

SECURING ACCESS TO JUSTICE

Fighting Federal Preemption

By Arthur H. Bryant and Leslie A. Brueckner*

Part One in a series.

The first brief that Trial Lawyers for Public Justice filed in the U.S. Supreme Court, nearly 20 years ago, opposed federal preemption of an injury victim's claim. It urged the Supreme Court to hold that Karen Silkwood could sue the Kerr-McGee Corporation for contaminating her with plutonium even though the company had complied with the federal government's regulations governing the safety of nuclear power plants. The Supreme Court agreed, 5 to 4.

Since that time, TLPJ's Federal Preemption Project has preserved the rights of millions of Americans to hold corporate wrongdoers accountable for their injuries. As we mark our 20th Anniversary, however, companies seeking to avoid responsibility for their conduct are advancing the federal preemption defense with more vigor than ever. This article, therefore, is intended to provide a short primer on how to fight back.

Before we do that, however, we want to emphasize one critical point first: if you are faced with a motion (or even a question) involving federal preemption, please contact TLPJ for help. We have been briefing and arguing these issues throughout the country for years. We have information packages, key briefs, and decisions readily available. We monitor developments daily, can bring you up-to-date, and can refer you to other useful people and resources, too. We will help you however we can. Now that you know

that, let us review some other things you should know about fighting federal preemption.

A Brief Overview

It is black letter law in virtually every state that a defendant's compliance with applicable government regulations is evidence of, but does not irrefutably establish, lack of negligence. If a reasonable person in the defendant's shoes would have done more than the bare minimum required by applicable regulations, then the defendant can be held liable. Thus, for example, the manufacturer of a harm-inducing drug can be found liable for the harm caused by the drug even though the manufacturer and the drug complied with all applicable regulations.

Despite this sound and well-established principle of state law, numerous manufacturers and other defendants are now arguing in products liability, toxic tort, environmental, consumer rights, and other cases that, no matter how outrageously they acted, they cannot be sued because they complied with a federal statute and/or regulation. Their argument, in a nutshell, is that the federal law "preempts" – in other words, eliminates – their victims' right to sue for compensation under



TLPJ Staff Attorney Michael J. Quirk, plaintiff Rex Sprietsma, and TLPJ Staff Attorney Leslie A. Brueckner after argument in *Sprietsma v. Mercury Marine*, which led to a 9-0 Supreme Court decision recognizing rights of injury victims.

Photo by Jonathan Huson

state law. Far too frequently, moreover, the courts (particularly the federal courts) are ruling in their favor. To reverse this unjust trend, plaintiffs' lawyers need to pay more attention to federal preemption issues and the constitutional implications they raise.

While numerous factors come into play when challenging federal preemption, there are two key factors that lawyers opposing preemption often overlook. First, federal preemption is fundamentally an issue of the relative power of the federal and state governments. The central values of our federal system – a system of

Continued on page 2.

United States – are at stake. For that reason, the analysis is generally supposed to start with a strong presumption *against* preemption.

Second, in arguing these issues, the substantive views of the courts on the propriety of tort litigation is not supposed to matter. Under the law, federal preemption is supposed to turn on what Congress intended when it enacted the allegedly-preemptive legislation and/or what the federal agency intended when it issued the allegedly-preemptive regulation.

In the past several years, the Supreme Court has generally heard at least one case each year addressing federal preemption of injury victims' claims. In 2002, the Court ruled unanimously in TLPJ's preemption case, *Sprietsma v. Mercury Marine*, that recreational boat engine manufacturers can be sued for failing to install propeller guards.

In its 9-0 decision of December 3, 2002, the Court resoundingly reaffirmed tort victims' right to seek recovery for injuries caused by unguarded boat propellers. The United States of America filed an *amicus* brief in support of our position, as did 17 State Attorneys General. The briefs are available online at www.tlpj.org.

If there is one unmistakable lesson of the Court's recent decisions, it is that plaintiffs' lawyers are going to face federal preemption motions for years to come. Unless and until the Court turns around, plaintiffs' lawyers must be aware of the threat of federal preemption – and work hard to avoid it.

Tips for Fighting Federal Preemption

To avoid federal preemption, there are several things that you should and should not do:

1. Take the threat of federal preemption into account before you file your case. Whether a court finds preemption may turn entirely on what claims you assert or how you frame your case. The very best way of dealing with federal preemption may literally be to avoid it, if you can still successfully pursue your clients' claims. Craft your complaint to avoid a preemption dispute if you can.



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Photos by Herman Farrer

amicus brief – or even brief and argue the issue ourselves.

5. Throughout your papers and argument, recognize and articulate the important constitutional issues at stake. Federal preemption is not simply about whether a particular set of victims will be able to obtain compensation – as important as that question is. Rather, it is about whether Congress has taken away from the States the power to compensate victims whom the States deem worthy of compensation. In preemption cases, the defendant is arguing that, no matter how outrageously it acted, the States have no power to require it to pay compensation to its victims. The constitutional implications of that argument are important.

2. Do not underestimate the importance of the issue. If the court finds federal preemption of your clients' claims, that may not just end the case. It may also end your ability to file similar cases in the future.

3. Do not underestimate the work to be done. These motions require research and briefing of Congress' intent in enacting a particular statute and the interplay of federal and state law. Law students and inexperienced briefing attorneys are unlikely to do an adequate job.

4. Call for help. Contact Trial Lawyers for Public Justice for assistance and for information about other lawyers faced with similar motions. We and they may be able to save you a lot of work. At a minimum, we can guide and assist your research efforts. In an important enough case or appeal, we may be willing to file an

6. Recognize and take appropriate advantage of the fact that, because preemption involves the usurpation of state power by the federal government, "States' rights" advocates, State Attorneys General, and local government lawyers are your natural allies.

