State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 23, 2024 CV-23-0150

AMERISOURCEBERGEN DRUG CORPORATION et al.,
Appellants,
v
NEW YORK STATE DEPARTMENT OF HEALTH et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: March 29, 2024

Before: Garry, P.J., Clark, Pritzker, Ceresia and Mackey, JJ.

Massey & Gail LLP, Washington, DC (*Jonathan S. Massey* of counsel) and *O'Connell and Aronowitz*, Albany (*Cornelius D. Murray* of counsel) and *Wachtell, Lipton, Rosen & Katz*, New York City (*Jonathan M. Moses* of counsel) and *Morgan Lewis & Bockius LLP*, Washington, DC (*Stephanie Schuster* of counsel), for appellants.

Letitia James, Attorney General, Albany (*Frederick A. Brodie* of counsel), for respondents.

Mackey, J.

Appeal from an order of the Supreme Court (Christina L. Ryba, J.), entered December 15, 2022 in Albany County, which, among other things, granted defendants' cross-motion for summary judgment dismissing the complaint.

In January 2018, then-Governor Andrew M. Cuomo announced that he was proposing an "[o]pioid [e]pidemic [s]urcharge" of "2 cents per milligram of active opioid ingredient on

prescription drugs" in the upcoming state budget (Press Release, NY St Div of Budget, Governor Cuomo Outlines FY 2019 Budget: Realizing the Promise of Progressive Government [Jan. 16, 2018], available at https://www.budget.ny.gov/pubs/press/2018/pr-eBudgetfy19.html). The measure, known as the Opioid Stewardship Act (L 2018, ch 57, part NN [hereinafter OSA]), created an "opioid stewardship fund" whose monies were to derive from the opioid surcharge and would be used for substance abuse services and to support a program that monitors the prescribing and dispensing of controlled substances (*see* State Finance Law § 97-aaaaa [4]; Public Health Law §§ 3323 [3]; 3343-a [1] [a]).[1] The OSA required a $100 million annual payment by "[a]ll manufacturers and distributors" of opioids in the state, whom the OSA refers to as "licensees" (Public Health Law § 3323 [2], [3]). Licensees' share of the payment was proportionate to the morphine milligram equivalent (hereinafter MME) material that a licensee sold in the state in the preceding calendar year. Even though adopted in April 2018 and effective in July 2018, the OSA required a payment for licensees' ratable share of MME opioid sales for the 2017 and 2018 calendar years, continuing through the 2022 calendar year. Payments were quarterly, with one-fourth of the annual amount due paid each quarter, except for the first payment, which was to be paid in full on January 1, 2019 (*see* Public Health Law § 3323 [6]).[2] Pertinent here, the OSA provided that "[n]o licensee shall pass the cost of their ratable share amount to a purchaser, including the ultimate user of the opioid, or such licensee shall be subject to penalties" of up to "one million dollars per incident" (hereinafter the pass-through prohibition) (Public Health Law § 3323 [2], [10] [c]).

Pharmaceutical industry groups and one licensee challenged the constitutionality of the OSA in the US District Court for the Southern District of New York, seeking declaratory judgments and injunctive relief (*see Healthcare Distrib. Alliance v Zucker*, 353 F Supp 3d 235, 243 [SD NY 2018], *revd in part sub nom. Association for Accessible Medicines v James*, 974 F3d 216 [2d Cir 2020], *cert denied* ___ US ___, 142 S Ct 87 [2021]). Ultimately, the District Court found that the pass-through prohibition of the OSA violated the Dormant Commerce Clause, as the prohibition had "the effect of discriminating between the purchasers of opioids in New York and those outside it" (*id.* at 262-263). The District Court concluded that, despite the presence of a severability

[1] The opioid stewardship fund was placed in the joint custody of the Comptroller and the Commissioner of Taxation and Finance (*see* State Finance Law § 97-aaaaa [1]).

[2] For 2017, there were 97 licensees for which respondent Department of Health calculated opioid stewardship payments.

clause in the OSA, the pass-through prohibition was inseverable from the rest of the statute and, thus, the entirety of the OSA was unconstitutional (*id.* at 264-265). Accordingly, the court enjoined the collection of taxes under the OSA (*id.* at 266).

After the District Court's decision, the Legislature amended the OSA to provide that the opioid stewardship payment would be collected only for opioid sales that took place in calendar years 2017 and 2018 (*see* L 2019, ch 59, part XX, § 5). For subsequent years, the Legislature reimposed a tax on the sale of opioids, but the tax was assessed on a per MME basis and did not include a pass-through prohibition (*see* L 2019, ch 59, part XX, § 1; codified as Tax Law §§ 497-499). The amended OSA took effect on July 1, 2019 (*see* L 2019, ch 59, part XX, § 6).

