FEDERAL PREEMPTION OF STATE LAWS

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Recently, the question of whether states may enact laws that conflict with or appear to conflict with federal law has come to the forefront of the discussion regarding controlled substances, particularly in the context of medical marijuana, recreational use of marijuana, and prescription drugs.

Article VI of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

This is known as the preemption clause of the Constitution and essentially means that the US Constitution, any treaties entered into by the United States, and, of particular interest to this memorandum, federal law, take supremacy over any state laws that may be passed. "[S]ince our decision in *M'Culloch v. Maryland*, it has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal citations omitted) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

If Congress has legislated in a field "which the States have traditionally occupied … we start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947) (citations omitted). "Because regulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power, [courts] must take a narrow view of any asserted federal preemption in these areas." *Qualified Patients Association v. City of Anaheim*, 187 Cal.App.4th 734, 757-758 (Cal. Ct. App., 4th Dis. 2010).

There are three basic types of preemption: express, field, and conflict. *Jackson v. Pfizer, Inc.*, 432 F.Supp.2d 964, 965-966 (D. Ne. 2006) (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)). Express preemption is where Congress has explicitly, in legislation, prohibited states from regulating in a particular area. *Id*. at 966. Field preemption may be evidenced by Congress having enacted laws or regulations that are so pervasive there is no room for the states to supplement it, or they may "touch a field in which federal interest is so dominant" that federal laws and regulations "will be assumed to preclude enforcement of laws on the same subject." *Rice* at 230 (citations omitted). Field preemption can be seen as a sub-category of conflict preemption. *Crosby* at 373 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79-80, n. 5 (1990)).

Conflict preemption is the most complex type of preemption and the most difficult to ascertain as a finding of conflict preemption is very fact specific. There are sub-types of conflict

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preemption, including obstacle preemption and impossibility preemption. Obstacle preemption exists where, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby* at 373 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In order to determine if a state law stands as an obstacle to the enforcement or implementation of federal law, one must start by examining the purpose and intended effect of the federal regulation. *Id*. at 373. Impossibility preemption exists "where it is impossible for a private party to comply with both state and federal law." *Id*. at 372 (citations omitted).

The case of *Cipollone v. Liggett Group*, *supra*, is an example of express preemption by Congress. In that case, plaintiffs brought suit against a cigarette manufacturer for damages resulting from smoking. The suit was initially brought by Rose Cipollone and her husband, and alleged that Rose developed lung cancer from smoking cigarettes. *Cipollone* at 509. After the deaths of Rose and her husband, their son maintained the suit on behalf of their estates. *Id*. The case hinged on the Supreme Court's interpretation of certain sections of the Federal Cigarette Labeling and Advertising Act of 1965 ("1965 Act") and the Public Health Cigarette Smoking Act of 1969 ("1969 Act"). The Court determined that "the pre-emptive scope of the 1965 Act and the 1969 Act [was] governed entirely by the express language in § 5 of each Act." *Id*. at 517. Each of those particular sections included an express intent on the part of Congress to preempt state law or regulation in those particular areas.

Section 5 of the 1965 Act, entitled "Preemption," read:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Id. at 514. The 1969 Act amended § 5(b) to read:

> (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.

Id. at 515.

The Court determined that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted … Therefore, we need only identify the domain expressly pre-empted by each of those sections." *Id*. at 517. In reviewing each of the sections in turn, the Court found that a narrow reading was appropriate. *Id*. at 518. Under that narrow reading, the Court concluded that § 5 of the 1965 Act simply

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preempted state and federal regulatory authorities "from mandating particular cautionary statements [on cigarette packaging] and did not pre-empt state-law damages actions." *Id*. at 519-520. However, the Court determined that the preemption provision in § 5(b) of the 1969 Act went beyond the mandates of the 1965 Act by prohibiting "requirement[s] or prohibition[s] … imposed under State law," and, further, reached "beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes." *Id*. at 520. As such, the Court found that, under the express preemption provisions of § 5(b) of the 1969 Act, the common law tort claims the plaintiffs were alleging could be preempted because such common law damages "are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions.'" *Id*. at 521-522. The Court then looked at each of the plaintiffs' claims in turn, asking for each whether the legal duty imposed "constitutes a 'requirement or prohibition based on smoking and health … imposed under State law with respect to … advertising and promotion,' giving that clause a fair but narrow reading." *Id*. at 523-524. Any allegation that did run afoul of that reading was deemed to be preempted.