7. Keep your eye on the ball. When statutory preemption is claimed, the question is supposed to be what Congress intended. The strong presumption is that Congress did not intend to preempt state law, but you still need to carefully research and fully brief the issues. Make sure you review all of the sources usually examined to determine what Congress intended. Focus first on the specific language in question. What does it mean in light of the purpose for which it was passed? Then turn to the legislative history. Did Congress or the bill's sponsors say they

Continued on page 4.

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High Court Rules Against Boating Industry in Propeller Case Injured Now Can Sue Engine Makers in State Courts for Failing to Install Safety Guards

by David G. Savage

WASHINGTON – In a surprising, unanimous defeat for the boating industry, the Supreme Court ruled Tuesday that swimmers or boaters who are injured in propeller accidents can sue the engine makers for failing to install propeller guards.

The ruling clears the way for the husband of an Illinois woman who died in a boating accident to sue Mercury Marine, which makes motors for recreational boats. The company is a division of Brunswick Corp. of Lake Forest, Ill. The ruling also puts boat makers on notice that they should consider adding propeller guards.

In 1990, the Coast Guard studied the issue and decided against requiring propeller guards on recreational boats. Federal authorities said then that there was not a single design for a guard that would suit the hundreds of boat models.

Since then, the recreational boating industry has assumed that its manufacturers could not be held liable for failing to put guards on propellers.

At least 447 recreational boaters were injured or killed in propeller accidents between 1995 and 1998, federal officials said. A study by the Johns Hopkins University Injury Prevention Center said the “true number of propeller injuries and deaths” may be much higher, as many as 3,000 a year.

Until now, judges had consistently thrown out lawsuits charging the engine makers with selling a defective or dangerous product.

But the Supreme Court reversed course Tuesday and ruled that nothing in federal law shields engine makers from being sued in state courts.

Justice John Paul Stevens said the main purpose of the Federal Boat Safety Act “emphasized by its title [is] promoting boat safety.” It should not be used to shield manufacturers from being forced to take extra steps to save lives, he said.

“It is quite wrong to view...the Coast Guard’s decision not to adopt a regulation requiring propeller guards on motor boats as the functional equivalent of a regulation prohibiting all states and their political subdivisions from adopting such a regulation,” he said in *Sprietsma vs. Mercury Marine*.

States, their courts and their juries remain free to hold engine makers liable for not adopting reasonable measures, he said.

The ruling revives a lawsuit filed by Rex Sprietsma for the death of his wife, Jeanne. On July 10, 1995, she

was riding in an 18-foot ski boat on a lake in Kentucky when she fell overboard and was killed by the propeller.

His lawsuit contended Mercury Marine’s engine was unreasonably dangerous because it lacked a propeller guard. However, judges in Illinois tossed out his case.

“Now we get our day in court,” said Leslie Brueckner of the [Trial Lawyers for Public Justice](#), who represented Sprietsma. “It’s a stunning affirmation of the tort system.”



A propeller guard such as this one might save boaters from serious injury or death.

It is rare, however, for the high court to side unanimously with trial lawyers and against manufacturers.

Two years ago, the court on a 5-4 vote blocked automakers from being sued for failing to install air bags on vehicles made before 1990. The justices also were closely split on whether federal law shielded medical device makers and cigarette companies from being sued in state courts.

Bush administration lawyers may have played a key role in tipping the case in favor of the plaintiffs. They filed a brief advising the court that federal transportation officials and the Coast Guard did not intend to prevent states from adopting more stringent standards of boat safety. ■

intended to preempt tort law claims? If not, what basis is there for saying they intended to do so? Review the position, if any, the federal agency involved has taken on the issue. In many cases, the agency has said there is no preemption. Then turn to the case law interpreting the statute – not simply in your specific factual context, but in all relevant cases. Don't forget to look at law reviews and other commentaries, too.

8. If your case involves an alleged conflict between your client's claims and a federal regulation, then, regardless of what Congress said, you need to research the complete history of the regulation too. Explain to the court exactly what the agency said in the regulation and why it said it. Review your client's claims and explain why there is no conflict between what the agency said and what your client alleges.

9. Recognize and stress the distinction between state regulations and state tort law. Congress often preempts the former and leaves the latter intact, particularly in the field of consumer protection. The reason is that the two bodies of law serve different purposes.

Regulatory law is forward-looking. It is primarily intended to change

future conduct. Tort law looks back in time. It is primarily intended to compensate victims. Note that, in many areas, if tort law is preempted, criminal law may be preempted, too. Its purpose is punishing wrongful conduct, but it also affects future conduct. See if there are any cases examining the preemptive effect of the federal law in question on state criminal law and argue that, too.

10. Keep fighting. Justice is on our side. The manufacturers are generally relying on federal legislation intended to increase consumer protection. Congress did not intend this legislation to immunize manufacturers from liability and leave injured consumers with no remedy at all.

Conclusion

Plaintiffs' lawyers can only obtain justice for their clients if they can preserve their clients' access to the courts. Corporate wrongdoers understand this fully; that's why they are developing so many different obstacles to access to the courts. Plaintiffs' lawyers need to be prepared to confront and overcome these obstacles, including federal preemption. To do so, they should follow the suggestions in this paper – and call Trial Lawyers for Public Justice or visit our web site, www.tlpj.org, for help. Working together, we can make sure access to the courts – and justice – continues to thrive. ■

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Through creative litigation, public education, and innovative work with the broader public interest community, we:

- protect people and the environment;
- hold accountable those who abuse power;
- challenge governmental, corporate and individual wrongdoing;
- increase access to the courts;
- combat threats to our justice system;
- and inspire lawyers and others to serve the public interest. ■

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