



Federal preemption cases: Reflections on the U.S. Supreme Court's busy docket

In today's partisan lineup, a "conservative" is most likely to support a claim of federal preemption that would eliminate state laws and favor corporate interests

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Over the last several decades, the United States Supreme Court has heard a series of cases dealing with federal preemption. Federal preemption is rooted in the Supremacy Clause of Article VI of the United States Constitution, which provides that the laws of the United States are "the supreme Law of the land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In practical terms, this means that Congress (or administrative agencies which have had certain powers delegated to them by Congress), subject to the limits on the federal government's own power imposed by the Constitution, has authority to preclude – or "preempt" – any state law that conflicts with federal law.

In a host of areas, the laws of many states are more favorable to consumers, injury victims, employees and all sorts of individuals with claims against corporations than are federal laws. Accordingly, the most common alignment of parties are that corporate defendants want to ex-

pand the scope of federal law at the expense of state laws, and individual plaintiffs generally resist preemption. In the past, there was a stereotype that "conservatives" favored states' rights generally, but when it comes to legal disputes involving corporate misconduct, the modern partisan lineup is more likely to find a "conservative" supporting a claim of federal preemption that would eliminate state laws.¹

At least once in every term in recent memory, the Court has considered whether some federal statute interdicts some body or other of state law. There have been more than a dozen cases discussing the preemptive scope of the Employee Retirement Income Security Act (ERISA) in the last 130 years, as well as cases addressing preemption under the National Bank Act, the Food and Drug Act, the Federal Communications Act, the Home Owner's Lending Act, the National Traffic and Motor Vehicle Safety Act, the Airline Deregulation Act, the Boat Safety Act, and our personal favorite, the Federal Insecticide Fungicide and Rodenticide Act, among many other federal statutes.

This year is no exception. Indeed, there are at least five cases pending on

the United States Supreme Court's docket for its 2007-2008 term that deal with whether federal law preempts state law in a particular area. The two cases that have attracted the most national attention from both lawyers and the media involve claims that Food and Drug Act law preempts state tort laws involving products liability claims. The first of these cases, *Riegel v. Medtronic, Inc.*, No. 06-179, concerns injuries caused by medical devices that have received premarket approval from the Food and Drug Administration. The second case, *Warner-Lambert v. Kent*, No. 06-1498, raises the issue of whether state laws may permit product liability suits to proceed against drug manufacturers who have defrauded the FDA.

State laws involving products liability claims against the manufacturers of drugs and medical devices are not the only type of state law in jeopardy in this term. The Court is also considering federal preemption questions in three other areas:

- Whether states can regulate certain types of employer speech aimed at convincing workers not to join unions. (*Chamber of Commerce v. Brown*, No. 06-939.)



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- Whether the Federal Arbitration Act overrides a state law that gives exclusive jurisdiction over certain categories of claims involving talent agencies to a state labor regulator. (*Preston v. Ferrer*, No. 06-1463.)
- Whether the 1994 authorization bill for the Federal Aviation Administration bars states from regulating the shipment of tobacco and other dangerous substances. (*Rowe v. New Hampshire Motor Transport Association*, No. 06-457.)

Cases rise and fall upon the language and history of the particular federal legal regimes involved

What lessons can be drawn from, or predictions be made about, all of these pending cases? If one reads the briefs of the parties (and, in most of these cases, the briefs of a number of amici on one or sometimes both sides of the cases), and the transcripts of the oral arguments in the cases (the *Riegel* case was argued on December 4, 2007, for example, with Public Citizen's Allison Zieve ably representing the family bringing the product liability claim and former Solicitor General Ted Olson representing Medtronic), one surprising thing becomes clear: the arguments being made in these cases are almost completely different in each case. To a very large degree, the outcome in each of these five cases will turn upon a detailed examination of the language of statutes that are surprisingly unlike each other, or upon a history of administrative regulations (or, in the case of the Federal Arbitration Act, court decisions) that have resulted from very brief and oblique statutory language. These five cases will almost certainly not be decided based upon some single broad principle that will govern the outcome in each matter or establish a rule of general application. It would not be at all surprising if the Court were to find preemption in two or three of the pending cases and to find no preemption in the other two or three pending cases, and for each case to be decided in an opinion that does not cite any of the other four cases.

