No. 92

City of New York,
Appellant,
v.
Smokes-Spirits.Com, Inc., et al.,
Respondents,
Joyce E. Houle, et al.,
Defendants.
(And Other Actions.)

Elizabeth S. Natrella, for appellant.
Randolph H. Barnhouse, for respondents Hemi Group, LLC and Kai Gachupin.

CIPARICK, J.:

These consolidated actions arise out of plaintiff City of New York's claims that defendants' allegedly illegal marketing and shipment of cigarettes into this State have deprived it of tax revenues. To resolve plaintiff's state law claims, the United States Court of Appeals for the Second Circuit has

certified two questions to us. First, "[d]oes the City have standing to assert its claims under General Business Law § 349?" Second, "[m]ay the City assert a common law public nuisance claim that is predicated on N.Y. Public Health Law § 1399-*ll*?" We answer both questions in the negative.

I.

Collectively, New York State and City impose some of the highest cigarette excise taxes in the nation (see Tax Law §§ 471, 471-a; McKinney's Uncons Laws of NY § 9436 [1]; Administrative Code of the City of New York § 11-1302 [a] [1]-[2]). At the time these actions were commenced, owing to the divergence in cigarette taxes throughout the nation, a carton of premium brand cigarettes purchased in Virginia or Kentucky cost approximately $ 30.00, while the same carton cost $ 70.00 in New York City.[1] This price differential is based almost entirely on the variance between cigarette excise taxes.

New York City's smokers cannot evade responsibility for City and State taxes simply by purchasing shipments of cigarettes from out-of-state sellers -- like defendants -- who operate in

[1] At the inception of these lawsuits, New York City residents paid $ 3.00 in combined City and State excise taxes and another .33 cents in combined sales taxes for each pack of cigarettes purchased. While the City's excise tax remains $ 1.50, the Legislature recently amended Tax Law § 471 to increase the State's excise tax to $ 2.75, bringing the combined excise taxes payable in New York City up to $ 4.25 (see Tax Law § 471 [1], Administrative Code of the City of New York § 11-1302 [a] [3]).

jurisdictions that impose minimal cigarette taxes. That is because, subject to exceptions not relevant here, the Tax Law and the Administrative Code of the City of New York require consumers to pay a tax on all cigarettes possessed for use in the City (see Tax Law §§ 471 [2], 471-a; Administrative Code of the City of New York § 11-1302 [3]). Thus, although out-of-state cigarette retailers are not required to collect State and City taxes at the time of sale, those taxes are still due and owing by a purchaser who possesses the cigarettes for use in New York.

Moreover, a federal law -- the Jenkins Act -- requires out-of-state cigarette sellers to file monthly reports with New York State's tobacco tax administrator (see 15 USC § 376 [a] [2]) and subjects violators to criminal penalties for failure to do so (see id. at § 377). Such reports -- which must identify the name and address of persons to whom cigarette shipments were made along with the quantity and brand of cigarettes purchased -- assist New York State taxing authorities in their efforts to collect cigarette use taxes (see id. at § 376 [a] [2]). The reports also further the collection efforts of the City because, by agreement, the State's Department of Taxation and Finance is obligated to share such reports with the City's Department of Finance.

According to the City's complaints, defendants are out-of-state entities and persons engaged in the business of selling cigarettes over the Internet. They are located in States with

negligible cigarette taxes and they have marketed and shipped cigarettes to New York City residents. As relevant here, certain defendants' websites have allegedly misrepresented that their Internet cigarette sales are "tax free," that their customers did not have to pay cigarette taxes, and/or that they are not required to file Jenkins Act reports. Due to these "materially deceptive and misleading" statements, the City alleges that some New York consumers were duped into purchasing cigarettes over the Internet in reliance on an entirely illusory tax savings. Consumers' apparent savings would disappear if the defendants filed Jenkins Act reports thereby allowing the City to locate cigarette purchasers and collect excise taxes owed for cigarette use. The City claims that defendants' deceptive statements, along with their failure to file Jenkins Act reports, have injured it in an undetermined amount of unpaid cigarette taxes. For this injury, the City seeks redress under GBL § 349 (h).

