A PREEMPTIVE STRIKE AGAINST FEDERAL PREEMPTION

By Michael Weiner and Christopher Moreland

It is doubtful that any other defense presents the challenges raised when the defendant in an injury or death case (or even in a commercial loss case) invokes the specter of federal preemption. Because the scope of the federal government's legislation is so vast, covering myriad products, industries and activities, defendants are virtually certain to raise a preemption defense any time federal legislation is even remotely implicated. Fortunately, in the vast majority of cases, Congress never intended (and Congressional intent is **determinative** on preemption issues) to bar the claim at issue. Unfortunately, the law of preemption is often complex and confusing, which can lead to conflicting rulings by lower courts until the precise question of Congressional intent has been definitely determined. This determination sometimes has required a ruling by the United States Supreme Court. In other words, while raising a preemption defense is quick and easy (the defendant simply says "Congress legislated on the product, industry or activity; therefore all is preempted"), educating the court why the defense should be rejected, even where the defense is absurd on its face, is rarely so quick and easy. And, because the stakes are so high - losing on preemption may result in dismissal - this issue, with all of its complexities, must be extensively researched and briefed to ensure understanding by the court.

Fortunately again, the trend in recent decisions, including the vitally important *Bates v. Dow Agrosciences, LLC.*[1], decision by the United States Supreme Court last term, has been towards courts recognizing that Congress **rarely** intends to bar private causes of action to recover damages for wrongful conduct. Hopefully, *Bates,* along with the Supreme Court's 2002 decision in *Sprietsma v. Mercury Marine*[2], will end the flawed analysis that had often been used, particularly in the federal courts, to improperly favor defendants. Because a preemption analysis will almost always be claim and statute specific, a comprehensive discussion is beyond the scope of this article, which will instead focus on some key fundamentals of preemption law, particularly how *Bates* and *Sprietsma* demonstrate the limited scope of the defense.

From the outset it is important to note that while defendants will typically try to paint with a broad brush, preemption is actually a **disfavored** defense, particularly in areas like health and safety, which are historically subject to the police powers of the States. Thus, to avoid unintended encroachment on the authority of the States, courts should construe federal law with a "presumption **against** the preemption of state police power regulations."[3] As noted above, the recent *Bates* and *Sprietsma* decisions are good examples of the narrow view that courts should be taking when considering federal preemption.

The *Bates* case originated as a declaratory judgment action by Dow Agrosciences against a number of Texas peanut farmers who were threatening to sue for damages allegedly caused to their crops by one of Dow's products. The farmers claimed that the herbicide was toxic and that Dow had misrepresented the product to them. In turn, Dow argued that the farmers' claims (which were based on state law and included allegations of breach of warranty, fraud, violation of the Texas Deceptive Trade Practices Act, defective design, and negligence) were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), a regulatory scheme aimed at controlling the use, sale and labeling of pesticides. The FIFRA contains an express preemption clause that allows States to participate in regulating the use and sale of federally regulated pesticides, but precludes them from "impos[ing] or continu[ing] in effect any **requirements** for labeling or packaging in addition to or different from those required" by the Act.[4]

The district court held that the farmers' tort claims were preempted because they were "in effect" challenging the product's label and thus constituted **"requirements** for labeling and packaging in addition to those required" under the FIFRA.[5] The Fifth Circuit affirmed, noting that success on the farmers' claims would "provide a manufacturer with strong incentive to alter its label to avoid future liability," and concluding that a potential judgement against Dow which might induce it to alter the product label was the equivalent of an additional or different labeling "requirement" subject to preemption by the FIFRA.[6]

The Supreme Court reversed, holding that the lower courts had interpreted the term "requirement" as used in the FIFRA's

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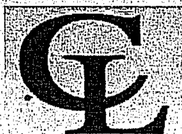

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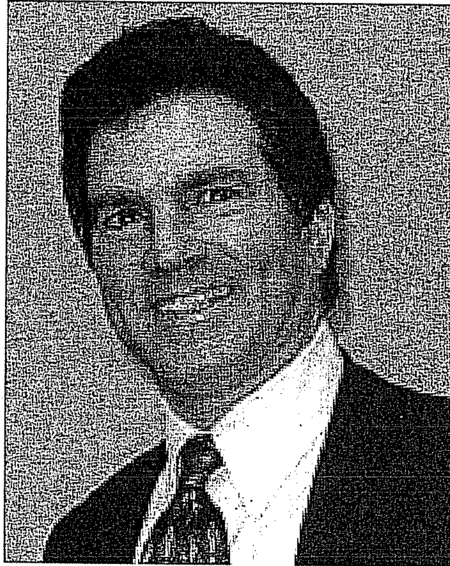
preemption clause too broadly. While the Court agreed that the term reached beyond "positive enactments, such as statutes and regulations, to embrace common law duties," it dismissed the notion that any occurrence which "merely motivates an optional decision" constitutes a "requirement."[7] Thus, the Fifth Circuit had been "quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement"[8] subject to preemption.

