



UNIVERSITY of MARYLAND
FRANCIS KING CAREY
SCHOOL OF LAW
LEGAL RESOURCE CENTER
FOR PUBLIC HEALTH POLICY

Federal Preemption and Tobacco Control

Brooke Torton, J.D.

March 23rd, 2017

Disclaimer

The Legal Resource Center for Public Health Policy provides information and technical assistance on issues related to public health in Maryland. The legal information and assistance does not constitute legal advice or legal representation. For legal advice, one should consult a lawyer licensed to practice law in their state.

Recap and Roadmap

1. History and explanation of relevant federal statutes related to tobacco law;
2. A description of specific areas preempted by federal statute; and
3. The court's interpretation of preemption and specific examples.

Major Federal Tobacco Laws

- ▶ Federal Cigarette Labeling and Advertising Act (1965)
- ▶ Public Health Cigarette Smoking Act (1969)
- ▶ Comprehensive Smokeless Tobacco Health Education Act (1986)
- ▶ Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act (1992)
- ▶ Family Smoking Prevention and Tobacco Control Act (2009)

Federal Preemption and Tobacco Control: A History

- ▶ In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (FCLAA). **15 U.S.C. § 1334.**
- ▶ The Act preempted states and locals from enacting law related to advertising or promotion of cigarettes as it relates to purposes of smoking and health.

Family Smoking Prevention Tobacco Control Act (TCA)

- ▶ In 2009, Congress found that **state governments have lacked the legal and regulatory authority to comprehensively address the public health and societal problems caused by tobacco products.**
- ▶ In response, President Obama signed the **Family Smoking Prevention Tobacco Control Act (TCA), 21 U.S.C. §301**

Preemption Language in TCA

- ▶ No State...may establish...any requirement...relating to:
 - (1) tobacco product standards
 - (2) premarket review
 - (3) adulteration
 - (4) misbranding
 - (5) labeling
 - (6) registration
 - (6) good manufacturing standards; or
 - (7) modified risk tobacco products

FCLAA Amended by TCA

- ▶ *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**.

Minimum Standards Established by the TCA

- ▶ Tobacco Control Act includes language stating that the Act does NOT preempt enacting more stringent law related to:
 - ▶ (1) tobacco sales and distribution restrictions
 - ▶ (2) youth possession restrictions
 - ▶ (3) use restrictions (typically, smoke-free laws)
 - ▶ (4) fire safety standards for products; or
 - ▶ (5) taxes on tobacco products

23–34 94th St. Grocery v. N.Y.C. Board of Health (2012)

- NYC Board of Health Resolution required tobacco retailers to post signs that **graphically depicted the adverse health effects of tobacco, wherever sold.**
- **Opponents argued** preemption by FCLAA.
- **Court held:** Preemption by FCLAA because this was a content restriction on advertisements related to health.

685 F.3d 174 (2d Cir. 2012)

U.S. Smokeless Tobacco Mfg. Co. LLC v. City of N.Y.

- **NYC enacted an ordinance** prohibiting the sale of flavored, non-cigarette tobacco products in all places within the city.
- **Opponents argued** the TCA preempted the ordinance because it set a tobacco product standard .
- **Court held:** This is a sales restriction, and not product standard. It is not preempted by the TCA.

708 F.3d 428 (2d Cir. 2013)

National Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.

- **Providence, Rhode Island enacted 2 ordinances:** (1) Prohibited the redemption of coupons; and (2) Prohibited the sale of flavored non-cigarette tobacco product
- **Opponents argued** that the coupon restriction was a cigarette promotion (in violation of FCLAA) and that the flavored product restriction set a product standard (in violation of TCA).
- **Court held:** Neither preempted by federal law. The Coupon restriction was a permissible time, place and manner restriction and the flavor restriction was a permissible sales restriction.

731 F.3d 71 (1st Cir. 2013)

Nat'l Ass'n of Tobacco Outlets, Inc. v. City of N.Y.

- ▶ **NYC enacted an ordinance** regulating the tobacco industry's use of promotional pricing strategies.
- ▶ **Opponents argued** it violated 1st amendment rights and was preempted by FCLAA as a content restriction.
- ▶ **Court held:** that it did not violate first amendment rights and was NOT preempted by FCLAA.

27 F. Supp. 3d 415 (S.D.N.Y. 2014)

Indeps. Gas & Serv. Stations Associations, Inc. v. City of Chicago

- ▶ **Chicago City Council** enacted an ordinance prohibiting sale of flavored tobacco products within 500 feet of city schools.
- ▶ **Opponents argued** this was a preempted product standard disguised as a sales restriction.
- ▶ **Court held:** This was a sales restriction, and not preempted.

112 F. Supp. 3d 749 (N.D. Ill. 2015)

The “Deeming” Rule

- **Doesn’t change federal preemption** landscape, but incorporates new products into current federal scheme.
- **Encourages** state and local **regulation.**
- **Reminder: States and locals cannot enforce federal law!**

What CAN’T States/Locals do?

- **FCCLA**
 - May not regulate the content of cigarette advertisements and promotions.
 - May not require tobacco retailers to post signs that graphically depicted the adverse health effects of tobacco.
- **TCA**
 - May not regulate tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards or modified risk tobacco products

What CAN States/Locals do?

▶ **TCLAA**

- May place bans or restrictions on the time, place and manner of cigarette advertisements and promotions.
- May impose content neutral, coupon restrictions.
- May enact pricing restrictions.

▶ **TCA**

- May enact more stringent laws related to sales/distribution, youth possession, use restrictions (smoke-free laws), fire-safety standards for products and taxation.
- May impose sales restrictions related to tobacco products.

Contact Information

- ▶ **Email:** btorton@law.umaryland.edu
- ▶ **Phone:** (410) 706-5993