After the enactment of the amended OSA, the State elected not to seek reversal of the District Court's invalidation of the pass-through prohibition. Rather, the State sought reversal of only the District Court's invalidation of the remaining provisions of the OSA, including the opioid stewardship payment. On appeal, the Second Circuit reversed in part, finding that the District Court lacked jurisdiction to abrogate the payment requirement of the OSA or enjoin the payment's enforcement, as federal law removes such acts from a district court's jurisdiction (*see Association for Accessible Medicines v James*, 974 F3d 216, 221, 227 [2d Cir 2020], *cert denied* ___ US ___, 142 S Ct 87 [2021]). Thus, the Second Circuit reversed "the District Court's judgment invalidating and enjoining enforcement of the opioid stewardship payment and all other provisions of the OSA except for the pass-through prohibition, the invalidation of which" was not before it (*id.* at 228). As such, the District Court's decision invalidating the pass-through provision stood (*see id.*), but the propriety of opioid stewardship payments based on a licensee's share of the 2017 and 2018 New York opioid market remained at issue.

In May 2022, plaintiffs, national distributors of pharmaceuticals who were not parties to the federal litigation, commenced this action, claiming that the OSA's remaining provisions were not severable from the now-unconstitutional pass-through prohibition, and thus the entire statute should be stricken. In the alternative, plaintiffs claimed that the OSA was invalid under the Due Process Clauses of the US and NY Constitutions because it was imposed retroactively.

In this litigation, plaintiffs seek a declaration that the OSA is invalid, an injunction against its enforcement, and a refund of $57,355,054.77 in opioid stewardship payments

that they made under protest.[3] Defendants moved pre-answer to dismiss the complaint. Plaintiffs asked Supreme Court to treat defendants' motion as one for summary judgment, as the parties' contention lay solely with the viability of defendants' collection of the opioid stewardship payments, and cross-moved for summary judgment. Defendants likewise cross-moved for summary judgment. Supreme Court granted defendants' cross-motion for summary judgment and dismissed the complaint. The court found the existence and strong language of the severability clause to be determinative of the severability issue, stating, "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." This was so, the court noted, because the primary purpose of the OSA was to "raise significant revenue" for the prevention and treatment of opioid addiction and the OSA serves this purpose without the pass-through prohibition. On the substantive due process issue, the court found that the period of retroactivity in the OSA was relatively short, its attempt to "generate immediate revenue" was legitimate, and plaintiffs did not justifiably rely on not being taxed for their MME sales in 2017. As such, the retroactive portion of the OSA did not offend due process. Plaintiffs appeal.

Initially, plaintiffs contend that Supreme Court erred in severing the pass-through prohibition from the remainder of the OSA. "In that regard, it is axiomatic that a court should refrain from declaring a statute unconstitutional when only a portion thereof is objectionable, and this is particularly true when[,] as here[,] the law contains a severability clause" (*Local Govt. Assistance Corp. v Sales Tax Asset Receivable Corp.*, 5 AD3d 829, 832 [3d Dept 2004] [internal quotation marks, brackets and citation omitted], *mod* 2 NY3d 524 [2004]; *see also Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d 88, 94 [1989]). Nevertheless, where severance of the offending provision would result in a statutory scheme unintended by the Legislature, the entire statute must be deemed unconstitutional (*see People ex rel. Alpha Portland Cement Co. v Knapp*, 230 NY 48, 60 [1920], *cert denied* 256 US 702 [1921]; *see also People v On Sight Mobile Opticians*, 24 NY3d 1107, 1109 [2014]; *CWM Chem. Servs., L.L.C. v Roth*, 6 NY3d 410, 423 [2006]). The question is "whether the [L]egislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (*Matter of Westinghouse*

[3] Each plaintiff was assessed an opioid stewardship payment under the OSA based on its 2017 share of the New York opioid market.

Elec. Corp. v Tully, 63 NY2d 191, 196 [1984] [internal quotation marks and citation omitted]).

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 their customers. They 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. We disagree.

While the legislative history of the OSA indeed reveals that lawmakers placed great importance on preventing opioid licensees from passing the cost of the stewardship payments on to their customers, we conclude that the primary purpose of the opioid stewardship payment is to raise revenue for the treatment and prevention of opioid addiction. That purpose will undoubtedly be accomplished even with severance of the offending portion of the OSA. We agree with our dissenting colleagues' observation that the question of severability presents a close call, especially given concerns regarding pass-through expressed by some legislators when the OSA was initially being debated. However, unlike the dissent, which spotlights comments made before passage of the original OSA, we believe the focus should be on what the Legislature intended in 2019 when it amended the act. In our opinion, the Legislature clearly answered the question of its intent at that time by amending the OSA to impose an excise tax on future opioid sales, with no prohibition on passing the cost through to the consumer. More importantly, at the same time it chose to retain the original OSA scheme, with the pass-through prohibition, for years 2017 and 2018. Although the Legislature must certainly have recognized that the pass-through prohibition was very much at risk at that time, with perhaps a likelihood that it would ultimately be held invalid,[4] it nonetheless retained a strongly worded severance provision, declaring it "to be the intent of the [L]egislature that this act would have been enacted even if such invalid provisions had not been included herein" (L 2018, ch 57, part NN, § 4). In our opinion, this demonstrates that the Legislature wanted the tax to remain in place, even if, as ultimately occurred, the pass-through prohibition was invalidated. Had it intended otherwise, it easily could have removed the severance clause or simply rescinded the tax for 2017 and 2018 when it amended the OSA. It did neither of those things, choosing instead for those years to retain the tax, with both the pass-through prohibition and severance clause. "[T]he words