As stated above, field preemption exists where Congress has pervasively regulated an area of law or where the federal interest in the area dominates, and is sometimes considered a sub-type of conflict preemption. Many of the arguments advanced by state law officials in medical marijuana cases claim that the federal Controlled Substances Act impliedly preempts state law via field preemption, but those arguments are generally not accepted.

In the case of *Reed-Kaliher v. Hoggatt*, the plaintiff was convicted of possession of marijuana for sale and entered into a plea agreement. *Reed-Kaliher*, 332 P.3d 587, 588 (Ariz. Ct. App., Div. 2, 2014). As part of the terms of plaintiff's probation, he was prohibited from possessing or using illegal drugs. *Id*. at 589. Plaintiff moved to modify the terms of his probation to allow him to use medical marijuana pursuant to the Arizona Medical Marijuana Act ("AMMA"). *Id*. at 588. The State argued that it would be a violation of the "judge's 'oath of office and duty' under the Supremacy Clause to 'sanction' the use of marijuana in violation of federal drug laws." *Id*. at 591. In reviewing that claim, the Court of Appeals for Arizona stated:

> [We] cannot see how a state court's fidelity to state law in a state prosecution under a state criminal code and subject to state rules setting forth probation conditions could violate the Supremacy Clause unless any of the state laws in question are preempted by federal law. To address the state's argument, we therefore must consider whether the AMMA is preempted by federal law.

Id.

The court first declined to accept the argument that Congress intended to occupy the field of drug regulation when it adopted the Controlled Substances Act.

> In the case of the federal Controlled Substances Act, Congress not only declined to state it was preempting state law, but it expressly provided, "No provision of [the subchapter on control and enforcement]

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> shall be construed as indicating an intent on the part of the Congress to occupy the field ... to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision ... and that State law so that the two cannot consistently stand together."

Id. (quoting 21 U.S.C. § 903). The court went on to say:

> Furthermore, the federal government has made clear that it does not currently intend to occupy the area of state medical marijuana law. As this court noted in *Polk v. Hancock*, 680 Ariz. Adv. Rep. 29, n. 7, ––Ariz. ––––, n. 7, –– P.3d ––––, n. 7, 2014 WL 623701 (Ct.App. Feb. 18, 2014), an August 2013 memorandum from the United States Department of Justice to the United States Attorneys explained, inter alia, that " 'enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.' "

Id. at 592, n. 2.

In its analysis of the AMMA as it relates to preemption by the Controlled Substances Act, the court found that the AMMA does not conflict with federal law as "it does not purport to make the use of marijuana lawful under federal law, but rather … creates a state statutory immunity that protects a cardholder from state penalty for the qualifying use of marijuana under the AMMA." *Id*. at 591. The federal government cannot compel states to enforce "federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with [the AMMA] does not put the state of Arizona in violation of federal law." *Id*. at 592 (citing Initiative Measure, Prop. 203, § 2(F) (2010), available in Historical and Statutory Notes to A.R.S. § 36-2801, et seq.). Because there was no conflict with federal law, and state law authorized the use of medical marijuana, the court held that the plaintiff was entitled to the use of medical marijuana notwithstanding the terms of his probation. *Id*. at 595.

Conflict preemption presents a different challenge for courts as seemingly conflicting state and federal laws are not necessarily in conflict under the terms of conflict preemption. As seen in the *Reed-Kaliher* case, simply because a state law authorizes an act that federal law prohibits, that does not mean that there is an actual conflict. As explained in the case of *Qualified Patients Ass'n., supra*:

> California's decision in the [Compassionate Use Act] and the [Medical Marijuana Program Act] to decriminalize *for purposes of state law* certain conduct related to medical marijuana does nothing to "override" or attempt to override federal law, which remains in force. To the contrary, because the CUA and the MMPA do not mandate conduct that federal law prohibits, nor pose an obstacle to federal enforcement of federal law, the enactments' decriminalization provisions are not preempted by federal law.

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187 Cal.App.4th 734, 757 (2010) (emphasis in original).

This case involved a request for a declaratory judgment by the plaintiff, Qualified Patients Association, that a city ordinance enacted by the city of Anaheim, California that provided criminal penalties for the operation of a medical marijuana dispensary was preempted by state law. *Id*. at 741-742. The city argued, and the trial court agreed, that the state law was preempted by federal law, and the plaintiffs appealed that determination. *Id*. at 742.

In its discussion of conflict preemption, the appeals court stated that there was no positive conflict between the state law decriminalizing certain provisions of the California statutes and federal law criminalizing use and possession of marijuana. *Id*. at 758-759.

> A claim of positive conflict might gain more traction if the state *required*, instead of merely exempting from state criminal prosecution, individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law. But because neither the CUA or the MMPA require such conduct, there is no "positive conflict" with federal law, as contemplated for preemption under the CSA. In short, nothing in either state enactment purports to make it impossible to comply simultaneously with both federal and state law.

Id. at 759 (emphasis in original) (citations omitted). In essence, the court said that there was no conflict because state law did not require something that federal law forbade. *Id*.

The court also discussed the city's argument that the state law was preempted under the theory of obstacle preemption, and determined that obstacle preemption was not supported either. *Id*. at 760. The city claimed that, because the use of medical marijuana was being abused, the law did present an obstacle to "the CSA's purpose of combatting recreational drug use." *Id*. The court disagreed, stating that the state law decriminalizing the use of medical marijuana did not present an obstacle to "the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (citations omitted). The court said that the city's argument failed because it was not the state law itself that presented an obstacle to the enforcement of the federal scheme, but the abuse or violation of state law that did, and the solution to that was "the enforcement of state law, not its abrogation." *Id*. at 760-761. The court further stated that "[p]reemption theory … is not a license to commandeer state or local resources to achieve federal objectives." *Id*. at 761.

> Just as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana.

Id. at 761-762.

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The court in *Emerald Steel Fabricators v. Bureau of Labor and Industries (BOLI)* reached a different decision regarding the preemption issue; however, in that case, the issue at hand was a state law authorizing the use of marijuana and not a state law decriminalizing the use of marijuana in certain circumstances. 230 P.3d 518, 520 (Or. 2010). In this case, an employee was terminated from employment for using medical marijuana. *Id*. at 521. Employee filed a complaint with BOLI alleging discrimination against him because of a disability and alleging that the employer failed to make reasonable accommodation for his disability. *Id*. BOLI filed charges against the employer, and the case was heard by an administrative law judge, who found that employer had not discharged employee as a result of his disability, but because of his use of marijuana, and that terminating an employee for that reason did not violate the law but that employer did fail to reasonably accommodate employee's disability. *Id*.

The main legal element that distinguishes this case from other medical marijuana cases is how the Oregon law is written. In other states that allow the use of medical marijuana, they have generally passed legislation that decriminalizes the use of marijuana for medical purposes under state law. However, Oregon law was interpreted by the Supreme Court of Oregon in this case to "affirmatively [authorize] the use of marijuana for medical purposes." *Id*. at 525. The question presented, as stated by the court, was whether federal law preempted the state Medical Marijuana Act to the extent it authorized the use of marijuana, and the court determined that it did. *Id*. at 526.

The court first discussed federal preemption under the impossibility doctrine, finding:

> . . . it is not physically impossible to comply with both the Oregon Medical Marijuana Act and the federal Controlled Substances Act. To be sure, the two laws are logically inconsistent; state law authorizes what federal law prohibits. However, a person can comply with both laws by refraining from any use of marijuana . . .

Id. at 528. Because a person can comply with both laws simultaneously, there was no impossibility preemption, and the court then turned to the question of whether the Oregon law presented an obstacle to the enforcement of federal law. *Id*. The court determined that it did present such an obstacle as it expressly permitted what federal law prohibited and, as such, stood as an obstacle to the objectives of Congress. *Id*. at 528-529. "To the extent that [Oregon law] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.'" *Id*. at 529 (citations omitted). However, the court did state that, to the extent they found that the particular subsection of the Oregon statute that authorized the use of marijuana was preempted, they did not hold that the other sections of the Medical Marijuana Act decriminalizing the use of marijuana for medical purposes were preempted. *Id*. at 526, n. 12.

Zohydro made national news in early 2014 when Zogenix, the manufacturer of Zohydro, filed suit against the Governor of Massachusetts, claiming that the emergency order prohibiting the prescribing, ordering, dispensing, or administration of Zohydro was unconstitutional and preempted by federal law. *Zogenix, Inc. v. Deval Patrick*, No. 14-11689-RWZ, 2014 U.S. Dist. MA, *1. Finding that the federal law giving the Food and Drug Administration the sole authority

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to ensure that drugs are safe and effective was obstructed by the Massachusetts emergency order, the court imposed an injunction against the enforcement of the order. *Id*. at *2-5.

