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What R.J. Reynolds' Calif. Suit Means for Tobacco Regulation

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On May 11, R.J. Reynolds Tobacco Co. Inc. went on the offensive to keep its new line of nonmenthol cigarettes marketed with language like “crisp,” “smooth” and “mellow” on store shelves in California.^[1]

This suit, *R.J. Reynolds Tobacco Co. v. Bonta*, seeks declaratory relief in the Superior Court of California, County of Fresno, that California’s attorney general misinterpreted and misapplied the state’s ban on flavored tobacco products, and incorrectly concluded that R.J. Reynolds’ new products violate this ban.

This litigation is significant in three key respects. First, proactively suing the California AG — instead of reactively waiting for the AG to take action — demonstrates a clear desire to mitigate expected regulatory scrutiny and control the pace of associated litigation. The tactic, however, is not without risk.

Second, R.J. Reynolds’ suit tests the limits of California’s flavored tobacco ban, and will shape the tobacco market in California moving forward. In particular, the suit will help delineate whether and when states and localities can enforce already vague concepts like “flavor” beyond their traditional meaning — and what kind of evidence an enforcer must marshal to prove a violation.

Third, the suit foreshadows issues in the coming years on the federal level, as the U.S. Food and Drug Administration is expected to finalize rules later this year banning menthol cigarettes — the last remaining characterizing flavor in cigarettes aside from tobacco flavor — as well as banning all characterizing flavors in cigars.

Background

In 2009, the federal Tobacco Control Act banned characterizing flavors in cigarettes other than tobacco or menthol. California’s own flavor ban, passed in 2020, prohibits retailers from selling most tobacco products with constituents that impart a characterizing flavor.^[2]

The California law defines a “characterizing flavor” as “a distinguishable taste or aroma, or both, other than the taste or aroma of tobacco,” and includes menthol in cigarettes.^[3]

Since then, R.J. Reynolds has marketed a new line of products under two brands previously associated with

menthol cigarettes — Camel Crush and Newport — to menthol smokers in the state.[4]

For instance, one ad for the Camel Crush Oasis product line tells customers: “Heads Up: Menthol won’t be around for much longer in California, but we crafted two new nonmenthol styles with a taste and smoking experience you’ll love.” The product packaging and ads also appear to borrow similar colors, patterns and typefaces as prior menthol brands.

In response to such ads, the California AG sent notices of determination in April to R.J. Reynolds, warning that the products were “presumptively flavored” under California’s flavor ban.[5]

The statute creates a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or its agents make a statement to consumers that the tobacco product has or produces a characterizing flavor, including explicit or implicit suggestions through text, color or images, on the product’s labeling or packaging.[6]

Instead of responding to the AG’s notice, R.J. Reynolds went directly to court to seek declaratory relief, citing in part the AG’s decision to post its notices on the California Department of Justice’s public website, which the company called “a clear effort to discourage retailers from carrying the products.”[7]

The lawsuit asserts that R.J. Reynolds prominently discloses to consumers that its products are nonmenthol. The company states that some of the new products do contain chemicals that impart a cooling sensation, but without any associated taste or aroma.

Others contain a crushable capsule that does not contain menthol inside the filter, and when crushed, the capsule releases a liquid that “brightens, smooths, and mellows the tobacco flavor but does not impart a distinguishable taste or aroma other than tobacco.”

The complaint also asserts the California AG erred by not evaluating the new products’ actual tastes or aromas. Contrary to California’s assertions, the complaint asserted that the flavor ban’s rebuttable presumption only governs the burden of production and proof in judicial proceedings, and does not bear on the substantive application of the characterizing flavor ban.

Thus, the AG “may not invoke the presumption … as a basis for enforcing the ban against the new products without a good-faith determination — absent here — that the products actually impart a characterizing flavor.”

Second, even if the presumption applies, R.J. Reynolds argues that the new products do not actually impart a characterizing flavor, because the products do not impart a distinguishable taste or aroma other than that of tobacco.

Advantages and Risks of R.J. Reynolds’ Suit

Bringing a proactive action for declaratory relief gives R.J. Reynolds an opportunity to nip any future enforcement against its retailers in the bud. California’s Code of Civil Procedure allows persons to seek declaratory relief to obtain a binding declaration of their legal rights or duties, including with respect to actual controversies over the

interpretation of statutes.[8]

If R.J. Reynolds prevails, a favorable declaration from the court could prevent California from enforcing the ban on flavored tobacco products against its new nonmenthol products. The certainty and breadth of this form of declaratory relief is clearly preferable to the alternative, which would likely be piecemeal enforcement actions against individual retailers.

California's flavor ban statute prohibits retailers, not manufacturers, from selling flavored tobacco products.[9] Therefore, the California AG might never sue R.J. Reynolds and instead bring enforcement actions against R.J. Reynolds's retailers.

This enforcement risk would likely lead many retailers to reconsider carrying the new nonmenthol product lines altogether. A proactive request for declaratory relief staves off any piecemeal enforcement against R.J. Reynolds' retailers, and mitigates the company's risk of losing its retailer customers in the process.

Moreover, although the AG invited the company to submit a response with supporting materials to challenge the notices of determination, this avenue does not afford the same procedural benefits as a court proceeding.