In two of its actions, the City also brought a common law public nuisance claim. Its basis lies in the legislative findings that accompanied Public Health Law § 1399-*ll*, which stated, in part, that "[t]he legislature finds and declares that the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of this state poses a serious threat to public health, safety, and welfare" (see Legislative Findings, L 2000, ch 262, § 1, McKinney's Cons Laws of NY, Book 44, Public Health Law § 1399-*ll*, at 238). After outlining

investigatory efforts that established that certain defendants had made shipments into its jurisdiction in violation of § 1399-*ll*, the City alleged that defendants' illicit shipments contributed to a public nuisance that "unreasonably and substantially interfer[ed] with rights common to the general public, with commerce, and the quality of daily life, and endanger[ed] the property, health, and safety of large numbers of residents of New York City." Accordingly, plaintiff sought an injunction to prevent additional illegal shipments and reimbursement of its costs for abating the claimed public nuisance.

The federal district court dismissed the City's General Business Law § 349 and public nuisance claims. On appeal, the Circuit Court recognized that while standing under General Business Law § 349 (h) had been extended to consumers and competitors, the statute had not yet been interpreted to grant a right of action to parties not suing in either of those capacities. The court also questioned the propriety of the City bringing a public nuisance claim predicated upon Public Health Law § 1399-*ll*. Accordingly, the court certified two legal questions to us. We now answer both in the negative.[2]

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[2] On May 4, 2009, the United States Supreme Court granted two defendants' petition for a writ of certiorari, which sought review of the Second Circuit's ruling regarding claims brought by the City under the federal Racketeer Influenced and Corrupt Organizations Act (see Hemi Group, LLC v City of New York, -- US --, 2009 US LEXIS 3310 at * 1 [2009]). As the resolution of

II.

General Business Law § 349 (a) declares unlawful "[d]eceptive acts or practices in the conduct of any business." As amended in 1980, the statute provides a private right of action to "any person who has been injured by reason of" such illegal conduct (see General Business Law § 349 [h]). The purpose of this amendment was to expand enforcement authority beyond the Attorney General and thereby ensure more optimal protection of the public (see Karlin v IVF Am., 93 NY2d 282, 291 [1999], quoting Mem of Assemblyman Strelzin, L 1980, ch 346, § 1, 1980 NY Legis Ann, at 146; Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, General Business Law § 349, at 566, quoting 1980 McKinney's Sessions Laws at 1867 [1988] ["[T]he purpose of the private right[] of action was to permit private enforcement against injuries resulting from consumer fraud"] [internal quotation marks omitted]).

To successfully assert a section 349 (h) claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice (see Stutman v Chemical Bank, 95 NY2d

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those federal claims does not affect our consideration of the City's relevant pendent state claims -- which invoked the federal district court's diversity jurisdiction (see 28 USC § 1332) -- we proceed to answer the questions certified to us by the Second Circuit.

24, 29 [2000]). Here, the City insists that it is part of the broad class of "person[s]" granted standing to pursue a section 349 claim (see General Construction Law § 37; Joseph Thomas Moldovan, Note, New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, 48 Brook L Rev 509, 526-527 [1982]). In a proper case, the City may be able to avail itself of a remedy pursuant to subsection (h). But it has failed to establish standing here because its claimed injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet.

In Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc. (3 NY3d 200 [2004]), we held that "derivative actions are barred" under section 349 (h) (id. at 207-208). "An injury is indirect or derivative when the loss arises solely as a result of injuries sustained by another party" (id. at 207). Thus, we concluded that the plaintiff insurance plan could not recover medical payments made on behalf of subscribers who suffered from smoking-related illnesses even though the defendants' misrepresentations as to the negative health effects of smoking allegedly caused those injuries. Although the plan had incurred costs due to the alleged deception, its injury was still "indirect" -- and thus not compensable under section 349 (h) -- "because the losses it experienced arose wholly as a result of smoking related illnesses suffered by [its]

subscribers" (id.). In rendering this decision, we noted the lack of any clear indication from the Legislature that derivative injuries were actionable under section 349 (h) (see id. at 206-207); our concern with expanding section 349 to permit "'a tidal wave of litigation against businesses that was not intended by the Legislature'" (see id. at 207, quoting Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 26 [1995]); and that our holding was "in accord with several other courts that recognize a remoteness bar to recovery under their state consumer protection statutes" (see id. at 208 n 3 [citing cases]).

