The Role of Federal Preemption in Injury Prevention Litigation

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INJURY DEATH BY CAUSE, U.S. 2007

All Injury Deaths: 182,479
Source: CDC, NCIPC WISQARS
Preemption

- Law at one level of government overrides law at another level

- Federal preemption is based on Constitution’s Supremacy Clause

- Usually involves legislation or regulation

- Can also involve litigation
Two Main Types of Federal Preemption

- **Express**: Based on the language of the statute

- **Implied**: Based on ....
  - Intent to occupy the field
  - Conflict with the operation or purposes of the federal law
Express Preemption: Example

- The Protection of Lawful Commerce in Arms Act (PLCAA) – enacted in 2005
- More than 30 cities had brought lawsuits against gun industry: based on nuisance and negligence
- PLCAA preempted most forms of litigation against gun makers or sellers.
- Some statutory exceptions.
Express Preemption, cont.

- Even where the statutory preemption language appears to refer to **legislation**, courts have found **litigation** preempted
- Sup Ct: a successful state tort verdict = a state common law duty.
Implied Preemption: Example


- Lawsuit alleging negligence in failing to equip vehicle with an airbag impliedly preempted – conflicted with NHTSA phase-in plan

- Even though relevant statute had a “savings clause”
Reverse (?) Preemption


- Coast Guard declined to require prop guards.

- Mercury argued that even failure to regulate could preempt state tort law.

- Supreme Court disagreed (9-0).
Conclusions

- Litigation can further injury prevention goals
- Preemption interferes with that purpose
- Remains a vibrant and controversial issue for Cts
- *Williamson v. Mazda*: Sup Ct recently granted cert. to (possibly) reconsider *Geier*: (Kagan sought cert.)
- Legislative drafters: take care if they wish to avoid preemption; even a savings clause may not work
- Trade-offs for those seeking new legislation