Preemption and Tobacco Control: Latest Tales from the Field

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• Covering public health policy topics related to tobacco control

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The Tobacco Control Legal Consortium

A national legal network supporting tobacco control policy change.
Preemption 101
Maggie Mahoney
Tobacco Control Legal Consortium

Federal Preemption
Micah Berman
The Ohio State University

State Preemption
Kathleen Hoke
Legal Resource Center for Public Health Policy
Preemption

“Higher” level of government:

• By legislative or regulatory action

• Eliminates or reduces the authority of a “lower” level of government

• Concerning a particular issue
Preemption
“State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.”

May 2009
- Ease of public comprehension
- Cost efficiencies
- Efficiencies of effort
- Some kind of standard in all places is better than no standard at all in some?
• Innovation
• Progress
• Accountability
• Movement building capacity
Preemption in Tobacco Control

• “NEVER AGREE TO PREEMPTION. If you are working on a law at the state or county level, the opposition may try to add a preemption provision to your language. Preemption is unacceptable and should be avoided at all costs.” ACS, AHA, ALA, APHA, ANR et al. Fundamentals of Smokefree Workplace Laws, 2009.

• “The AHA opposes federal preemption of state and local statutes and state preemption of local statutes..”

• “Based on solid research findings, state attorneys general and other experts have recommended that any effort to reduce youth access to tobacco products include the following key elements: ... No preemption of local ordinances.” CTFK
“While we’re not married to any particular form of preemption language, we’re dead serious about achieving preemption in all 50 states.”

– Philip Morris
Federal Preemption in Tobacco Control: New World, New Challenges

The Tobacco Control Legal Consortium

Micah Berman, JD
Preemption

Federal Government

↓

State Government

↓

Local Government
Before 2009

Preempted:
Product Labeling/Warnings
Advertising and Promotion

Not Preempted:
Everything Else
Federal Cigarette Labeling and Advertising Act (FCLAA)

15 U.S.C. 1334(b):

“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.”
Lorillard v. Reilly (2001)
“The Congress finds…State governments have lacked the legal and regulatory authority. . . they need to address comprehensively the public health and societal problems caused by the use of tobacco products.”
15 U.S.C. 1334(c):

“Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health . . . imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.”
FCLAA After 2009

Preempted:
Product Labeling/Warnings
Advertising and Promotion – content only

Not Preempted:
Advertising and Promotion – time, place, and manner restrictions
FSPTCA Preemption

Preempted:
- Tobacco product standards
- Premarket review
- Manufacturing practices
- Labeling
- Registration
FSPTCA Preemption

NOT Preempted:
Sales/distribution restrictions
Youth possession
Use restrictions (smoke-free laws)
Fire-safety standards for products
Taxation
“There is creative reading as well as creative writing.”

- Ralph Waldo Emerson
23-34 94th St. Grocery v. New York City Board of Health (2nd Cir. 2012)
NATO v. Providence (1st Cir. 2013)
US Smokeless Tobacco v. New York (2nd Cir. 2013)
NATO v. Providence (1st Cir. 2013)
Final Thoughts

• Tobacco industry will continue to make preemption arguments – even when they seem weak.

• LOTS of unsettled issues in new post-TCA environment.

• Time/place/manner restrictions permitted, but still not sure what that means.

• Frame restrictions as *sales* restrictions, not advertising restrictions where possible.
Thanks!

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PREEMPTION IN TOBACCO CONTROL
Beware:
State Preemption May Restrict Local Action

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August 13, 2013
“[A]ll public health is local—it’s got to start and be sustained at the local level.”

Howard Koh, Assistant Secretary for Health and Human Services

Weight of the Nation: CDC’s Inaugural Conference on Obesity Prevention and Control
Washington, DC; July 28, 2009.
Healthy People 2020

- Tobacco Use Objective 16:
  - Eliminate State laws that preempt stronger local tobacco control laws.
    - Specifically in the areas of clean indoor air, advertising and youth access.
  - Per the CDC: “[N]o progress has been achieved in the past decade [2000–2010] in reducing the number of states with laws preempting local restrictions on tobacco advertising and youth access to tobacco products. This situation contrasts with the significant strides made in reducing the number of states preemting local smoking restrictions.”
Role of State Preemption in Tobacco Control