[4] Passage of the amended OSA occurred after the District Court had invalidated the pass-through prohibition and the matter was on appeal.

of [a] statute are the best evidence of the Legislature's intent" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000]). Applying that principle, we conclude that the Legislature intended what it said and that the invalid pass-through provision should be severed from the rest of the OSA.

Plaintiffs also contend that the retroactive opioid stewardship assessment for 2017 and 2018 violated their substantive due process rights to retain their property. We agree with plaintiffs as to 2017, but disagree as to 2018.

It is well settled that "[r]etroactivity provisions in tax statutes, if for a short period, are generally valid" (*Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d 451, 455 [1987], *appeal dismissed* 485 US 950 [1988]; *see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community 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. LP v Mullen*, 21 NY3d 233, 246 [2013]). "[W]hether a retroactive statute comports with due process principles is a 'question of degree' that turns on the length of the retroactivity period, the taxpayer's forewarning of a change in legislation as relevant to reliance interests and the public purpose for retroactive application" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 376, quoting *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d at 456). The Court of Appeals has noted that, "[g]enerally, there are two types of retroactive statutes that courts have found to be constitutional: those employing brief, defined periods that function in an administrative manner to assist in effectuating the legislation, and statutory retroactivity that – even if more substantial – is integral to the fundamental aim of the legislation" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 376). Even so, this is not an "exacting review" (*United States v Carlton*, 512 US 26, 34 [1994]), and statutory abrogation on economic substantive due process grounds is a "vanishingly rare" result (*Brightonian Nursing Home v Daines*, 21 NY3d 570, 575-576 [2013]). All it takes to justify such statutes is "a rational legislative purpose" (*Caprio v New York State Dept. of Taxation & Fin.*, 25 NY3d 744, 752 [2015] [internal quotation marks and citations omitted]; *see also Pension Benefit Guaranty Corporation v R.A. Gray & Co.*, 467 US 717, 730 [1984]) that

is "in a very broad sense reasonably related" to the achievement of that purpose (*Brightonian Nursing Home v Daines*, 21 NY3d at 577).

When assessing the constitutionality of a retroactive tax, the important factors to consider "are (1) the taxpayer's forewarning of a change in the legislation and the reasonableness of reliance on the old law, (2) the length of the retroactive period, and (3) the public purpose for retroactive application" (*James Sq. Assoc. LP v Mullen*, 21 NY3d at 246 [internal quotation marks, ellipsis and citation omitted])."The focus of the three-pronged test is fairness" (*id*. at 248). Defendants need not prevail on all three factors to establish that retroactivity is rational (*see Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d at 456).

While we agree with plaintiffs that they were not forewarned of the OSA's opioid tax, other factors weigh in defendants' favor. As to 2018, we conclude that the length of the retroactive period – about 3½ months from the beginning of 2018 to its enactment on April 12, 2018 – was not excessive. It is a "usual practice that tax legislation will . . . apply to the year in which it was enacted and perhaps the immediately preceding year" (*Matter of Chrysler Props. v Morris*, 23 NY2d 515, 521 n [1969], citing *Welch v Henry*, 305 US 134; *compare Matter of Lacidem Realty Corp. v Graves*, 288 NY 354, 357 [1942]; *People ex rel. Beck v Graves*, 280 NY 405, 409-410 [1939]). We further conclude that the retroactive impact of the OSA is amply justified by a rational legislative purpose – to quickly raise revenue to fund treatment and prevention programs for opioid addiction. As defendants point out, if the OSA were purely prospective, then the State would have had to wait until January 2021 to collect opioid stewardship payment revenue. The Legislature reasonably concluded that it should not wait that long to fund opioid treatment and prevention. As one senator explained, lives were at stake: "they get their 30-day supply and go through them in a week, and then they wind up in your emergency rooms and they go through withdrawal, and then we send them on their way and they go back home and they do it again every month" (Senator Diane Savino, Tr of Joint Hearing of Senate Finance and Assembly Ways and Means Comms, Feb. 12, 2018 at 426-427). Even while opposing the bill, Michael Duteau, President of the Chain Pharmacy Association of New York State, acknowledged the need to "prevent opioid addiction and the devastation that it can cause to individual families and entire communities" (Michael Duteau, Tr of Hearing of Joint Hearing of Senate Finance and Assembly Ways and Means Comms, Feb. 12, 2018 at 528). Balancing the relatively brief period of retroactivity against the other *Matter of Replan Dev.* factors, we find that aspect of the OSA pertaining to calendar year 2018 to be valid.

