Preemption in Alcohol Control

Lessons Learned the Hard Way

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Alcohol & the U.S. Constitution

- Alcohol is unlike other consumer product
- Subject of 2 Constitutional Amendments
  - 18th Amendment - Prohibition
  - 21st Amendment – repeal, but also gave power to states
- Alcohol is heavily regulated at the state level
  - Localities must look for state level preemption
How far does State power extend under the 21\textsuperscript{st} Amendment?

**Constitutional Issues**

- 1\textsuperscript{st} Amendment
  - Freedom of Speech

- Commerce Clause
  - Authorizes Congress to regulate commerce between the states

- Dormant Commerce Clause
  - Flows from the Commerce Clause
  - States cannot discriminate against interstate commerce
How far does State power extend under the 21st Amendment?

Federal Regulation

- Advertising and Labeling
- Federal Taxation & Licensing
- Antitrust Laws
- Criminal Activity
Case Study

Power of 21st Amendment to overcome federal preemption – New Mexico

- State banned airline from serving alcohol when in or flying over the state
- Airline sued claiming federal aviation law preempted state action
  - Airplanes traveling over state were transporting alcohol in state
  - 21st Amendment allows state to regulate “transport” of alcohol within its territory
  - Federal law controlling airlines did not preempt alcohol regulation
Case Study

Preemption Strengthening Local Laws – Massachusetts

- Some towns restricted happy-hour promotions
- Alcohol establishments in neighboring towns began promoting their happy-hour specials
- Increased risk of drunk driving
- Competing alcohol policies undermined policy
- State level law on happy-hour promotions set minimum standards, locals could go further
Case Study

Preemption Weakening Local Laws – California

- Beer and wine can be sold at convenience stores
- Convenience stores began adding gas pumps and gas stations began adding convenience stores
- Increased concern regarding drunk driving
- 30 cities passed bans of alcohol/gasoline markets
- Industry got weak law passed to preempt local laws
Case Study

State Preemption Work Around – California

- State sole authority over licensing of retailers
- City of Oakland sought to reduce nuisance problems associated with alcohol sales in its community
- Passed ordinance that:
  - Imposed requirements on the retailers to curb nuisance activities
  - Collected fee to fund enforcement of ordinance
- Ordinance upheld under local land use authority
- Other localities have since adopted similar ordinances
Addressing State Preemption Issues

- Become acquainted with state alcohol laws
- Use a different power – e.g., in California, land use
- Develop statewide proposals of minimum standards
  Always a floor, never a ceiling, preserve local control
- Consult an attorney when drafting any local ordinance
- Keep an eye on industry trump card at all times
  - When you start getting successful at local level…may be trouble
Caution – Issues all Intersect

- Giving up preemption in one area (e.g. food) could undermine public policy in tobacco, alcohol
- Poorly drafted bills make bad court decisions
- Consider what is lost in grassroots movement by losing a preemption battle, or worse, giving it away
- Consider proactive laws to ensure local control
- Battle has largely been lost in alcohol taxation; don’t let this happen in other areas, such as food / beverages
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