

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-20

Date issued: December 20, 1989

Requested by: Sarah Vogel  
Commissioner of Agriculture

- QUESTION PRESENTED -

Whether the North Dakota Commissioner of Agriculture may establish a greater amount of bond for livestock dealers, packers, and market agencies subject to the Packers and Stockyards Act of 1921 than the amount required under the provisions of the Act.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the North Dakota Commissioner of Agriculture may establish a greater amount of bond for livestock dealers and market agencies subject to the Packers and Stockyards Act of 1921 than the amount required under the provisions of that Act, but may not establish a greater amount for packers in connection with their livestock purchases.

- ANALYSIS -

Both federal law and state law require livestock dealers to be bonded. Consequently, the determination of whether the North Dakota commissioner of Agriculture can require a bond amount which exceeds the amount required by federal law is a question of preemption. Before addressing the preemption issue, however, it is necessary to review the federal and state statutes relating to the bonding of livestock dealers.

N. D. C. C. ' 36-04-05 provides that livestock dealers must file a bond with the North Dakota Department of Agriculture. The bond must be conditioned upon the faithful performance of the dealer's duties, compliance by the dealer with all North Dakota laws relating to the purchase of livestock, the full and complete payment to the seller for all livestock purchased by the dealer, and full protection of any person who deals with the dealer. Id. A "dealer" is defined as "any person, copartnership, association, or corporation engaged in the business of buying or dealing in . . . cattle . . . from the producer, terminal market, or livestock auction market for resale, slaughter, or shipment within or without the state and also resale in the local market." N. D. C. C. ' 36-04-01(2).

In relation to the amount of the bond required of livestock dealers, N. D. C. C. ' 36-04-05 provides, in part:

36-04-05. Dealer to file bond with department -- Additional bond may be required. . . .The minimum amount of bond is ten thousand dollars, and must be for any greater amount as may be determined by computing the amount of bond on the same basis as prescribed for dealers subject to the provisions of the Packers and Stockyards Act, 1921 [Pub. L. 67-51; 42 Stat. 159; 7 U.S.C. 181 et seq.]. The department may demand an additional or increased bond whenever in its judgment the volume of business of the principal warrants such demand.

N. D. C. C. ' 36-04-05.

N. D. C. C. ' 36-04-05 requires the amount of the bond to be at least \$10,000, or a greater amount if required by the Packers and Stockyards Act of 1921. However, the statute goes on to provide that "[t]he department may demand an additional or increased bond whenever in its judgment the volume of business of the principal warrants such demand." Id. Thus, under state law the North Dakota Commissioner of Agriculture is authorized to require a greater amount of bond than that required by the Packers and Stockyards Act of 1921.

As previously stated, federal law also provides for the bonding of livestock dealers. 7 U.S.C. ' 204 (1988) authorizes the United States Secretary of Agriculture to "require reasonable bonds from every market agency . . . every packer . . . in connection with its livestock purchasing operations . . . and every other person operating as a dealer . . . under such rules and regulations as [the Secretary] may prescribe, to secure performance of their obligations. . . ." 7 U.S.C. ' 204 (1970) Id. "Market agency" is defined as "any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyards services. . . ." 7 U.S.C. ' 201(c) (1978). "Dealer" is defined as "any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his account or as the employee or agent of the vendor or purchaser." 7 U.S.C. at ' 201(d) (1978). "Packer" is defined as follows:

[A]ny person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

7 U. S. C. ' 191 (1978).

The North Dakota definition of "dealer" includes market agencies, dealers, and packers who are dealing in livestock. See N. D. C. C. ' 36-04-01(2). However, the distinction between market agencies, dealers, and packers under the Packers and Stockyards Act is important in examining whether federal law preempts state law.

The supremacy clause of the United States Constitution gives Congress the authority to preempt state law. Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368 (1986); see U.S. Const. art. VI, cl. 2. Federal law preempts state law in one of three ways. First, federal law preempts state law if it is expressly preempted by federal law. Second, federal law preempts state law if congress intended to regulate an entire field to the exclusion of state law. Finally, state law is preempted if "it actually conflicts with federal law." Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145, 1150 (1988); see State v. Liberty Nat'l Bank and Trust Co., 427 N. W.2d 307, 309 (N. D.), cert. denied, 109 S. Ct. 393 (1988).

