Holland & Hart

Jessica Smith

Partner
303.295.8374
Denver
jjsmith@hollandhart.com

Christopher Jackson

Partner
303.295.8305
Denver
cmjackson@hollandhart.com

Tenth Circuit Adopts Expansive Reading of Express-Preemption Provision

Insight — April 13, 2022

Law.com

In 'Thornton v. Tyson Foods', the Tenth Circuit took up the scope of the preemption provision in the Federal Meat Inspection Act. In doing so, the appellate court confirmed that it will continue to read express-preemption provisions broadly, giving district courts little room to apply state law even in areas traditionally subject to local control.

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit held that a federal law, the Federal Meat Inspection Act (FMIA), expressly preempts state law claims relating to the alleged misbranding of meat products. In doing so, the appellate court suggested that it will continue to read *all* preemption provisions broadly, leaving little room for states to regulate.

Case Background

The plaintiffs in the case filed a putative class action lawsuit against three meat-packing companies under New Mexico state law, alleging that the defendants put deceptive and misleading labels on their beef products. *Thornton v. Tyson Foods*, 2022 U.S. App. LEXIS 6380, at *2-3 (10th Cir. March 11, 2022). Specifically, the plaintiffs claimed that the use of a "Product of the U.S.A." label was false and misleading because the defendants' beef products didn't originate from cattle born or raised in the United States. Id. According to the complaints, the defendants "imported live cattle from other countries, slaughtered and processed the cattle here, and labeled the resulting beef products as 'Products of the USA.'" Id. at *3.

The defendants removed the case to federal court and filed a motion to dismiss. The district court granted the motions, holding that federal preemption barred all of the plaintiffs' claims. Id. at *4. The lower court relied on the FMIA, which contains an express-preemption provision that prohibits states from imposing any "labeling … requirements in addition to, or different than those made under this chapter … ." 21 U.S.C. §678.

The Tenth Circuit's Decision

On appeal, the defendants contended that the FMIA did not preempt their state law claims. In a 2-1 decision, the Tenth Circuit disagreed.

Writing for the majority, Judge Moritz began by reviewing the scope of the FMIA, which "'regulates a broad range of activities' related to meat processing." *Thornton*, 2022 U.S. App. LEXIS 6380, at *5 (quotation omitted). To ensure that meat products are properly labeled, the FMIA only permits labeling that is both not false or misleading and approved by the Secretary of Agriculture. Id. To help manufacturers comply with these requirements, the Department of Agriculture publishes a "Food Standards and Labeling Policy Book," which is "a composite of policy and day-to-day labeling decisions" of the department. Id. at *6 (quotation omitted). As relevant to this appeal, the Policy Book provides that "a label 'may bear the phrase 'Product of the U.S.A.'' if 'the product is processed in the U.S. (i.e., is of domestic origin).'" Id. at *7 (quotation omitted). It was also undisputed that that the Department of Agriculture preapproved the defendants' labels. Id. at *8.

On appeal, the plaintiffs urged the Tenth Circuit to apply a presumption against preemption. In support, they relied on the Supreme Court's decision in *Medtronic v. Lohr*, where the court held that "[i]n *all* preemption cases," courts must "start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." 518 U.S. 470, 485 (1996) (emphasis added). The majority, however, rejected that view, noting that "in more recent years, the Supreme Court has declined to apply such a presumption in express-preemption cases." Id. at *9-10 (relying on *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016)). Turning to the FMIA's preemption provision, the majority held that it "plainly preempts the plaintiffs' labeling claims" because the Department of Agriculture "has already approved defendants' labels, concluding that they are not deceptive or misleading under the FMIA." Id. at *11.

Next, the plaintiffs contended that the FMIA cannot preempt their state law claims because the Act "allows states to exercise concurrent jurisdiction to prevent misbranding … ." Id. at *13. The Tenth Circuit again rejected the plaintiff's argument, concluding that a state's concurrent jurisdiction "must be 'consistent with' the FMIA" and that the plaintiffs' complaint depends on state law imposing a requirement that is "in addition to, or different than" what the FMIA requires. Id. Because the plaintiffs' complaints were entirely preempted by the FMIA, the appellate court affirmed the district court's dismissal. Id. at *21-22.

The Dissent

Judge Lucero dissented from the panel decision. In his view, the majority's reading of the text of the FMIA's preemption clause is plausible, but there is another other equally plausible interpretation that would not result in preemption, and in such a case, the court must adopt the reading that disfavors preemption. Id. at *23-24 (Lucero, J., dissenting). Lucero's interpretation turns on language in the FMIA: states are prohibited from imposing any "labeling … requirements *in addition to, or different than* those made under this chapter … ." 21 U.S.C. §678 (emphasis added). According to Lucero, the italicized language imposes two separate requirements: the department must approve a label and, in addition, the label must not be false or misleading. As a result, "mere agency approval

does not suffice to satisfy the statute. Rather, the Act contemplates the existence of—and indeed proscribes—labels that are both misleading and approved by the Secretary." *Thornton*, 2022 U.S. App. LEXIS 6380, at *28 (Lucero, J., dissenting). The FMIA's concurrent-jurisdiction clause "close[s] the resulting gap by allowing states to enforce the Act's prohibition against misleading labels when the agency declines to do so." Id. Based on this reading of the statute, Lucero would have allowed the plaintiff's claims to move forward. Id. at *30.

Conclusion

The *Thornton* decision indicates that the Tenth Circuit continues to take an expansive view of federal preemption. When Congress adopts an express-preemption provision, the appellate court will not apply any presumption against preemption. In this case, the court was faced with two plausible interpretations of the FMIA's preemption clause, yet it had no trouble rejecting the narrower one. While *Thornton* was limited to one particular federal statute, the opinion sends a strong signal that the Tenth Circuit will take a similar view regarding other express-preemption provisions that come before it.

Christopher Jackson and Jessica Smith are attorneys at Holland & Hart, specializing in complex commercial litigation. Chris is an experienced appellate advocate with a strong background in complex civil trials and state government investigations. Jessica leads the firm's religious institutions and First Amendment practice and handles a wide range of state and federal appeals.