As to 2017, however, we reach the opposite conclusion. We acknowledge that there is no bright-line rule; rather, balancing the *Matter of Replan Dev.* factors involves a significant degree of discretion. In *Caprio* (25 NY3d at 758), the Court of Appeals upheld an amendment to the Tax Law containing a 3½-year retroactive period, but in *James Sq. Assoc. LP* (21 NY3d at 249), it found a 16-month period of retroactivity to be "excessive" and unconstitutional.[5] The primary distinction between the two cases lies in the purpose of the legislation. In *Caprio*, "the [L]egislature was not acting merely to increase tax receipts, but to prevent unanticipated and unintended consequences arising from erroneous administrative determinations that were contrary to long-standing [Department of Taxation and Finance] policies" (25 NY3d at 758). In *James Sq. Assoc. LP*, however, the purpose was to raise money, which the Court found was "not a particularly compelling justification. Absent an unexpected loss of revenue, such a legislative purpose is insufficient to warrant retroactivity in a case where the other factors militate against it, as is the situation here. Raising funds is the underlying purpose of taxation, and such a rationale would justify every retroactive tax law, obviating the balancing test itself" (*James Sq. Assoc. LP v Mullen*, 21 NY3d at 250).

Here, the primary purpose of the OSA was to raise money – that is the very justification advanced by defendants in support of severance, as discussed above. As *James Sq. Assoc. LP* makes clear, that is not a particularly compelling justification. Balancing that against the 15½-month period of retroactivity and the lack of forewarning to plaintiffs, we conclude that the OSA, as it pertains to calendar year 2017, is violative of plaintiffs' substantive due process rights. Of the several factors that the Court must consider, "[f]irst, and perhaps predominant, is the taxpayer's forewarning of a change" (*Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d at 456). Because plaintiffs had no forewarning for 2017, they had no opportunity "to alter their behavior in anticipation of the [new law]" (*James Sq. Assoc. LP v Mullen*, 25 NY3d at 248). We contrast this with 2018 where, for most of the year, plaintiffs were aware of the impending change. For these reasons, we find the OSA valid for 2018 and invalid for 2017. We therefore remit the matter to Supreme Court for a determination of the amount of any refund due to plaintiffs.

Garry, P.J. and Ceresia, J., concur.

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[5] In *James Sq. Assoc. LP* there was a dispute as to whether the period of retroactivity was "deemed to span 16 or 32 months" (21 NY3d at 249), which the Court did not resolve, ruling that either period was excessive.

Clark, J. (dissenting).

We respectfully disagree with the majority's conclusion that the pass-through prohibition is severable from the remainder of the Opioid Stewardship Act (L 2018, ch 57, part NN [hereinafter the OSA]) and believe we must set forth, in detail, the text of the OSA, the 2019 excise tax bill and their respective legislative histories to illustrate our perspective. Where, as here, a legislative provision is found to be unconstitutional, the question of whether the remainder of the legislation is severable from the invalidated provision turns on whether the Legislature, having foreseen such partial invalidity, would have wished for the remainder of the legislation to be enforced with the invalid part exscinded or whether it would have wished for the legislation to be rejected in its entirety (*see People v On Sight Mobile Opticians*, 24 NY3d 1107, 1109-1110 [2014]; *Matter of Hynes v Tomei*, 92 NY2d 613, 627 [1998], *cert denied* 527 US 1015 [1999]). This inquiry requires first examining the text of the legislation and its legislative history to determine the Legislature's intent and the purpose of the law and, second, evaluating the available options, in light of said history, to ascertain which legislative provisions would have been enacted if the invalidated provision had been foreseen (*see CWM Chem. Servs., L.L.C. v Roth*, 6 NY3d 410, 423 [2006]). Having engaged in such examination and evaluation, we conclude that "removing [the pass-through prohibition] while leaving the remainder [of the OSA] intact would result in a law the Legislature would not have intended," and, as such, "the entire [legislation] must be stricken" (*Matter of Hynes v Tomei*, 92 NY2d at 627; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 150, Comment; *Healthcare Distrib. Alliance v Zucker*, 353 F Supp 3d 235, 263-264 [SD NY 2018], *revd in part sub nom. Association for Accessible Medicines v James*, 974 F3d 216 [2d Cir 2020], *cert denied* ___ US ___, 142 S Ct 87 [2021]; *People v Marquan M.*, 24 NY3d 1, 10 [2014]).