In the case of packers subject to the Packers and Stockyard Act, Congress has preempted state law. 7 U.S.C. ' 228c contains an express statement in regard to preemption. "No requirement of any state . . . with respect to bonding of packers . . . for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions of [7 U.S.C. 204] . . ." 7 U.S.C. ' 228c (1978).

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It should be noted, however, that section 228c does not prohibit a state bonding law with respect to packers not subject to the Packers and Stockyards Act. See 7 U.S.C. ' 228c (1978). To fall within the definition of "packer" set forth within the Packers and Stockyards Act, the packer must operate in "commerce." See 7 U.S.C. ' 191 (1978). Consequently, packers who do not operate in commerce are not subject to the Packers and Stockyards Act. See generally Peterman v. United States Dept. of Ag., 770 F.2d 888, 889 (10th Cir. 1985).

"Commerce" is defined as:

[C]ommerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

7 U.S.C. ' 182(11) (Supp. 1989).

The Packers and Stockyards Act also specifies when a transaction is deemed in commerce. 7 U.S.C. ' 183 provides in part:

[A] transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce in the livestock and meatpacking industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the

In addition to the express language of section 228c, a review of the legislative history indicates an obvious intent to preempt state law. Senate Report Number 94-932 provides in part: "[A new provision] of the Packers and Stockyards Act . . . provides that no requirement of a State . . . with respect to bonding of packers . . . for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions of the [Packers and Stockyards Act] . . . ." S. Res. 932, 94th Cong. 2d Sess., reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 2267, 2274 (1976). Furthermore, in the House debate over the preemption

provision of the Packers and Stockyards Act, Representative Poage stated: "[T]he packer bonding provisions . . . preempt state law." 122 Cong. Rec. H. 28, 313 (daily ed. August 30, 1976) (statement of Rep. Poage).

The express language of 7 U.S.C. ' 228c, as well as the legislative history of the Packers and Stockyards Act, evinces the preemption of federal law concerning the bonding of packers for livestock purchases. Consequently, the North Dakota Commissioner of Agriculture cannot enforce additional bonding requirements on persons who come within the federal statutory definition of packers in connection with their livestock purchases.

Although the Packers and Stockyards Act preempts state law in relation to bonding of packers in connection with their livestock purchase, it contains no similar provisions with regard to market agencies and dealers. Furthermore, nothing in the Packers and Stockyards Act indicates an intent to preempt state law, nor do any of its provisions conflict with state law.

It should be noted, however, that federal regulations as well as statutes may preempt state law. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (quoting Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153-54 (1982)). In this case, however, the language of the United States Secretary of Agriculture's bonding regulations for market agencies and dealers indicates that the regulations were meant to work in conjunction with state bonding laws, and not to preempt them.

The Secretary of Agriculture has adopted rules that specify how the amount of

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above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this [chapter].

7 U.S.C. ' 183 (1978).

bond required from packers, dealers, and market agencies is calculated. See 9 C.F.R. ' 201.30 (1989). After specifying how a bond is calculated for market agencies and dealers, section 201.30 provides that the bond must be for at least \$10,000 or such higher amount as required by state law. 9 C.F.R. ' 201.30(a), (b) & (c) (1989). This language illustrates the lack of conflict between state and federal bonding requirements for market agencies and dealers as defined by the Packers and Stockyards Act.

In conclusion, the definition of "dealer" under North Dakota law includes dealers, packers, and market agencies as defined under the Packers and Stockyard Act. Congress has preempted state bonding laws concerning packers and their livestock purchasing activities. However, Congress has not preempted state bonding laws as applied to market agencies and dealers as defined by the Packers and Stockyards Act. Consequently, the North Dakota Commissioner of Agriculture may establish a greater amount of bond than the amount required under the Packers and Stockyards Act for dealers and market agencies, but not for packers in connection with their livestock purchases.

- EFFECT -

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.

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Attorney General

Assisted by: Patrick K. Stevens  
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It is interesting to note that the provision explaining how to calculate the amount of bond for packers does not provide for a higher minimum bond if it is required by state law. See 9 C.F.R. 201.30(d) (1989).