

## **PREEMPTION: TOBACCO CONTROL'S #1 ENEMY**

*August 2004*

Preemption, as most tobacco control advocates know, is a dirty tactic that removes communities' right to enact local smokefree air laws. In other words, if a preemption law passes at the state level, your decision-making body (city council, board of health) will lose the power to enact a smokefree law. Sound like a raw deal? It is for us, but the tobacco industry wants nothing more. Why?

The industry wants to undermine effective, meaningful smokefree air laws because the majority of their power lies at the state level and they know that the only business harmed by these public health measures is their own. Once a preemptive law is enacted, it can halt tobacco control efforts throughout the state and it is extraordinarily difficult to restore local control.

Victor Crawford, the former Tobacco Institute lobbyist, once said "[T]he Tobacco Institute and tobacco companies' first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can't do that, at least on the state level, because the health advocates can't compete with me on a state level."

Protect Local Control, ANR's preemption specific website, provides state specific news, action alerts, and tracks legislative bills in an effort to stop preemptive legislation before it is passed. For the latest information and materials about protecting and restoring local control, please visit [www.protectlocalcontrol.org](http://www.protectlocalcontrol.org).

### **TYPES OF PREEMPTION**

There are two broad categories of preemption. One is explicit (or express) preemption, in which preemptive language is expressly written into the law. The other is implicit preemption, which is implied rather than explicitly stated in the law. Implicit preemption occurs when Congress or a state legislature adopts comprehensive regulations on a subject which are later interpreted by the courts to "occupy the field" being regulated, and therefore preclude inconsistent local (or state) regulation.

### **FEDERAL PREEMPTION**

The only current federal preemption in tobacco control is contained in the Federal Cigarette Labeling and Advertising Act. The Act contains a preemption clause which restricts the power of state and local governments to regulate tobacco advertising based on health concerns. In June 2001, the U.S. Supreme Court reinforced the preemptive status of the Federal Cigarette Labeling and Advertising Act by striking down a Massachusetts regulation prohibiting tobacco advertising within 1,000 feet of schools. This ruling potentially invalidates dozens of local tobacco advertising restrictions and underscores the detrimental effect of preemption on local policy activity.

Smokefree advocates have similar concerns of potential federal preemption as the U.S. Occupational Safety and Health Administration (OSHA) proposed workplace smoking regulations. However, OSHA decided in 2002 that states and municipalities were undertaking progressive, effective action to protect employees in the workplace and that this should be allowed to continue unfettered by federal interference.

However, in general, preemption is less of a current threat at the federal level than it is the state level.

## PREEMPTIVE STATE LAWS

The most common area in which the tobacco industry seeks preemption is at the state level. Preemption comes in a variety of packages, many times disguised in good-guy wrapping. This strategy was articulated in an internal memo from the Smokeless Tobacco Council in 1991. The memo summarized the results of a meeting between Philip Morris executives and prominent California state legislators:

“At that time the Speaker made clear a significantly more proactive tobacco control effort would be needed to secure preemption. Out of these discussions the notion of a Comprehensive Tobacco Control Act (that would provide preemption) evolved. In order to gain preemption, the Speaker wanted a ‘Comprehensive Tobacco Control Act’...The Speaker believes the trick to doing this would be that such an act would have to have the ‘appearance’ of a comprehensive scheme.”

In 2001, in Oregon, tobacco allies in the hospitality industry were willing to accept a state law that made a number of venues, including many restaurants, smokefree, in exchange for preemption of municipal regulation. Preemption in Oregon was important to the tobacco industry at such a cost because five municipalities had adopted comprehensive local smokefree air ordinances that included bars, and this smokefree momentum was a threat to the long-term profitability of the tobacco industry.

“By introducing pre-emptive statewide legislation we can shift the battle away from the community level back to the state legislatures where we are on stronger ground.” -*Tina Walls, Philip Morris, July 8, 1994. Bates No: 2041183751/3790.*

Many in the tobacco control movement initially did not recognize the devastating effect preemption has on not only tobacco control policies, but also on grassroots involvement in tobacco control. On more than one occasion, unsuspecting tobacco control coalition members and pro-health legislators have been deceived into supporting preemptive bills. Once preemption is passed, the result is that public health policymaking is significantly harmed, without a justifiable benefit.