The Supreme Court also rejected the idea that because the FIFRA does not expressly provide for a private right of action in favor injured persons, such persons are precluded from pursuing a common law damages remedy. In so doing, the Court noted that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."[9] It went on to cite the "long history" of tort litigation against manufacturers of poisonous substances, explaining that "if Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."[10]

In short, the *Bates* Court concluded that because in enacting FIFRA Congress chose to prohibit only state-law labeling and packaging requirements that are "in addition to or different from" those set forth in the Act, "a state law labeling requirement is not preempted . . . if it equivalent to, and fully consistent with, FIFRA's misbranding provisions."[11] It is significant to note that this "parallel requirements" interpretation found strong precedential support in *Medtronic v. Lohr*, a case in which the Court held that a similarly worded preemption clause in the Medical Devices Act did not deny the State of Florida the right to provide a traditional damages remedies for violations of common law duties that paralleled federal requirements.[12] Citing Justice O'Connor's separate opinion in *Medtronic*, the *Bates* Court concluded:

> . . . [A] state cause of action that seeks to enforce a federal requirement "does not impose a requirement that is 'different from, or in addition to,' requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k [of the Medical Devices Act] does not preclude States from imposing different or additional **remedies**, but only additional **requirements**." (Citation omitted) (emphasis in original). Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, **nothing in § 136v(b) precludes States from providing such a remedy.**[13]



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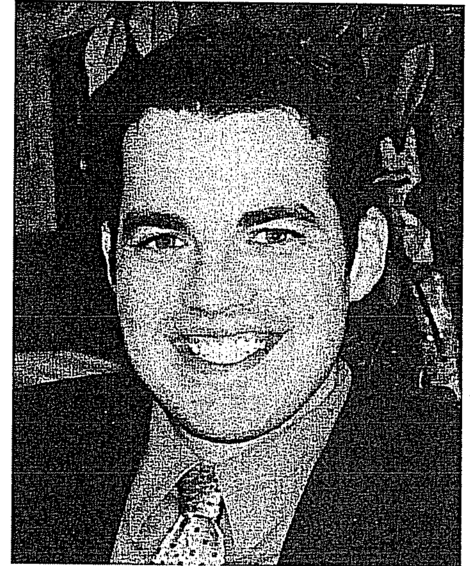

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Similarly illustrative of the Supreme Court's reluctance to leave injured parties without an adequate judicial remedy in the absence of clear and manifest Congressional intent is *Sprietsma v. Mercury Marine*, a case in which the Court considered the preemptive scope of the Federal Boat Safety Act (FBSA).[14] The FBSA contains a preemption clause providing, in relevant part, that:

> . . . [A] State . . . may not establish, continue in effect, or enforce a **law** or **regulation** establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.[15]

At issue in *Sprietsma* were the plaintiff's allegations, following the death of his wife as a result of being struck by a boat propeller, that the boat in question was unreasonably dangerous because its motor was not protected by a propeller guard. Propeller guards were not required by the FBSA or Coast Guard regulations at the time of death. Although the Coast Guard had considered the issue (having commissioned a lengthy study on the topic), it ultimately decided not to adopt a regulation requiring propeller guards.

The trial court granted the manufacturer's motion to dismiss, and the Illinois Court of Appeals affirmed. The Illinois Supreme Court rejected the Court of Appeals' express preemption rationale, but affirmed the dismissal on implied preemption grounds. Once again, the United States Supreme Court reversed. With respect to express preemption, the Court held that the FBSA's preemption clause did not extend to encompass a boat manufacturer's common law duties, and therefore could not preclude the plaintiff's claims based on breaches thereof. There the Court explained:

> . . .[T]he [FBSA's] express preemption clause in § 10 applies to "a [state or local] **law** or **regulation**." We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article "a" before "law or regulation" implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law. Second, because "a word is known by the company it