This is not to say that it does not matter whether counsel have a broad understanding of the law of federal preemption. Lawyers who regularly handle complex federal preemption cases in a variety of different areas enjoy an enormous advantage over the more generalized practitioner who comes into contact with her or his first case that raises issues of federal preemption.²

The experienced preemption lawyer understands the vast difference between cases where federal preemption is a defense (meaning, if the defendant's claim of preemption is successful, state laws upon which a plaintiff may rely will be voided) and cases involving what is called "complete preemption" (where preemption gives rise to exclusive jurisdiction in the federal courts, but may not actually wipe away the state laws upon which an individual is suing).³

The experienced preemption lawyer will also understand the enormous difference between the different types of preemption as a defense – express preemption (where the direct language of a statute or federal regulation preempts state law), field preemption (where the Congress intended federal regulation to be so comprehensive that all state law in an entire field of law is overridden), and implied/conflict preemption (where federal law preempts state laws that either (a) make it impossible for federal law to operate; or (b) frustrate the objectives of federal law). (*E.g.*, *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 371.) The types of arguments that can and should be made in opposing a claim of federal preemption vary a great deal depending upon whether the preemption claim is based upon field preemption, for example, as opposed to conflict preemption.

Nonetheless, the key point to recognize about the diversity of the legal arguments set forth in the five pending United States Supreme Court cases is that federal preemption issues tend to be decided based upon a very detailed and painstaking analysis of the particular

body of federal and state law that relates to a dispute, and practitioners should not hope to win these cases by relying upon generalized statements of law that are generated in different settings.

One point in particular should be noted about generalized statements that are often bandied about with respect to federal preemption. There are a number of cases where the Supreme Court has held that there is a strong presumption *against* federal preemption.⁴ In a number of other cases, however, the Court makes no mention of the presumption against preemption. It is not clear the extent to which this doctrine is actually regularly a decisive element of the Court's consideration of claims of federal preemption, or whether it has sometimes become a doctrine that is invoked when the Court intends to rule against a claim of federal preemption and is ignored in cases where the Court intends to rule the other way.

The position of the federal government can be crucial

Historically, the conventional wisdom has been that the United States Government's position – typically expressed through the Office of the Solicitor General, who generally represents the federal government before the U.S. Supreme Court – is crucial to the outcome of federal preemption cases. (*E.g.*, *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 496 [court should give "substantial weight" to agency's view of the preemptive effect of statute it is authorized to implement].) In a great many cases where a petition for certiorari raises an issue of federal preemption, the Court will ask the Solicitor General to file a brief setting forth the government's position as to whether a given federal regulatory regime does or does not preempt state law.⁵ While there are certainly a number of cases where the Supreme Court has not followed the recommendations or positions of the Solicitor General, there is little doubt that a number of justices put great weight on the Gov-



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ernment's views. Some have suggested that the Government's position is particularly important where it argues that there is not preemption – it is harder for a corporation to say that some body of state law jeopardizes a body of federal law, when the Government itself does not object to the operation of state law. (*E.g.*, *Sprietsma v. Mercury Marine* (2002) 123 S.Ct. 518 [finding no implied conflict preemption of common law tort claims in the absence of governing federal regulation, in a case where the Solicitor General supported the “no preemption” position of the individual injury victim].)

Unfortunately, it is becoming increasingly rare to find a case in which the Solicitor Generals appointed by this Administration do not support federal preemption.⁶ For a cadre of men who all came to the attention of the Administration through their activities in an organization called “The Federalist Society” (which at least nominally and ostensibly was created, in part, to advance the goal of “states’ rights”), Supreme Court litigation has become just another vehicle for this Administration to advance its pro-“tort reform” agenda.⁷

As a telling indication of the extent to which the Supreme Court has become the forum of choice for the Administration to expand the scope of federal law at the expense of state law, the United States Solicitor General has filed briefs supporting the pro-preemption provision of the corporate party in all but one of the five cases that are currently pending before the United States Supreme Court that involve assertions that federal law preempts state laws. (The only case in which it has not done so is *Preston v. Ferrar*, the Federal Arbitration Act case. Unlike most other statutes that have been given preemptive force, no federal agency plays any role in implementing the FAA.) While there are no guarantees that the corporate pro-preemption position will prevail in each of these cases, it is likely that the government's position helps the position of the corporate side.

