

## The Pre-emption Doctrine and the Commodity Futures Trading Commission Act: In Favor of State Law

In 1974, President Ford signed into law the Commodity Futures Trading Commission Act of 1974<sup>1</sup> (CFTC Act), which amended the Commodity Exchange Act<sup>2</sup> by providing in part that the newly formed Commodity Futures Trading Commission (CFTC) shall have

exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . ; *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.<sup>3</sup>

Thereafter, in 1975, an Indiana securities law amendment included commodity futures contracts in its definition of a security,<sup>4</sup> thereby requiring registration of commodity futures and commodity futures brokers with the Indiana Securities Commission.<sup>5</sup>

Because section 201(b) of the CFTC Act refers only to "transactions" involving commodity futures, and because the Act contains no other provision for the registration of a commodity futures broker-dealer with the CFTC, the question arises as to whether the CFTC has totally pre-empted the SEC and state authorities from the field of commodity futures, or whether the states can enforce

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<sup>1</sup>Pub. L. No. 93-463, 88 Stat. 1389 (1974) (amending 7 U.S.C. §§ 1-22 (1970 & Supp. III 1973)).

<sup>2</sup>7 U.S.C. §§ 1-22 (1970 & Supp. III 1973) (amended 1974). For a discussion of the changes made in the Commodity Exchange Act, see Johnson, *The Changing Face of Commodities Regulation*, 20 PRAC. LAW., Dec. 1974, at 27; Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 VAND. L. REV. 1 (1976); Rainbolt, *What the New Commodity Futures Trading Commission Means to You*, COMMODITIES, Feb. 1975, at 23-26; Note, *The Role of the Commodity Futures Trading Commission Under the Commodity Futures Trading Commission Act of 1974*, 73 MICH. L. REV. 710 (1975).

<sup>3</sup>7 U.S.C. § 2 (1976).

<sup>4</sup>"'Security' means any . . . commodity futures contract; option, put, call, privilege or other right to purchase or sell a commodity futures contract; margin accounts for the purchase of commodities or commodity futures contracts . . ." IND. CODE § 23-2-1-1(k) (Supp. 1977).

<sup>5</sup>*Id.* § 23-2-1-8.

their own laws regarding registration of commodity futures and commodity futures brokers.

### I. FORMULATION OF A PRE-EMPTION DOCTRINE

The problem of pre-emption has long been a perplexing one;<sup>6</sup> and as many areas such as education (segregation), welfare, and the sharing of federal revenues acquire a national rather than local dimension, the question of where to draw the line between federal and state authority continues to be a problem. The primary source of the pre-emption doctrine is found in the supremacy clause of the United States Constitution,<sup>7</sup> with the purpose of pre-emption being either to effectuate a congressional occupation of a particular field, even where the federal regulatory scheme does not occupy the entire field, or to nullify state regulation in conflict with federal legislation. The Supreme Court has yet to develop a uniform approach to pre-emption;<sup>8</sup> although many rules have been promulgated for determining whether there should be pre-emption, the formulas are vague and lend themselves to a wide range of interpretation and discretion. For example, in *Kelly v. Washington*,<sup>9</sup> the Supreme Court determined that the "exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" According to the Supreme Court's decision in *Hines v. Davidowitz*,<sup>10</sup> pre-emption occurs when a state statute interferes with the "accomplishment and execution of the full purposes and objectives of [an Act of] Congress."<sup>11</sup> More specifically,

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"Preemption occurs when a state statute obstructs the "accomplishment and execution of the full purposes and objectives of an Act of Congress." More specifically, either a congressional design to "occupy the field" or a conflict between federal and state statutes is needed to place a statute in an unconstitutionally obstructive position.

Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975). For further discussion of the pre-emption doctrine, see Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630 (1972); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

<sup>7</sup>U.S. CONST. art. VI, cl. 2, provides:

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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

<sup>8</sup>See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975).

<sup>9</sup>302 U.S. 1, 10 (1937).

<sup>10</sup>312 U.S. 52 (1941).

<sup>11</sup>*Id.* at 67.

either a congressional intent to "pre-empt the field" or a conflict between federal and state statutes<sup>12</sup> is needed before a state statute must defer to federal law under the pre-emption doctrine.

A congressional intent to occupy the field supersedes the operation of state law on federally regulated subject matter regardless of whether the state regulation impairs the actual operation of the federal law. Thus, a finding of congressional occupation must be preceded by a showing that it is "the clear and manifest purpose of Congress" that an area be exclusively federally regulated.<sup>13</sup> However, the Supreme Court has not relied exclusively upon expressions of congressional purpose or specific intent in determining the scope of pre-emption based on grounds of federal occupation of the field.<sup>14</sup>

Furthermore, the Court may take into consideration factors outside the language of the federal legislation in determining whether pre-emption exists. For example, the nature of the subject matter being regulated may reveal a need for nationwide uniformity<sup>15</sup> that would preclude the separate states from entering the field. Consideration of these factors parallels those factors taken into account in the early cases under the commerce clause.<sup>16</sup> Those cases categorized certain subject matter as national in character and thus pre-emptive, regardless of congressional action; other subject matters are characterized as inherently local in nature and thus subject to regulation by the individual states. However, this approach does not present a definite rule for determining pre-emption, because subject matter has not been treated in a uniform manner by the courts and hence is not considered determinative of pre-emption independent of congressional intent.<sup>17</sup>

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<sup>12</sup>Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

<sup>13</sup>*Id.* at 146.

<sup>14</sup>In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the Court stated that pre-emption is favored if the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or if State policy would produce a result inconsistent with the objective of the federal statute. *Id.* at 230 (emphasis added).

<sup>15</sup>See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

<sup>16</sup>See, e.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851).

<sup>17</sup>In both *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), and *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963), the Court characterized the subject matter as local, then went on to determine whether Congress intended to occupy the fields at issue. This is a curious result because if the Court has characterized a certain subject matter as local for commerce clause purposes, Congress may nevertheless enter the field; however, for pre-emption purposes, if Congress has acted in the field, albeit short of complete occupation, the Court must disregard Congress' determination that the subject matter is national in character in order to find pre-emption. See 75 COLUM. L. REV. 623, 625 n.18 (1975).

