



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 3, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 62

The Honorable Vernon L. Williams
State Representative, Ninety-First District
State Capitol, Room 431-N
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities -- Public Employees Retirement Systems; Kansas Public Employees Retirement System -- Investment of KPERS funds; Divestiture of Investments in Companies Doing Business in the Republic of South Africa

Constitution of the United States -- Article Six; Miscellaneous Provisions -- Supremacy Clause; Federal and State Legislation Concerning the Republic of South Africa

Synopsis: K.S.A. 74-4921(4) (a) provides that the Board of Trustees of the Kansas Public Employees Retirement System (KPERS) may "[dispose] of as investments of the fund every kind of investment which men of prudence, discretion and intelligence . . . dispose of for their own account." It is our opinion that the prudent person standard does not permit the KPERS Board of Trustees to make divestiture decisions solely on the basis of moral or political beliefs.

The preemption doctrine, derived from the Supremacy Clause of the United States Constitution, invalidates state laws which conflict with or are contrary to the purpose of federal laws. For the reasons outlined in this opinion, we conclude that,

even though federal legislation has been enacted applying sanctions to the Republic of South Africa, the preemption doctrine does not in this instance preclude state and local governments from taking action requiring divestiture of investments in companies doing business in South Africa. Cited herein: K.S.A. 17-5004; 58-1201; 74-4904; 74-4921; H.R. 4868, 99th Cong., 2d Sess., 100 Stat. 1086 (1986); U.S. Const., Art. VI, cl. 2.

* * *

Dear Representative Williams:

As State Representative for the Ninety-First District and Chairperson of the House Committee on Pensions, Investments and Benefits, you request our opinion on two questions concerning divestiture by the state of investments in companies doing business in the Republic of South Africa:

1. Does the Board of Trustees of the Kansas Public Employees Retirement System have authority to use the assets of the system as a means to achieve political or moral objectives without regard to the economic impact on the fund?
2. Does federal legislation applying sanctions on South Africa preempt state and local actions requiring divestiture?

"Divestment" is defined as "the sale by investors of the securities of business with South African contacts." Dobris, Arguments in Favor of Fiduciary Divestment of "South African" Securities, 65 Neb. L. Rev. 209, 211 (1986). The "divestment movement" is "the use of economic pressure to battle apartheid" by persuading "state and local governments to liquidate existing investments and to prevent new investments in corporations or financial institutions doing business in or with South Africa." Note, State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign, 54 U. Cin. L. Rev. 543, 544 (1985).

The Kansas Public Employees Retirement System (KPERS) is administered by a board of trustees (trustees). K.S.A. 74-4904. The standard of care the trustees must exercise in managing and investing the fund is specified by statute:

"In investing and reinvesting moneys in the fund and in acquiring, retaining, managing and disposing of investments of the fund there shall be exercised the judgment and care under the circumstances then prevailing, which men of precedence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard and subject to clause (b) of this subsection, there may be acquired, retained, managed and disposed of as investments of the fund every kind of investment which men of prudence, discretion and intelligence acquire, retain, manage and dispose of for their own account." K.S.A. 74-4921(4) (a).
(Emphasis added).

"Prudent person" is defined in the Uniform Trustees' Powers Act as follows:

"'[P]rudent person' means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which persons of prudence, discretion and intelligence would act in the management of their own affairs."
K.S.A. 58-1201(3).

In administering investments subject to their control, cities and counties are subject to the "prudent person" rule of K.S.A. 17-5004. This standard is substantially similar to K.S.A. 74-4921(4) (a). In Attorney General Opinion No. 85-153 we were asked whether the "prudent person" rule precludes cities and counties from divesting their holdings of stocks and other interests in corporations which do business in South Africa. We stated:

"The 'prudent person' rule establishes a high fiduciary standard of care in

managing trust assets. (Citations omitted). Hence, traditional notions of prudent investment would not enable trustees to make a decision to divest based solely on moral beliefs without violating their fiduciary responsibilities."

We concluded that the prudent person standard does permit divestment if the trustees find that "economic conditions in South Africa make continued investment in a particular asset less than prudent." In like manner, it is our opinion that the prudent person investment standard of K.S.A. 74-4921(4) (a) does not permit the trustees of KPERS to make divestiture decisions solely on the basis of moral or political beliefs.

Your second question is whether federal legislation applying sanctions on South Africa preempts state and local actions requiring divestiture. The preemption doctrine is derived from the Supremacy Clause of the United States Constitution:

"This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land" U.S. Const., Art. VI, cl. 2.