The preemption effect of federal regulations

The Supreme Court will not give deference to a government agency's interpretation of a matter in every circumstance. Where there is no ambiguity in a statute, an agency's attempt at reinterpretation is entitled to no deference.⁸ Before a court will consider an agency's interpretation, a party must show that there is ambiguity warranting the agency's involvement.

There are several additional exceptions where courts will refuse to defer to agency interpretations or regulations. For example, just a few years ago, by a 7-2 vote, the U.S. Supreme Court refused to give deference to a federal agency's position where it represented a change from the agency's prior position.⁹ The significance of consistency has long been an important factor in how the U.S. Supreme Court views agency positions.

The format in which the agency opinion is issued is a factor in whether deference is granted. For example, the Supreme Court has rejected the rule of traditional Chevron deference for “policy statements, interpretive rules, agency manuals and enforcement guidelines lacking the force of law.”¹⁰ Where the agency has not engaged in a formal process, such as formal and public rule-making, the Supreme Court has denied deference. Courts also look to the authority granted the agency by congress as a factor into determining the appropriateness of deference.¹¹ *U.S. v. Mead*, 533 US 218 (2001). In contrast, where the issue involves the interpretation or application of an agency's own published federal regulations, the Court will defer to the agency. *Long Island Care at Home, Ltd. v. Coke* (2007) 127 S.Ct. 2339, 2550.

There are some indications that the Supreme Court gives less weight to the Government's position when it senses that the Government has changed its position for apparent political purposes. See, e.g., *Bates*, 544 U.S. at 449, (rejecting

the Solicitor General's position as “particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.”)

In other cases, the Supreme Court has not been as sensitive as it could have been to situations where government agencies have strong incentives to be biased in favor of federal preemption. For example, in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) a 6-3 majority of the Supreme Court held that regulations of the Office of Comptroller of Currency (“OCC”) (which regulates national banks under the National Bank Act) preempted Michigan's predatory lending statute, overriding the arguments of Michigan and many consumer advocates that the OCC's regulations improperly, and significantly, expanded the scope of federal preemption by re-writing the National Bank Act. In upholding the OCC's regulations, the Court took no note of concerns raised by several amici that the OCC – whose budget depends heavily upon user fees from national banks for its income, and which must keep the favor of those banks or risk having them change their status to that of a state-chartered bank or a federally regulated thrift¹² – tends to favor the banks. See, e.g., A.E. Wilmarth, *The OCC's Twisted Logic on Overdrafts*, American Banker, August 10, 2007 (“The OCC has issued numerous regulations, rulings, and court briefs over the years in a systematic effort to bar consumer claims against its constituents. In the OCC's legal universe, debts become nondebts, noncustomers become customers, and conditions become nonconditions – whatever is necessary to advance the interests of the constituents who pay the agency's bills.”)

Bush administration would expand preemption

The Supreme Court has not yet decided any of the five federal preemption cases pending on its docket for the 2007-2008 term. It is not only impossible to



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predict the outcome of these individual cases at this point; it is impossible to predict with any degree of certainty whether any particular significant trend will emerge from the Court's decisions. One thing is clear, however: the current Administration is energetically advocating in favor of reducing the liability of corporations through expanded preemption of state laws, and the Solicitor General is strongly and consistently coming in on behalf of corporate defendants and against individual consumers and injury victims.



Sturdevant

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Bland

F. Paul Bland, Jr., is a Staff Attorney for Public Justice (formerly Trial Lawyers for Public Justice), where he handles precedent-setting complex civil litigation in areas including federal preemption and challenges to binding arbitration. He is also of counsel for The Sturdevant Law Firm. He has argued or co-argued and won more than twenty reported decisions from federal and state courts across the nation, including cases in the four federal Circuit Courts of Appeal and five state high courts. He is co-author of a book entitled Consumer Arbitration Agreements: Enforceability

and Other Issues and numerous articles. For three years, he was a co-chair of the National Association of Consumer Advocates. He was named the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers." Prior to coming to Public Justice, he was a plaintiffs' class action and libel defense attorney in Baltimore. In the late 1980s, he was Chief Nominations Counsel to the U.S. Senate Judiciary Committee. He graduated from Harvard Law School in 1986, and Georgetown University in 1983.