When using conflict between federal and state statutes as grounds for pre-emption,<sup>18</sup> the Court first analyzes the statutes in question, then determines whether a conflict actually exists.<sup>19</sup> The clearest cases arising on grounds of conflict occur when state law mandates action forbidden by federal law, or vice-versa.

During the 1930's, the Supreme Court shifted the burden of establishing pre-emption onto Congress rather than engaging in its own assessment as to whether pre-emption had occurred.<sup>20</sup> Under that approach, absent an actual conflict between federal and state law, pre-emption could occur only if congressional intent to occupy the field was "definitely and clearly" shown.<sup>21</sup> Although it appeared that the Court favored a specific expression of intent, the Court never articulated the elements that would satisfy the burden of proving pre-emption. Moreover, if congressional language was not specific, the Court itself proceeded to ascertain the purposes of the legislation. If the purposes necessarily implied federal supremacy, the inconsistent state law was struck down.<sup>22</sup>

In *Rice v. Santa Fe Elevator Corp.*,<sup>23</sup> the Court attempted to sharpen this intent standard. In an earlier decision, *Cloverleaf Butter Co. v. Patterson*,<sup>24</sup> the Court invalidated a state regulation overlapping a federally regulated field but also occupying an aspect untouched by the congressional scheme.<sup>25</sup> In *Rice*, the Court stated three instances in which the doctrine of pre-emption should be in-

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<sup>18</sup>It should be noted that occupation of the field and conflicting statutes are not easily separated as grounds for pre-emption. In addition, the Court does not always point out precisely which ground it is using before proceeding with its determination as to whether pre-emption exists.

<sup>19</sup>*Perez v. Campbell*, 402 U.S. 637, 644 (1971).

<sup>20</sup>Prior to 1930, the Court invoked the doctrine of pre-emption in any case where there was mere presence of congressional regulation in a particular field. See, e.g., *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915). The view was that the very exercise of federal power inherently excluded concurrent yet compatible regulation by the states.

Whether Congress or the Supreme Court should determine if pre-emption has occurred has in itself been a source of conflict. The Court resolves conflicts as to the allocation of power in the federal system pursuant to the "necessary and proper" clause, U.S. CONST. art. I, § 8, cl. 18, thereby making it doubtful that Congress should be able to conclusively pre-empt state law in any area. The framers of the Constitution intended the Supreme Court to determine where the line should be drawn when state and federal laws are in conflict. THE FEDERALIST No. 39. (J. Madison).

<sup>21</sup>*Mintz v. Baldwin*, 289 U.S. 346, 350 (1933).

<sup>22</sup>*Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967); *David v. Elmira Sav. Bank*, 161 U.S. 275 (1896).

<sup>23</sup>331 U.S. 218 (1947).

<sup>24</sup>315 U.S. 148 (1942).

<sup>25</sup>The contested Alabama statute authorized confiscation and destruction or sale of packing stock butter that did not conform to state standards, ALA. CODE tit. 2, § 495 (1940), but the federal regulatory scheme had no parallel provision.

voked. First, the scheme of federal regulation may be "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."<sup>26</sup> This determination requires an investigation of congressional intent, and deference should be given to this intent because Congress is better equipped than the judiciary to make fact-finding inquiries. Second, the act of Congress "may touch a field 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."<sup>27</sup> This is a matter of constitutional law, and does not defer to statutory interpretation. Finally, "the object sought to be obtained by the federal law and the character of obligations imposed by it"<sup>28</sup> may be such that pre-emption is required.

Thus, *Rice* requires the courts to weigh the federal and state interests at stake and decide which should control, but the decision must be tempered by the extent to which Congress has manifested an intention to control the field. Congressional intent in itself is an inadequate source for deciding pre-emption questions, because as a rule Congress does not consider the impact of its legislation with respect to state law.<sup>29</sup> The *Rice* approach has expanded the judiciary's role in pre-emption cases and has resulted in increased findings of the existence of pre-emption, a trend seemingly related to the concurrent decline in states' rights and interests.<sup>30</sup>

Even before its decision in *Rice*, the Court indicated that it would lower the intent requirement and engage in a presumption in favor of federal interests rather than state interests. In *Hines v. Davidowitz*,<sup>31</sup> the Court for the first time applied pre-emption to

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<sup>26</sup>331 U.S. at 230.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>During the course of legislative debate, congressmen often make statements concerning their own intent, but such statements often merely reflect their failure to anticipate the impact federal law will have on state law. For example, in *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956), the Court found that Congress clearly intended to occupy the field of sedition, even though Congressman Howard Smith had flatly denied in debate that Congress ever intended to deprive the states of their concurrent jurisdiction. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 208 n.4 (1959).

<sup>30</sup>Between 1868 and 1920, the Court decided 195 cases involving the exercise of police power by the states. In 93% of those cases the power was upheld, while the remaining 7% declared such power to be unconstitutional. From 1921 to 1927, state action was upheld in 72% of the 53 cases considered. Between 1930 and 1941, the Hughes Court only upheld state law in 60% of the cases considered, while the Vinson Court decided 49% of its cases in favor of state power. The Stone Court upheld 41% of the cases in favor of state law, and the Warren Court decided only 32% of the cases in support of the states. R. ROETTINGER, *THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM* 18, 195-206 (1957).

<sup>31</sup>312 U.S. 52 (1941). The issue was whether the Alien Registration Act of 1940, which required aliens to register with the federal government and carry identification

legislation that was not dependent on the commerce clause. Justice Black established a presumption in favor of the federal law's pre-emptive capability because the statute belonged to "that class of laws which concern the exterior relation of this whole nation with other nations"<sup>32</sup> and was "so intimately blended and intertwined with the responsibilities of the national government" as to present on its face a complete scheme of regulation in the field, precluding the states from participation in the field.<sup>33</sup> The decision amounted to a capability of finding pre-emption even where clear congressional intent to occupy the field or actual conflict of state and federal laws was lacking, so long as the nature of the federal regulation called for exclusive operation.

Subsequent cases in the area of foreign affairs also brushed over the intent requirement and pre-empted state regulation on the strength of a presumption in favor of federal interests.<sup>34</sup> The Court's assumption of pre-emptive authority, coupled with the relaxed intent standard, permitted pre-emption in areas formerly unreachable without a clear congressional intent;<sup>35</sup> with this propensity to find pre-emption came an impairment of the balance between federal and state interests.

Although the Court seems to have become firmly entrenched in its attitude toward pre-emption, the recent case of *Goldstein v. California*<sup>36</sup> may indicate a changing attitude in favor of state interests. In *Goldstein*, the Court upheld a California statute making record piracy a criminal offense<sup>37</sup> and rejected the argument that even though federal copyright law is silent on the matter of protection afforded recordings, concurrent state legislation could not stand.<sup>38</sup> Basing its decision on commerce clause cases that distin-

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cards, pre-empted a Pennsylvania statute with a similar registration procedure but more extensive criminal sanctions. The federal act only imposed criminal sanctions upon failure to register, while the Pennsylvania act did so upon the alien's failure to have the registration card in his possession. The 1940 federal act was repealed and replaced by the Act of June 27, 1952, 8 U.S.C. §§ 1301-1306 (1976).

<sup>32</sup>312 U.S. at 66 (citing *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875)).

<sup>33</sup>312 U.S. at 66.

<sup>34</sup>See *Graham v. Richardson*, 403 U.S. 365 (1971); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *United States v. Pink*, 315 U.S. 203 (1942).

<sup>35</sup>See, e.g., *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (civil rights); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (communications); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (civil liberties).

<sup>36</sup>412 U.S. 546 (1973).

<sup>37</sup>CAL. PENAL CODE § 653h (West 1970) (amended 1975 & 1977).

<sup>38</sup>The United States Constitution grants to Congress the power to protect the "Writings" of "Authors." 412 U.S. at 561 (quoting U.S. CONST. art. I, § 8, cl. 8). Although the term "Writings" has not been strictly construed, the above-mentioned enabling provision of the Constitution "does not require that Congress act in regard to

guished between local and national subject matter,<sup>39</sup> the Court ruled that federal law should govern when the exercise of a similar power by the states would be "absolutely and totally contradictory and repugnant."<sup>40</sup> The test for determining repugnancy is a flexible one: Federal law will be pre-emptive if and only if the matter is "necessarily national in import" and a conflict would "necessarily" arise if state law were allowed to stand.<sup>41</sup>

The broad interpretation the Court gave to "necessarily national" in *Goldstein* can be appreciated only after considering that sound recordings are a subject matter that is not purely local in character. The Court thus deferred to state interests that could be considered to have national impact and ignored a possible federal interest in uniform copyright laws. In so doing, the Court has essentially allowed state law to stand in the absence of federal action, leaving the door open for Congress to later act in that field.<sup>42</sup>

*Goldstein* is also significant in light of two previous cases involving the extent to which federally unpatentable articles may be protected by state unfair competition laws. In *Sears, Roebuck & Co. v. Stiffel Co.*<sup>43</sup> and *Compco Corp. v. Day-Brite Lighting, Inc.*,<sup>44</sup> the Supreme Court unanimously determined that federal patent law pre-empted any state unfair competition law protecting articles eligible, but unqualified, for a federal patent. The Court interpreted the

all categories which meet the constitutional definition. Rather, whether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of Congress." 412 U.S. at 562. The Register of Copyrights, who is charged with administration of the federal copyright statute, ruled in 1959 that "claims to exclusive rights in mechanical recordings . . . or in the performances they reproduce" were not entitled to protection under the then-applicable copyright statute, 17 U.S.C. § 4 (1970). 24 Fed. Reg. 4958 (1959), cited in *Goldstein v. California*, 412 U.S. at 568. *But cf.* 37 C.F.R. §§ 202.8(b), .15a (1977) (implements registration of copyright claims in sound recordings pursuant to the 1971 amendments to and the 1976 revision of the Copyright Act).

Petitioners in *Goldstein* had been involved in "unauthorized duplication of recordings of performances by major musical artists." 412 U.S. at 549. They argued that the state statute they had violated established a copyright of unlimited duration, thereby conflicting with the above-mentioned clause of the United States Constitution. They also asserted that "the state statute interfered with implementation of federal policies inherent in federal copyright statutes." 412 U.S. at 551.

<sup>39</sup>*Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

<sup>40</sup>412 U.S. at 553 (quoting THE FEDERALIST No. 32 (A. Hamilton) at 241 (B. Wright ed. 1961)).

<sup>41</sup>412 U.S. at 554.

<sup>42</sup>After *Goldstein* was filed, legislation that extended federal copyright protection to sound recordings became effective. Pub. L. No. 92-140, § 1(a), (b), 85 Stat. 391 (1971) (subsequently codified at 17 U.S.C. §§ 1(f), 5(n) (Supp. I 1971)).

<sup>43</sup>376 U.S. 225 (1964).

<sup>44</sup>376 U.S. 234 (1964).

copyright and patent statutes as requiring (rather than permitting) national uniformity.<sup>45</sup> However, in *Goldstein*, the Court used an interstate commerce rationale<sup>46</sup> rather than a copyright basis with which to break precedent, thereby distinguishing *Sears* and *Compco*, in determining that states are entitled to give protection to copyright claims not qualifying for federal protection.<sup>47</sup> The commerce clause cases allowed pre-emption only where the subject matter was necessarily national in import.<sup>48</sup> By using these cases as the basis for decision in *Goldstein*, the Court set up a pre-emption requirement analogous to that of specific intent.

Although *Goldstein* only hinted at a return to the specific congressional intent standard, the subsequent decision in *New York State Department of Social Services v. Dublino*<sup>49</sup> made that requirement more explicit:

If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.<sup>50</sup>

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,<sup>51</sup> the Court considered an issue not dealt with in *Dublino*—whether the state and federal laws were in conflict.<sup>52</sup> The issue on appeal in

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<sup>45</sup>*Id.* at 231 & n.7. "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." *Id.* at 231.

<sup>46</sup>*Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>47</sup>The Court relied on *Cooley* and *Gibbons*, both of which distinguished between matters local and national in character, and determined that exclusive federal power existed only if a matter was necessarily national in import.

<sup>48</sup>412 U.S. at 554, 568.

<sup>49</sup>413 U.S. 405 (1973).

<sup>50</sup>*Id.* at 413 (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

<sup>51</sup>414 U.S. 117 (1973).

<sup>52</sup>Because the Court remanded the case on the issue of whether there was a conflict between the two laws, it was never decided if the New York Work Rules' termination penalty conflicted with the requirements of the Social Security Act. Those Work Rules require employable welfare recipients to pick up their checks in person, to certify the unavailability of employment, and to report for public works employment, job interviews, and any employment obtained therefrom. Failure to meet these requirements results in termination of welfare payments. N.Y. SOC. SERV. LAW § 131(4) (McKinney Supp. 1974).

Under the Work Incentive Program (WIN) of the Social Security Act, 42 U.S.C. §§ 630-644 (1976), the certification requirements are less strict, the termination penalty is omitted, and there are extensive procedural safeguards. *Cf.* 42 U.S.C. § 602(a)(8), (19)

*Ware* centered around a conflict between a California law requiring its courts to disregard certain arbitration clauses in controversies concerning due but unpaid wages,<sup>53</sup> and a New York Stock Exchange Rule<sup>54</sup> requiring arbitration of controversies arising out of employment termination. In upholding the state law, the Court noted that since the congressional purpose in allowing the exchanges to regulate themselves was "to insure fair dealing and to protect investors,"<sup>55</sup> the exchanges' rules should pre-empt conflicting state law "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act."<sup>56</sup> Because the federal arbitration rule did nothing to further the objectives of the Securities Exchange Act<sup>57</sup> and because the state law did not obstruct the objectives of the federal securities law,<sup>58</sup> the alleged conflict was held to be insignificant. Hence, the Court allowed the state law to stand, although it admittedly conflicted with federal law.

These recent decisions demonstrate the Court's renewed interest in favoring state law, even where it possibly conflicts with federal law. However, the Court has also indicated that it will not presume in favor of state law in every case.<sup>59</sup> Because of the Court's

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(1976) (federal criteria for state programs providing aid to needy families with children).

However, the Court intimated as to its treatment of the conflict problem, stating: "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one. 413 U.S. at 421.

<sup>53</sup>The state court utilized this statute in declaring an employment contract provision requiring arbitration of termination disputes to be ineffective. *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App. 3d 35, 45, 100 Cal. Rptr. 791, 798 (1972) (citing CAL. LAB. CODE § 229 (West 1971)), *aff'd*, 414 U.S. 117 (1973). The controversy initially arose over the employer's assertion that the petitioner-employee had forfeited his rights under an employment contract to the benefits of a noncontributory profit-sharing plan when he voluntarily left his job in favor of other competitive employment. The state court relied on a restraint-of-trade statute in declaring the forfeiture provision of the employment contract void. 24 Cal. App. 3d at 43-44, 100 Cal. Rptr. at 796-97 (citing CAL. BUS. & PROF. CODE § 16600 (West 1964)).

<sup>54</sup>NEW YORK STOCK EXCHANGE, CONSTITUTION AND RULES, Rule 345 (a) (1) (CCH 1973).

<sup>55</sup>414 U.S. at 130.

<sup>56</sup>*Id.* at 127 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963)).

<sup>57</sup>*Id.* at 134-36 (citing the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976)).

<sup>58</sup>414 U.S. at 139-40.

<sup>59</sup>In *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Court found a federal aviation regulation to be pre-emptive of Burbank's curfew on late night flights.

The Court reasoned that if local "airspace management" were preempted by the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, then by definition local noise pollution regulation had also been preempted.

past reluctance to confine its pre-emption decisions within strict guidelines, it would be unreasonable to formulate a general rule concerning future pre-emption cases, especially in light of the trend indicated by *Goldstein*, *Dublino*, and *Ware*. However, these recent cases do suggest that where Congress has failed to articulate a specific intent to pre-empt or where a conflict between state and federal law either has not yet arisen or is insignificant, state law will be allowed to stand.

## II. APPLICATION OF THE DOCTRINE TO THE COMMODITY FUTURES TRADING COMMISSION ACT

The best indicator that pre-emption will be favored is a clear expression of congressional intent that the federal legislation is to supersede any state legislation in the field. An examination of the legislative history of the Commodity Futures Trading Commission Act, however, leaves unanswered many questions concerning congressional intent.

In 1973, the House Committee on Agriculture began a series of hearings to consider possible improvements to the Commodity Exchange Act. At that time, the chairman of the Chicago Board of Trade<sup>60</sup> expressed a desire that the commodity regulatory agency have exclusive jurisdiction over futures trading.<sup>61</sup> After hearing testimony both for and against exclusive jurisdiction,<sup>62</sup> the House introduced H.R. 13113,<sup>63</sup> a bill intended to clarify any jurisdictional

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ted. "Airspace management" was defined as the complete and ultimate regulation of flights and of the use of navigable airspace.

Comment, *City of Burbank v. Lockheed Air Terminal, Inc.: Federal Preemption of Aircraft Noise Regulation and the Future of Proprietary Restrictions*, 4 N.Y.U. REV. L. & SOC. CHANGE 99, 104 (1974). Despite the lack of any express language for pre-emption in the 1972 Act, Justice Douglas found that "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is pre-emption." 411 U.S. at 633.

<sup>60</sup>The Chicago Board of Trade is one of 12 organized commodity exchanges. The others include Chicago Mercantile Exchange; Mid-America Commodity Exchange (Chicago); Kansas City Board of Trade; Minneapolis Grain Exchange; New York Cocoa Exchange; New York Coffee and Sugar Exchange; Commodity Exchange, Inc. (New York); New York Cotton Exchange and Associates; New York Mercantile Exchange; Pacific Commodity Exchange (San Francisco); West Coast Commodity Exchange (Los Angeles).

