



Federal Preemption of Stronger State Consumer and Public Health Protections: Examples of Upcoming Battles

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States have long been the laboratories for innovative public policy, particularly on environmental and consumer protection issues. Over the last three decades, states have become more active in passing strong laws to protect the health, safety, and financial well-being of their residents. This state initiative has given rise to a disturbing and growing trend: the increasing willingness of the federal government to establish weak federal laws that preempt the right of states to enact stronger laws to safeguard their citizens.

Just in the last few years, we have seen the federal government trump state laws on issues ranging from privacy to prescription drugs to air pollution, always with negative consequences for the public interest. Unfortunately, these actions only set a precedent for the battles to come. Below are just a few of the areas where Congress and the Bush administration are likely to push for federal preemption of more protective state laws in the coming months.

Consumer Safeguards

PRIVACY

In 2003, Congress enacted the Fair and Accurate Credit Transactions Act (FACTA). Congress passed this legislation not to address rising identity theft but to satisfy industry's desire to both expand and make permanent expiring limits on state authority to enact stronger privacy and identity theft laws. Similarly, in 2003, Congress passed the CAN-SPAM Act. This weak legislation, according to the Electronic Privacy Information Center, allows every spammer in the world to send every Internet user at least one message. The Act preempts more stringent state laws, thereby eliminating stronger protections against spam in many states, including individual rights of action against spammers and a California opt-in spam law that would have taken effect on January 1, 2004. Several new battles are on the horizon; the next fight likely will be over responses to the ChoicePoint debacle.

Response to the ChoicePoint Debacle. In February 2005, consumers learned that a fraud ring had stolen the personal and financial information of an estimated 145,000 consumers from computer databases maintained by ChoicePoint, Inc. Consumer groups have long urged lawmakers to give consumers the right to lock up their credit files with a security freeze and to require companies to notify consumers when sensitive customer information has been compromised. Currently, California is the only state that requires consumer notification when security breaches occur. In fact, the only reason consumers across the country learned about the identity theft was because of California's strong law; federal protections were not adequate to protect these victims. Legislators in more than a dozen states have proposed security breach

notification laws, security freezes (already law in California, Texas, Louisiana and Vermont), and other protections in response to the ChoicePoint case and other recent security breaches. Unfortunately, bank regulators already have issued a regulatory guidance that is weaker than the California law; it allows regulated banks, thrifts and credit unions discretion to determine whether misuse will occur before deciding whether consumer notification is necessary. Congress is likely to debate federal legislation that would set a weak standard for consumer notification while preempting the right of states to do more to protect their consumers' privacy.

Financial Privacy. The Ninth Circuit U.S. Court of Appeals heard oral arguments in the fall of 2004 and could decide any day on the fate of financial privacy legislation, SB 1 (State Senator Jackie Speier), enacted in California in 2003 and upheld by a lower federal court. The issue before the court is whether the Gramm-Leach-Bliley Financial Services Act of 1999 (GLBA), one of the few recent pro-state financial privacy laws, allows states to apply stronger financial privacy laws to sharing of confidential information among corporate affiliates or only to sharing with third parties. The American Bankers Association's appeal argues that the GLBA cross-reference to the more preemptive Fair Credit Reporting Act limits California's authority to enact stronger state laws only to third parties, not affiliates. Every federal banking regulator and the Federal Trade Commission signed a brief supporting the banks' appeal.

The Consumer Privacy Protection Act. On March 10, 2005, Representative Cliff Stearns (R-FL) introduced the Consumer Privacy Protection Act, legislation to provide consumers with weak privacy rights in all commercial transactions, such as Internet transactions, where their privacy rights have not been previously described by any other law. This bill would provide for a notice and opt-out in these transactions but would preempt "any statutory law, common law, rule, or regulation of a State, or a political subdivision of a State, to the extent such law, rule, or regulation relates to or affects the collection, use, sale, disclosure, retention, or dissemination of personally identifiable information in commerce. No State, or political subdivision of a State, may take any action to enforce this title." If enacted, its information security provisions could be construed to preempt state security breach notification laws, even though it does not require breach notification.