The City's claimed injury here is just as indirect as the insurer's was in Blue Cross. Quite simply, had the allegedly deceived consumers not been improperly induced to purchase defendants' cigarettes then the City would have no claim to lost tax revenue (see Blue Cross, 3 NY3d at 207 ["Although [the insurer] actually paid the costs incurred by its subscribers, its claims are nonetheless indirect because the losses it experienced arose wholly as a result of smoking related illnesses suffered by those subscribers"]; see also Laborers Local 17 Health & Benefit Fund v Phillip Morris, Inc., 191 F3d 229, 239 [2d Cir 1999] ["Being purely contingent on harm to third parties, these injuries are indirect"]). Although in some sense the City's injuries are "caused" by defendants' alleged conduct, this Court has required more than an allegation of "but for" cause to state

a claim for relief under section 349 (h) (see Blue Cross, 3 NY3d at 208; Stutman, 95 NY2d at 30 ["[P]laintiffs allege that because of defendant's deceptive act, they were forced to pay a $ 275 fee that they had been led to believe was not required . . . This allegation satisfies the causation requirement"]; see also Ganim v Smith & Wesson Corp., 258 Conn 313, 373, 780 A2d 98, 110 [Conn 2001] ["but for cause" allegation insufficient under state unfair trade practices act]).

We reject the City's assertion that it may state a cognizable section 349 (h) claim "simply" by alleging "consumer injury or harm to the public interest." If a plaintiff could avoid the derivative injury bar by merely alleging that its suit would somehow benefit the public, then the very "tidal wave of litigation" that we have guarded against since Oswego would loom ominously on the horizon (see 85 NY2d at 26; Blue Cross, 3 NY3d at 207). Certainly, "as a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented" (see Oswego, 85 NY2d at 25). But such plaintiffs must also plead that they have suffered actual injury caused by a materially misleading or deceptive act or practice (see id. at 26; accord Blue Cross, 3 NY3d at 205-206; see also Stutman, 95 NY2d at 29 ["The plaintiff . . . must show that the defendant's 'material deceptive act' caused the injury"]). Since Blue Cross, it has been clear that allegations of indirect or derivative injuries will not suffice (see 3 NY3d

at 207).

Nothing in Securitron Magnalock Corp. v Schnabolk (65 F3d 256 [2d Cir 1995]) purports to confer standing upon derivatively injured parties such as the City. There, the Second Circuit characterized the "gravamen" of a section 349 claim as "consumer injury or harm to the public interest" (id. at 264, quoting AZBY Brokerage, Inc. v AllState Ins. Co., 681 F Supp 1084, 1089 n 6 [SD NY 1988]). We, too, have emphasized that section 349 is "directed at wrongs against the consuming public" and that plaintiffs must demonstrate that the complained-of acts or practices "have a broader impact on consumers at large" (see Oswego, 85 NY2d at 25; see also Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 344 [1999]).

But those statements relate to just one element of a section 349 claim -- consumer-oriented conduct (see Gaidon, 94 NY2d at 344). The Securitron Court did not discuss the remaining two elements -- materially misleading or deceptive act or practice and actual injury -- presumably because the defendants there argued that "'there is absolutely nothing in this record showing that this private commercial dispute between the plaintiff and the defendant was aimed at the public'" (see 65 F3d at 264). This argument derives from the rule, recognized in Oswego, that certain disputes, such as "[p]rivate contract disputes, unique to the parties . . . would not fall within the ambit of [section 349]" (see Oswego, 85 NY2d at 25, citing and

quoting Genesco Entertainment v Koch, 593 F Supp 743, 752 [SD NY 1984]). Thus, in concluding that defendants' purely-private-dispute argument was meritless in the case before it, the Securitron court did not expand the class of section 349 (h) plaintiffs to those persons who, like the City, can link a derivative injury to some public harm.[3]

Accordingly, we hold that plaintiff lacks standing to bring its section 349 (h) claim for lost cigarette tax revenue.