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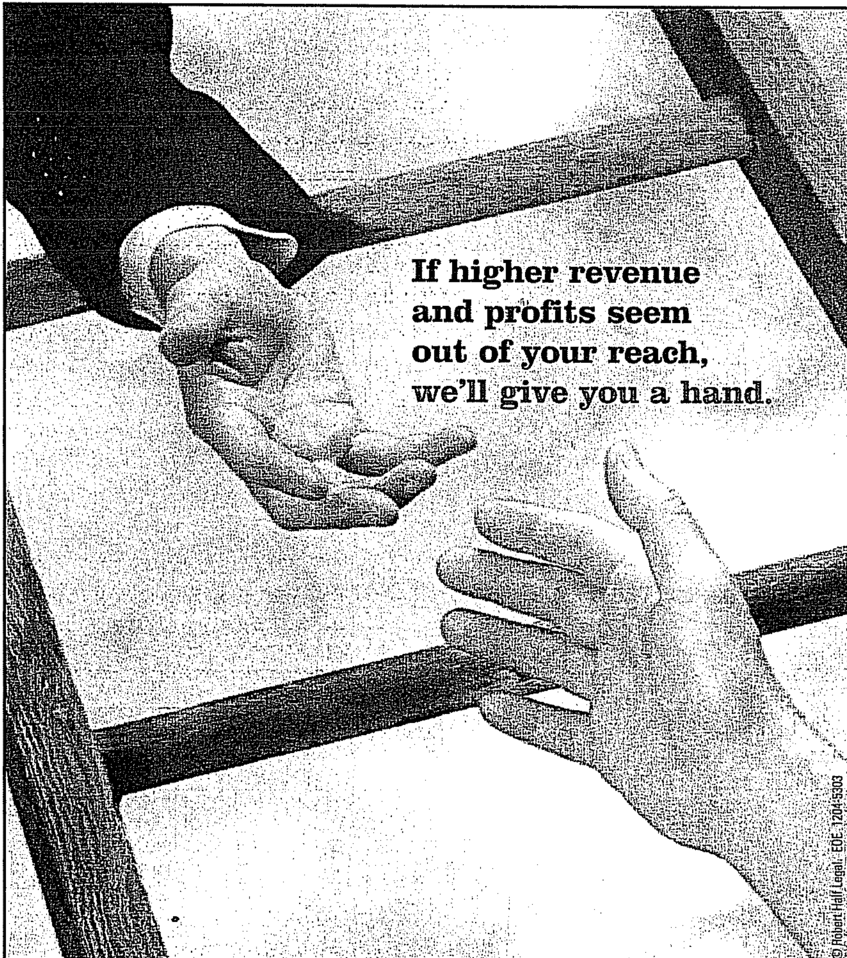

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> keeps," . . . the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to "regulation" in the pre-emption clause superfluous.[16]

The Court also rejected the argument that the Coast Guard's decision not to regulate propeller guards impliedly preempted the plaintiff's claims. Although it recognized that a decision to forego regulation can be preemptive (i.e., that it may imply a federal determination that the area is best left unregulated), the Court concluded that the Coast Guard's decision in this instance (though "undoubtedly intentional and carefully considered") did not convey "an 'authoritative' message of a federal policy against propeller guards,"[17] and thus was without preemptive effect.

1. Congress did not intend for the FRSA to preempt common-law tort claims (as evidenced by the absence of any express language to that effect and the continuing prevalence of common law claims to recover damages based on railroad negligence);

   The FRA regulations in question did not "cover" the subject matter of the plaintiffs' specific claims (and thus had no preemptive effect); and

2. That their claims were not based on any State law or regulation seeking to impose different or additional duties on the railroad, but rather were based on the railroad's breach of its common law duty to keep its tracks in a reasonably safe condition, on its violation of various federal regulations, and on its failure to comply with its own internal rules and standards with respect to track inspection, maintenance and repair.

The trial court agreed with the plaintiffs, rejected the application of federal preemption, and denied the railroad's motion to dismiss. While a formal memorandum has not been entered, the trial court's decision is bolstered by and likely based in part on the Minnesota Supreme Court's 2001 decision in *Engvall v. Soo Line R. Co.*[18] In *Engvall* the court held that common-law claims based on violations of a federal railroad safety statute, the Locomotive Inspection Act (LIA),[19] were not preempted. The court rejected the argument that permitting such claims would undermine the goal of national uniformity, noting that the plaintiffs' claims were not based on a different substantive state law standard, but rather on the standard imposed by the federal LIA itself.[20] The court explained that "because no state standard is imposed, there is no danger of undermining the goal of nationwide uniformity of railroad operating standards, the primary rationale for holding state law claims preempted."[21] Accordingly, the field preempted by the LIA does not include state common law actions based on a violation of the LIA.[22]

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Although it is evident that preemption can be a troubling and complicated defense, at its core it is a narrow one. The recent trend appears to be a more limited application due to the compelling interests that the individual States have in providing redress for their injured citizens and avoiding the "erosion of their sovereignty . . . in yet other areas of traditional state concern,"[23] as well as a recognition that Congress rarely intends to deprive injured citizens of historically available remedies. Therefore, in every instance, the defense must be confronted with a healthy dose of skepticism and contested with a commensurate amount of vigor.