In January 2018, in an effort to address the harm caused by the deadly opioid epidemic, then-Governor Andrew M. Cuomo released his 2018-2019 executive budget, which included a proposal "to fund an opioid prevention, treatment and recovery account" through the imposition of "a surcharge on opioid sales to disincentivize the use of opioids by placing the share of societal costs from opioid use on the manufacturers, producers and distributors who financially gain from the use of these drugs" (NY State Div of the Budget, Mem in Support of FY 2018-2019 Executive Budget, at 31, available at https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19artVIIs/REVENUE-

ArticleVII-MS.pdf [last accessed May 9, 2024]).[1] The first draft of the bill imposed a surcharge of $0.02 per morphine milligram equivalent (hereinafter MME)[2] on the first sale of any opioid within the state (*see* 2018 NY Senate-Assembly Bill S7509, A9509, part CC, § 1). The bill further directed that the surcharge be paid by the entity making the first sale "and shall not be added . . . or otherwise passed down to the customer" (2018 NY Senate-Assembly Bill S7509, A9509, part CC, § 1).

During the ensuing budget hearings, the Legislature considered the OSA, recognizing the importance of raising revenue quickly to address the deadly opioid epidemic. Various stakeholders – including people in sustained recovery and representatives for hospice care agencies and pharmacies – expressed concern that the cost of the surcharge would be passed down to dispensers and consumers, leading to a financially burdensome increase in the cost of much-needed pain management medications (*see e.g.* NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Health and Medicaid, Feb. 12, 2018 at 473, 529-530; NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Mental Hygiene, Feb. 13, 2018 at 344-346). Numerous legislators shared that concern and sought assurances that the OSA would not permit licensees to increase their sale prices to pass the cost of the surcharge on to pharmacies and consumers (*see e.g.* NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Taxes, Feb. 8, 2018 at 75-77, 80-84, 105-106; NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Health and Medicaid, Feb. 12, 2018 at 117-118, 174-175, 423; NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Mental Hygiene, Feb. 13, 2018 at 158-162, 197-200; NY Assembly Debate on 2018 NY Assembly Bill A9507C, Mar. 30, 2018 at 21-27, 42-45, 51). In response, one of the OSA's sponsors[3] along with spokespersons for the executive branch – such as the

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[1] The record on appeal includes a breadth of documents that are part of the OSA's legislative history. Where available, cites to the publicly-available documents are provided herein.

[2] MME serves as a standardized measurement of the potency of a particular controlled substance, as determined by respondent Department of Health (*see* Public Health Law § 3323 [4] [g]; [4-a] [b]).

[3] As these were budget bills, the Senate and Assembly websites list "no sponsors" for this or the 2019 excise tax bill. However, throughout the hearings, the Chairs of various committees were treated as sponsors, responding to inquiries from other legislators.

Commissioner of Health, the Budget Director and the Deputy Commissioner of Taxation and Finance – assured legislators that the OSA was structured to ensure that the cost of the surcharge would be borne by the manufacturers and distributors of opioids, and not the consumers or local dispensers (*see e.g.* NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Taxes, Feb. 8, 2018 at 75-77, 81-83, 106; NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Health and Medicaid, Feb. 12, 2018 at 117-118, 175-176; NY Joint Legislative Hearing on FY 2018-2019 Executive Budget on Mental Hygiene, Feb. 13, 2018 at 158-161; NY Assembly Debate on 2018 NY Assembly Bill A9507C, Mar. 30, 2018 at 22-25, 42-45). The OSA was signed into law in April 2018.

Set to take effect on July 1, 2018 and expire on June 30, 2024 (*see* L 2018, ch 57, part NN, § 5), the OSA established an opioid stewardship fund comprised of money to be kept in a special revenue account, separate from other money held by the state (*see* State Finance Law § 97-aaaaa [1]-[2]).[4] The stewardship fund was pre-set to a total of $100 million per year, with manufacturers and distributors licensed to sell opioids in the state (hereinafter collectively referred to as licensees) required to pay into the fund based on the market share of the opioids that each licensee sold within the state (hereinafter the ratable share) (*see* Public Health Law § 3323 [1]-[3]). A licensee's ratable share was calculated by determining the total amount of MMEs sold or distributed in the state by that licensee during a given year, dividing that sum by the total MMEs sold or distributed by all licensees in the state during the same year, then multiplying the resulting quotient by $100 million; "[t]he product of such calculation shall be the licensee's ratable share" (Public Health Law § 3323 [5] [a]). This calculation expressly excluded MMEs of opioids sold or distributed to entities operating pursuant to Mental Hygiene Law article 32 (Regulation and Quality Control of Chemical Dependence Services and Compulsive Gambling Services) or Public Health Law article 40 (Hospice), as well as MMEs of buprenorphine, methadone or morphine (*see* Public Health Law § 3323 [5] [b]). The OSA prohibited licensees from "pass[ing] the cost of their ratable share amount to a purchaser, including the ultimate user of the opioid" (hereinafter the pass-through prohibition) (Public Health Law § 3323 [2]), and violations of said prohibition were subject to a

[4] Money held in the stewardship fund would be allocated to support programs operated by the Office of Alcoholism and Substance Abuse Services and other agencies approved to provide such programs (*see* State Finance Law § 97-aaaaa [4]-[7]).

