

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EBY-BROWN COMPANY LLC,

Plaintiff,

OPINION AND
ORDER

00-C-0718-C

v.

WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER
PROTECTION and its SECRETARY,
JAMES HARSDORF,

Defendants.

This is a civil action for declaratory and injunctive relief. Eby-Brown Company LLC challenges Wisconsin's Unfair Sales Act, Wis. Stat. § 100.30, which regulates the minimum price that distributors and retailers can charge for specified products, including cigarettes. It is seeking a declaration that the act is unconstitutional under the commerce clause and the due process and equal protection clauses of the Fourteenth Amendment. In addition, plaintiff seeks to enjoin defendants Wisconsin Department of Agriculture, Trade and Consumer Protection, and its Secretary, James Harsdorf, from enforcing the act.

Presently before this court is plaintiff's motion to strike or, in the alternative, respond

to the amicus curiae brief in support of defendants' motion for summary judgment and in opposition to plaintiff's motion for summary judgment submitted by the Wisconsin Association of Distributors, Inc.

Because I find that the amicus brief should be considered and that plaintiff should be given an opportunity to respond to the amicus brief submitted by Wisconsin Association of Distributors, plaintiff may have until November 2, 2001, to respond.

BACKGROUND

Plaintiff Eby-Brown Company is a Delaware company engaged in the business of wholesale distribution of tobacco products, food products and miscellaneous sundry items. Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection is the entity authorized to enforce the provisions of the Unfair Sales Act pursuant to Wis. Stat. § 93.07. Wisconsin Association of Distributors, Inc. is a trade organization of which plaintiff is a member.

On March 30, 2001, this court entered an order prohibiting Wisconsin Association of Distributors from intervening in this cause of action, but allowing it to file an amicus curiae brief.

On October 9, 2001, Wisconsin Association of Distributors filed an amicus curiae brief in support of defendants' motion for summary judgment and in opposition to plaintiff's

motion for summary judgment.

OPINION

Plaintiff argues that the timing of the filing of Wisconsin Association of Distributors' amicus brief prohibits any rebuttal by plaintiff. Plaintiff contends that Wisconsin Association of Distributors should have either sought leave to file from this court or followed Fed. R. App. P. 29(e), which states that an amicus brief should be filed "not later than 7 days after the principal brief of the part being supported is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer."

Rather than strike the amicus brief, I will give plaintiff an opportunity to respond to it. Plaintiff may have until November 2, 2001, to respond. In addition, because plaintiff and defendants each have a motion for summary judgment pending before this court, the December 3, 2001 trial date will be cancelled and re-scheduled if the pending motions have been decided and any issues remain to be tried.

ORDER

IT IS ORDERED that

1. Plaintiff Eby-Brown Company LLC's motion to strike is DENIED; its alternative motion to respond to the amicus curiae brief submitted by the Wisconsin Association of

Distributors, Inc. in support of defendants' motion for summary judgment and in opposition to plaintiff's motion for summary judgment is GRANTED; plaintiff may have until November 2, 2001, to respond. There will be no reply brief; and

2. The trial date of December 3, 2001, is cancelled.

Entered this 24th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge