
The Role of Federal Preemption in Injury Prevention Litigation

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Introduction

In 2007, there were 182,479 injury-related deaths in the United States — including homicides, suicides, and unintentional injuries — making injuries the leading cause of death for persons under age 45.¹ Also in 2007, nearly 30 million Americans suffered a non-fatal injury serious enough to warrant hospital treatment.² The lifetime cost of fatal and non-fatal injuries occurring in 2000 is estimated to exceed \$400 billion.³

Efforts to prevent injuries have often focused on changes to the built environment or potentially dangerous products to reduce risks. Building safety into a product or environment — especially in ways that require little or no user action to confer protection — is often more effective than trying to change consumer behavior. For example, improving the crashworthiness of cars through design changes such as air bags, fire-resistant fuel systems, or electronic stability programs, is more effective than simply trying to teach operators to become safer drivers.

Although manufacturers and other businesses will sometimes improve safety voluntarily, changes to product design or environments often must be mandated through legislation or regulation. Numerous federal agencies are authorized to regulate the safety of specific products including: the National Highway Traffic Safety Administration (cars); the Coast Guard (boats); the Consumer Product Safety Commission (most home products); and the Food and Drug Administration (drugs and medical devices).

Litigation can also be a valuable tool for the prevention of injuries, particularly when legislation or regulation is inadequate or even absent. Lawsuits

involving dangerous products or environments can serve the dual purpose of compensating plaintiffs for their injuries and providing economic incentives for manufacturers or others to reduce risks.⁴ There are numerous examples of manufacturers re-designing (or withdrawing) their products to make them safer in response to lawsuits.⁵

But lawsuits can also be a costly, time-consuming, and sometimes inefficient strategy for injury prevention. Defendants do not always respond to lawsuits, or the threat of lawsuits, in ways that promote safety. For example, a manufacturer may add warnings of little or uncertain value, or simply pay damages without substantially reducing risks.

Various legal obstacles can also hinder the success of litigation as a tool for injury prevention. Among the most prominent obstacles is the preemption of lawsuits. In the past decade, the U.S. Supreme Court has frequently addressed the issue of preemption — without wholly consistent results.

This article will: (1) briefly review the legal doctrine of federal preemption; (2) discuss recent federal legislation protecting certain manufacturers from lawsuits; (3) describe several recent Supreme Court cases — all involving injuries — addressing preemption; and (4) consider the impact of these developments for the future of injury prevention litigation.

Brief Overview of Federal Preemption

Preemption refers to the ability of law at one level of government to disallow or supersede law at a lower level. State law can preempt local law. Federal law can preempt both state and local laws. The authority for federal preemption derives from the supremacy clause of the U.S. Constitution declaring that the “Laws of the United States ... shall be the supreme Law of the Land

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...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁶

There are two main types of preemption: express and implied. Express preemption occurs when an act of Congress explicitly includes language forbidding states or localities from legislating on the same topic. Typically, express preemption clauses will permit only state and local laws that are not inconsistent with federal law.

Even when Congress has not expressly limited the power of states and localities to act, courts may nevertheless conclude that preemption is implied based on the nature of the federal legislative or regulatory scheme. Implied preemption has two primary types: field preemption and conflict preemption. If a court concludes that Congress intended to fully occupy the field of regulation, to the exclusion of state or local laws, it may find such laws preempted. In addition, if a state or local law would actually conflict with an existing federal law, or act as an obstacle to the fulfillment of the federal objectives, then preemption may occur.⁷

Federal preemption raises issues of federalism. Except in those areas which the Constitution forbids states to regulate, states have broad police power authority to promote the health, safety, and welfare of their citizens. Implied preemption, in particular, highlights a tension between the sovereignty of states and the “supremacy” of federal law.

Ordinarily federal preemption is thought of as applying to legislation — i.e., a federal statute preempting a conflicting state statute. But the Supreme Court has concluded that federal law may also preempt state common law in the form of lawsuits.⁸ As with legislation, federal preemption of lawsuits may occur either expressly or impliedly.

Express Preemption of Lawsuits

Perhaps the most direct recent example of express federal preemption of state lawsuits involves litigation against the firearm industry. Beginning in the late 1990s, a number of localities, states, and even individuals began bringing lawsuits against firearm manufacturers and dealers. These litigants argued, in part, that the industry’s marketing practices made it more likely that firearms would make their way from the legal to the illicit market. They also contended that the firearms themselves should have included certain safety features to reduce the risk of accidents, suicides, and gun thefts.⁹

As a result, the firearm industry sought Congress’ protection from these lawsuits. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA).¹⁰ Most federal laws with an express preemption clause are intended to serve some other pur-

pose, usually regulating the relevant product or industry in some way. By contrast, the primary purpose of PLCAA was to preempt most lawsuits against the gun industry, particularly those where the harm alleged by the plaintiff was caused by an intervening criminal act involving guns. PLCAA did contain several exceptions but nearly all of the lawsuits brought by municipalities were dismissed following its enactment.¹¹

The language of the Medical Device Amendments (MDA) of 1976 to the Federal Food, Drug, and Cosmetic Act is more typical of federal express preemption provisions.¹² As part of a regime to reduce risks associated with certain medical devices by requiring federal oversight, Congress also forbade states and localities to “continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device...”¹³