Other cases involving prescription drugs have reached differing conclusions, some finding no preemption on the basis that Congress did not intend the FDA to encompass the field of controlled substances while others have found that tort claims made under state law were in conflict with federal law. In the case of *Horne v. Novartis Pharmaceuticals Corporation*, the District Court for the Western District of North Carolina found that holding the defendant "liable for failing to provide an additional warning … when the FDA has already determined that such risks do not appear to result from use of the drug … would create a direct conflict" between state law and federal law, and would create a situation wherein the defendant could not comply with both simultaneously. 541 F.Supp.2d 768, 782 (D. N.C. 2008).

In the *Horne* case, the plaintiff sued the defendant drug manufacturer on behalf of her deceased son for failure to warn that use of their drug during the first trimester of pregnancy could cause fetal injury or death. *Id*. at 772-773. The court stated that the question before them was whether the plaintiff's claims of failure to warn or inadequate labeling of the drug in question conflicted with the federal labeling requirements. *Id*. at 781. The package insert including drug warnings advised that injury or death could occur to a developing fetus if the drug were taken during the second or third trimester. *Id*. at 773. The insert also including a "category C" warning for first trimester pregnancy usage, indicating that animal studies have shown an effect on a fetus but that "no adequate or well-controlled studies in humans" have been conducted. *Id*. at 774 n. 2. Ultimately, based on the finding that the FDA had considered a warning for use of the drug in the first trimester of pregnancy and determined that such a warning could not be substantiated by the available evidence, the court held that the claim of failure to warn was preempted. *Id*. at 782.

In 2006, the FDA issued a Final Rule on the content and format requirements for labeling of prescription drugs. *Id*. at 779. In the Preamble to the Final Rule, the FDA included a preemption clause that stated:

> … State laws conflict with and stand as an obstacle to achievement of the full objectives and purposes of Federal law when they purport to compel a firm to include in labeling or advertising a statement that FDA has considered and found scientifically unsubstantiated. In such cases, including the statement in labeling or advertising would render the drug misbranded under the act (21 U.S.C. § 352(a) and (f)).

Id. at 780 (citations omitted).

The District Court for the District of Nebraska found that this Preamble was "not persuasive" when deciding the case of *Jackson v. Pfizer, Inc.*, *supra*, at 968. This case was brought by the parents of an 11 year old boy who committed suicide after being prescribed and taking the antidepressant Zoloft. *Id*. at 965. The plaintiffs claimed that the drug warnings were

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inadequate under Nebraska law, and the defendant moved for summary judgment on the basis that Nebraska law was preempted by federal law in this matter. *Id*.

The court determined initially that the only area of preemption it needed to examine was that of conflict preemption. *Id*. at 966. In beginning its analysis of the conflict preemption issue, the court first looked at Congressional intent, turning to the 1962 amendments to the Food, Drug, and Cosmetic Act, wherein Congress specifically stated:

> Nothing in the amendments made by this Act to the Federal Food, Drug and Cosmetic Act shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments **unless there is a direct and positive conflict between such amendments** and such provisions of State law.

Id. (quoting Pub.L. No 87-781, 76 Stat. 780, 793 (1962)) (emphasis in original). The defendant argued that complying with Nebraska law regarding giving proper warning of possible safety hazards would have caused them to violate FDA policy regarding the labeling of prescription drugs. *Id*. at 967-968. The court disagreed, finding that, despite the FDA's attempt at express preemption in its Preamble and the defendant's arguments to the contrary, the Nebraska law in no way directly conflicted with the FDA labeling requirements, there was no "frustration of purpose," and the FDA regulations allowed "unilateral strengthening of the labeling." *Id*. at 968.

Questions of preemption are not easily answered. Most cases are very fact specific so it is hard to judge whether a particular case will fall within an area of preemption or not. A good rule of thumb is that if a state law directly conflicts with federal law, it will be preempted by the federal law in question. This includes both the legalizing of marijuana under state law (versus simply decriminalizing the use or possession of marijuana) and prohibiting the prescribing or use of a drug under state law that has been approved by the FDA, as in the case of Zohydro.

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