Endnotes:

¹ Affixing partisan labels in this area can often be tricky business. In the context of lawsuits against HMOs for failure to cover serious medical conditions, for example, Justice Thomas has written one of the most sweeping pro-preemption decisions of the last decade. *See Aetna Health Inc. v. Davila* (2004) 542 U.S. 200. In the context of the Federal Arbitration Act, however, Justice Thomas has repeatedly been the one justice to insist that the Act does not preempt any state laws in cases arising in state court. (E.g., *Buckeye Check Cashing, Inc. v. Cardagna* (2006) 546 U.S. 440 (Thomas, J., dissenting from 7-1 decision finding preemption of Florida state contract law.)

² The same is true, for example, in cases involving motions to compel arbitration and motions to strike under California's anti-SLAPP statute, Code of Civil Procedure section 425.16, *et seq.*

³ E.g., *Beneficial National Bank v. Anderson* (2003), 539 U.S. 1, 8 ("when a federal statute wholly displaces the state-law clause of action through complete preemption," a case may be removed to federal court.") The Court has so far announced only a few statutes to which complete preemption applies – ERISA, the Labor Management Relations Act, the National Bank Act with respect to usury claims, and the Price Anderson Act.

⁴ E.g., *Bates v. Dow Agrosciences, Inc.*: "Even if Dow had offered us a plausible alternative reading of § 136v(b) – indeed, even if its alternative were just as plausible as our reading of that text – we would nevertheless have a duty to accept the reading that disfavors preemption. Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cava-

lierly pre-empt state-law causes of action. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 (internal quotations and citations omitted).)"

⁵ The Solicitor General's recommendation is not always accepted by the U.S. Supreme Court, however. In the *Roué v. New Hampshire Motor Transport Association* case now pending decision this term, for example, the Solicitor General urged the Supreme Court not to take the case (because it believed, naturally for this Solicitor General), that the pro-preemption position of the U.S. Court of Appeals for the First Circuit was correct. Notwithstanding the Solicitor General's position, the Supreme Court decided to grant *certiorari* and hear the case.

⁶ This fact has been criticized and bemoaned by a number of commentators. Historically, there was a broad consensus that the Solicitor General was supposed to be a non-political, even-handed and scholarly figure in the government. While this notion was always perhaps an ideal rather than a description, humans being humans, there are many who argue that the Solicitor General has become an increasingly political figure in this Administration who regularly takes positions (and particularly pro-tort reform positions) that advance the political agenda of the current President.

⁷ There has been a substantial amount of press coverage, as well as a September 12, 2007, U.S. Senate Judiciary Committee hearing, on the issue of the Administration using its control of various federal agencies to push for broad new preemptive regulations. *See, e.g., Eric Lipton and Gardiner Harris, In Turnaround, Industries Seek U.S. Regulations*, New York Times, September 16, 2007 ("Industry officials, consumer groups and regulatory experts all agree there has been a recent surge of requests for new regulations, and one reason they give is the Bush administration's willingness to include provisions that would block consumer lawsuits in state and federal courts.")

⁸ *Christensen v. Harris County* (2000) 529 U.S. 576, 588 (where the agency's regulation is not ambiguous, "defense is unwarranted").

⁹ *Bates*, 544 U.S. at 449 (the Solicitor General's position was held to be "particularly dubious given that just five years [previously] the United States advocated the interpretation that we adopt today").

¹⁰ *See, Christensen*, 529 U.S. 576.

¹¹ *See, e.g., U.S. Mead* (2001) 533 U.S. 218.

¹² *See generally, Bravin & Beckett, Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers - Depending on Lenders' Fees, the OCC Takes Banks' Side Against Local, State Laws*, Wall St. J., Jan. 28, 2002.