III.

Turning to the public nuisance claim, the City admits that the conduct it complains of -- the "mailing of cigarettes" -- "is not illegal or even traditionally deemed offensive." But

[3] We have cited Securitron for the proposition that the class of persons accorded standing under 349 (h) is not necessarily limited to "consumers" (see Blue Cross, 3 NY3d at 207). The present case offers no occasion for us to opine upon the classes of potential plaintiffs who may or may not have standing to sue under section 349 (h). We note, however -- as we have in the past -- that there is some legislative history supporting the position that business competitors have standing under the statute (see Blue Cross, 3 NY3d at 207, citing and quoting May 22, 1980 Mem of Atty Gen, Bill Jacket, L 1980, ch 346; Special Comm. on Consumer Affairs Assoc. of the Bar of the City of New York, "Private Right of Action" Proposals, Bill Jacket, L 1980, ch 346, § 1 ["permitting suits by either consumers or competitors . . . would help police the marketplace against misrepresentations which constitute deception against the consumer and unfair competition with firms not engaging in such practices"]; see also Givens, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, General Business Law § 349, at 565 [1988] ["In addition to consumers, . . . competitors . . . are given the right to sue by GBL §§ 349 and 350-d as an additional enforcement measure"]).

it says that the legislative findings accompanying Public Health Law § 1399-*ll* changed that and that those findings permit it to bring an action to abate this "newly characterized" public nuisance since nothing in section 1399-*ll* or its legislative history purports to preempt such a claim. We agree that the Legislature had in mind a concern for the public health -- specifically, the detrimental effects of smoking on minors -- when it passed section 1399-*ll*. We do not view this case, however, as one involving preemption. Instead, the question here is one of pure statutory interpretation. Based on its text and legislative history, we conclude that the Legislature did not contemplate that section 1399-*ll* would be used as the predicate for public nuisance actions in cases -- like the present -- that primarily involve alleged tax evasion.[4]

Public Health Law § 1399-*ll* is found under Title 13-F

[4] The City's public nuisance claims were brought against certain defendants who have elected not to appear before us for oral argument or to submit a brief for our review. We do not consider these claims moot since we have no indication that they are not presently the subject of a live controversy (see Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 812 [2003] ["Where, as here, a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot"]). Similarly, because our decision will have an effect on the City's public nuisance claims, the second certified question is not academic (compare Blue Cross, 3 NY3d at 209). Moreover, while it is unfortunate that the relevant defendants did not appear, in this case their arguments can be sufficiently assessed based on the briefs filed in the Second Circuit, which are part of the record before us (see 541 F3d 425, 458 [2d Cir 2008]; 22 NYCRR 500.27 [c]).

of the Consolidated Laws, which is entitled "Regulation of Tobacco Products and Herbal Cigarettes; Distribution to Minors." By its provisions, it is "unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in this state" who is not a person licensed as a cigarette tax agent, wholesale dealer, or a registered retail dealer; an export warehouse proprietor or an operator of a customs bonded warehouse; or a person who is a government agent or employee, acting in an official capacity (see Public Health Law § 1399-*ll* [1]). Likewise, "common or contract carrier[s]" are forbidden from knowingly transporting cigarettes to any person, not within the class of exempted persons (see § 1399-*ll* [2]). The same prohibition applies to "any other person," except that such individuals are permitted to transport "not more than eight hundred cigarettes at any one time to any person in this state" (see id.). The statute provides that authorized shipments sent by cigarette sellers must be "plainly and visibly marked with the word 'cigarettes'," unless shipped "in the cigarette manufacturer's original container or wrapping" (see § 1399-*ll* [3]).

Unauthorized shipments are subject to seizure and forfeiture (see Public Health Law § 1399-*ll* [4]) and expose the violator to criminal and civil penalties. Thus, a shipment in violation of subdivisions (1) and (2) constitutes a class A misdemeanor, which is increased to a class E felony upon a

"second or subsequent violation" (see § 1399-*ll* [5]). In addition, § 1399-*ll* (5) authorizes the imposition of up to a $ 5,000 civil fine for each violation of subdivision (1) or (2) and a similar fine for violation of subdivision (3), when committed by a cigarette seller (see id.).

