

Approved: 2-23-94
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Clyde Graeber at 1:30 p.m. on February 14, 1994 in Room 526-S of the Capitol.

All members were present except: Representative Phill Kline, Excused
Representative Rand Rock, Absent
Representative Candy Ruff, Absent
Representative Kathleen Sebelius, Excused

Committee staff present: Mary Galligan, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Jim Conant, Department of Revenue, Division of
Alcoholic Beverage Control
Brian Gilpin, Communications and Marketing Director
American Heart Association

The Chairperson announced that Jim Conant, Department of Revenue, Division of Alcoholic Beverage Control, wished to introduce legislation prohibiting the sale or distribution of tobacco products to individuals under 18 years of age.

Jim Conant, Division of Alcoholic Beverage Control, requested legislation be introduced enforcing the licensing system and a graduated schedule of penalties of illegal sales, in addition to field investigative procedures. The Synar amendment is part of the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA) Reorganization Act. The amendment provides that as a condition of receiving federal block grant funds for prevention and treatment of substance abuse, states must enact and enforce laws which prohibit the sale or distribution of tobacco products to individuals under 18 years of age. The amendment takes effect on October 1, 1993 and could impact block grants to the State beginning in FY 94. (See Attachment #1)

The Chairperson asked how much Kansas receives annually in these block grants?

Mr. Conant stated that Kansas receives \$8.6M a year in block grants and as a condition to receiving these block grants state have to show that they exhibit compliance levels as far as the sales of cigarette and other tobacco products to persons under 18 years of age. These funds are used for substance abuse and treatment type programs.

Representative Lane moved and Representative Wilk seconded to accept request as a committee bill.

Representative Krehbiel asked if there was a fiscal note on this legislation.

Mr. Conant stated there was not a fiscal note...a small part of the informal grant would be available for compliance of this law.

It was asked if tobacco farms were subsidized.

The Chairperson replied that tobacco farms were subsidized at the federal level.

Brian Gilpin, Communications & Marketing Director, American Heart Association, stated the tobacco industry's leading legislative strategy during the past decade has been the promotion of preemptive state tobacco control laws. Preemption is a mechanism by which a higher level of government takes away the power of lesser jurisdictions to regulate a given subject and the American Heart Association opposes preemption. Mr. Gilpin stated the bottom line for the Synar amendment to show them 20% of total merchants are selling illegally to under 18 year old. (See Attachment #2)

The Chairperson stated the Committee would look at these issues during the hearing after having a bill.

The Chairperson stated the pictures that had been hung recently were donated by Representative Carl Holmes.

The meeting adjourned at 2:00 P.M.

The next meeting will be February 15, 1994.

Date: 2/14/94

FEDERAL and STATE AFFAIRS COMMITTEE

NAME	ORGANIZATION	ADDRESS
Kirk Peters	intern	Lawrence
Doug Smith	Automatic Merchandising Assn	Topeka
Frances Kastner	KS Food Dealers Assn	Topeka
JOHN BOTTENBERG	PHILIP MORRIS	TOPEKA
B. H. SNEED	STC	TOPEKA
Ken Belar	Habeser-Busch	"
Julia Hest	R. Reynolds	Topeka
Donnie Guizanic	Am. Cancer Society	Topeka
Douglas Young	Office of Rep. Dennis Everhart	Lawrence Topeka
Stephen English	intern	Lawrence
Brian Gilpin	Tobacco Free Kansas	Topeka
Bob Swafford	KDHE/OCDAHP - Tobacco Control	Topeka
Robert Engler	ABC	Topeka
Sam Conrad	XDC	"

STATE OF KANSAS



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Department of Revenue *Division of Alcoholic Beverage Control*

SYNAR AMENDMENT ENFORCEMENT OF CIGARETTE AGE LAWS

Synopsis

The Synar amendment is part of the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA) Reorganization Act. The amendment provides that as a condition of receiving federal block grant funds for prevention and treatment of substance abuse, states must enact and enforce laws which prohibit the sale or distribution of tobacco products to individuals under 18 years of age. The amendment takes effect on October 1, 1993 and could impact block grants to the State beginning in FY 94.

Major Elements of the Amendment

- Enforcement efforts must be underway in FY 94. Enforcement should include a licensing system and a graduated schedule of penalties for illegal sales, in addition to field investigative procedures.
- Random, unannounced compliance inspections must be conducted beginning in FY 94. States must demonstrate that inspections were conducted in a scientifically sound manner. Compliance data must show that of the outlets inspected, not more than 50% make illegal sales in the first year; 40% in the second year; 30% in the third year; and 20% in the fourth and subsequent years.
- States must submit an annual report documenting the "extent of success the state has achieved in reducing the availability of tobacco products" to underage persons. Failure to achieve prescribed compliance rates will result in a 10% reduction of block grant funds in the first year; 20% in the second year; 30% in the third year; and 40% in the fourth and subsequent years.
- States must report annually on current and proposed strategies which will be employed to enforce the age law.

