PREEMPTION BY FEDERAL GOVERNMENT IN THE FIELD OF FOOD REGULATION[1]

BENJAMIN G. HABBERTON
Fistere & Habberton
1012 Fourteenth St., N. W., Washington, D. C.

Abstract

It frequently happens that the federal government and a state government attempt to regulate the same commercial activity — or what may appear to be the same commercial activity. If the laws or regulations are in agreement, there is no problem. But suppose they are not in agreement. Here, the problems arise. The teaching of the numerous judicial decisions appears to be that even if the state requirement in issue is different from the federal, if it is not in direct conflict with the federal, and does not interfere with the policy or administration of the federal, the two may co-exist and both be enforced. But if the state requirement is in direct conflict with the federal and interferes with the policy or administration of the federal, the federal law or regulation will prevail over the state, and the state law or regulation will be stricken down. In this situation, the federal government with its paramount constitutional power to regulate interstate commerce, is said to have occupied or preempted the particular field of government control and thereby to have excluded regulation by the state. This doctrine, articulated in the foregoing or comparable language, has been applied in numerous cases involving the regulation of commerce in food products. There are cases, for example, involving federal versus state food standards, and these are of particular interest.

The framers of the Constitution of the United States did a wonderful thing for lawyers when they wrote the Commerce Clause. To be quite specific, this is clause 3 of Section 8 of Article 1 and it provides as follows: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." The regulation of commerce with foreign nations and more especially with the Indian Tribes has not occasioned too much difficulty, relatively speaking. It is the power of Congress to regulate commerce among the several states that has proved so problematical. The amount of litigation that this simple expression has caused is rather overwhelming and it may fairly be said that it is one of the constitutional happy hunting grounds of lawyers representing clients engaged in commercial pursuits.

Needless to say, the problems of law arise chiefly because each of our fifty states also has the power to regulate commerce, and although state regulation is primarily concerned with intrastate commerce, it frequently happens that both a state and the Congress (or one of the federal governmental agencies to which the power of Congress has been delegated) attempt to regulate the identical commercial activity. The consequences of this collision are apt to be interesting.

An unusually important situation of just this kind involving a state standard of identity for ice cream and the new federal standard has quite recently been adjudicated by a United States District Court and is now on appeal. Later on, we shall consider this case at length, but first we shall trace the development of this area of the law as applied to food regulation. And since some of the cases we shall discuss are not too easily understood, we shall look first at an instructive and comparatively simple case which involves the same principles of law but does not involve food. This case, which was decided by the United States Supreme Court only last year, is *Huron Cement Co.* v. *City of Detroit*, 362 U. S. 440.

This was a criminal prosecution under the Detroit Smoke Abatement Code. The cement company operated several ships on the Great Lakes, and Detroit was one of the ports of call. Two of the ships were equipped with marine boilers, and it was necessary to keep these boilers fired and cleaned while the ships were docked for loading and unloading, in order to operate deck machinery. When the cleaning occurred, the boiler stacks emitted smoke which, in density and in duration, exceeded the maximum standards allowable under the Detroit Code.

Now these ships operated in interstate commerce and the ships and their equipment, including their boilers, had been inspected, approved, and licensed to operate in interstate commerce under a comprehensive system of regulation enacted by Congress. The Cement Company urged that by the enactment of this comprehensive system of regulation, the federal government had preempted the field and had manifested an intention that states should take no conflicting action in that field. Accordingly, the provisions of the Detroit Smoke Abatement Code could not constitutionally be applied to the Company's ships.

The Supreme Court, affirming the lower courts, ruled adversely to these contentions and upheld the application of the Detroit Code. The court reviewed the federal inspection and licensing laws and found that although they are comprehensive in scope, their purpose is only to afford protection from the perils of maritime navigation. On the other hand, the

[1]Presented at 15th Annual Meeting of the Dairy Products Improvement Institute, Inc., Hotel Governor Clinton, New York City, February 15, 1962.

purpose of the Detroit Code is to protect the health and enhance the cleanliness of the local community. Accordingly, the court concluded that the federal law has not preempted the field of regulation covered by the local law.

This case illustrates the nature and some of the limitations of the doctrine of preemption.