A concern with public health as well as the public fisc is evident in section 1399-*ll*'s legislative findings. These state that:

> "[T]he legislature finds and declares that the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of this state poses a serious threat to public health, safety, and welfare, to the funding of health care pursuant to the health care reform act of 2000, and to the economy of the state. The legislature also finds that when cigarettes are shipped directly to a consumer, adequate proof that the purchaser is of legal age cannot be obtained by the vendor, which enables minors to avoid the provisions of article 13-F of the public health law. It is also the legislature's finding that by preventing shipment of cigarettes directly to consumers, the State will be better able to measure and monitor cigarette consumption and to better determine the public health and fiscal consequences of smoking. The legislature further finds that existing penalties for cigarette bootlegging are inadequate. Therefore, the bill enhances existing penalties for possession of unstamped or unlawfully stamped cigarettes"

(see Legislative Findings, L 2000, ch 262, § 1, McKinney's Cons Laws of NY, Book 44, Public Health Law § 1399-*ll*, at 238).

It is well settled that a governmental entity, such as the City, may bring an action to abate a public nuisance or the

"conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend the public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (see Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568 [1977] [internal citations omitted]; New York Trap Rock Corp v Town of Clarkstown, 299 NY 77, 83 [1949] [Trap Rock I] ["[A] municipal corporation . . . has the capacity and is a proper party to bring an action to restrain a public nuisance which allegedly has injured the health of its citizens"]). Equally clear is the Legislature's authority to enact laws deeming certain activities public nuisances (see Trap Rock I, 299 NY at 84-85; People v New York Trap Rock Corp., 57 NY2d 371, 377 [1982]; see also Lawton v Steele, 152 US 133, 140 [1894]; Restatement [Second] of Torts § 821B, Comment c ["[A]ll of the states have numerous special statutes declaring certain conduct or conditions to be public nuisances"]).

But we think that the task of discerning whether a set of legislative findings purport to recognize a particular type of conduct as a public nuisance is one of statutory construction, requiring us to "look beyond the language of the statute . . . to search for and effectuate the Legislature's purpose" (cf. Fumarelli v Marsam Dev., 92 NY2d 298, 303 [1998]; Uhr v East Greenbush Cent. School Dist., 94 NY2d 32, 38 [1999] ["A statutory

command . . . does not necessarily carry with it a right of private enforcement by means of tort litigation"]). In this regard, the maxim that an "affirmative statute," such as section 1399-*ll*, should not be read to cancel the City's common law right to abate public nuisances (see McKinney's Cons Laws of NY, Book 1, Statutes § 34, at 76-77) is unhelpful since the City essentially concedes that the right to abate the nuisance caused by the shipment of cigarettes did not exist prior to the enactment of section 1399-*ll*. In any event, we need not resort to canons of construction "because the legislative intent is otherwise more readily and reliably manifest" (see Fumarelli, 92 NY2d at 307).

Properly framed, we believe that the second certified question requires an inquiry similar to that undertaken in cases concerning implied private rights of action (see Sheehy v Big Flats Community Day, 73 NY2d 629, 633 [1989]; Uhr, 94 NY2d at 38; Hammer v American Kennel Club, 1 NY3d 294, 299 [2003]; McLean v City of New York, 12 NY3d 194, 2009 WL 813026, * 3 [2009]). In such cases we consider "'(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (see Hammer, 1 NY3d at 299, quoting Carrier v Salvation Army, 88 NY2d 298, 302 [1996]).

