LETTER OPINION
2011-L-01

February 3, 2011

The Honorable Al Carlson
Majority Leader
House of Representatives
State Capitol
Bismarck, ND 58505-0360

The Honorable Robin Weisz
State Representative
State Capitol
Bismarck, ND 58505-0360

Dear Representatives Carlson and Weisz:

Thank you for your letter asking about the constitutionality of H.B. 1286, 2011 N.D. Leg. (H.B. 1286). In light of the strong presumption of constitutionality of legislative enactments,[1] the Attorney General's role to defend statutory enactments from constitutional attacks, and as no specific facts are identified in your request, I am unable to provide a specific opinion on the constitutionality of H.B. 1286. However, based on the plain language of H.B. 1286, it is my opinion that it is likely preempted by federal law and, thus, likely violative of the Supremacy Clause.

In light of the numerous federal laws covering aspects of the provision of medical services and health insurance coverage, if H.B. 1286 passes, I believe a conflict likely would arise between H.B. 1286 and federal law. If H.B. 1286 passes and an actual conflict arises between H.B. 1286 and federal law, I further believe a court would likely find H.B. 1286 preempted by federal law and unconstitutional under the Supremacy Clause.

[1] See N.D.A.G. 2003-L-21.

ANALYSIS

The primary question raised is whether H.B. 1286 is preempted by federal law, making its application unconstitutional under the Supremacy Clause.[2]

The United States Supreme Court summarized the preemption doctrine in Fidelity Federal Savings & Loan Association v. de la Cuesta.[3] In doing so, it wrote:

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).
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> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See also *Jones v. Rath Packing Co.*, 430 U.S., at 526, 97 S.Ct., at 1310; *Bethlehem Steel Co. v.*

[2] See U.S. Const. art. VI, cl. 2; Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000).
[3] 458 U.S. 141 (1982).

> *New York Labor Relations Bd.*, 330 U.S. 767, 773, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234 (1947).[4]

The categories of preemption are not "rigidly distinct."[5] "Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, 'field pre-emption may be understood as a species of conflict pre-emption.'"[6]

Whether a particular state law is preempted by federal law cannot be determined in the abstract; a specific federal law must be identified to determine congressional intent and whether the state law actually conflicts with the federal law. A court's "ultimate task in any pre-emption case" is to determine whether the state statute is consistent with the structure and purpose of the federal statute as a whole, looking to "'the provisions of the whole law, and to its object and policy' . . . ."[7] "The question, at bottom, is one of statutory intent . . . ."[8]

Simply stated, H.B. 1286 makes it a crime for federal or state employees to apply federal law, including federal regulations and rules, when determining a North Dakota resident's right of access to medical services and health insurance coverage, unless the federal law has "received specific statutory approval by the North Dakota legislative assembly." Thus, H.B. 1286, by its very terms, pits state law against federal law, making compliance with both state and federal law impossible. Because "the Supremacy Clause prohibits states from enacting laws that make compliance with both federal and state law a physical impossibility or that 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'"[9] if a conflict arises between H.B. 1286 and federal law, a court would likely find H.B. 1286 violative of the Supremacy Clause.

It is speculative whether a conflict will ever arise between H.B. 1286 and federal law. Some factors affecting whether a conflict will arise include the nature of current and future federal laws regarding the provision of medical services and health insurance

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[4] Id. at 152-53; see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98-99 (1992).
[5] Crosby, 530 U.S. at 373 n.6 (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)).
[6] Id. (quoting English, 496 U.S. at 79-80 n.5).
[7] Gade, 505 U.S. at 98 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).
[8] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992).
[9] Chamber of Commerce v. Edmondson, 594 F.3d 742, 766-67 (10th Cir. 2010) (quoting Fid. Fed. Sav. & Loan Ass'n, 458 U.S. at 152-53).