By virtue of this authority, federal law may preempt or supercede any state law on the same subject.

The general principles applied by the United States Supreme Court in determining whether federal law preempted state law were cited by the court in Mega Renewables v. County of Shasta, 644 F. Supp. 491, 493 (E.D.Cal. 1986):

"It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to' federal law. Gibbons v. Ogden, 9 Wheat. 1, 211 [6 L.Ed. 23] (1824) (Marshall, C.J.). Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is

empowered to preempt state law by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519, 525 [97 S.Ct. 1305, 1309, 51 L.Ed.2d 604] (1977). In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Pre-emption of a whole field also will be inferred when the field is one 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.' Ibid.; see Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

"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, 1217-1218, 10 L.Ed. 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, supra at 67 [61 S.Ct. at 404]. See generally Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, [404 S.Ct. 2694 at 2700] [81 L.Ed.2d 580] (1984). We have held repeatedly that state laws can be preempted by federal regulations as well as by federal statutes. See, e.g., Capital Cities Cable, Inc. v. Crisp, supra at [2700-2701]"

Thus, under the doctrine of preemption a state law will be declared invalid for the following reasons:

1. The state statute is prohibited by the literal and express terms of the national legislation;
2. Congress has preempted the field so as to preclude state interference;
3. Conflict is found between compliance with the state law and federal law;
4. State law obstructs the execution of the full purpose and objectives of the federal legislation.

See Rose v. Arkansas State Police, 479 U.S. _____, 93 L.Ed.2d 183, 107 S.Ct. 334 (1986); Terry, On Behalf of C. Herman Terry v. Yamashita, 643 F.Supp. 161, 166 (D. Hawaii 1986); Isla Petroleum Corp. v. Dept. of Consumer Affairs, 640 F.Supp. 474, 507 (D.Puerto Rico 1986); Joe Flynn Rare Coins Inc. v. Stephan, 526 F.Supp. 1275, 1279 (1981).

In determining whether a state law is invalid under the preemption doctrine, "the court's duty is to strike harmony between the federal and the state interests." Isla Petroleum Corp. v. Dept. of Consumer Affairs, 640 F.Supp. at 507. The court begins its analysis "with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." Joe Flynn Rare Coins Inc. v. Stephan, 526 F.Supp. at 1279 quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). The United States Supreme Court has mandated that the doctrine is not be applied in a "literal, mechanical fashion" or in a manner which "sweeps away state-court jurisdiction." Whelan's Inc. v. Kansas Dept. of Human Resources, 235 Kan. 425, Syl. ¶ 2 (1984). Federal preemption of state law is not favored unless there are "persuasive reasons," such as Congress' specific declaration, or the nature of the subject matter permits no other conclusion. Integrity Management Intern. v. Tombs & Sons, Inc., 614 F.Supp. 243 (D.C. Kan. 1985). The Kansas Supreme Court has recently stated:

"Generally, in making a preemptive determination a court should examine those

concerns emphasized by Congress in enacting the federal legislation. (Citation omitted). Where state enforcement activity does not impair the federal regulatory interests, concurrent enforcement activity is authorized. (Citation omitted). State law should be preempted only to the extent necessary to protect achievement of the purposes of the federal act in question." Goben v. Barry, 237 Kan. 822, 828 (1985). See Blue Cross and Blue Shield v. Riverside Hospital, 237 Kan. 829, 833 (1985).

"[C]onflict between the two laws must be positive and direct in order to make coexistence of two laws an impossibility. Unless there is a specific prohibition in federal law, state law which complements federal law is valid. To determine whether state law is in conflict with federal law which regulates the same field, it is necessary that the state law in its application contravene federal public policy or cause different results or consequences." Elkins v. Showcase, Inc., 237 Kan. 720, 727 (1985).

The United States Congress recently passed legislation concerning the Republic of South Africa. The "Comprehensive Anti-Apartheid Act of 1986" became law on October 2, 1986, after the President's veto was overridden by both Houses of Congress. H.R. 4868, 99th Cong., 2d Sess. (1986); Pub. L. No. 99-440, 100 Stat. 1086 (1986). The purpose of this legislation is stated in Section Four as follows:

"The purpose of this Act is to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government. This Act sets out United State policy toward the Government of South Africa, the victims of apartheid, and the other states in southern Africa. It also provides the President with additional authority to work with the

other industrial democracies to help end apartheid and establish democracy in South Africa." 100 Stat. 1089 (1986).

