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Drawing The Line: Preemption Of State Enviro Regulation

Law360, New York (July 15, 2013) -- The last piece of major environmental legislation enacted in the U.S. was the Clean Air Act Amendments of 1990, and over the past two decades, the U.S. Environmental Protection Agency has been viewed as acting slowly on adopting aggressive new environmental regulations. In light of this perceived inaction at the federal level, states and local governments have taken an increasingly active role in enacting programs aimed at addressing environmental concerns such as climate change and clean air.

Often, however, states and localities must contend with federal preemption — either through express preemption provisions in a statute's text or through the doctrine of implied preemption.

Two recent cases shed light on the dividing line between permissible state and local programs and those that are preempted by federal law. These two cases — one from the U.S. Supreme Court concerning short-haul truckers at the Los Angeles port and one from the Fifth Circuit on a Dallas ordinance regulating taxicabs — suggest that the touchstone for preemption will not necessarily be the form of the law but its effect.

Where federal law occupies an area of regulation, states and localities may properly act as participants in the marketplace or offer noncoercive incentives to market participants; however, they may not take actions that, as a practical matter, have the same force as a traditional "command and control" regulation.

In the first case, American Trucking Associations Inc. v. City of Los Angeles, --- S.Ct. ---- (June 13, 2013), the Supreme Court struck down provisions of the "Clean Truck Program" run by the Port of Los Angeles because they compelled compliance by trucking companies at the risk of being barred from the port.

Under this program, short-haul, or "drayage," trucking companies were required (through contracts signed with the port, the nation's busiest marine terminal) to post placards on their trucks providing information about how to report safety and environmental concerns and were also required to submit a plan for off-street parking of their trucks when they were not in use.

These provisions were designed to ease relations with the surrounding community in anticipation of an eventual expansion of the port. Violations of the provisions are classified as misdemeanors, and repeated or serious violations could cause a drayage hauler to be banned from operating out of the port.

The American Trucking Associations (ATA), a national association representing drayage haulers at the port, argued that the requirements were preempted under the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which prohibits state laws or regulations "having the force or effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

In the alternative, the ATA argued that the provisions were barred by existing court precedent that prohibited states from refusing to permit federally certified haulers to operate on state highways. See Castle v. Hayes Freight Lines Inc., 348 U.S. 61 (1954).

The Ninth Circuit ruled for the port, holding that the provisions were not preempted because they advanced the port's "business interest" in "managing its own facilities" and addressed only a "specific proprietary problem."

The Supreme Court reversed unanimously (Justice Thomas wrote a concurrence), concluding that despite being embodied in a contract, the provisions nonetheless had "the force and effect of law" because they compelled a drayage hauler to comply through the threat of criminal prosecution and possible expulsion from the port. As such, they were preempted under the FAAAA.

Other provisions at issue — including certain financial capacity and truck maintenance requirements — might also be prohibited under Castle, but the court could not make a determination given the case's pre-enforcement posture.

By contrast, in Association of Taxicab Operators USA v. City of Dallas, --- F.3d ---- (5th Cir. June 13, 2013) (ATO), the Fifth Circuit held that a city ordinance regulating taxicab operators was not preempted because the law created an incentive for adopting environmentally friendly practices, rather than compelling action. The case revolved around a city ordinance that permitted cabs using compressed natural gas (CNG) to jump the taxi line at Love Field, one of two Dallas-area airports and the hub of Southwest Airlines.

The association argued that this ordinance was prohibited by Section 209(a) of the Clean Air Act, prohibiting states from enforcing "any standard relating to the control of emissions ... [or] require certification, inspection, or any other approval relating to the control of emissions" from new cars or vehicle engines. 42 U.S.C. § 7543(a).

The association argued that the provision, while not phrased as a command-and-control requirement, nonetheless was a "standard" under Section 209(a) because of its indirect effects. That is, by permitting CNG cabs to pick up passengers first, the ordinance had so increased the wait time of traditional cabs at

Love Field — and thereby so decreased their profits — that it constituted, in effect, a requirement that cabbies switch to CNG or abandon their line of work.

But the Fifth Circuit disagreed. Distinguishing a district court case that found that a New York City law made nonhybrid cabs so expensive to operate that cabbies were effectively forced to abandon traditional cabs, see Metropolitan Taxicab Board of Trade v. City of New York, 633 F. Supp. 2d 83, 103-05 (S.D.N.Y. 2009), the Fifth Circuit held that there was no effective compulsion in Dallas. The law affected only the small number of cabbies (estimated at 7 percent of all city taxis) who operated exclusively or largely out of Love Field.

The law provided no other benefits to CNG taxis operating in the rest of the city and did not burden the balance of the city's traditional cabs. While acknowledging that an incentive program might become "sufficiently coercive [as] to qualify as a de facto 'standard,'" as was the case in Metropolitan Taxicab Board of Trade v. City of New York, the Fifth Circuit concluded that, on the facts in Dallas, this was a permissible incentive not preempted by Section 209(a). ATO at *14.

The juxtaposition of these two cases provides important guidance to practitioners looking to argue that a local action, especially an environmental one, is preempted by federal law. The book can't always be judged by its cover; the Port of Los Angeles Clean Truck Program, while ostensibly a contract provision, nonetheless had the effect and force of law because it imposed criminal liability and possible expulsion from the port.

As such, it is essentially an offer that a drayage hauler can't refuse and is preempted under federal law. But an incentive program that is essentially noncoercive and offers benefits for compliance is not preempted so long as those benefits do not effectively force the hand of a regulated entity.

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