The tobacco control movement now recognizes preemption as the disaster that it is. As health advocates have become adept at defeating explicitly preemptive legislation, the tobacco industry has turned to new strategies to help it achieve its goal of eliminating local power over tobacco control efforts. For a while, the tobacco industry tried to convince unsuspecting state legislators that they needed to pass preemptive statewide youth access laws in order to be compliant with federal regulations that tied grant funding for states to reductions in youth access to tobacco products. What the tobacco industry lobbyists failed to mention was that all 50 states already had laws making it illegal for minors to purchase tobacco products, which put them in compliance with the federal regulation. Additionally, weak preemptive youth access laws would actually put states at increased risk for non-compliance with federal regulations.

Similarly, tobacco lobbyists may either seek to maneuver preemptive language into tobacco settlement appropriations bills or to suggest a trade-off for tobacco settlement dollars. As tobacco control program funding is jeopardized by budget deficits and competing fiscal interests, tobacco allies may attempt to insinuate a quid pro quo – funding for preemption. However, savvy advocates know that such a deal would be sorely short-sighted. Program funding will still remain in jeopardy during the next legislative session after preemption is enacted, except that by then the local grassroots capacity, which is built and sustained via local policy initiatives, will have been cut off at the knees.

“We try to keep Philip Morris out of the media on issues like taxation, smoking bans and marketing restrictions. Instead, we try to provide the media with statements in support of our positions from third party sources, which carry more credibility than our company and have no apparent vested interest...[W]e create coalitions of third party sources to help carry our baggage on issues.” -Tina Walls, *Philip Morris*. March 30, 1993. Bates No. 2024023252/3265.

The tobacco industry continues to cultivate new allies to help promote legislation to end local control. Increasingly, as tobacco lobbyists stand in the wings, lobbyists for state licensed beverage associations, restaurant associations, hotel-motel associations and other pro-tobacco hospitality front groups push preemption in state legislatures across the country. Other preemption tactics include ‘hijacking’ legislation introduced by tobacco control advocates and attaching preemption through amendments or other legislative maneuvers, as well as the introduction of ‘super preemption’ bills that preempt all aspects of tobacco control, not just the area covered by the bill.

The tobacco industry has tried other stealth strategies to achieve preemption. One particularly onerous approach involves legislation to create appointed ‘state tobacco control boards.’ The membership of the proposed boards is weighted in favor of tobacco industry representation and they are given broad decision-making power over tobacco related issues. A biased board coupled with inherent bureaucratic stonewalling would in effect eliminate local control over tobacco and solidify tobacco industry influence over tobacco control legislation and policy matters. For example, Arkansas’ tobacco control board, established in 1997, had considered forming a legislative committee to work with a state retailer association to draft new legislation. The board’s bylaws require that only three days notice be given—either verbally or in writing—for board meetings, making it difficult for pro-health advocates to participate and provide input or effectively hold the board accountable.

Another stealth preemption strategy successfully enacted in Ohio—and attempted in West Virginia and Massachusetts—prohibits local boards of health from enacting regulations. This bill would have overturned 37 clean indoor air regulations enacted in West Virginia by county boards of health. While the tobacco industry’s stealth preemption strategies may not technically deny municipal governments the authority to enact tobacco control laws, they do have the desired effect of eliminating local control.

A new tactic that emerged in the 2004 Kentucky legislative session was not specifically preemptive, but was an underhanded tobacco industry move aimed at dissuading local tobacco control regulation on a financial basis. The proposed bill would have prohibited the use of the state’s tobacco settlement money in a county where a local municipality enacted a smokefree air regulation or any other type of tobacco control measure. The bill died through the help of sharp-eyed tobacco control advocates, and advocates in other states should be on the lookout for a similar funding-related tactic in their state.

“Our record in defeating state smoking restrictions has been reasonably good. Unfortunately, our record with respect to local measures...has been somewhat less encouraging...Over time, we can lose the battle over smoking restrictions just as decisively in bits and pieces-at the local level-as with state or federal measures.”  
-Raymond Pritchard, *Brown & Williamson. US Tobacco & Candy Journal*, July 18, 1986.

## LEGAL AND LEGISLATIVE SETTLEMENTS WITH BIG TOBACCO

Another potential vehicle for preemption involves legal and legislative settlements of the lawsuits filed by state attorneys general against the tobacco industry for reimbursement of Medicaid costs related to smoking. Early versions of federal legislation to settle these lawsuits would have resulted in preemption of state and local clean indoor air laws. However, all attempts to enact federal legislation failed. The public health community is united in its vigorous opposition to any form of preemption in individual or group settlements between the states and Big Tobacco.

