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On ENVIRONMENTAL LAW

In most of the country, environmental law is federal law with an overlay of state implementation and enforcement. But in California, environmental law is predominantly state and local law. Our laws are not only more stringent; they also regulate in novel ways. Companies caught unawares by these differences consider California a treacherous place to do business.

Proposition 65 is the best known example — nowhere else in the world can a consumer product manufacturer face private litigation over very low levels of chemicals. But recent efforts in California to address new environmental issues such as climate change and pharmaceutical waste have prompted new laws and new litigation.

Those efforts are frequently challenged as inconsistent with the system of nationwide regulation preferred by businesses seeking to distribute and sell their products efficiently. The main doctrinal grounds for court challenges seeking national uniformity are federal preemption, primary jurisdiction, and the dormant Commerce Clause. Perhaps due to Washington gridlock, or perhaps to conscious policy choices, federal preemption challenges often are based on meager statutory or regulatory language, and primary jurisdiction challenges often flounder on federal regulators' lack of resources and lack of enthusiasm for confrontation with California officials. Recent developments suggest that challenges under the dormant Commerce Clause will fare no better. not.

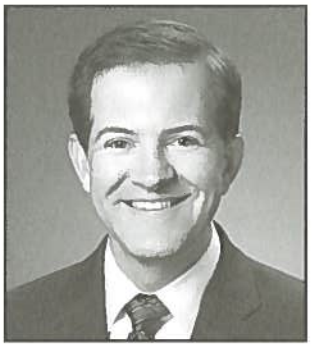
Under the Commerce Clause, Congress has the authority "to regulate commerce...among the several states." The dormant Commerce Clause is the implied converse: state (and local) governments may not unduly interfere with interstate commerce. The U.S. Supreme Court has set out the doctrine in two parts. First, state or local laws that favor in-state interests over out-of-state interests, *i.e.*, laws that appear fundamentally protectionist, are generally unconstitutional unless there is no alternative non-discriminatory means to serve the legitimate state or local interest. Second, even-handed laws that have indirect effects on interstate commerce can be unconstitutional if the burden on interstate commerce exceeds the local benefits. This balancing test is notoriously indeterminate.

In two recent high-profile cases, regulated industries challenged novel California environmental laws under the dormant Commerce Clause. Neither has fared well so far.

At the heart of the first case, *Rocky Mountain Farmers Union v. Corey*, was California's low carbon fuel standard aimed at addressing climate change. The law restricts fuels used in California based on the amount of carbon associated not only with the fuels' use in California but also with their production and transportation to California. In other words, California regulators count not just the carbon in the gasoline, but also the carbon emitted outside of California by burning other fuels to get the oil out of the ground, to refine it, and to ship it to a gas station in California. A federal court in Fresno enjoined the law because it discriminated against fuel produced outside of California, which naturally must be transported farther.

The Ninth Circuit reversed, and despite the concerted effort of the business community, the U.S. Supreme Court recently refused to hear the case. The Ninth Circuit held that the law did not facially discriminate against out-of-state actors and did not exceed California's authority. While the lawsuit had called into question the power of states to regulate the "life cycle" environmental effects of a product, the resolution of the facial challenge may prompt other states — reportedly Washington and Oregon — to enact similar approaches.

The second case also deals with life-cycle effects but involves a local ordinance: Alameda County's first-in-the-nation requirement that producers of prescription drugs fund or operate "take back" programs for proper disposal of unused products. The law is part of the "extended producer responsibility" movement aimed at regulating the "cradle to grave" effects of consumer products and shifting the disposal costs for items that may require special treatment (*e.g.*, electronics containing mercury) from local governments to the items' manufacturers.



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A federal court in San Francisco rejected the dormant commerce clause challenge of pharmaceutical manufacturers and distributors, finding no discrimination even though the ordinance ultimately shifts the costs of disposal in Alameda County from local taxpayers to purchasers of prescription drugs nationwide. The court was unswayed by the "happenstance" that most producers of prescription drugs have no presence in Alameda County and that 99 percent of prescription drugs in the U.S. are made outside of Alameda County. The Ninth Circuit recently heard arguments on the appeal, which is being closely watched by state and local governments interested in such cost-shifting efforts as well as by producers of other products that may be targeted.

California continues to innovate in environmental regulation; for example, the state's Green Chemistry statute allows for "life cycle" considerations in future regulatory actions. As businesses continue to confront a growing patchwork of laws that increase costs and decrease efficiency, with little prospect of preemptive federal legislation, dormant Commerce Clause challenges are sure to continue.

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