



COURTROOM BRIEFS is written by The Troutman Sanders Tobacco Team, part of the international law firm with offices in the U.S. and China.

Ashley L. Taylor, the Practice Group Leader, can be reached at 804-697-1286 or Ashley.taylor@troutmansanders.com.

A CIVICS LESSON: FEDERAL PREEMPTION OF STATE AND LOCAL TOBACCO REGULATIONS

Do you remember your Civics classes? Those typical courses covered events from the Founding of the Republic to relatively modern events, but also a good deal of focus was on the Constitution. As you have moved into your role in our representative democracy, how many of you deal with constitutional issues in your work? The answer is – all of you.

Laws are what regulate our daily business lives, but they can be often taken for granted and overlooked. In the tobacco industry alone there are legion laws, ranging from the federal level to local municipalities. One area of law that should not be taken for granted or overlooked is how the federal and state governments interact. Where the two conflict, the constitutional doctrine of preemption comes into play.

This article discusses preemption under the Supremacy Clause of the United States Constitution, which states that the Constitution is the “supreme law of the land”, and how it relates to the recent Family Smoking Prevention and Tobacco Control Act (FSPTCA) of 2009, which gave the Food and Drug Administration (FDA) the authority to regulate tobacco products, and provides insight into potential federal law preemption of state and local legislative efforts to regulate tobacco products.

Federal Preemption of State Laws

Businesses are subject to regulation at several levels of government – the federal government, State government and sometimes units of local government. Each is a distinct sovereign entity in their respective spheres, and their regulation often works in harmony. Conduct subject to federal regulatory requirements is often subject to state and local regulatory standards; however, this also creates the possibility of conflict, which the doctrine of preemption addresses to determine how the two can coexist.

Express Preemption: The Family Smoking Prevention and Tobacco Control Act

A current example of express preemption is demonstrated in the FSPTCA, which was signed into law by President Barack Obama on June 22, 2009. The Act gives the FDA the power to regulate the tobacco industry, and requires tobacco companies to seek FDA approval for new tobacco products. Another signature element of the law imposes new warnings

and labels on tobacco packaging and their advertisements, with the intent of discouraging minors from smoking. The Act also bans flavored cigarettes, as well as places limits on the advertising of tobacco products.

Tobacco retailers and manufacturers have used the FSPTCA to challenge on preemption grounds restrictions by local governments on the sale of tobacco products. In a federal court case decided at the end of 2011, manufacturers and distributors of smokeless tobacco unsuccessfully challenged a New York City ordinance that restricted the sale of flavored tobacco products on the ground that the FSPTCA preempted the ordinance. In that case, styled *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, New York City passed an ordinance making it “unlawful for any person to sell or offer to sell any flavored tobacco product, except in a tobacco bar.” The tobacco retailers and manufacturers argued the ordinance was, in effect, regulating the manufacture of a class of tobacco products. In contrast, New York City argued the ordinance was a permissible restriction on the sale of a class of tobacco products. The court sided with New York City, finding that the ordinance was not expressly preempted because the only restriction that the FSPTCA placed on flavored tobacco was on the manufacturing of flavored cigarettes, and the city ordinance merely regulated the sale of flavored tobacco products.

The New York City case highlights that the FSPTCA reserves the authority for state and local governments the right to pass restrictions on the time, place and manner of tobacco sales. Any state or local regulations that reach beyond that limited zone into areas of tobacco standards, labeling requirements, and the tobacco manufacturing processes will be preempted. ^{TR}