Title I, Section 101 of the Act provides that the "United States policy toward the Government of South Africa shall be designed to bring about reforms in that system of government that will lead to the establishment of a nonracial democracy." 100 Stat. 1089 (1986).

Sanctions by the United States on the government of South Africa are listed in Title III of the Act, which is entitled "Measures by the United States to Undermine Apartheid." These measures can best be summarized by referring to the table of contents of this legislation:

- "Sec. 301. Prohibition on the importation of krugerrands.
- Sec. 302. Prohibition on the importation of military articles.
- Sec. 303. Prohibition on the importation of products from parastatal organizations.
- Sec. 304. Prohibition on computer exports to South Africa.
- Sec. 305. Prohibition on loans to the Government of South Africa.
- Sec. 306. Prohibition on air transportation with South Africa.
- Sec. 307. Prohibitions on nuclear trade with South Africa.
- Sec. 308. Government of South Africa bank accounts.
- Sec. 309. Prohibition on importation of uranium and coal from South Africa.
- Sec. 310. Prohibition on new investment in South Africa.
- Sec. 311. Termination of certain provisions.
- Sec. 312. Policy toward violence or terrorism.
- Sec. 313. Termination of tax treaty and protocol.
- Sec. 314. Prohibition on United States Government procurement from South Africa.
- Sec. 315. Prohibition on the promotion of United States tourism in South

- Africa.
- Sec. 316. Prohibition on United States Government assistance to, investment in, or subsidy for trade with, South Africa.
 - Sec. 317. Prohibition on sale or export of items on Munition List.
 - Sec. 318. Munitions list sales, notification.
 - Sec. 319. Prohibition on importation of South African agricultural products and food.
 - Sec. 320. Prohibition on importation of iron and steel.
 - Sec. 321. Prohibition on exports of crude oil and petroleum products.
 - Sec. 322. Prohibition on cooperation with the armed forces of South Africa.
 - Sec. 323. Prohibition on sugar imports." 100 Stat. 1086-1087 (1986).

Section 310 prohibits any U.S. citizen, corporation, or other business entity from making any new investment in South Africa. 100 Stat. 1102 (1986). The enforcement and penalty provisions of the Act are included in Title VI. Section 606 states as follows:

"(1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and

(2) no other penalty may be imposed by the Federal Government,

by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of this Act." 100 Stat. 1115 (1986)

On October 27, 1986, President Ronald Reagan issued executive order no. 12,571, which implements the Comprehensive Anti-Apartheid Act by ordering various departments to carry out the provisions of the law. Exec. Order No. 12,571, 51 Fed. Reg. 4224 (1986).

Several states and many local governments have enacted divestiture legislation. See Note, State and Local

Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs, 72 Va. L. Rev. 813, 816-822 (1986). Our research has not revealed any case law as to whether federal legislation applying sanctions on South Africa preempts state and local actions requiring divestiture of investments in companies doing business in or with South Africa. Therefore, we must examine the recently enacted federal legislation to determine whether it precludes such state and local legislation. See Id. at 846 (discusses preemption before enactment of Public Law 99-440).

The Comprehensive Anti-Apartheid Act of 1986 provides that no new investments can be made in South Africa, but it does not include divestment as a measure to "undermine apartheid." Nowhere in the Act is it stated that state and local governments are precluded from enacting legislation in this area. In addition, state and local actions requiring divestiture would not seem to conflict with any provisions of the anti-apartheid law. The purpose of the federal legislation is to help bring an end to apartheid in South Africa. There does not appear to be any persuasive reasons to find that Congress has preempted the area concerning legislation affecting South Africa, nor is there any evidence that Congress intended to preclude state and local governments from enacting divestiture legislation. We conclude that such state and local actions do not contravene the purpose of the federal law or impair its enforcement. Therefore, it is our opinion that state and local legislation requiring divestiture of investments in companies doing business in South Africa would not violate the preemption doctrine, as derived from the Supremacy Clause of the United States Constitution, Art. VI.

In summary, we conclude that the prudent person investment standard of K.S.A. 74-4921(4)(a) does not permit the trustees of KPERS to make divestiture decisions solely on the basis of moral or political beliefs. It is also our opinion that, even though federal legislation has been enacted applying sanctions to the Republic of South Africa, the preemption doctrine does not in this instance preclude state and local governments from taking action requiring divestiture of investments in companies doing business in South Africa.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Rita L. Noll
Assistant Attorney General