Turning now to food regulation we find that there have been several landmark cases in the United States Supreme Court, and the first of these was *Savage* v. *Jones*, Indiana State Chemist, 225 U. S. 501. In this case, decided in 1912 under the old Federal Food and Drug Act of 1906, the plaintiff was the manufacturer of "International Stock Feed," a preparation for domestic animals. Plaintiff manufactured this product in Minnesota and shipped it to numerous other states including Indiana. The Manufacturer sued the Indiana State Chemist to enjoin him from enforcing, as to the manufacturer's product, the provisions of the Indiana statute regulating the sale of "concentrated commercial feeding stuffs." The manufacturer contended that his shipments into Indiana were regulated by the federal act and that the Indiana statute, if applied to his products, would be unconstitutional. More specifically, he contended that insofar as the Indiana statute was applied to interstate commerce, it has been "superseded" by the federal law.

The court first considered the Federal Food and Drug Act of 1906 and found that as applied to food for domestic animals, it prohibited the interstate shipment of such foods as misbranded only if the label bore any false or misleading statement, design, or device. The plaintiff's labels contained no such false or misleading statements, designs, or devices, and hence complied with the federal law. The court then examined the Indiana law and found that it went beyond this and required that every label contain a full declaration of ingredients.

The court upheld the Indiana statute. Comparing the two statutes, the court found that Congress had so limited the scope of those acts which were prohibited as adulteration or misbranding that they did not include the object at which the state law was aimed. Congress, in enacting the federal act, had seen fit only "to occupy a limited field." The requirements of the state law were "not in any way in conflict with the provisions of the Federal act," and "they may be sustained without impairing in the slightest degree" the "operation and effect" of the federal law. Hence, the court says, "There is no question here of conflicting standards or of opposition of state to Federal authority."

Only a year after *Savage* v. *Jones*, the Supreme Court distinguished that case in deciding the leading case of *McDermott* v. *Wisconsin*, 228 U. S. 115. This case involved the sale in interstate commerce of the well-known product "Karo Corn Syrup." The package was labeled "Karo Corn Syrup - 10% Cane Syrup - 90% Corn Syrup." It was conceded that this label complied with a regulation, promulgated under the Federal Food and Drug Act, which prescribed the wording for labels for corn syrups, with or without added cane syrup, and which stated that a syrup so labeled "is not misbranded." On the other hand, the Wisconsin statute required that corn syrup be labeled "Glucose," together with language indicating the presence of other ingredients, if any. Furthermore, the Wisconsin statute provided that corn syrups should have no label other than the one prescribed.

This troubled the court, and it concluded that the Wisconsin statute was not valid. Even giving full recognition to the principles and ruling of *Savage* v. *Jones*, the court said that "the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution."

It is important to observe that the court here found a state law which directly conflicted with a federal law intended to regulate the very field covered by the state law.

Savage v. *Jones* and *McDermott* v. *Wisconsin* were both decided by unanimous courts. Coming along a number of years later, the case of *Cloverleaf Butter Co.* v. *Patterson, Alabama Commissioner of Agriculture*, 315 U.S. 148, was decided five to four.

This case involved the manufacture of renovated butter from packing stock butter. The federal regulation of this business was contained in the Renovated Butter Act and the Internal Revenue Code. The State of Alabama also regulated the production of renovated butter, and one of the specific provisions of the Alabama statute was that authorizing the seizure of packing stock butter being held for renovation. The state authorities made repeated seizures of Cloverleaf's packing stock butter, and Cloverleaf brought this suit to enjoin further seizures. Cloverleaf urged that the federal law establishes a comprehensive scheme of regulation of the manufacture of renovated butter and that these seizures of the materials to be renovated interfered, and were inconsistent, with the federal scheme of regulation and hence were "excluded" by the federal law. Five members of the Supreme Court agreed with these contentions.

Four members of the Court disagreed. They point out that the Federal legislation grants authority to seize the finished product - renovated butter - but

as to the packing stock butter, it authorizes only inspection. The federal government, say these four justices, has thus not completely occupied this field of regulation and there is no conflict with the federal law. In their view, the effect of the majority opinion is to create a vacuum: It deprives the state of the right to seize the packing stock butter, and under the federal legislation the federal authorities have no right to do so.

It is not too difficult to see why the decision of this case resulted in a sharply divided court.

To this point we have considered only cases decided by the Supreme Court of the United States. We come now to a series of three cases decided by the highest court of the State of New York.

The first two of these cases — *Quaker Oats Company* v. *City of New York,* and *Hill Packing Company* v. *City of New York,* 68 N.E. 2d 593, were considered by the court together since they brought into question the constitutional validity of the same New York City ordinance.