In 2008, in *Riegel v. Medtronic*, the U.S. Supreme Court concluded that this MDA language expressly preempted a lawsuit involving an “Evergreen Balloon Catheter” manufactured by the defendant. The catheter burst during an angioplasty procedure to open the plaintiff’s blocked artery. Because the product had undergone a rigorous premarket approval process to demonstrate its safety pursuant to MDA, the Court concluded that a state lawsuit would amount to a “requirement” different from that mandated by the Act.¹⁴

Interestingly, just 12 years earlier in 1996, in *Medtronic v. Lohr*, the Supreme Court concluded that a lawsuit against the same manufacturer, involving a different medical device (a heart pacemaker), was *not* expressly preempted. The key difference, according to the Court, was that the pacemaker in *Lohr* had not undergone the same rigorous premarket approval, but had instead been permitted under a part of the MDA allowing certain devices to be “grandfathered” onto the market if they were “substantially equivalent” to approved pre-1976 devices.¹⁵

Implied Preemption of Lawsuits

Even when express preemption is not found, courts may still determine that implied preemption is applicable. Predicting the outcome of the Supreme Court’s recent implied preemption cases can be, if anything, even more difficult than for express preemption.

In *Geier v. American Honda*, for example, the plaintiff sustained serious injuries when the 1987 Honda Accord she was driving collided with a tree. At the time the Accord was manufactured, a federal regulation, Federal Motor Vehicle Safety Standard (FMVSS) 208, did not require that all cars be equipped with air-

bags, but instead permitted manufacturers to phase-in this safety technology. Ms. Geier brought suit against American Honda arguing that her car was negligently and defectively designed because it lacked an airbag.¹⁶

FMVSS 208 was promulgated by the Department of Transportation (DOT) under authority granted by the National Traffic and Motor Vehicle Safety Act, which contains an express preemption provision. However, in 2000 the Supreme Court concluded that Geier's lawsuit was not expressly preempted because the Act also contains a so-called "savings" clause providing that "[c]ompliance with" a federal safety standard "does not exempt a person from liability at common law."¹⁷

Perhaps surprisingly, the existence of a savings clause did not end the preemption inquiry. In fact, the Supreme Court concluded that Geier's lawsuit was impliedly preempted. The Court determined that if Ms. Geier were to prevail in her lawsuit, this would frustrate the purpose of the phase-in provision of FMVSS 208, creating conflict preemption. In determining whether a successful tort action would truly conflict with the federal law, the Court chose to "assume compliance" by the car manufacturers with the state tort duty to provide an airbag rather than, for example, simply paying damages to Geier.¹⁸

In *Sprietsma v. Mercury Marine*, by comparison, a federal regulatory body also declined to mandate a specific safety technology on all products, yet the Supreme Court reached a different conclusion regarding implied preemption.¹⁹ In 1995, Jeanne Sprietsma was killed while waterskiing when she was struck by the propeller blades of an outboard motor manufactured by Mercury Marine. Her estate brought a lawsuit against Mercury Marine alleging that the outboard motor was unreasonably dangerous because it was not equipped with a propeller guard intended to prevent persons in the water from being struck by spinning propeller blades.²⁰

The U.S. Coast Guard was delegated authority to establish safety standards for recreational boats pursuant to the Federal Boat Safety Act of 1971.²¹ From 1988 to 1990, the Coast Guard considered mandating propeller guards but chose not to do so. As a result, relying on the Supreme Court's decision in *Geier*, the Illinois Supreme Court found Sprietsma's claim subject to implied preemption.²²

In a rare 9-0 decision, in 2002 the Supreme Court reversed, reinstating Sprietsma's claim. The Court distinguished *Geier*, in part, as involving an affirmative regulation (FMVSS 208) whereas the Coast Guard's action was simply to decline to regulate. With FMVSS 208, DOT believed that phasing-in airbags would best promote motor vehicle safety; the Coast Guard's deci-

sion reflected no such conclusion. As the Court wrote, the Coast Guard's decision to take no action "left the law applicable to propeller guards exactly the same as it had been before...."²³

Conclusion

The Supreme Court has decided a remarkable number of recent cases addressing issues of federal preemption in the context of product safety and the public's health. Additional preemption cases are on the way. Already for its 2010-11 term, the Court has agreed to hear a new case, *Williamson v. Mazda*, offering an opportunity to revisit its decision in *Geier*.²⁴

The ability for lawsuits to serve a public health purpose is weakened when federal law preempts tort litigation. But given what some see as the generally pro-business orientation of the current Supreme Court, it seems unlikely that the Justices will reverse the Court's recent expansion of the preemption doctrine.²⁵ The Court's willingness to assume that defendants will comply with new "duties" created by successful lawsuits, rather than simply pay judgments and litigate the next case, reinforces this conclusion. At a minimum, therefore, it would be helpful if the Court would enhance the consistency and predictability of its preemption jurisprudence. Clarifying when a savings clause truly "saves" the viability of lawsuits, for example, would assist legislators and litigators alike to create and apply new laws designed to improve product safety.

The power of courts to *infer* Congress' intent to restrict the power of states, through implied preemption, raises difficult issues of federalism. It also affects the ability of the judicial system to address the enormous public health problem of injuries, especially where legislation or regulation has proven inadequate.

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