- Clean Indoor Air Laws:
  - A Tale of Two Approaches
    - Express Preemption—Full and Limited Scope
    - Express Anti–Preemption/Savings Clause
Example of Express Preemption in Clean Indoor Air Acts

- **Broad Express Preemption—South Dakota:**
  
  *The Legislature is the exclusive regulator of all matters relating to the use of tobacco products. Nothing prohibits a person or a public entity from voluntarily regulating the use of tobacco products on the person's or entity's property.*

  - Passed in 1995 to curtail local efforts to restrict smoking in public places and workplaces. A statewide Clean Indoor Air Law was not passed until 2009 as a result of a ballot initiative. Preemption remains valid.
Example of Express Preemption in Clean Indoor Air Acts

- Limited Express Preemption—Nebraska
  - No county resolution or city ordinance that prohibits smoking in indoor areas shall apply to cigar bars.
  - Cigar bars are exempt from the Nebraska Clean Indoor Air Act; this provision makes clear that local jurisdictions are prohibited from including cigar bars in local clean indoor air laws.
Example of Express Preemption in Clean Indoor Air Acts

- Anti–Preemption/Savings Clause—Maryland

- Nothing in this subtitle shall be construed to preempt a county or municipal government from enacting and enforcing more stringent measures to reduce involuntary exposure to environmental tobacco smoke.

  - For example, Maryland local governments may prohibit smoking in tobacconist establishments that are exempt from the State’s Clean Indoor Air Act.
Express Preemption Language to Look Out For

*Preemption* is the most obvious! But also keep an eye out for:

- *Supersede*
- *Shall be consistent with state law*
- *Uniform state standard*
- *Exclusive*
- *Occupy the field*

Helpful resource with more examples of language to watch for:

Implied Preemption in Tobacco Control: Snake in the Grass

- Implied preemption may be tougher to prevent than express, particularly when it is based on “field occupation” or the notion that the state has so thoroughly regulated a field, there is no room for local regulation.

- This is why anti-preemption/savings clauses are important in most, if not all, state tobacco control laws (or any state public health law).
Implied Preemption: Local Cigar Packaging Laws in Maryland

- 2009: Prince George’s County, Maryland, passed a local ordinance imposing a minimum pack size of 5 for cigars, exempting premium products and those sold by tobacconists. There was no Maryland law regulating cigar pack size.

- Industry filed suit challenging the law on a variety of bases, including that state law preempts such a local regulation.
2010: Circuit Court (trial court) ruled in favor of County.

2011: Case heard before the Maryland Court of Appeals (highest court). Attorney General and local health departments filed amicus briefs in support of County.

2013: Court of Appeals reverses Circuit Court, finding that the local ordinance is preempted by state law.
Circuit Court: A “hodgepodge” of state laws regulating the sale of tobacco products is not evidence that the state intends to preempt all local tobacco regulation.

Court of Appeals: “[W]e hold that state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field.”
Basis for the Court of Appeals’ Decision:

- State law passed in 2010 (after the PG County ordinance) that imposes licensing requirements on OTP sellers, modeled after the cigarette licensing scheme.
  
  - *Here’s the rub:* Public health advocates worked to help the Comptroller get this legislation passed to close a loophole. The Comptroller did not intend this regulatory provision to have a negative impact on local public health powers.
  
  - Court also used previous public health efforts to secure a statewide bill as evidence of preemption—even though all of those bills failed.
Public health officials and advocates could have requested an anti-preemption/savings clause provision in the 2010 OTP licensing legislation as well as in the previous (unsuccessful) statewide cigar packaging bills.

- This is a consideration that should be given to any state public health legislation, even the bills that public health officials and advocates support!
Potential Responses in Maryland

- Secure a statewide cigar packaging restriction.

- Secure legislation specifically overturning the Court of Appeals decision.
  - Because the Court determined that the legislature intended to preempt local cigar packaging laws, the legislature has control to reverse the decision by making clear its intent to NOT preempt.
Secure an anti-preemption/savings clause provision that more broadly addresses the preemption issue by making clear that unless expressly preempted, local home rule governments have power to regulate the sale and distribution of tobacco products.

