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Ten Tips for Lawyer Well-Being in the Age of Coronavirus

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AMICUS

BY: AMANDA KARRAS,
IMLA Deputy Director and Director of Legal Advocacy

Fighting Preemption of Public Health Measures

IMLA's legal advocacy program focuses primarily on cases of national concern, which often means we file amicus briefs in the Supreme Court (either at the petition or merits stage) or in federal appellate courts. One area where we are particularly active in state courts, however, is in cases involving preemption. Although these cases can often turn on state law because we see trends in state legislatures preempting local governments throughout the country, as well as trends by businesses in attempting to use state and federal preemption as a way to invalidate local ordinances, we believe supporting local governments in these preemption cases is critical to IMLA's mission. IMLA will be filing amicus briefs in the coming month in two such cases, which are described below.

State of Texas v. City of Austin

This case involves the State of Texas' legal challenge to the City of Austin's ordinance requiring facial coverings due to the coronavirus. On March 2, 2021, Texas Governor Greg Abbott issued Executive Order GA-34, which removed nearly all COVID-19 precautionary measures such as limits on business occupancy and public gatherings, social distancing requirements, and the wearing of masks. GA-34 also indicates that it "supersede[s] any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts services allowed by this executive order…"[1] The Executive Order also purports to suspend portions of the Texas Disaster Act that would otherwise authorize local governments to issue emergency management orders during a declared public disaster in order to ensure local officials do not impose any "inconsistent" restrictions in response to COVID-19.[2]

Because the City of Austin continues to see ongoing threats of transmission, the introduction of new virus variants, a low percentage of vaccinations, and possible "super spreader public events," the City sought to keep its mask mandate in place despite GA-34. The State of Texas sued the City. Austin argued in the lower court that the Public Health Authority for the City of Austin/County of Travis has "the independent and express statutory authority provided to it from the Texas Legislature to take preventative measures in an effort to curb the transmission of infectious disease under the Local Public Health Reorganization Act," Tex. Health & Safety Code §121.024.[3] The Local Public Health Reorganization Act provides local governments in Texas with the authority to "enforce any law that is reasonably necessary to protect the public health," and local governments of Austin's size may "take any action necessary or expedient to promote health or suppress disease," including actions to prevent the introduction or spread of a communicable disease and to abate a public health nuisance.[4]

The City contends that this authority is separate from and unrelated to the Governor's emergency management authority and that the City's mask ordinance is therefore not preempted by the Governor's order. In other words, according to the City, the Governor's attempt to preempt its ordinance is a separation of powers violation because the City's authority to act came from the Legislature under a separate grant of authority and its ability to act to address health and safety concerns exists even outside a declared disaster, whereas the Governor's power is more limited.

The City's arguments prevailed in the state trial court, and the State is appealing. On appeal, the question is whether local governments in Texas have the authority, through their public health authority delegated to them by the Texas Legislature, to take steps to stop the spread of communicable disease or whether the Governor's Executive Order preempts local authority in this area.

IMLA filed an amicus brief in a nearly identical case last summer in support of local governments in Georgia. As noted above, preventing unwarranted preemption is central to IMLA's mission and these cases are significant affronts to local government authority and autonomy. Local governments are in the best position to know, through science-backed public health decision making, what their health and safety risks are and how best to prevent the serious

consequences of unchecked spread of the coronavirus in their communities. This is particularly true in a case like this, where some areas of the state may have relatively low levels of coronavirus transmission and hospitalizations, and public health authorities in those jurisdictions may believe it is appropriate to lift public health measures like mask mandates. But a one-size-fits-all approach that ties local governments' hands behind their backs when it comes to protecting their communities is entirely inappropriate, particularly given the fact that the Governor was acting outside the scope of his constitutional authority in usurping the legislature's role. The consequences of the Governor's attempted usurpation of properly delegated legislative authority to local governments are particularly serious in the face of a deadly virus that has already claimed the lives of over 550,000 Americans and nearly 50,000 Texans.

GA-34 raises additional questions and problems for local governments. The Executive Order indicates that it does not "preclude businesses or other establishments from requiring employees or customers to follow additional hygiene measures, including the wearing of a face covering." This allowance does not mention whether it applies to local governments acting in their proprietary capacity, such as when local governments require facial coverings in municipally owned buildings, whether for their employees or the general public. If the carve-out only applies to private businesses, the usurpation of power by the Governor is even greater, given the self-government granted to local governments to control their own property and workforces.

Finally, the issues raised in this case are larger than just a local government's authority to prevent the spread of COVID-19. That is because the Governor is attempting to preempt local government's authority to act to prevent the spread of any communicable disease; this broad power grab would mean that local governments' ability to enact reasonable ordinances for the health and welfare of their citizenry would be stymied. The issue is central to local governments' police powers.

R.J. Reynolds Tobacco Company, v. County of Los Angeles

This case involves a Los Angeles County Ordinance that prohibits tobacco retailers from selling flavored tobacco products, including both cigarettes and e-cigarettes.[5] A number of tobacco companies sued seeking an injunction, claiming the ordinance was preempted by the Family Smoking Prevention and Tobacco Control Act (the FSPTCA), 21 U.S.C. §§ 387-387u. The FSPTCA's preemption clause states in pertinent part:

> (A) In general. No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this chapter [21 USCS §§ 387 et seq.] relating to tobacco product standards, …
> (B) Exception. Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products.[6]

The FSPTCA also has a "Preservation of State and Local Authority" Clause, which states:

> Except as provided in paragraph (2)(A), nothing in this chapter [21 USCS §§ 387 et seq.], or rules promulgated under this chapter [21 USCS §§ 387 et seq.], shall be construed to limit the authority of … a State or political subdivision of a State, … to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter [21 USCS §§ 387 et seq.], including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products.[7]