Agencies Involved

Kansas Department of Revenue (Licensing/Enforcement)
Kansas Department of Health and Environment (Education/Prevention)
Kansas Department of Social and Rehabilitative Services (Prevention/Treatment)
Kansas Board of Education, Drug Free Schools Program (Education/Prevention)
Governor's Office of Drug Abuse Programs

F+SA
2-14-94
Atch #1

Results of Sales of Cigarettes to Minors Study

	Wichita	Southwest*	Southeast#	TOTAL
Age of Underage Cooperating Individuals (UCI)	17	17	16 & 17	

ACTIVITY SUMMARY

No. of Cig. Retailers Approached	50	44	73	167
No. of Retailers Selling to UCI	40	26	55	121
% Selling to UCI	80.0%	59.1%	75.3%	72.5%

ACTIVITY BY BUSINESS TYPE

No. of Convenience Stores	37	27	48	112
No. of Conv. Stores Selling to UCI	30	21	34	85
% Conv. Stores Selling to UCI	81.1%	77.8%	70.8%	75.9%

No. of Grocery Stores	10	5	14	29
No. of Grocery Stores Selling to UCI	3	0	9	12
% of Grocery Stores Selling to UCI	30.0%	0.0%	64.3%	41.4%

No. of Gas Stations	3	6	5	14
No. of Gas Stations Selling to UCI	3	5	5	13
% of Gas Stations Selling to UCI	100.0%	83.3%	100.0%	92.9%

No. of "Other" Retailers•	0	6	6	12
No. of "Other" Selling to UCI	0	0	4	4
% of "Other" Selling to UCI	-	0.0%	66.7%	33.3%

* includes Dodge City and Garden City

includes Coffeyville, Pittsburg, Parsons, Columbus and Baxter Springs

• includes discount stores, food markets and tobacco outlets

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Department of Revenue
Division of Alcoholic Beverage Control

ISSUES FOR LEGISLATIVE CONSIDERATION
RE: ENFORCEMENT OF CIGARETTE AGE LAWS

KDOR Recommendations:

- Authorize Department of Revenue to impose administrative fines for violations of cigarette and tobacco products laws, in addition to existing provisions for suspension and revocation of license.
- Outlaw all vending machine sales of cigarettes and tobacco products.
- General update of Article 33 of Chapter 79, clarifying regulatory and tax aspects, modernize collections procedures, etc.

Additional issues:

- Prohibit any person (not just licensees) from selling or otherwise furnishing cigarettes and tobacco products to those under 18.
- ~~Prohibit underage possession of cigarettes and tobacco products~~, in addition to existing prohibition against underage attempts to purchase.
- Establish statewide standards for licensing and regulation of traffic in cigarettes and tobacco products as guide for local governing authorities.

Please oppose preemption!

Special Issue: Preemption

The tobacco industry's leading legislative strategy during the past decade has been the promotion of preemptive state tobacco control laws (Pertschuk and Shopland, 1989; US DHHS, 1993b). Preemption is a mechanism by which a higher level of government (in this case, the state) takes away the power of lesser jurisdictions to regulate a given subject. Preemption in tobacco control has occurred in both the clean indoor air and access to minors arenas (US DHHS, 1993b). States with preemptive tobacco control laws include Florida, Pennsylvania, Virginia, Nevada, Illinois, and Oklahoma, among others.

The success of the tobacco control movement at the local level remains remarkable even in the face of increased tobacco industry opposition to defeat local efforts. In spite of their considerable efforts to defeat these laws, hundreds of strong, comprehensive tobacco control ordinances have passed (Sylvester, 1989; US DHHS, 1993b). The tobacco industry's local opposition has included hiring public relations firms, creating front organizations, disseminating false information, funding referendum and recall campaigns, and occasionally filing lawsuits.

Tobacco policy has succeeded at the local level in part because campaign contributions are relatively unimportant in local races. Local officials are closer to their constituents and tend to be more interested in the voters' views than in the rhetoric of tobacco industry lobbyists. In fact, the use of paid outside lobbyists can backfire locally, where local legislators may resent out-of-towners telling them how to manage their community.

In short, public health advocates have the home field advantage at the local level. As one Tobacco Institute executive put it, "We are under siege [at the local level]" (Matthews, 1990).

Because of its relative weakness at the local level, the tobacco industry turns to its allies in state legislatures to shift the battle to their state level. Tobacco control activists can rarely compete with the industry's campaign contributions, nor can they afford the high-profile professional lobbyists who have greater access to state legislators.