The ordinance in question was one which required that any horse meat intended for animal feed be decharacterized by the addition of harmless coloring. The purpose was, of course, to cause the product to be readily distinguishable from foods intended for human consumption. Now the federal government also had entered this field. A regulation promulgated under the Federal Meat Inspection Act provided that horse meat intended for animal feed might either be decharacterized by the addition of harmless coloring or by being packed in hermetically sealed cans and labeled, for example, "Dog Food." The Quaker Oats Company's product "Ken-L-Ration" complied with the federal law because it was packed in a can and labeled "Dog Food." However, it was not decharacterized by the addition of color and hence did not comply with the New York ordinance.

As applied to this product, the court had no difficulty in concluding that the city ordinance must give way to the federal regulation. The court says that "a state or municipal statute will be stricken only if — in terms or in practical administration — it conflicts with the Federal law or infringes on its policy." Here, the court found "a conflict, actual and open, on the very face of the two provisions." This is true because "the city forbids to interstate commerce what the Federal government has authorized." This ordinance did not "supplement the federal prescription;" it "adds a further requirement."

The Hill Packing Company case was quite simple. The Hill Company was marketing its product without complying with either the Federal regulation or the city ordinance, and since the city requirement of decharacterization by the addition of color was also one of the alternative requirements of the federal regulation, the company had no cause for complaint.

The third of the three New York cases involved the amount of added moisture that may be present in briskets of beef. A New York City ordinance provided that briskets of beef should contain a maximum of ten percent moisture added by processing, and at the same time a regulation of the United States Department of Agriculture, promulgated under the Federal Meat Inspection Act, provided that they might contain a maximum of twenty percent.

As to shipments of this product from outside the State of New York, the New York Court held the New York City ordinance unconstitutional. *Kansas Packing Company* v. *City of New York,* 127 N.Y.S. 2d 107; modified 131 N.Y.S. 2d 351; affirmed 128 N.E. 2d 411. The court says that a state statute or municipal ordinance "must fall if in terms or practical administration it either conflicts with the Federal law or infringes on its policy. This ordinance does both. In terms it prohibits importation of a product which has received the imprimatur of approval from that authority. In practice it renders nugatory the inspections conducted by the Federal authority and effectually substitutes a different standard. Trading pursuant to the sanction thereby given is infringed upon to an extent that can render it impossible. The statute is therefore unconstitutional.

It is significant to observe in this case that the New York ordinance provided for a food product of higher nutritional value than did the Federal regulation, since the former permitted only ten percent moisture while the latter permitted twenty percent. But the New York court did not regard this factor as affecting the paramount authority of the Federal law under the conditions here found to exist.

To these judicial decisions on the question of the preemption by the federal government of the field of food regulation, there should be added at least one opinion by a State Attorney General. This is an official opinion by the Attorney General of Wisconsin given to the Director of the Department of Agriculture of that state (Reported in Vol. 3, C.C.H. Food, Drug & Cosmetic Law Reporter at Par. 85, 127). The Director had asked the Attorney General for his opinion as to the validity of the Wisconsin standards of identity for canned vegetables and canned fruits, jams, and jellies. The federal standards of identity for these products permitted the use of certain optional ingredients such as water, sugar, vinegar, spices, and vegetable oil in certain canned vegetables and canned fruits, and permitted jams and jellies to be made of frozen and canned fruit as well as fresh fruit. The Wisconsin standards recognized none of these optional ingredients in canned vegetables and canned fruits and required that jams and jellies be made of fresh fruit only. The Attorney General found that the state standards were

in direct conflict with the federal standards and relying largely upon the case of *McDermott* v. *Wisconsin* heretofore discussed, expressed his opinion that the state standards were invalid and unenforceable.

One further non-judicial pronouncement should be noted. In January 1959 - some nine months before the final promulgation of the new federal standard of identity for ice cream - the International Association of Ice Cream Manufacturers, through its counsel, asked the Federal Food and Drug Administration whether, in its opinion, an ice cream containing milk fat in the proportion provided by a federal standard could legally be shipped into a state whose statute or regulation provides for a greater proportion of milk fat. The Food and Drug Administration replied that in its opinion the situation hypothesized would present a direct conflict between federal and state law, and that upon the basis of the decided cases, especially *Kansas Packing Co.* v. *City of New York*, heretofore discussed, the federal regulation, by preemption, would be controlling over the state law, and the product meeting the federal standard could legally be shipped into the state having a higher requirement.