- The advantage of this approach is that it would address preemption more broadly and not just impact the cigar packaging issue.
Express Anti-Preemption/Savings Clause Language

- Be careful to use broad language.
- Compare:
  - Nothing in this statute shall be construed to limit a local jurisdiction from regulating tobacco products.
    - This is broad and cuts against any field occupation argument.
  - Nothing in this statute shall be construed to limit a local jurisdiction from prohibiting the sale of menthol cigarettes.
    - This is more narrow; it is only “saving” local authority to prohibit the sale of menthol cigarettes; perhaps a court would construe that to mean that there are other local restrictions that are preempted.
The Courts will be Courts Caveat

- Any express preemption or anti-preemption/savings clause may be subject to court interpretation. And the result may surprise you.
The Courts will be Courts Caveat

This is a provision in the California Penal Code that prohibits the sale of tobacco to minors:

- *It is the Legislature’s intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section.*

Would this provision prohibit a local jurisdiction from passing an ordinance prohibiting the sale of cigarettes via vending machine? Or a local ordinance establishing a tobacco retailer licensing scheme?
A California court upheld both local ordinances upon challenges based on preemption.

- Critical to the decision was the use of the word “inconsistent.”
- Court’s determination of the scope of the state law was also important.
We are not alone . . .

- Preemption is an issue for any public health measure, from gun control to food safety to pesticide use and any other measure.

- A “Sister” Success Story:
  - City of Cleveland passed an ordinance prohibiting restaurants from preparing food in oils containing trans fat.
  - Shortly after, the Ohio legislature passed a budget bill that included a provision preempting local authority to regulate the content of food served at restaurants (at the behest of the Ohio Restaurant Association).
  - Cleveland sued Ohio . . . and won!
“[W]e conclude R.C. 3717.53 is not a general law because it is not part of a comprehensive, statewide legislative enactment; does not operate uniformly throughout the state; does not set forth police regulations but simply purports to limit municipal legislative power and does not prescribe a rule of conduct upon citizens generally. We, therefore, conclude that R.C. 3717.53 unconstitutionally limits a municipality’s home rule police powers.”
Lessons Learned

- Be vigilant in looking for express preemption.

- Be demanding about asking for an anti-preemption/savings clause—and write a good one!

- If you live under preemption and it is limiting local power to make positive change, strike back however possible, via public opinion, legislative change or the judicial system.
P.S. Is preemption ever a good thing?

- There are issues perhaps better addressed at the national level than by a hodgepodge of state and local laws. For example, federal law regulates the content and appearance of food product labels.

- *Sometimes* a decent, if not perfect, state law with preemption is better than a poor state law with preemption. Situational analysis is required (and hard) to determine when these situations arise. This is often an issue that advocates should consider before engaging in the advocacy process; know where your team’s lines in the sand are.
Excellent overview of preemption in public health, including a framework for public health officials and advocates who are working to prevent or repeal preemption:


- The article and a simple version of the framework is available through TCLC at: http://publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health
The End.

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Make the day great!
Preemption in Public Health

Overview

Why is “preemption” so significant in public health law? The concept itself is fairly simple.

Preemption occurs when, by legislative or regulatory action, a “higher” level of government (state or federal) eliminates or reduces the authority of a “lower” level over a given issue. *Express* preemption occurs when a law contains a preemption clause or other explicit preemptive language. *Implied* preemption happens when a court finds that a law is preemptive even in the absence of an express preemption clause. The only way to guarantee that a federal or state law will not preempt state or local laws is to include a non-preemption clause (also known as a savings clause). For example, a federal law might state: “Nothing in this law preempts more restrictive state or local regulation or requirements.”

The federal government has very broad authority to preempt. Under the Supremacy Clause of the U.S. Constitution, Congress and federal regulators have virtually unlimited authority — if they choose to exercise it — to preempt state and local health laws. Similarly, states almost always have broad authority to preempt local laws. The ways in which municipal powers are granted or revoked may depend on whether the municipality
Resources

Preemption

What it is, how it works, and why it matters for public health

2009

Preemption & Movement Building in Public Health

Essentials of Preemption

- Preemption occurs when a legislative or regulatory action, a "super" level of governance, is used to preempt or overrule actions of a "subordinate" level of governance. When preemption affects public health, there are often legal, financial, and ethical implications that must be considered.

- In the case of preemption in public health, it is important to consider the potential implications for public health policy and practice. Preemption can create inconsistencies in public health standards and regulations, which can have significant consequences for public health outcomes.

- Public health professionals and stakeholders must be aware of the potential implications of preemption and work to prevent or mitigate its effects.

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Questions Now?
• Q&A panel on your screen

Questions Later?
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