<sup>61</sup>*Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 128 (1973).

Futures markets offer trading in cocoa, coffee, copper, foreign currency, and other areas; however, Congress only included specific farm items in the definition of "commodity." 7 U.S.C. § 2 (1976).

<sup>62</sup>*Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. (1974).

<sup>63</sup>H.R. 13113, 93d Cong., 2d Sess., 120 CONG. REC. 10752 (1974).

questions that had previously arisen.<sup>64</sup> However, the bill only aggravated the situation; it contained a "saving" clause protecting the jurisdiction of the SEC and other federal agencies:

*Provided*, that the [CFTC] shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market: *And provided further*, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission [*sic*] or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States.<sup>65</sup>

In a subsequent report, the House Committee sought to reconcile this jurisdictional language by stating that the retention of jurisdiction by other agencies was limited to areas other than futures trading on a contract market.<sup>66</sup> The issue was not reconciled, however, until the Senate Committee proposed that the language "except as hereinabove provided"<sup>67</sup> be inserted between the clause giving the CFTC exclusive jurisdiction and the clause retaining some jurisdiction for other regulatory agencies.<sup>68</sup> As indicated in the report prepared by the Senate Committee on Agriculture and Forestry, the Senate version of H.R. 13113 was intended to clarify the House's professed intent that the CFTC be vested with exclusive jurisdiction.<sup>69</sup> In addition, the Senate Committee added language that extended the CFTC's exclusive jurisdiction to "ac-

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<sup>64</sup>*Commodity Futures Trading Commission Act: Hearings on H.R. 13113 Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. (1974).

When commodity futures expanded into a billion-dollar industry in the early 1970's, the Commodity Exchange Commission and the Secretary of Agriculture, federal watchdogs of the industry, found themselves unable to regulate a number of nonfood items that had been introduced for trading into the predominantly agricultural futures markets. Trading scandals arose, and efforts to centralize supervision of the various futures markets into one agency culminated in the CFTC Act.

<sup>65</sup>*Id.* at 140-41.

<sup>66</sup>H.R. REP. NO. 93-975, 93d Cong., 2d Sess. 37 (1974).

<sup>67</sup>U.S.C. § 2 (1976).

<sup>68</sup>S. REP. NO. 93-1131, 93d Cong., 2d Sess. 54, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5870. *See note 3 supra* and accompanying text.

<sup>69</sup>S. REP. NO. 93-1131, 93d Cong., 2d Sess. 6, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5848.

counts" and "agreements,"<sup>70</sup> as well as "transactions" for future delivery on a contract market.<sup>71</sup>

Thus, the Senate Committee's intent was to explicitly define the scope of the CFTC's exclusive jurisdiction and to insure the CFTC's actual and exclusive jurisdiction in those areas. However, when the Committee took its "clarified" version of H.R. 13113 to the floor for debate, Committee Chairman Herman Talmadge delivered a prepared statement that only confused the matter:

In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the anti-trust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.<sup>72</sup>

On its face, this statement did not reflect the language of the Senate bill but instead conflicted with the contents of H.R. 13113.

When the House and Senate versions went to conference committee, the Senate version prevailed except in one respect—the conference report struck section 402(d) from the Senate version,<sup>73</sup> which formerly provided: "Nothing in [section 4c] or section 4b shall be construed to impair any state law applicable to any transaction enumerated or described in such sections."<sup>74</sup> With that exception, the Senate version of H.R. 13113 was signed into law on October 24, 1974.<sup>75</sup>

In light of the confusing legislative history of the CFTC Act, it is necessary to determine whether the end result reflects Congress' voiced intent to pre-empt any state law dealing with subject matter coming under the CFTC's jurisdiction. Under section 2(a) of the Act,<sup>76</sup> agencies other than the CFTC are expressly excluded from regulating in the field of commodity futures; but because such an ef-

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<sup>70</sup>*Id.*

<sup>71</sup>*Id.* at 54, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843, 5870.

<sup>72</sup>120 CONG. REC. 30459 (1974) (remarks of Sen. Talmadge).

<sup>73</sup>H.R. REP. NO. 93-1383, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5894.

<sup>74</sup>*Id.* at 35, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5897.

<sup>75</sup>Pub. L. No. 93-463, 88 Stat. 1389 (1974) (amending 7 U.S.C. §§ 1-22 (1970 & Supp. III 1973)).

<sup>76</sup>7 U.S.C. § 2 (1976). See note 3 *supra* and accompanying text.

fort was made to insert explicit language into the Act, the conclusion can be drawn that if a subject is not mentioned in the Act, it does not come under the CFTC's exclusive jurisdiction. Therefore, even though Chairman Talmadge's remarks on the Senate floor indicate the possibility that *persons* dealing in commodity futures would be subject to the CFTC,<sup>77</sup> no part of the Act itself suggests that brokers are included in "accounts," "agreements," or "transactions" to be regulated solely by the CFTC.

Despite Congress' assertion that it had provided the CFTC with exclusive jurisdiction, SEC Chairman Ray Garrett, Jr., termed the CFTC Act "ambiguous" on the question of pre-emption and proposed amending the Securities and Exchange Act so as to repeal the CFTC's exclusive jurisdiction.<sup>78</sup> SEC Chairman Garrett's successor, Roderick M. Hills, also questioned the CFTC's exclusive jurisdiction in a letter to CFTC Chairman William Bagley: "Both the CFTC and this Commission should be concerned, not with the bare question of *jurisdiction*, but with a number of important questions relating to the integrity and viability of our capital markets, and the effect futures trading will have on the securities markets and on public investors therein."<sup>79</sup> Chairman Hills also intimated that he would seek legislative relief to clear up the controversy.<sup>80</sup>

In an effort to clarify the purpose of granting the CFTC exclusive jurisdiction, Howard Schneider, General Counsel for the CFTC, stated that because it was Congress' feeling that the bureaucratic red tape inherent in registering with a federal agency and fifty separate state agencies was unnecessary, the CFTC Act was intended to discourage state registration or licensure of persons in the commodities field.<sup>81</sup> However, Schneider's suggestion lacks persuasion because the avoidance of red tape has never provided grounds for pre-emption. Moreover, Schneider's inference that broker registration would be discouraged indicates that such registration does not fall within the CFTC's exclusive jurisdiction. Finally, broker registration would be desirable if the "fundamental purpose of the Commodity Exchange Act is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers."<sup>82</sup>

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<sup>77</sup>120 CONG. REC. 30458 (1974). See text accompanying note 72 *supra*.