"penalty not to exceed [$1 million] per incident" (Public Health Law § 3323 [10] [c]).[5] The OSA also included a severability clause.[6]

Following legislative enactment of the budget, the Speaker of the Assembly explained that the OSA would fund "heroin and opioid treatment, prevention and recovery services" by requiring licensees to pay their ratable share while "ensur[ing] that the cost is borne by the [licensees], not the consumers" (Speaker of the Assembly, Press Release, Approved SFY 2018-19 Budget to Include Critical Human Services Funding, Apr. 12, 2018, available at https://nyassembly.gov/Press/?sec=story&story=80571 [last accessed May 9, 2024]). The Senate Democratic Conference's report about the enacted budget described the OSA as requiring licensees to pay their ratable share of the $100 million fund, and that licensees "may not pass the cost of their ratable share payment along to the purchaser of the opioid" (Rep of Senate Democratic Conf on the Adopted Budget FY 2018-2019 at 38, available at https://www.nysenate.gov/sites/default/files/article/attachment/2018_adopted_budget_report.pdf [last accessed May 9, 2024]). Similarly, the former Governor asserted that the opioid stewardship fund would help combat "the ongoing and growing costs of prevention, treatment, and recovery services for individuals with a substance abuse disorder" and "ensure[ ] the costs are borne by industry, not by consumers" (Governor, Press Release, Governor Cuomo Announces Highlights of the GY 2019 State Budget, Mar. 30, 2018, https://www.budget.ny.gov/pubs/press/2018/pr-enactfy19.html [last accessed May 9, 2024]).

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[5] The OSA penalized licensees who failed to comply with the OSA's reporting provisions, at a rate of $1,000 per day (*see* Public Health Law § 3323 [10] [a]), and licensees who failed to timely pay their ratable share could be assessed a penalty between 10% and 300% of the unpaid sum (*see* Public Health Law § 3323 [10] [b]). Untimely reporting and untimely payments could also result in the denial of license renewals (*see* Public Health Law § 3316 [1] [c]).

[6] In full, the severability clause states that, "[i]f any clause, sentence, paragraph, subdivision, or section 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, or section directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the [L]egislature that this act would have been enacted even if such invalid provisions had not been included herein" (L 2018, ch 57, part NN, § 4).

Thereafter, a set of plaintiffs brought suit in federal court, challenging the OSA as unconstitutional. The US District Court for the Southern District of New York agreed, finding that the pass-through prohibition violated the Dormant Commerce Clause and that, despite the existence of the severability clause, "the OSA clearly rests on the twin pillars of a surcharge and a pass-through prohibition" such that the remainder of the OSA could not be severed from the unconstitutional pass-through prohibition (*Healthcare Distrib. Alliance v Zucker*, 353 F Supp 3d at 265). Consequently, in December 2018, the District Court invalidated the OSA in its entirety and enjoined the State from enforcing it (*id.* at 265-267). The State appealed the decision.

As that appeal was pending, the Legislature was again faced with enacting the state's annual budget. In another attempt to address the deadly opioid epidemic, the Legislature considered a proposal to impose an excise tax on opioid sales within the state. During the ensuing hearings, various lawmakers took issue with the lack of safeguards to prevent opioid manufacturers and distributors from passing the cost of the excise tax down the supply chain to pharmacies and consumers (*see* NY Assembly Debate on 2019 NY Assembly Bill A2009C, Mar. 31, 2019 at 355-357, 483-484; NY Senate Debate on 2019 NY Senate Bill S1509C, Mar. 31, 2019 at 2564-2565, 2571-2580, 2770-2771). The sponsors in each legislative chamber explained that, due to the legal landscape caused by the District Court decision, the 2019 opioid tax bill (*see* L 2019, ch 59, part XX) pivoted in a number of ways from the OSA, including implementing a more traditional excise tax, abandoning the pass-through prohibition and comingling the proceeds of the excise tax with the state's general funds (*see* NY Assembly Debate on 2019 NY Assembly Bill A2009C, Mar. 31, 2019 at 355-356; NY Senate Debate on 2019 NY Senate Bill S1509C, Mar. 31, 2019 at 2564-2565, 2571-2580). The resulting legislation "sunset" the OSA, limiting its application to opioids sold or distributed in the state on or before December 31, 2018 (NY Assembly Debate on 2019 NY Assembly Bill A2009C, Mar. 31, 2019 at 355; *see* L 2019, ch 59, part XX, § 5). In its place, the 2019 opioid tax bill imposed an excise tax on the first sale of an opioid in the state at a rate of $0.0025 per MME where the manufacturer's list price for a single opioid unit is less than $0.50 and at a rate of $0.015 per MME where the list price is $0.50 or more per opioid unit (*see* Tax Law §§ 497 [a]-[g]; 498 [a]). Like the OSA, the excise tax would not apply to the chemical compounds of buprenorphine, methadone or morphine (*see* Tax Law § 497 [a]) or to the sale of opioids to entities operating pursuant to Mental Hygiene Law article 32 (Regulation and Quality Control of Chemical Dependence Services and Compulsive Gambling Services) or Public Health Law article 40 (Hospice) (*see* Tax Law § 498 [a]). The excise tax was set to take effect on July 1, 2019 (*see* L 2019, ch 59, part XX, § 6); it