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1. *Bates v. Dow Agrosciences, LLC.*, 125 S.Ct. 1788 (Apr. 27, 2005).
2. *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002)

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[3] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992)
[4] *See* 7 U.S.C. § 136v(a) and (b) (emphasis added).
[5] *Dow Agrosciences, LLC v. Bates*, 205 F.Supp.2d 623, 626 (N.D. Tex. 2002).
[6] *Dow Agrosciences, LLC v. Bates*, 332 F.3d 323, 331-32 (5th Cir. 2003).
[7] *Bates v. Dow Agrosciences, LLC.*, 125 S.Ct. 1788, 1799 (2005).
[8] *Id.* at 1798.
[9] *Id.* at 1801, *quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).
[10] *Bates*, 125 S.Ct. at 1801.
[11] *Bates*, 125 S.Ct. at 1800.
[12] *Id.* 125 S.Ct. 1788, 1800, *citing Medtronic*, 518 U.S. at 495.
[13] *Bates*, 125 S.Ct. at 1800-01 (emphasis added).
[14] 46 U.S.C. §§ 4301-4311.
[15] 46 U.S.C. § 4306.
[16] *Sprietsma*, 537 U.S. 1, 51, 63 (2002). In *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2005). the Eighth Circuit echoed this logic in considering the preemptive scope of the Federal Rail Safety Act of 1970 (FRSA - 49 U.S.C. § 20101 *et seq.*). The FRSA contains a preemption clause (49 U.S.C. § 20106) which, like that of the FBSA, limits its application to the States' ability to continue in force "a **law**, **regulation**, or **order**." In *Chapman* the court stated:

> . . . [O]ne might question whether the text of § 20106 provides authority for the Secretary to preempt state common law. While the terms "standard" and "rule" seem naturally to encompass the common law, . . ., the revised text extends only to 'a law, regulation or order.' In *Sprietsma v. Mercury Marine*, the Supreme Court held that a preemption clause in the Federal Boat Safety Act that applied to "a [state or local] law or regulation" was "most naturally read as not encompassing common-law claims . . ." 390 F.3d at 625-26.

Ultimately the Eighth Circuit did not have to decide the issue in *Chapman* (because the plaintiffs did not make the argument), and in a more recent case the court distanced itself from this statement, noting that in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), the Supreme Court had concluded that common law duties fell within the ambit of the FRSA's preemption clause. *See In re Derailment Cases*, 416 F.3d 787, 793 (8th Cir. 2005).

Also of some concern is the fact that in *In re Derailment Cases*, the Eighth Circuit stated that "there is no indication that the FRA meant to leave open a state tort cause of action to deter negligent [rail car] inspection." 416 F.3d at 794. The court's statement in this regard is inconsistent with the U.S. Supreme Court precedent discussed above (and to cases from the other circuits) and it is dicta. Indeed, a review of the *In re Derailment* decision (and the briefs submitted by the parties) reveals that the plaintiffs therein did not specifically plead any claims based on the railroads' failure to comply with FRSA regulations governing rail car inspections. Nor did they present any evidence of such noncompliance. Thus, the court was not directly presented with the question of whether state law claims based on violations of federal regulations remain viable.

[17] *Sprietsma*, 537 U.S. at 67.
[18] 632 N.W.2d 560 (Minn. 2001)
[19] The LIA is a federal statute that completely occupies the field of locomotive safety and which, like the FRSA, does not expressly create a private right of action.
[20] *Engvall*, 632 N.W.2d at 570-71, 567 (emphasis added).
[21] *Id.*
[22] *Id.*
[23] Memorandum of Amicus Curiae State of Minnesota in Opposition to Defendant Pfizer, Inc.'s Motion for Summary Judgment (Preemption), in *Witczak v. Pfizer, Inc.*, Civil File No. 04-CV-2819-JMR-FLN, U.S. Dist. Ct., D. Minn. (dated March 21, 2005), at p. 1-2.

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