The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2015

TUESDAY, NOVEMBER 17, 2015

An ALM Publication

PERSONAL INJURY

Federal Pre-emption of State Products Liability Law

BY PATRICK C. LAMB
AND AMANDA R. HAMMAR
Special to the Legal

Since the U.S. Supreme Court handed down *Wyeth v. Levine* and *Pliva v. Mensing*, two important pre-emption decisions in the mass tort realm, there has been increased interest in pre-emption of state law claims. Pre-emption arguments, however, are not limited to mass tort pharmaceutical litigation.

Products liability law in the United States is largely based upon state regulations and common law, which dictate how manufacturers, distributors, suppliers and retailers are to produce, package, distribute and sell merchandise to consumers through the stream of commerce. Traditionally, defenses to strict products liability claims under state law have been limited. While the new standards established by the Pennsylvania Supreme Court in *Tincher v. Omega Flex*, 104 A.3d 328 (2014), seem to provide both Pennsylvania consumers and manufacturers with an advantage (depending upon which side is making the argument), counsel for both sides should always consider how the affirmative defense of pre-emption can severely limit, if not totally negate state law claims.

THE PRE-EMPTION DOCTRINE

The genesis of federal pre-emption is found in Article VI of the U.S. Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state

Patrick C. Lamb *is a principal in Post & Schell's casualty litigation department, and focuses his practice on high-exposure cases involving catastrophic loss. He typically handles matters and claims arising out of construction, products liability and commercial transportation. He can be reached at plamb@postschell.com.*

Amanda R. Hammar *is an associate in the firm's casualty litigation department, where she focuses on the defense of clients in complex litigation and claims involving catastrophic losses, including products liability, construction injury and defect, commercial vehicle, and premises liability claims. She can be reached at ahammar@postschell.com.*

shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." The supremacy clause sets forth the relatively straightforward concept that when federal and state laws are in conflict with one another, the federal law wins. While simple in theory, the doctrine of federal pre-emption creates myriad issues, including the interpretation of Congress' intent and the actual or perceived conflict between state and federal requirements.

Congress indicates its pre-emptive intent in one of two ways: through a statute's express language or through its structure and purpose, as in *Altria Group v. Good*, 129 S. Ct. 538 (2008). Express pre-emption occurs when a federal law explicitly confirms Congress' intention to pre-empt state law by its plain language, as in *English v. General Electric*, 110 S. Ct. 2270 (1990). For example, the Hazardous Materials Transportation Act (HMTA), enacted by Congress in 1975 to uniformly regulate the transportation of hazardous materials in commerce, contains an express pre-emption clause: "A law, regulation, order or other requirement of a state ... about any of the ... subjects [listed in Section 5125(b)(1)(A)-(E)], that is not substantively the same as a provision of [the HMTA] [or] a regulation prescribed under [the HMTA] ... is pre-empted." Therefore, any common law products liability claim seeking to impose a state requirement for the design, manufacture or testing of a product that falls within the HMTA would be pre-empted by the federal statute, and the plaintiff would be precluded from recovery under traditional state law tort claims.

Congress' pre-emptive intent becomes more difficult to determine when the federal statutes are silent on the issue. In this circumstance, courts analyze the federal law in accordance with the state law to decide whether implied pre-emption was intended, keeping in mind that there exists a presumption against pre-emption based

on principles of federalism and a hesitancy to intrude on state powers. If it is impossible to comply with both the state and federal regulations governing the design and manufacture of a product, or when the state law imposes an obstacle to the achievement of Congress' distinct objectives in enacting a federal regulation, then conflict pre-emption exists and a plaintiff's state law claims will be barred, as in *Gade v. National Solid Wastes Management Association*, 112 S. Ct. 2374 (1992). Even absent a direct conflict between state and federal requirements, courts will infer an intention to pre-empt state law if the federal regulation creates such a pervasive scheme in a particular area of the law that it tends to wholly "occupy the field," leaving the states no room in which to govern.