coverage, which federal laws receive specific statutory approval by the North Dakota Legislative Assembly, and any future specific requests for medical services and health insurance coverage by North Dakota residents and inhabitants. The mandate presented by H.B. 1286 is exacerbated by the fact that Congress meets continually while the Legislature meets only every two years, unless a special session is called. For example, under the current version of H.B. 1286, Congress could pass a law that would not be considered until the next regular legislative session in 2013.[10]

Whether H.B. 1286 is preempted by federal law and unconstitutional under the Supremacy Clause is a fact sensitive inquiry that cannot be answered in the abstract.[11] However, in light of the numerous federal laws preempting certain aspects of the provision of medical services and health insurance coverage,[12] if H.B. 1286 passes, it is likely an actual conflict will arise between H.B. 1286 and federal law. If H.B. 1286 passes and an actual conflict arises between H.B. 1286 and federal law, a court would likely find H.B. 1286 preempted by federal law and unconstitutional under the Supremacy Clause.[13]

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[10] There are two additional bills with provisions that raise similar concerns. The first, H.B. 1287, provides a state agency with authority to approve or disapprove of rules adopted by the [U.S.] environmental protection agency as well as authority to pre-approve or disapprove of visitations or inspections in North Dakota by the environmental protection agency. The second, S.B. 2234, provides the Legislative Assembly with authority to approve or disapprove, by concurrent resolution, any "federal designation" over land or water resources in North Dakota by the federal government or any agency or instrumentality of the federal government.

[11] See Phi, Inc. v. Office & Prof'l Emps. Int'l Union, Civ. A. Nos. 06-1469, 06-2243, 2010 WL 3905084, at *10 (W.D. La. Sept. 27, 2010) (explaining "whether a state law claim is preempted under federal law is a highly nuanced, fact-specific inquiry"); Buffalo S. R.R. v. Vill. of Croton-on-Hudson, 434 F. Supp. 2d 241, 249 (S.D.N.Y. 2006) (stating "whether a certain state action is preempted requires a fact-specific inquiry"); Aloha Airlines, Inc. v. Mesa Air Group, Inc., No. 07-0007 DAE-BMK, 2007 WL 1582707, at *2 (D. Hawaii May 31, 2007) (explaining some preemption questions are of a "fact-intensive nature" and do not "involve a pure question of law").

[12] See, e.g., the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029; the Emp. Ret. Income Sec. Act, 29 U.S.C. § 1001, et seq.; and the Federal Food, Drug, & Cosmetics Act, 21 U.S.C. § 301, et seq.

[13] In reviewing Idaho legislation intended to nullify the application of the federal health law, the Office of Attorney General of the State of Idaho concluded that the legislation would conflict with the Supremacy Clause in Article VI of Clause 2 of the United States Constitution. Letter from Brian Kane, Ass't Chief Deputy Att'y Gen. of Idaho, to Rep. William Killen (Jan. 21, 2011).

It should be noted, as you are probably aware, that I joined a lawsuit in the federal district court for the Northern District of Florida challenging the constitutionality of the federal health care law, the Patient Protection and Affordable Care Act (Act).[14] On January 31, 2011, United States District Court Judge Roger Vinson ruled Congress exceeded the bounds of its authority in passing the Act with the individual mandate—specifically, the requirement individuals carry health insurance or face a tax penalty. He also found the individual mandate not severable from the Act (i.e., that it is an essential and indispensable part of the Act). Because the individual mandate is unconstitutional and not severable, Judge Vinson declared the entire Act void. In addition, United States District Court Judge Henry Hudson ruled in a Virginia case that Congress does not have the power to require individuals to carry health insurance or face a tax penalty. Other federal district courts have upheld the Act against constitutional challenge. It is widely agreed that the constitutionality of the Act will ultimately be resolved by the Supreme Court. Nothing in this opinion regarding the constitutionality of H.B. 1286 should be construed as departing from my view that the individual mandate in the Patient Protection and Affordable Care Act exceeds congressional power under the Commerce Clause of the Constitution and is unconstitutional.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[15]

[14] Florida v. U.S. Dep't of Health and Human Servs., Case No. 3:10-cv-91-RV/EMT.
[15] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).