did not include a severability clause or any prohibition against passing the cost of the excise tax down the chain of commerce.

In pursuing its appeal from the District Court's decision, the State expressly abandoned any argument relating to the District Court's invalidation of the pass-through prohibition. Rather, it argued that the OSA was a tax and, thus, the Tax Injunction Act (*see* 28 USC § 1341) deprived the District Court of jurisdiction over the action. The US Court of Appeals for the Second Circuit agreed with that position (*see Association for Accessible Medicines v James*, 974 F3d 216, 227 [2d Cir 2020], *cert denied* ___ US ___, 142 S Ct 87 [2021]). Consequently, it reversed the District Court's decision invalidating the OSA and enjoining the State from enforcing it but left in place the portion of the decision which invalidated the pass-through provision, as the state had not sought reversal of such (*id.* at 228).[7]

We recognize that the question of severability presents a close call here, as "the inclusion of [a severability] clause creates a presumption that [the Legislature] did not intend the validity of the [OSA] to depend on the validity of the constitutionally offensive" pass-through prohibition (*Alaska Airlines, Inc. v Brock*, 480 US 678, 686 [1987]; *see Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d 88, 94 [1989]). However, as the OSA, the 2019 opioid tax bill and their collective legislative histories present strong evidence that the Legislature intended otherwise (*see Alaska Airlines, Inc. v Brock*, 480 US at 686; *People v Taylor*, 9 NY3d 129, 154 [2007]; *Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d at 94), we would find that severing the pass-through prohibition and giving effect to the remainder of the OSA is not appropriate.

The majority "conclude[s] that the primary purpose of the opioid stewardship payment is to raise revenue for the treatment and prevention of opioid addiction" (majority op at 5). However, this is an incomplete expression of the Legislature's dual intent, articulated throughout the budget hearings and reaffirmed through various reports and press releases setting forth the purpose of the OSA. While true that the Legislature

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[7] Following this decision, a senior advisor for the former Governor commended the Second Circuit, noting that, " '[s]ince the beginning we've been seeking to hold these huge corporations accountable for the opioid crisis that they helped create and fuel' " (Dan Clark, *Cuomo's Opioid Tax Revived by Federal Appeals Court*, New York Now From WMHT, Sept. 14, 2020, available at https://nynow.wmht.org/blogs/health/cuomos-opioid-tax-revived-by-federal-appeals-court/ [last accessed May 9, 2024]).

intended to establish the opioid stewardship fund to rapidly raise revenue to address the opioid epidemic, the record reveals that the Legislature equally sought to ensure that said fund would be subsidized by the licensees and, expressly, not by consumers or local pharmacies dispensing opioids. Such intent is further apparent from the rejected first draft of the OSA, which utilized a prospective $0.02/MME surcharge and included some language prohibiting passing the cost down to the consumer but was devoid of any penalty language. Instead, to effectuate its dual purpose, the Legislature created the $100 million stewardship fund and required licensees to pay their ratable shares into said fund, while prohibiting licensees from passing such cost down the chain of commerce and making a violation of such prohibition punishable by a hefty penalty of up to $1 million. Critically, since the first draft featuring a weak pass-through prohibition failed to pass, it stands to reason that the lawmakers never would have enacted a version of the OSA without a strong pass-through prohibition, the exact provision now argued to be severable. As severing the pass-through prohibition would result in a "law the Legislature would not have intended, the entire [OSA] must be stricken" (*Matter of Hynes v Tomei*, 92 NY2d at 627).