APPLICATION IN PRODUCTS LIABILITY CASES

Congress' intent in passing the HMTA was to levy a nationwide regulatory scheme for transporting hazardous materials in commerce by creating uniformity of existing regulations and replacing those regulations that were inconsistent therewith. Congress chose to do so by improving the regulation and enforcement authority of the U.S. Secretary of Transportation and endowing the U.S. Department of Transportation with regulatory jurisdiction over the containment and transport of hazardous materials throughout the nation.

The HMTA provides broad regulations for the labeling and packaging of containers that hold hazardous materials. In many cases, these regulations may subject a manufacturer or distributor to regular inspection of their products and containers by the DOT. Common consumer products such as aerosol cans, gasoline containers and oxygen cylinders fall under the HMTA's regulatory authority.

Wielding its pre-emptive power, the DOT has formally declared that the HMTA and DOT's enforcement regime occupy the field of hazardous materials exclusively, leaving the states with no room for additional regulation, as in *In re Amtrol Holdings*, 532 Fed. Appx 316 (3d Cir. 2013). Therefore, state products liability claims are not only expressly pre-empted by Section 5125(b)(1) of the HMTA, but could also be barred by the doctrine of field pre-emption.

Practitioners can consult the DOT spreadsheet for the 2,945 different "Hazardous Materials Descriptions and Proper Shipping Names" that are regulated by the DOT. Many consumer products may contain one of the listed hazardous materials substances. While the substance itself may not be regulated by the HMTA, any claims regarding the warning labels found on the container or its design will probably be pre-empted under the HMTA. For instance, a California court granted summary judgment in a case where the plaintiff alleged that an old aerosol can exploded as she attempted to discard it, injuring her hand, in *Maxwell-Miller v. Dow Chemical*, Case No. 37-2010-00058419-CU-PL-NC, Superior Court of the State of California, County of San Diego (Sept. 10, 2013). The aerosol can was a regulated container under the HTMA, and the court, finding express pre-emption of the plaintiff's state tort claims, ruled that the plaintiff had failed to establish evidence of a violation of the federal statute.

CONSUMER PRODUCT SAFETY ACT

The Consumer Product Safety Commission imposes limits on consumer products through the provisions of the Consumer Product Safety Act (CPSA) and the Consumer Product Safety Improvement Act of 2008 (CPSIA). There are a wide variety of consumer products that are regulated by the CPSA and CPSIA, including bicycle helmets, cap guns, matchbooks, art supplies and lawn darts.

The CPSA contains an express pre-emption clause as follows: "Whenever a consumer product safety standard under this act is in effect and applies to a risk of injury associated with a consumer product, no state or political subdivision of a state shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the federal standard."

The CPSA also contains what is known as a "savings clause" that allows a consumer to proceed with a cause of action against a manufacturer: "Compliance with consumer product safety rules or other rules or orders under this act shall not relieve any person from liability at common law or under state statutory law to any other person." This language has been interpreted to allow a plaintiff to claim that a manufacturer's compliance with CPSA rules did not bar a state law claim for failure to exceed the federal labeling, design and manufacturing standards, as held in *Leipart v. Guardian Industries*, 234 F.3d 1063 (9th Cir. 2000).

Courts across the country have interpreted savings clauses in different ways, with the majority of decisions requiring a case-by-case assessment. One consistently successful argument for consumers arises from *Geier v. American Honda Motor*, 120 S. Ct. 1913 (2000), in which the U.S. Supreme Court found that the inclusion of a savings clause in a federal statute prohibits a broad reading of any express pre-emption language.

TIPS FOR PRACTITIONERS

When defending a state law claim for products liability, it is important to research and know all state and federal laws that govern not only the product itself, but the overall industry in which the product is found. Be sure to flush out any potential arguments you may have for pre-emption, beginning of course with the existence of any express pre-emption provisions or savings clauses. Analyze the federal regulations in accordance with any applicable state laws for direct conflict or the impossibility of mutual compliance. Finally, evaluate the balance of state and federal power in the field to determine whether the states were given any deference by Congress to govern. •

Reprinted with permission from the November 17, 2015 edition of THE LEGAL INTELLIGENCER © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. # 201-11-15-07