## WHY LOCAL CONTROL IS IMPORTANT

***Ease of enactment:*** Local legislation remains far easier to pass than state or federal legislation. The tobacco industry has a much stronger influence at the state and federal levels, via lobbyists, money and political connections. They prefer to fight one state law rather than try to defeat numerous local laws. Although, in an attempt to defeat local ordinances, the tobacco industry funds fake business associations, launches smokers' rights groups, funds referenda and recall campaigns, and files legal challenges, these efforts are rarely successful. In most instances, local legislation passes despite the tobacco industry's considerable opposition.

***Ease of enforcement and compliance:*** Local enforcement agencies are easily accessible, particularly when compared to often distant enforcement agencies for state laws. Furthermore, because residents have a higher level of awareness of local ordinances than of state statutes, compliance rates tend to be higher for local ordinances.

***Synergism:*** The most important reason for protecting local control is that it supports our larger goal: societal rejection of tobacco use. A powerful educational process unfolds as a local community considers a smoking control ordinance. Letters to the editor, newspaper and television coverage, town hall meetings and public hearings all ensue. In the process, the community is left not only with a strong, enforceable law bolstered by public support, but with an increased understanding of tobacco issues. All this helps change social norms and attitudes, bringing us closer to our ultimate goal of a smokefree society.

## WHY IS PREEMPTION THE TOBACCO INDUSTRY'S CHIEF LEGISLATIVE GOAL?

The tobacco industry's push for preemption is a measure of our success at the local level. More than 2,330 local jurisdictions have now enacted local tobacco control ordinances. Of those, 1,539 contain clean indoor air provisions, including 178 smokefree ordinances which completely eliminate smoking in enclosed workplaces, 121 smokefree restaurant ordinances, 87 smoke free bar ordinances and 366 smokefree public places ordinances. Big Tobacco finds it nearly impossible to shut down local policy campaigns, so they try to close the door to local ordinances via preemption at the state level.

The tobacco industry is keenly aware that it is at a complete disadvantage at the local level. Walker Merryman of the Tobacco Institute said in 1991 "It's barely controlled chaos [at the local level]. We can't be everywhere at once." Victor Crawford, a former Maryland state legislator and lobbyist for the Tobacco Institute, explains the tobacco industry's strategy of taking the fight to the state level, away from local control:

"We could never win at the local level. The reason is, all the health advocates, the ones that unfortunately I used to call 'health Nazis,' they're all local activists who run the little political organizations. They may live next door to the mayor, or the city councilman, and they say 'Who's this big-time lobbyist coming here to tell us what to do?' When they've got their friends and neighbors out there in the audience who want this bill, we get killed. So the Tobacco Institute and tobacco companies' first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can't do that, at least on the state level, because the health advocates can't compete with me on a state level."

## DON'T CONFUSE TOOLS WITH GOALS

The tobacco control movement has embraced legislative advocacy whole-heartedly, and wisely so. Legislative campaigns, when done right, achieve a number of important goals: community education, changing social norms about tobacco use, institutionalizing protections. Unfortunately, some advocates accidentally play into the tobacco industry's hands while working to pass legislation.

We lose when we start thinking that legislation is our goal or that the measure of our success is getting a bill, any bill, passed. **Legislation is not our goal. Ending the disease, suffering and death caused by tobacco use is.** Legislation is merely a tool to help us achieve our goal. One pro-health Pennsylvania legislator said of a weak, preemptive state clean indoor air law passed in 1988: "It's a marshmallow, but it's better than nothing." He was wrong. Today, Pennsylvania cities are prevented from passing effective laws, even as cities in states from New York to New Mexico go smokefree.

The tobacco industry pushed preemption through the Pennsylvania legislature shortly after Pittsburgh adopted a strong local smoking control ordinance. At the time preemption passed other jurisdictions were lining up to pass similar ordinances. Who knows how many smokefree ordinances might have passed in Pennsylvania by now, or what strong, non-preemptive state law could eventually have been adopted once momentum had built up at the local level.

## WHAT ABOUT 100% LAWS THAT INCLUDE PREEMPTION?

The issue gets much more murky when a proposed law goes as far as is seemingly possible in a given area of tobacco control. Why should we oppose a state clean indoor air act that eliminates smoking in all workplaces and public places, including restaurants and bars just because it includes preemption of local ordinances?

Before we answer the "why not" question, let's turn the issue around and ask why anyone would want preemption in this situation. Why include preemption if a state clean indoor air act is the strongest possible? There's only one reason to add preemption to a state tobacco control law -- and that's to appease someone aligned with the tobacco industry.