PREDATORY LENDING

Mortgage Lending. Predatory lenders often target low-income and cash-strapped borrowers with offers of quick loans made against their homes. Lenders often charge triple-digit interest rates and employ deceptive marketing practices to conceal the true cost of these loans, trapping borrowers in a cycle of debt. According to the Center for Responsible Lending, predatory lending costs homeowners more than \$9 billion a year. In the absence of federal action to address this problem, several states, including California, Georgia, New York, and North Carolina, have enacted strong laws designed to curb predatory mortgage lending practices. In March 2005, Representatives Robert Ney (R-OH) and Paul Kanjorski (D-PA) introduced legislation, The Responsible Lending Act (HR 1295), which would preempt state anti-predatory mortgage lending laws and replace them with a weak federal standard that would not go far enough to eliminate predatory lending practices.

Rent-to-Own. Rent-to-own outlets rent high-cost items such as TVs, computers, large appliances, and furniture, with the promise that the consumer could eventually own the item. Rent-to-own firms target low-income consumers and often hide the true cost of renting to own

these items; after undisclosed triple-digit interest rates (APRs) and other fees, the total cost of the item may be double or triple the cash price. While almost every state has already passed weak legislation regulating these rent-to-own businesses in a manner approved by the industry, four states (New Jersey, Minnesota, Wisconsin and Vermont) have insisted on stronger consumer protections. Senator Mary Landrieu (D-LA) recently introduced legislation (the Consumer Rental-Purchase Agreement Act) that would establish weak federal standards similar to those of the 46 states but specifically preempt states from requiring an APR disclosure or subjecting rental-purchase transactions to state credit protection laws, including usury limits, as those four states with pro-consumer laws do today. A virtually identical bill (HR 1701) sponsored by Representative Walter Jones (R-NC) passed the House in 2002.

CIVIL JUSTICE

On February 18, 2005, the President signed legislation (S. 5) long-sought by the U.S. Chamber of Commerce to federalize most class actions brought by victims of civil rights and employment discrimination, consumer protection violations and environmental contamination, even when those claims are based on state law. The Senate and House are now considering major legislation to impose federal rules on another matter long considered a state issue—medical malpractice. In addition, the House has passed legislation preempting state laws holding car rental companies liable for the actions of their insured.

Medical Malpractice. Companion legislation pending in Congress, S. 354 and HR 534, would impose federal rules on medical negligence and liability standards—areas traditionally considered matters of state tort law. The bills would cap non-economic damages (for pain-and-suffering, disfigurement, etc) awarded to medical malpractice victims at \$250,000, eliminate punitive damages claims against companies selling FDA-approved drugs or medical devices, limit attorneys’ fees, restrict jury instructions, impose statutes of limitations, and generally restrict the use of punitive damages in all claims. While the House bill is only partly preemptive of state laws, the Senate bill would allow states to retain or enact lower (but not higher) damage caps and provide stronger legal rights for doctors, hospitals or drug or medical device companies that may have injured patients through malpractice. It does **not** preempt “State law that imposes greater procedural or substantive protections (such as a shorter statute of limitations) for a health care provider, health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product from liability, loss, or damages than those provided by this Act.”

Car Rental Liability. Sixteen states and the District of Columbia allow rental car companies the freedom to lease cars to a customer whether or not the customer has his or her own insurance. In exchange, state law requires the companies to assume responsibility when uninsured drivers cause injury and are financially unable to compensate the people they injure or kill. On March 9, 2005, Representative Sam Graves (R-MO) offered an amendment to the House Transportation Bill (HR 3) to rescind this “vicarious” liability, allowing rental car companies to lease vehicles to uninsured drivers with no recourse for innocent victims should an accident occur. The House voted narrowly to accept this amendment, which would nullify state laws imposing vicarious liability to rental car companies if it becomes law.

HEALTH CARE

In the last several Congressional sessions, Congress considered, but failed to enact, legislation granting patients greater rights when their HMOs refuse to cover medically necessary treatment. In the absence of federal action, several states have enacted strong measures to expand patients' legal rights when health care providers deny coverage, fail to provide adequate coverage, or limit health care choices. In 2004, the Supreme Court held in Davila vs. Aetna that the Employment Retirement Income Security Act (ERISA) of 1974 established an exclusive remedy for claims for denial of care against ERISA-governed HMOs. The Court held that ERISA preempted broader state law remedies and also required removal of all ERISA claims to federal courts. While Congress should amend ERISA to reinstate stronger state patients' rights laws, action has shifted to prescription drug prices.