<sup>78</sup>Letter from Ray Garrett, Jr., to Harley O. Staggers (Feb. 14, 1975).

<sup>79</sup>[1975] SEC. REG. & L. REP. (BNA) No. 329 at F-1.

<sup>80</sup>*Id.* at F-2.

<sup>81</sup>Schneider, *The CFTC: Initial Actions and Future Priorities*, 27 AD. L. REV. 369 (1975).

<sup>82</sup>S. REP. NO. 93-1131, 93d Cong., 2d Sess. 23, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5826.

Shortly after the CFTC Act took effect, the CFTC and SEC were involved in litigation on the question of jurisdiction. In July 1975, the CFTC filed a brief as *amicus curiae* in *SEC v. American Commodity Exchange, Inc.*,<sup>83</sup> in which the SEC sought to enjoin alleged violations of the federal securities laws by a dealer in commodity options. The SEC contended that commodities were securities, and that the defendant had violated the registration requirements, anti-fraud provisions, and broker-dealer registration requirements of the federal securities laws. Although the trial court failed to resolve the issue because the alleged violation occurred prior to the effective date of the CFTC Act,<sup>84</sup> the Tenth Circuit Court of Appeals held that to deprive the SEC of jurisdiction in cases where securities violations had occurred in the period between passage of the CFTC Act and its effective date would create a "no-man's land" for jurisdictional purposes.<sup>85</sup> The court relied on House and Senate floor debates as evidence of Congress' intent not to do away with interim jurisdiction and to allow the SEC to complete its investigations of pending cases.<sup>86</sup>

The first reported test involving the CFTC's pre-emptive power arose in a Texas state court. In *Texas v. Monex International, Ltd.*,<sup>87</sup> the Texas state securities commission sought to enjoin Monex from selling its margin account investment plan based on the reasoning that the accounts were "leverage" contracts and were within the definition of securities. Defendant had failed to register these "securities" as required by the Texas Securities Act. The trial court denied the injunction, concluding that Monex was not selling securities within the meaning of the Texas Securities Act. Although the appellate court affirmed, its decision relied on pre-emption rather than on the statutory definition of securities, stating: "The State contends Pacific's 'margin account' investment plan constitutes an 'investment contract' and is thus a security. . . . We do not reach this point. . . . We think it is clear the newly established Commodity Futures Trading Commission now has exclusive jurisdiction to regulate Pacific's margin account sales."<sup>88</sup> In addition, the court did not discuss whether the CFTC had exclusive jurisdiction over the commodity as well as the brokers, or only over the commodity transaction.

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<sup>83</sup>546 F.2d 1361 (10th Cir. 1976).

<sup>84</sup>[1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,063 (W.D. Okla. 1975), *aff'd*, 546 F.2d 1361 (10th Cir. 1976).

<sup>85</sup>546 F.2d at 1367.

<sup>86</sup>*Id.* at 1368.

<sup>87</sup>527 S.W.2d 804 (Tex. Ct. App. 1975).

<sup>88</sup>*Id.* at 806.

One curious aspect of the *Monex* case is that it was dismissed even though it was brought prior to the CFTC Act's effective date. This contradicts the CFTC's statement in *American Commodity Exchange*, wherein the agency avowed that it would not exercise jurisdiction over matters occurring before April 21, 1975.<sup>89</sup> However, the *Monex* court allowed the litigation to continue instead of granting dismissal, because the Texas commission sought to enjoin future conduct that would be governed by the CFTC's jurisdiction.<sup>90</sup>

Two other cases, *Clayton Brokerage Co. v. Mouer*<sup>91</sup> and *SEC v. Univest, Inc.*,<sup>92</sup> also failed to clarify the jurisdictional dispute over commodity dealers because that issue was never litigated.<sup>93</sup> Finally, in *New York v. Monex International, Ltd.*,<sup>94</sup> a New York court conceded that some transactions in the commodities field might be considered securities transactions and that overlap might create a conflict in jurisdiction between the SEC and the CFTC. However, because the parties failed to raise the jurisdictional issue, the court decided the case without addressing the jurisdictional issue, relying instead on the intent of the CFTC Act not to abate proceedings pending at the time the Act became effective.<sup>95</sup>

Because the few cases that have been litigated since formation of the CFTC have not conclusively settled the issue of whether the CFTC Act pre-empts a co-extensive state statute, various state agencies have called upon the CFTC for its interpretation of the conflict. In a letter to the Indiana Securities Commission, the CFTC expressed the opinion that a commodity options trading advisor who offers and sells commodity options to the public is not required to register as a broker-dealer under state securities law, because the CFTC Act pre-empts state law insofar as it seeks to regulate commodity options transactions.<sup>96</sup> The CFTC cited *Clayton Brokerage*,

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<sup>89</sup>[1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,063 (W.D. Okla. 1975), *aff'd*, 546 F.2d 1361 (10th Cir. 1976).

<sup>90</sup>527 S.W.2d at 807.

<sup>91</sup>520 S.W.2d 802 (Tex. 1975).

<sup>92</sup>405 F. Supp. 1057 (N.D. Ill. 1975).

<sup>93</sup>*Clayton Brokerage* was dismissed because the question as to the necessity of state registration of London commodity options became moot with the passage of the CFTC Act. *SEC v. Univest* was dismissed on grounds the SEC lacked standing to sue because the proceedings were not pending prior to passage of the CFTC Act.

