the retroactivity of the OSA is not inconsistent with constitutional principles of due process (see, United States v Carlton, 512 US 26, 34 [1994]; Caprio v New York State Dep't of Tax'n & Fin., 25 NY3d 744, 753 [2015]). Accordingly, defendants’ cross motion for summary judgment is granted and the complaint is dismissed. In view of the court’s decision to grant summary judgment pursuant to CPLR 3212, defendants’ initial motion to dismiss the complaint pursuant to CPLR 3211 is denied. Plaintiffs’ cross motion is denied.

To the extent that the parties’ arguments have not been specifically discussed, the Court has found that they are either lacking in merit or otherwise unnecessary to address.

Or the foregoing reasons, it is

ORDERED that defendants’ motion to dismiss the complaint pursuant to CPLR 3211 is denied, and it is further

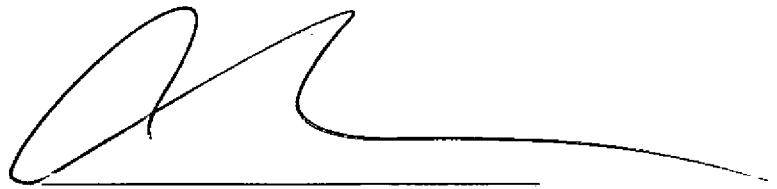
ORDERED that defendants’ cross motion for summary judgment is granted, and the complaint is dismissed, and it is further

ORDERED that plaintiffs’ cross motion is denied.

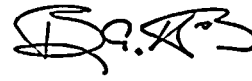
This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, counsel for defendants shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22

NYCRR § 202.5-b [h] [1], [2]).

Dated: December 14, 2022



HON. CHRISTINA L. RYBA
Supreme Court Justice



12/15/2022