Additionally, contrary to the majority's characterization of the 2019 opioid tax bill as an amendment to the OSA, the 2019 legislation was a new law. In the shadow of the District Court's decision, the Legislature could have simply exscinded the pass-through prohibition from the OSA, thereby rebuffing that court's characterization of the surcharge and the pass-through prohibition as "twin pillars" that were so inextricably intertwined that they could not be severed (*Healthcare Distrib. Alliance v Zucker*, 353 F Supp 3d at 265). Instead, the Legislature "sunset" the OSA, making it applicable only to opioids sold in 2017 and 2018 (NY Assembly Debate on 2019 NY Assembly Bill A2009C, Mar. 31, 2019 at 355; *see* L 2019, ch 59, part XX, § 5), and abandoned the retrospective formula involved in calculating the ratable share due from each licensee, replacing it with a simple, prospectively-calculated excise tax upon the first sale of opioids into the state (*compare* Public Health Law § 3323 [5] [a], *with* Tax Law § 498 [a]). The OSA surcharge and the 2019 excise tax present two vastly different taxing structures and reflect differing legislative priorities. In 2018, the Legislature enacted the OSA and implemented a retrospective surcharge which lawmakers were assured could not be passed down to consumers, lest a licensee become subject to significant penalties; then, in 2019, the Legislature enacted a simple excise tax and accepted that consumers would likely pay the cost of such tax. In our view, severing the pass-through prohibition from the OSA would result in a taxing structure the cost of which would be borne by the very people that the Legislature intended to insulate therefrom. As this "would result in a misshapen fragment of the original [act] drafted by a court's impermissible use of a

legislative pen" (*People v Taylor*, 9 NY3d at 154 [internal quotation marks and citation omitted]; *see City of New York v Patrolmen's Benevolent Assn. of City of N.Y.*, 89 NY2d 380, 394 [1996]; *Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d at 94; *compare People v On Sight Mobile Opticians*, 24 NY3d at 1110), we would reverse the order on appeal, find that the remainder of the OSA is not severable from the invalidated provision and grant summary judgment in plaintiffs' favor.

Although the foregoing position obviates the need to address the retroactive application of the OSA, we also write to express concern over the majority's rationale for finding that applying the OSA to 2017 violates plaintiffs' due process rights. "The important factors in determining whether a retroactive tax transgresses the constitutional limitation are (1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness of reliance on the old law,' (2) 'the length of the retroactive period,' and (3) 'the public purpose for retroactive application' " (*James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 246 [2013] [ellipsis omitted], quoting *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d 451, 456 [1987], *appeal dismissed* 485 US 950 [1988]). Importantly, this is not an exacting burden but merely requires a "showing that the retroactive application of the legislation is itself justified by a rational legislative purpose" (*United States v Carlton*, 512 US 26, 31 [1994] [internal quotation marks and citation omitted]; *accord Caprio v New York State Dept. of Taxation & Fin.*, 25 NY3d 744, 752 [2015]). Briefly, as to 2018, we agree with the majority that plaintiffs lacked forewarning of the OSA during the first four months of the year, but that, ultimately, such short period of retroactivity did not violate plaintiffs' due process rights, as retroactive application was "amply justified by a rational legislative purpose – to quickly raise revenue to fund treatment and prevention programs for opioid addiction" (majority op at 7).

As to 2017, we again agree with the majority's conclusion that plaintiffs lacked forewarning of the OSA. Although retroactive application to 2017 presents a longer, 16-month period of retroactivity, this is not a case where "the [s]tate fail[ed] to set forth a valid public purpose for the retroactive application" or lacked "an important public purpose to make the law retroactive" (*James Sq. Assoc. LP v Mullen*, 21 NY3d at 249). Rather, the same purpose that the majority finds justifies retroactive application to all of 2018 serves as a rational legislative purpose justifying retroactive application of the OSA to 2017. Retroactivity was also "integral to full achievement of the fundamental purpose of the legislation" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 378 [2020]), as retroactive application to 2017

would ensure that the opioid stewardship fund would receive its first influx of money in January 2019; limiting retroactivity to 2018 would delay such influx until January 2020, severely delaying the state's efforts to alleviate the lethal effects of the opioid crisis. The Legislature also required that the opioid stewardship fund be kept separate from the state's general funds (*see* State Finance Law § 97-aaaaa [1]-[2]), highlighting the state's important legislative purpose to ensure that the money collected from licensees would be used for the intended goal. As retroactive application of tax legislation to the year preceding its passage is often considered acceptable (*see United States v Darusmont*, 449 US 292, 296-298 [1981]; *Matter of Chrysler Props. v Morris*, 23 NY2d 515, 519, 521 n [1969]), we disagree with the majority's determination that retroactive application of the OSA to 2017 violates plaintiffs' due process rights (*see United States v Carlton*, 512 US at 32-35).

Pritzker, J., concurs.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as found the Opioid Stewardship Act to be constitutional in its entirety; that aspect of the Act pertaining to 2017 is hereby declared invalid; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court