<sup>94</sup>86 Misc. 2d 320, 380 N.Y.S.2d 504 (N.Y. Sup. Ct. 1976).

<sup>95</sup>*Id.* at 324, 380 N.Y.S.2d at 508-09. *Monex International* engaged in margin sales of gold and silver coins and bullion. These transactions could also be considered sales of securities because commodities are not traded on margins in the same sense as securities.

<sup>96</sup>CFTC Interpretive Letter No. 76-19, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,213 (1976). A similar letter was sent to the California Commission:

It is our view . . . that the California Commodity Law and the regulations adopted thereunder may not constitutionally be enforced insofar as they seek

*Univest*, and *Texas v. Monex International, Ltd.* to substantiate its argument, even though these cases did not resolve the jurisdictional issue. Furthermore, the CFTC failed to solve the definitional problem of whether "transaction" includes broker-dealers; the CFTC merely assumed that by pre-empting transactions entered into by brokers it also pre-empted the requirement that the brokers themselves be registered.<sup>97</sup> This interpretation relies on circuitous reasoning and leaves unsettled the state registration requirement issue.

Additionally, the CFTC noted that if the interpretation of the CFTC Act in the *Clayton Brokerage, Univest*, and *Texas v. Monex International, Ltd.*, cases is correct, the federal regulatory scheme prevails regardless of whether it is as strict as that of certain states.<sup>98</sup> However, this statement may be modified by *Davis v. Aetna Casualty & Surety Co.*,<sup>99</sup> a recent decision based upon the National Flood Insurance Act.<sup>100</sup> In *Davis*, the court determined that even though the federal act did not impose a penalty on insurers who arbitrarily refused to pay an insured's claims, states were not precluded from applying their own statutory penalties. In finding that the purposes of the National Flood Insurance Act<sup>101</sup> did not coincide with the purposes of the state statute,<sup>102</sup> the court reasoned that the two statutes could be read in harmony, and that the federal act was not intended to pre-empt state law in areas in which Congress had not acted. Reiterating Justice Brennan's opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,<sup>103</sup> the court reasoned that pre-emption in some contexts has been determined by whether

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to regulate the activities of commodity trading advisors or other persons subject to the Commission's exclusive jurisdiction under the pervasive regulatory scheme of the Commodity Exchange Act.

CFTC Interpretive Letter No. 76-20, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,214 (1976).

<sup>97</sup>CFTC Interpretive Letter No. 76-19, *supra* note 96.

<sup>98</sup>*Id.*

<sup>99</sup>329 So. 2d 868 (La. Ct. App. 1975).

<sup>100</sup>42 U.S.C. §§ 4001-4128 (1976).

<sup>101</sup>The purposes of the 1973 amendments to the Act were (1) to provide for flood insurance on a nationwide scale at a reasonable cost; (2) to provide for identification of flood-prone areas; (3) to require states or local communities, as a condition of future federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances; and (4) to require the purchase of flood insurance by property owners who are being assisted by federal programs or by federally supervised, regulated, or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards. 42 U.S.C. § 4002 (1976).

<sup>102</sup>The state statute was designed to protect the insured and to facilitate the prompt settlement of his claims. LA. REV. STAT. ANN. § 22:658 (West 1959).

<sup>103</sup>414 U.S. 117 (1973).

the contested state statute frustrates any part of the purpose of the federal legislation. Hence, the Louisiana statute was not pre-empted because it did not thwart the purposes of the National Flood Insurance Act.

Likewise, in *Edina State Bank v. Mr. Steak, Inc.*,<sup>104</sup> the state statute at issue required an issuer of stock to display any transfer restrictions conspicuously on the face of the stock certificate. Any restriction not so noted would be ineffective against one without actual knowledge of it.<sup>105</sup> The Securities Act of 1933<sup>106</sup> did not impose such an obligation, but the court reversed the trial court holding that the federal act had pre-empted the state statute, stating:

We cannot agree that the absence of a requirement for a notation of the restriction in the federal statute overrides [the state statute] under the doctrine of preemption. . . . [W]e feel that this important provision of the [state statute] may be read in harmony with the federal statute. Both regulations can be enforced without impairing federal superintendence of the field and thus the state statute need not give way.<sup>107</sup>

Analogously, the purpose of a state law requiring registration of commodity futures broker-dealers would likely be to protect the public from persons who are unqualified to deal in commodities but nonetheless enter into such transactions. Therefore, according to the reasoning in *Mr. Steak*, even though the CFTC Act purports to vest the CFTC with exclusive jurisdiction over all commodities transactions, this jurisdiction should not extend to areas not covered by the Act or which are compatible with the Act's purpose.

In addition to the area of registration, the issue of whether the CFTC Act has pre-empted state anti-fraud provisions is still unresolved. Although the CFTC is charged with the primary responsibility of protecting the public against commodity frauds through enforcement of the Commodity Exchange Act,<sup>108</sup> it is questionable whether the CFTC has the tools with which to detect and prosecute fraudulent conduct in connection with futures trading, the sale of

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<sup>104</sup>487 F.2d 640 (10th Cir.), cert. denied, 419 U.S. 883 (1974).

<sup>105</sup>COLO. REV. STAT. § 4-8-204 (1973) (originally enacted as COLO. REV. STAT. § 155-8-204 (1963)).

<sup>106</sup>15 U.S.C. §§ 77a-77aaa (1976).

<sup>107</sup>487 F.2d at 644. The court relied on *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963), and *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 417 (1973), to substantiate its opinion.