In Virginia, for example, the tobacco industry hired Anthony F. Troy, "a former state attorney general and one of the best-connected lawyers in Richmond. He has walked the hallways of the General Assembly for many years, has access to almost any member of the legislature and calls most by their first names" (Sylvester, 1989) to run a campaign to preempt local tobacco control ordinances. In contrast, the tobacco control advocates "were two lobbyists who don't call many legislators by their first names, and who don't — as Troy does — feel free to scribble amendments on legislators' bills" (Sylvester, 1989).

In Washington State, "tobacco lobbyists face little of the opposition they get in Congress from well-organized, resourceful health groups" (Weisskopf, 1993).

Tobacco companies "hired nine outside lobbyists, including two former lawmakers...and had three in-house lobbyists join in" (Weisskopf, 1993), compared with only one full-time lobbyist representing health groups. In state legislatures, tobacco money is used for more than campaign contributions: it buys access, friendships, and personal relationships. It buys influence that a volunteer could never acquire.

The industry flaunts its power at the state level. According to Walker Merryman, vice president of the Tobacco Institute, "[A]bout 90 percent of legislation at the state level [adversely] affecting our industry will not be enacted" (Sylvester, 1989).

In some cases, tobacco control advocates have accepted preemption as a temporary compromise in order to gain some statewide advances, hoping to remove the preemption in subsequent years. In reality, of all the states that have adopted preemption in tobacco control, only West Virginia has ever repealed their preemption. Extensive committee hearings make it far easier to stop a bill than to pass a bill in any state legislature. Tobacco companies have used this to their advantage to prevent amending preemptive laws once they are in place.

To play on these desires for a quick, temporary solution, the tobacco industry now attempts to create bills in which preemption is "coupled with smoking restrictions that appear at first glance to be reasonable, but really are riddled with loopholes" (Matthews, 1993). These bills shield legislators by allowing them to tell their constituents that they are addressing tobacco issues, when they are in fact aiding the tobacco industry. They may also lull tobacco control advocates into a false security, perhaps even getting the advocates to lobby for the bill themselves.

In California, a 1991 internal memo from the Smokeless Tobacco Council described a teleconference in which such a strategy was outlined. "[T]he trick to doing this would be that such an act would have to have the 'appearance' of a comprehensive scheme," the memo explained. "[Assembly] Speaker Brown and Chairman Floyd [Chair of the Assembly Governmental Organization Committee] would attempt to make the Tobacco Control Act as close as possible in 'appearance' to the concepts that the anti-tobacco groups were fostering.... [T]he main goal was to seek preemption of smoking restrictions at the local level..." (Kerrigan, 1991).

The language drafted by the industry ultimately would have preempted every aspect of tobacco control: smoking, licensing, vending machines, sampling, and advertising restrictions — in short, anything dealing with the sale, promotion, distribution, and use of tobacco products.

As part of their strategy, the industry had to mask their own involvement as well. "[T]he concept behind the bill was to be that the tobacco companies appeared to be against the bill" (Kerrigan, 1991). Fortunately, tobacco control advocates saw through the deception even before the memo was leaked, and intense media scrutiny, including calls for the Speaker's resignation, caused the bill to flounder.

Today, the tobacco industry often tries to disguise preemption of youth access to tobacco ordinances in subtle ways. Preemption of licensing ordinances, for example, may be hidden in tax laws or in laws licensing tobacco wholesalers. State laws prohibiting selling tobacco to minors can be subsequently interpreted to be implicitly preemptive. Tobacco companies have argued that the state intended to fully occupy the field of regulating tobacco sales with these laws. To avoid this result, state youth access legislation should contain an explicit anti-preemption clause.

In several states, vending machine companies (usually with funding from tobacco companies (Levin, 1991)) have sued communities over cigarette vending machine ordinances, arguing that state law preempts these local ordinances. In most cases, the challenges are based on a theory of *implicit preemption* — laws that do not clearly prevent cities and counties from regulating cigarette vending machines, but may be interpreted later by the courts to do so. Laws licensing vending machines, regulating over-the-counter sales of tobacco, or indicating who is responsible for illegal sales to minors through the machines, are usually used as the basis for these challenges. Fortunately, the courts have upheld almost every vending machine ordinance challenged on the grounds of implicit preemption. In Maryland, however, the Court of Appeals overturned vending machine ordinances in Bowie and Takoma Park, ruling that although state law does not specifically address vending machines, nor explicitly preempt local ordinances, it nevertheless represents a comprehensive scheme regarding tobacco sales issues and therefore fully occupies the field to the exclusion of local ordinances (Tapscott, 1993).

Activists have learned from these and other examples that once enacted, state laws take on a life of their own and may be interpreted differently than the authors and sponsors intend. Clear language and an explicit anti-preemptive clause will protect advocates from unintended consequences. Given the power of the tobacco industry, this is easier said than done.

Fortunately, the procedural issues that make it easier to kill a bill in the legislature can work to our advantage, too. If a stalemate in the legislature develops, where neither health advocates nor the tobacco industry can pass their legislation, we can still work in cities and counties to protect youth.