The redetermination process outlined in the notices of determination would not have any review by an independent arbiter, briefing from both sides, or opportunity for a hearing. Instead, the California AG's Tobacco Unit that issued the initial determination would review and consider whether to revise its initial decision in light of the company's response.

Although there are clear advantages for pursuing declaratory relief, there is no guarantee of success for R.J. Reynolds. Indeed, before even reaching the merits, a court might find that the company's suit is not ripe.

In California, like many jurisdictions, there must be an actual controversy for a court to consider a request for declaratory relief, and if a matter is purely conjectural or attempts to seek an advisory opinion, the court could dismiss the matter.[10] R.J. Reynolds will need to convince the court that the notices are tantamount to a threat to sue the retailers should they continue selling the relevant products.

How the Suit May Reshape the California Tobacco Market

If the court reaches the merits of the argument, it will need to determine whether the California AG can simply rely on the statute's rebuttable presumption that the products are flavored in light of the manufacturer's statements in its marketing materials.

And if so, the court must determine whether the packaging and language of R.J. Reynolds' nonmenthol cigarettes — which use former menthol brands and words like "crisp" — constitute an explicit or implicit suggestion that the products have a characterizing flavor.

If the court determines the presumption does not apply, the California AG would likely need to develop and conduct an inquiry capable of fairly and consistently assessing whether the product has a distinguishable taste or aroma, or both, before issuing such a notice of determination.

The court's reasoning on these issues could help to provide regulatory certainty regarding the contours of California's flavor ban and how it should be applied. To a certain extent, even if R.J. Reynolds were to lose on the merits, this greater regulatory certainty would still help it navigate the flavor ban moving forward.

And if R.J. Reynolds' new products are determined to be "flavored tobacco products" — something that is still unclear at this juncture — the company would likely rather know sooner than later. The longer the products are marketed and build a customer base, the bigger the possible loss in revenue and goodwill among retailers and consumers.

How the Suit Foreshadows Federal Issues

R.J. Reynolds' approach to the California flavored tobacco ban may foreshadow certain manufacturers' future efforts to produce products that appeal to menthol smokers if

menthol cigarettes and cigars are banned nationwide.^[11]

Nonflavored products like "crisp" or "smooth" cigarettes are likely to prompt similar legal challenges under the FDA's future characterizing flavor rules. This is especially likely given that the FDA's proposed rules have declined to define the phrase "characterizing flavor."

Instead, the proposed rules offer a set of four factors that the agency intends to apply on a case-by-case basis to determine whether a product has a characterizing flavor. These include the multisensory experience of a flavor, and language in a product's advertising. It is unclear whether R.J. Reynolds' new nonmenthol products will be considered impermissible flavored cigarettes under this new rule.

Whatever the result of the company's suit against California, the court's decision will serve as persuasive authority for courts grappling with other current and future bans on flavored tobacco products around the U.S.

[1] Reynolds Files Lawsuit in California to Protect Legal Tobacco Products, [CSNews.com](https://csnews.com/reynolds-files-lawsuit-california-protect-legal-tobacco-products#:~:text=Reynolds%20Tobacco%20Co.,based%20on%20their%20promotional%20materials) (May 12, 2023), <https://csnews.com/reynolds-files-lawsuit-california-protect-legal-tobacco-products#:~:text=Reynolds%20Tobacco%20Co.,based%20on%20their%20promotional%20materials>.

[2] Troutman Pepper Tobacco Practice, California Voters Approve Flavored Tobacco Ban in Referendum; Is It Unconstitutional? (Nov. 17, 2022), <https://www.tobaccolawblog.com/2022/11/california-voters-approve-flavored-tobacco-ban-in-referendum-is-it-unconstitutional/#more-4272>.

[3] Cal. Health & Safety Code § 104559.5(a)(1). Note that the ban does not apply to certain shisha tobacco products, loose leaf tobacco or premium cigars. See id. § 104559.5(c), (d), (e).

[4] See Notices of Determination to R.J. Reynolds Tobacco Company (April 25,

2023), <https://californiahealthline.org/wp-content/uploads/sites/3/2023/05/California-Attorney-General-Letters.pdf>.

[5] See id.

[6] Cal. Health & Safety Code § 104559.5(b)(2).

[7] See Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, R.J. Reynolds Tobacco Co. v. Bonta, No. 23CECG01734 (Cal. Sup. Ct. May 11, 2023).

[8] See Wilson & Wilson v. City Council of Redwood City, 191 Cal. App. 4th 1559, 1582 (Cal. Ct. App. 2011) (citing Cal. Code Civ. Proc. § 1060).

[9] Cal. Health & Safety Code § 104559.5(b)(1) (“A tobacco retailer, or any of the tobacco retailer’s agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer”).

[10] See Wilson & Wilson, 191 Cal. App. 4th at 1582.

[11] Tobacco Product Standard for Characterizing Flavors in Cigars, 87 Fed. Reg. 26,396 (May 4, 2022), <https://www.federalregister.gov/documents/2022/05/04/2022-08993/tobacco-product-standard-for-characterizing-flavors-in-cigars>.

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