Prescription Drug Importation. Since Congress has done nothing to address skyrocketing prescription drug prices, the states have developed a number of innovative programs to lower the costs for their consumers, ranging from bulk purchasing to price evaluation programs. Some states and cities also have promoted importation of lower-cost drugs from Canada and other countries, which the Food and Drug Administration (FDA) has aggressively discouraged. In 2004, Vermont sued FDA over its denial of a prescription drug importation plan for Vermont's state employees and retirees. The suit alleges that the FDA denial was contrary to federal law. It also asserts that a provision in the federal Food, Drug and Cosmetic Act referenced by FDA in its denial is unconstitutional. In January 2005, FDA sent a letter to the Rhode Island Attorney General stating that a proposed state program to facilitate drug importation would be preempted because "the drug importation scheme set forth by Congress preempts conflicting state or local legislation that would legalize the importation of certain drugs from Canada in contravention of the FFDCA [Federal Food, Drug and Cosmetics Act]."

Environmental and Public Health Safeguards

Air Pollution from Power Plants. Under current law, when power plants in upwind states cause violations of air pollution health standards in downwind states, the affected states can force those plants to cut their pollution. For example, in March 2004, North Carolina petitioned the Environmental Protection Agency to crack down on power plant pollution blowing across its borders from 13 states. The Bush administration's "Clear Skies" bill effectively repeals this states' rights provision, making it difficult, if not impossible, for states like North Carolina to comply with the Clean Air Act and provide their residents with safe air. The Senate Environment and Public Works Committee defeated the "Clear Skies" bill on a 9-9 vote in March 2005, but the Bush administration continues to call on Congress to pass the bill.

Air Pollution from Cars, Trucks, and Other Mobile Sources. Only California has the authority under the Clean Air Act to enact emission standards for mobile sources that are more stringent than federal law. The Clean Air Act also allows other states with polluted areas to adopt California's emission standards in lieu of federal law, giving states a powerful tool to protect public health. Lately, Congress has shown a willingness to deprive states of this tool and preempt them from adopting California's stronger standards. In September 2003, Senator Christopher Bond (R-MO) inserted a rider on the FY04 appropriations bill that prevents states from adopting California's standards for small engines used in equipment such as lawnmowers,

leaf blowers and chainsaws. This is a dangerous precedent, one that could lead Congress and the Bush administration to consider other restrictions on state authority to adopt California's stronger standards for cars, trucks, personal watercraft, and other mobile sources.

Global Warming. The federal government has done nothing to address emissions of carbon dioxide and other global warming gases from power plants, cars, and other sources. Citing the "compelling and extraordinary impacts" of global warming on California, in September 2004, the California Air Resources Board finalized new greenhouse gas standards for vehicles in model year 2009 and beyond. The agency estimated that the plan will reduce climate change emissions from the light duty fleet by 27 percent in 2030. In December 2004, the Alliance of Automobile Manufacturers and others sued to block these standards, arguing that California, by setting stringent standards for carbon dioxide and other global warming gases, violated a federal law forbidding states from regulating fuel economy standards. The Bush administration may intervene on behalf of the automakers, as it did with a 2002 legal challenge to California's clean cars standards.

MTBE. MTBE (methyl tertiary butyl ether), a toxic gasoline additive and potential human carcinogen, leaks out of underground gasoline storage tanks, dissolves and spreads readily in groundwater, and is difficult and expensive to remove. MTBE contamination has been found in every state. In 2001, EPA proposed banning MTBE nationwide in four years, but the Bush administration shelved the proposal. Twenty states, however, have passed bans on MTBE in gasoline; some of these bans have yet to go into effect. The current House draft of the energy bill delays the federal ban on MTBE until December 31, 2014, and it may block the state bans as well. In addition, House leaders continue to insist on shielding major oil and chemical companies from federal and state product liability lawsuits for MTBE contamination.

For more information:

PIRG's Consumer and Environmental Preemption Resources Page:
<http://www.stopatmfees.com/occpirg.htm>

PIRG's Model State Privacy and Identity Theft Law Page:
<http://www.pirg.org/consumer/credit/model.htm>

National Association of State PIRGs (U.S. PIRG) Home Page: <http://www.uspirg.org>

Privacy, general consumer issues:

Ed Mierzwinski
Consumer Program Director, U.S. PIRG
(202) 546-9707
edm@pirg.org

Health care, civil justice issues:

Lindsey Johnson
Consumer Advocate, U.S. PIRG
(202) 546-9707
lindsey@pirg.org

Air pollution and global warming issues:

Emily Figdor
Clean Air Program Director, U.S. PIRG
(202) 546-9707
efigdor@pirg.org

MTBE issues:

Christy Leavitt
Environmental Advocate, U.S. PIRG
(202) 546-9707
cleavitt@pirg.org