We have now gone full circle in our consideration of preemption in the field of food regulation. At the outset, it was stated that a case involving the new federal standard of identity for ice cream had quite recently been adjudicated by a United States District Court and is now on appeal. We have traced the development of the law applicable to this situation from its beginnings down to the present, and we now again come to the recent case.

The case is that of *The Borden Company* v. *Liddy, Secretary of Agriculture of the State of Iowa*, and it was decided in the United States District Court for the Southern District of Iowa on December 15. The case is a fascinating one to food law lawyers and it is a largely important one to this audience. As you know, the federal standard of identity for ice cream provides that the weight of the milk fat shall be not less than ten percent of the weight of the finished ice cream. An Iowa statute prescribes that it shall be not less than twelve percent. The Borden Company manufactured a ten percent ice cream within the State of Iowa for sale outside the state, and it manufactured a ten percent ice cream in other states for sale in Iowa. The Iowa Secretary of Agriculture made demand upon The Borden Company to discontinue both practices and threatened to invoke criminal sanctions unless Borden immediately complied. Borden promptly brought this suit seeking an injunction and a declaratory judgment.

During the course of the proceedings, the Secretary conceded Borden's right to manufacture ten percent ice cream in Iowa for shipment into other states. He did this because another Iowa statute expressly provided that "articles" might be held in Iowa for sale in other states notwithstanding that they failed to comply with Iowa standards. Thus, a ruling upon this point as a matter of general law, uncontrolled by legislation, was avoided. However, there remained for decision the classic question of whether Iowa could exclude the product manufactured outside the state which failed to meet the Iowa twelve percent requirement but which complied with the federal standard in that and every other respect. The court ruled, surprisingly, that Iowa could exclude it.

The Borden Company quite naturally brought many arguments to bear. One of these arguments was based upon an Iowa statute concerning the "labeling of mixtures." This statute says, in effect, that any food product labeled in conformance with the labeling requirements of federal law shall be deemed to be labeled in conformance with the laws of the State of Iowa. Arguing from this, Borden urged that its ten percent product labeled "Ice Cream" in conformance with federal law is hence properly labeled "Ice Cream" in conformance with Iowa law and is entitled to be sold as such in Iowa. As to this, the court said: "If limited to this statute, plaintiff's argument is correct, but this argument tends to ignore the effect of the Iowa statute which prohibits the sale of adulterated food." The court then proceeded, at great length, to point out that the Iowa statutes prohibit the sale of both misbranded and adulterated foods and that among adulterated foods, as defined, are foods which do not conform with the Iowa standards.

However, later in its opinion the court says: "Nothing in the Iowa adulterated food statute forbids the sale of Borden's frozen dessert product containing only 10 percent milk fat. It merely prohibits the sale of said product as the food 'ice cream'." Presumably, a change of the name of the product would cure the adulteration, and the inference is that at least this portion of the adulteration statute is, after all, only a matter of labeling. The court's disposition of this argument can scarcely be considered adequate.

Of greater relevance to our discussion here is Borden's argument that by the promulgation of the federal standard of identity for ice cream, the federal government had preempted this field of regulation and that to exclude a product which fully complies with the federal standard would be to impose an undue burden on interstate commerce. The court specifically rejected this argument. The court said there was no indication that the federal regulation was intended to supersede state laws or regulations. The effect of the federal regulation was only to establish a minimum standard which states are at liberty to improve upon. Under this interpretation,

said the court, there is no conflict between the federal law and the state law, and no undue burden is imposed upon interstate commerce. It is of course true that the federal regulation prescribes a minimum standard: It says that ice cream must contain at least ten percent butterfat. But in my opinion it goes farther than this: It says also that a product which contains ten percent butterfat *is* ice cream and is entitled to be recognized as ice cream and to move in interstate commerce as ice cream.

The Federal Food and Drug Administration issued its standard of identity for ice cream nineteen years after proceedings for that purpose were begun. The standard itself is long, comprehensive, and detailed. If this standard is not intended to preempt this field of regulation, one wonders how *any* regulatory pronouncement could be so construed.

More light will be thrown on the merits of this case in the course of time, for, as has been stated, The Borden Company has appealed. The outcome of the appeal holds much significance for the dairy manufacturing industry.