Why not accept such a preemption clause? First, while the proposed legislation might provide 100% coverage when introduced, there is no guarantee that it will remain 100% as it wends its way through the legislative process. The initially "perfect" bill may be amended to be riddled with loopholes and exemptions, preemption still intact, by the time it is signed into law. Second, even if activists manage to successfully navigate the often perilous legislative waters of their state capitol, no law is tamper-proof, not even Federal statutes. Once enacted, a state law isn't cast in stone where it remains protected forever. It's a much simpler proposition for the tobacco industry to undermine one state law than it is to rescind dozens of local ordinances.

"While we're not married to any particular form of pre-emption language, we're dead serious about achieving pre-emption in all 50 states." -Tina Walls, *Philip Morris*, July 8, 1994. Bates No: 2041183751/3790.

Once enacted, preemption has proven difficult to remove. To date, of the 28 states that have fallen prey to the tobacco industry's campaign to enact preemption, only one has been able to remove it from its books. Several other states are waging difficult, incremental, and slow fights to repeal their preemptive state laws.

Most importantly, a state law with preemption doesn't allow the communities who haven't yet enacted ordinances to go through the beneficial educational process described earlier. There's no "buy-in" for residents in communities that haven't yet wrestled with issues surrounding tobacco.

## **PREPARING TO BEAT PREEMPTION**

What should we be doing to prepare for the next wave of preemption bills in our state legislatures?

**Reach consensus.** Make sure your state and local coalitions (and their lobbyists) agree that preemption is always unacceptable and grounds for withdrawing support from a bill. Convey this position to your legislative friends in the state capitol -- both legislators and lobbyists.

**Build your grassroots infrastructure.** Develop lists of supportive individuals and organizations; make sure you have all their relevant contact information. Set up phone trees, email lists and other systems to send out action alerts. You don't want to be scrambling to create this infrastructure at the same time you are trying to generate calls, letters, and other grassroots activities.

**Frame the issue to win public support.** While the public yawns when we mention preemption, they get very excited about "local control," "big government taking away your rights," and "special interests." The public also dislikes the tobacco industry, so linking preemptive bills with their origins in the tobacco industry goes a long way toward rallying public opposition to them. Make the public aware of the potential threat to local control by proactively educating the media, policy makers and their constituents. For materials to help frame the issue of local control to increase public support, refer to the Preemption Survival Kit (call ANR Foundation for a copy).

**Forge alliances outside the health community to fight preemption.** State municipal leagues representing local governments generally oppose preemption on principle. While they may not care about tobacco issues, they will probably agree that cities and counties should have the power to make their own decisions. The Kentucky Municipal League, for example, has been very supportive in the state's fight to protect local control. Public advocacy groups, like the state PIRGs (Public Interest Research Groups) and Common Cause, and some religious organizations, may also lend their lobbying and grassroots efforts to the fight against preemption.

"The bad news is that the most favorable states for preemption are already onboard. In many of the remaining states we're going to have to fight like hell to get a preemption law we can live with." -Tina Walls, *Philip Morris*, July 8, 1994. Bates No: 2041183751/3790.

**Educate your state legislature and the media.** Expose preemption as part of a national tobacco industry strategy, and the industry's alliance with hospitality industry associations to promote preemption. Try to secure commitments from the leadership of the state legislature and the governor to oppose preemption in any form.

**Keep a close eye on your legislature.** Carefully monitor all tobacco-related bills. Preemption is often inserted at the last minute, behind closed doors. Keep an eye on other legislation, too. Preemption of clean indoor air ordinances, cleverly disguised in budget legislation, was recently discovered by watchful eyes in North Carolina.

**Be savvy.** Don't introduce a bill in your state legislature unless your coalition has the power to kill the bill if it gets hijacked by the tobacco industry. Make sure your legislative sponsor understands and agrees that preemption is never an acceptable compromise. If you do introduce a bill, make sure that it contains an explicit anti-preemption clause protecting the power of local jurisdictions to adopt and enforce their own ordinances. If your sponsor objects to this clause, you know you have a problem.

***Don't lose sight of our ultimate goal.*** Keep in mind the following wise words of Robert M. LaFollette, former governor of Wisconsin:

*“In legislation, no bread is often better than half a loaf... A halfway measure never fairly tests the principle and may utterly discredit it. It is certain to weaken, disappoint, and dissipate public interest. Concession and compromise are almost always necessary in legislation, but they call for the most thorough and complete mastery of the principles involved in order to fix the limit beyond which not one hair's breadth can be yielded.”*

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