<sup>108</sup>Section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-1 (1976), empowers the CFTC to seek injunctive relief in the federal courts to ensure compliance with the Act.

commodity options, or the offering of "leverage" contracts in gold and silver bullion or bulk coins. The most frequently cited policy rationale in criticism of the CFTC's exclusive jurisdiction is that other agencies may be better equipped to prevent fraudulent activities,<sup>109</sup> and at least one court has held that the anti-fraud provisions of the federal securities laws are broader in scope than those provided by the CFTC Act. In *McCurnin v. Kohlmeyer & Co.*,<sup>110</sup> the court refused to read section 4b of the Commodity Exchange Act<sup>111</sup> as broadly as other courts' rulings under SEC rule 10b<sup>112</sup> because section 4b(B) is directed only toward "willful" misconduct in connection with the use of fraudulent devices, while rule 10b is directed at misconduct regardless of its willfulness.<sup>113</sup>

Notwithstanding the narrow *McCurnin* decision, the CFTC has interpreted the anti-fraud provisions of the Commodity Exchange Act broadly.<sup>114</sup> However, such an interpretation is unwarranted; section 4b applies only to those persons acting as agents or brokers in

<sup>109</sup>For a collection of jurisdictional correspondence of the CFTC and the SEC, see [1975-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,336.

<sup>110</sup>347 F. Supp. 573 (E.D. La. 1972).

<sup>111</sup>Section 6b of the Commodity Exchange Act, 7 U.S.C. § 6b (1976), provides in part:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person . . .

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract . . . or in regard to any act of agency performed with respect to such order or contract for such person . . . .

Section 78j of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j (1976), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

<sup>112</sup>17 C.F.R. §§ 240.10b-1 to -17 (1977).

<sup>113</sup>347 F. Supp. at 575-76.

<sup>114</sup>40 Fed. Reg. 26,505 (1975).

commodity transactions, and not to the principals in the transactions.<sup>115</sup> It appears, then, that a fraud committed by a principal to the transaction (a buyer or seller) or by a third party not acting as a principal's agent cannot be the basis of a private suit or disciplinary action under section 4b of the Commodity Exchange Act.<sup>116</sup> In contrast, it is well established that under section 10(b) of the Securities Exchange Act of 1934,<sup>117</sup> a defrauded investor can proceed against a violator other than the broker.<sup>118</sup> Hence, because state securities laws reflect the SEC provisions in the area of commodities regulation, they should not be pre-empted in order to fill the gap between state and federal anti-fraud statutes.

Although the ability of the states to implement their own anti-fraud laws indicates that the CFTC Act does not totally pre-empt state law, the CFTC has suggested that the Act does not apply to registration of broker-dealers:

[T]he Commission has instructed its staff to draft regulations that among other things would:

(1) make it unlawful for any person to offer or sell to the public commodity options, or to be associated with any such person, unless registered as a futures commission merchant or associated person, respectively, and thereby subject to plenary regulation under the Act.<sup>119</sup>

The CFTC does not define "associated person," but if brokers are covered by the term, then the gap left by the CFTC Act would be bridged.

Finally, reflecting the views of state securities commissioners at a panel discussion of the CFTC, a panel member expressed the fear that commodities investors would lose faith in the investment markets, the industry, and Congress if they were not given substantial protection under the law. It was suggested that pre-emption would be unreasonable where states have strong, active regulation because of the maximum protection these state laws afford the

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<sup>115</sup>U.S.C. § 6 (1976).

<sup>116</sup>All cases under section 4b, 7 U.S.C. § 6b (1976), for example, have been brought by investors against their brokers. *See, e.g.,* Booth v. Peavy Co. Commodity Servs., 430 F.2d 132 (8th Cir. 1970); Gould v. Barnes Brokerage Co., 345 F. Supp. 294 (N.D. Tex. 1972); McCurnin v. Kohlmeyer & Co., 347 F. Supp. 573 (E.D. La. 1972).

When effort has been made to invoke section 4b in the absence of a broker-investor relationship, the suit has been dismissed. *See, e.g.,* Rosee v. Board of Trade, 311 F.2d 524 (7th Cir. 1963).

<sup>117</sup>15 U.S.C. § 78j (1976).

<sup>118</sup>*See, e.g.,* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

<sup>119</sup>CFTC Interpretive Letter No. 76-19, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,213.

public, and that pre-emption would be impractical where sources of information and manpower are available on a local basis but lacking at the federal level.<sup>120</sup>

### III. CONCLUSION

Two questions arise when considering whether the Commodity Futures Trading Commission Act has totally pre-empted state law in the area of commodities. The first inquiry is whether pre-emption in general is a favored policy, and the second is whether the CFTC in fact has exclusive jurisdiction over the field of commodities.

A survey of cases involving pre-emption reveals a trend toward allowing state law to stand when Congress has remained silent or has not explicitly covered the subject matter it purports to pre-empt. A finding of pre-emption, however, hinges on the view that the courts take toward federalism. If the courts view the federal government's purposes as requiring protection in a given area, then pre-emption takes the form of a presumption of federal exclusivity, and state interests will be held subordinate to those federal interests. On the other hand, if the aims of the federal and state governments complement each other, congressional action on a certain matter will not carry a presumption of pre-empting state law.

For a period of time, the federal presumption predominated, and pre-emption was found even in the absence of clear congressional intent that state law in the same field was barred. As a result, state law that was either incompatible with federal legislation or that acted in an area left untouched by Congress was doomed. The Supreme Court has recently realized, however, that such a result is unfortunate because states and their citizens may be left without the protection that their own laws sought to provide. The Court has begun to invoke a standard of specific intent when Congress purports to exclusively control a field, and, absent a showing of this intent, state interests will be favored.

Even though Congress may have intended to give the CFTC exclusive jurisdiction, this intent was not clearly expressed in the CFTC Act. Although it is conceded that the CFTC Act pre-empts most areas of commodities regulation, some areas have been left untouched. Moreover, because the purpose of commodities regulation is to protect the investing public, it would be undesirable to presume total pre-emption and leave the investor unprotected. The better result would be to let state law stand when it is not in con-

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<sup>120</sup>Wunder, *Commodities Regulation: State and Federal Jurisdiction*, 27 AD. L. REV. 377 (1975).

flict with federal legislation or when it applies to an area left untouched by Congress. If Congress truly intended total pre-emption, it can later clarify its position by acting on that matter.

ANITA SAKOWITZ