With respect to the public health, the Legislature's passage of section 1399-*ll* was predominantly intended to "prevent young people in New York from becoming addicted to cigarettes" (see Senate Introducer Mem in Support, Bill Jacket, L 2000, ch 262, at 6; see also id. at 3 ["These amendments will prevent underage youths from obtaining cigarettes, and in effect, require that all purchases be made face-to-face in retail stores where proof of age can be ascertained"]; Mem of State of New York Dept of Public Health, Bill Jacket, L 2000, ch 262, at 17; Sting's smoking gun, NY Daily News, July 14, 2000, Bill Jacket, L 2000, ch 262, at 51 [describing Department of Consumer Affairs investigation in which "a 7-year-old boy bought cigarettes over the Internet three times"]). Although our State has stringent proof-of-age requirements intended to prevent persons under the age of eighteen from purchasing cigarettes (see Public Health Law § 1399-cc), by 2000, it had become apparent that certain minors were circumventing those measures by making purchases from mail order or Internet cigarette retailers (see Senate Introducer Mem in Support at 6). As explained in section 1399-*ll*'s Bill Jacket:

> "[P]ersons under 18 often receive cigarettes by mail-order or Internet purchases from out-of-state vendors or unlicensed in-state vendors.
>
> "Recognizing this problem and the proliferation of Internet sales, this bill would make it unlawful for persons to ship or cause cigarettes to be shipped to any person in the State (who does not fall within the three exceptions codified in section 1399-*ll* [1]) . . . Further, the bill would make it

> unlawful for a common or contract carrier to knowingly transport cigarettes to . . . a person in this State reasonably believed by such carrier to be a person other than a person authorized to receive cigarettes. With few exceptions, cigarette consumers will thus have to purchase their cigarettes at a registered retail dealer's place of business. As a result, these amendments would ensure that the Public Health Law's proof of age requirements would not be evaded by underage purchasers. Further, the State's Cigarette Marketing Standards Act (CMSA) in Article 20-A of the Tax Law, which provides for minimum prices for sales of cigarettes in the State in conjunction with the State's tax on cigarettes, would not be avoided, thereby further discouraging smoking among persons under 18"

(id. [emphasis added]).

Even assuming that the City may be included within the class of persons whom the Legislature had in mind when enacting section 1399-*ll* and that a public nuisance action may in some cases further the legislative purpose, permitting the present public nuisance actions to proceed would not be consistent with the legislative scheme. To be sure, the penalties authorized by section 1399-*ll* take aim at tax evasion, albeit primarily to deter underage smoking (see Senate Introducer Mem in Support at 6). But enforcement of those penalties has been entrusted to local District Attorneys and the Commissioner of Health (see § 1399-*ll* [5]). When it enacted the criminal and civil penalties contained in section 1399-*ll* (5), the Legislature also codified a series of amendments intended to "strenghten[] existing civil and criminal penalties" that already punished cigarette tax evasion,

or "bootlegging" (see Senate Introducer Mem in Support at 6-7; see also Budget Report on Bills, Bill Jacket, L 2000, ch 262, at 13-14 [listing amendments to previously enacted laws]). Thus, the City's alleged injury -- lost tax revenue -- is a harm that is subject to thorough regulation, both by section 1399-*ll* as well as other laws not implicated here.

When considering similarly comprehensive enforcement schemes, we have declined to imply a private right of action (see Hammer, 1 NY3d at 300; McLean, 2000 WL 813026 at * 3; Uhr, 94 NY2d at 40). The presence of such a scheme here, when coupled with the Legislature's clear expressions that the public health thrust of section 1399-*ll* was related to the prevention of underage smoking, persuades us that the Legislature did not intend its findings to authorize a public nuisance claim based primarily upon alleged tax evasion (cf. Fumarelli, 92 NY2d at 307 ["The history, timing, wording and breadth of the statutory enactment all indicate that the Legislature did not intend an overlapping dual track that would engender confusion, indefiniteness, and lawsuits"]).[5]

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[5] We acknowledge that a different result might be reached if the City's complaint alleged that defendants had made unauthorized shipments to minors (cf. City of New York v Milhelm Attea & Bros., 550 F Supp 2d 332, 349 [ED NY 2008] [finding public nuisance claim viable in action against cigarette wholesalers where City alleged "that sellers of unstamped cigarettes are 'major suppliers' to underage smokers, and these sellers fail to comply with N.Y. Public Health Law § 1399-cc(3), which requires proof of age"]). But no such allegations appear in the complaints here.

Accordingly, the certified questions should be answered in the negative.

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Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in the negative. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 9, 2009