The tobacco companies argued that the FSPTCA expressly preempts the Ordinance because it impermissibly "establishes a state requirement that is 'different from' and 'in addition to' federal requirements related to tobacco product standards,'" which they claim violates 21 USCS § 387p.[8] The district court rejected the argument that the ordinance is preempted, agreeing with the Second Circuit (which upheld a similar ban by New York City) "that a ban on flavored tobacco products was not a tobacco product standard" under the FSPTCA.[9] The court reasoned the ordinance addressed only "whether final tobacco products are ultimately characterized by – or marketed as having – a flavor and is not easily read to direct manufacturers as to which ingredients they may or may not include in their products" which if it was, would infringe on the FDA's authority to determine what chemicals and processes can be used in making tobacco products.[10] The court also rejected the implied preemption arguments, finding the ordinance is "neither a manufacturing standard nor does it

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regulate the ingredients of tobacco products" and it therefore was not an obstacle to the purpose of the FSPTCA.[11] Finally, the court notes that the FSPTCA has a Preservation Clause which "expressly *preserves* localities' traditional power to adopt any 'measure relating to or prohibiting the sale' of tobacco products.'"[12]

The tobacco companies appealed the case to the Ninth Circuit, where it is currently pending. The issue in the case is whether the FSPTCA preempts, either expressly or impliedly, the County's Ordinance banning the sale of flavored tobacco products.

This case represents one of several challenges by tobacco companies to local government ordinances banning flavored tobacco products.[13] Additionally, we are seeing more instances of large corporations arguing that local government regulations are preempted by state federal law and we believe IMLA should strive to prevent private companies from seeking to circumvent a local government's regulations that relate to the health and welfare of its citizenry through these preemption challenges.[14]

In addition to the preemption issues, this case is important as it relates to municipalities' core police powers given that local governments have an interest in promoting healthy communities. The rise in popularity of flavored tobacco and e-cigarette products with young people poses serious health risks. The purpose of the Los Angeles County Ordinance is to help protect children and reduce tobacco use in youth under 21. According to the latest data from the 2020 National Youth Tobacco Survey, nearly 20% of high school students and 4.7% of middle school students were current e-cigarette users.[15] Public health experts generally agree that flavored tobacco products contribute to this high usage among youth.[16] Increases in health risks within a population will ultimately increase costs for local governments due to amplified demands on the health system.

Both the *County of Los Angeles* and the *City of Austin* cases present issues that are central to IMLA's mission of seeking to promote local autonomy and stave off unwarranted preemption challenges. If you are facing a preemption challenge in your state that you believe would benefit from IMLA's amicus participation, please contact Amanda Karras, IMLA's Director of Legal Advocacy, at akarras@imla.org. ML

Notes

1.Executive Order by the Governor of the State of Texas, GA 34, March 2, 2021, available at: https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-34-opening-Texas-response-to-COVID-disaster-IMAGE-03-02-2021.pdf

2. *Id.*

3. *See* State of Texas v. City of Austin, No. D-1-GN-21-001046, Defendants' Amended Joint Response in Opposition to Plaintiff's Application for Temporary Restraining Order and/or Temporary Injunction.

4. *See* Tex. Health & Safety Code §§ 121.003(a), 122.005-.006, 341.011-012.

5. Los Angeles County Ordinance §11.35.070(E); § 11.35.020(J); § 11.35.020(U)(1)-(2).

5. 21 USC 387p.

6. *Id.*

7. R.J. Reynolds Tobacco Co. v. Cty. of Los Angeles, 471 F. Supp. 3d 1010, 1013 (C.D. Cal. 2020)

8. *Id.* at 1018.

9.*Id* at 1014-15.

10. *Id.* at 1018.

11. *Id.* at 1019.

12. See R.J. Reynolds Tobacco Co. v. Cty. of San Diego, No. 20-CV-1290 JLS (WVG), 2021 U.S. Dist. LEXIS 59800, at *26 (S.D. Cal. Mar. 29, 2021) (upholding County's ban on flavored tobacco products and concluding the ban was not preempted by the FSPTCA); Cigar Ass'n of Am. v. City of Phila., No. 20-3220, 2020 U.S. Dist. LEXIS 212267, at *1 (E.D. Pa. Nov. 13, 2020) (concluding City's ban on sale of flavored tobacco products was preempted by state law).

13. For example, IMLA filed amicus briefs in *Portland Pipeline Corp. v. City of South Portland* in both the Maine Supreme Judicial Court and the First Circuit in a case involving an oil pipeline company's challenge to the City's zoning ordinance. In that case, the corporation claimed the City's ordinance prohibiting the storing and handling of petroleum products for the "bulk loading of crude oil onto any marine tank vessel" in certain districts was preempted by a number of federal and state laws. The City passed the ordinance after extensive study when it concluded that higher concentrations of hazardous air pollutant (HAP) emissions caused by the crude oil loading would cause increases in City residents' risk of cancer and that these risks were particularly concerning due to the proximity of the Portland Pipe Line Corporation (PPLC) facilities to schools, parks, and other areas most used by children and the elderly. The First Circuit certified three questions of state law to the Maine Supreme Judicial Court and that court concluded that state law did not preempt the City's zoning ordinance. The case is now back before the First Circuit on the federal preemption questions.

14. Wang, Teresa, et. al, E-cigarette Use Among Middle and High School Students — United States, 2020, Centers for Disease Control and Prevention Mobility and Mortality Weekly Report, September 9, 2020, available at: https://www.cdc.gov/mmwr/volumes/69/wr/mm6937e1.htm?s_cid=mm6937e1_w

15. *Id.*