Three Supreme Court Cases to Test "Presumption Against Preemption"

November 2010

Stephen A. Miller[1]

Several political candidates won elections recently with calls to reinvigorate States' rights. The Supreme Court has famously been accused of following the nation's election returns, and, coincidentally or not, States' rights will be front and center in the minds of the Supreme Court justices this Term. In particular, the Court will consider the proper balance between federal and States' rights in three, important cases involving the doctrine of preemption.

The Supreme Court has recognized several species of preemption, though the categories tend to overlap. "Express" preemption occurs when Congress precludes state regulation in a particular area by announcing such an intention in the text of a statute. "Implied" preemption occurs when state laws conflict with federal law, either by directly penalizing federal compliance or simply by interfering with the accomplishment of the "full purposes and objectives" of a congressional enactment. "Field" preemption is another type of implied preemption used to invalidate state laws where the depth and breadth of federal regulation in an area suggests a congressional desire to occupy that entire legislative field.

The Supreme Court's application of preemption doctrine this term will be closely watched by the business community. The scrutiny will be especially acute from those businesses operating in heavily regulated areas. The reasons are easy to understand. How can a business comply with the law and estimate its expenses until it knows which laws apply? It is critical to know whether there is one body of law to follow —and, if necessary, one set of legislators to lobby for a change — or, instead, whether they will be subject to a patchwork of federal and state regulations.

It remains to be seen what clarity, if any, the Supreme Court will provide in three preemption cases on its docket this Term.

Williamson v. Mazda Motor of America, Inc.

In early November, the Court heard oral argument in a preemption case originating in the state courts of California. The seeming dryness of the preemption issue

[1] Stephen A. Miller practices in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining Cozen O'Connor, he clerked for Justice Antonin Scalia on the Supreme Court and served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.

obscures a heart-breaking set of facts. Two parents were driving with their daughter in a Mazda minivan. The father and daughter wore lap-and-shoulder harnesses, while the mother wore only a waist belt in the back seat. When their car crashed, the mother jack-knifed around her waist belt and later died from internal injuries. Her estate sued Mazda for negligence under California state law.

Mazda argued that the California tort claims were preempted by federal law, and the intermediate appellate court in California agreed. The court noted that, in 1966, Congress created the National Highway Traffic Safety Administration (NHTSA) and delegated to this new agency responsibility for promulgating federal motor vehicle safety standards (FMVSS). Through the 1980's, the NHTSA considered *and rejected* a requirement that automakers install lap-and-shoulder seatbelts in the rear seats (where Mrs. Williamson was seated at the time of the accident). Instead, FMVSS 208 made it optional for automakers to install lap-and-shoulder seatbelts in the rear seats. The California appellate court held that "FMVSS 208 preempts common law actions alleging that a manufacturer chose the wrong seatbelt option. . . . ." The California Supreme Court declined to review the case.

Like most cases that reach the Supreme Court, the preemption inquiry was not an easy one. The 1966 congressional enactment contained somewhat conflicting instructions about the preemptive scope of FMVSS. On one hand, Congress expressly announced its intention to preempt state regulation of automobile safety that was not "identical" to federal standards. Yet, on the other hand, the legislation contained a savings clause emphasizing that compliance with federal standards would "not exempt a person from liability at common law." Each of these congressional statements seemingly undermined the other.

The appellate court relied heavily on the Supreme Court's holding in *Geier v. American Honda* (2000), which addressed the preemptive scope of the same FMVSS 208. In that case, a plaintiff claimed that the automaker's failure to install airbags in her car was negligent. The Supreme Court, however, rejected that claim and held that the plaintiff's "no airbag" claim was preempted by FMVSS 208, which allowed the installation of airbags to remain optional.

Several factors suggest that the Supreme Court will craft an opinion in *Williamson* that tempers its endorsement of federal preemption in *Geier*. First, the timing alone is suggestive—why else would the Court return to address the preemptive scope of the same federal safety standard twice in ten years? It is doubtful that the Court did so in order to say either "Ditto!" or "We <u>really</u> meant what we said in *Geier*!" Second, the Solicitor General (remarkably) conceded here that *Geier* has been applied too aggressively in the lower courts, and that the NHTSA did not intend to preempt the type of state-law claims at issue in *Williamson*. Third, and finally, the *Williamson* case comes to the Court just a few months after its decision in *Wyeth v. Levine*, where the Court strongly reaffirmed its commitment to applying a "presumption against preemption" in such cases.

Bruesewitz v. Wyeth

Fresh off its loss in a preemption case last Term, Wyeth returned to the Court in October for oral argument in *Bruesewitz v. Wyeth*. As a six-month old baby, Hannah Bruesewitz received a diphtheria, tetanus, and pertussis vaccine manufactured by Wyeth. She and her parents claimed that, soon thereafter, she began suffering seizures that have continued throughout her life, leaving her developmentally impaired. Federal law mandated that she initially pursue remedies through a "vaccine court" in the U.S. Court of Federal Claims specially established for these types of cases. Dissatisfied with the award offered in that forum, the Bruesewitz family declined the offer and sued Wyeth for negligence under Pennsylvania law.

Federal law appeared to contemplate such claims, albeit in limited circumstances. In the late 1980's, Congress enacted the National Childhood Injury Act and subsequent modifications in an effort to protect vaccine manufacturers from crushing tort liability that might lead to the withdrawal of vaccines from the market. The protection mainly took the form of immunity from common-law liability for defects that were "unavoidable" despite proper preparation, instructions, and labeling. The Bruesewitzes' lawsuit alleged that Wyeth could have avoided the defects that caused Hannah's injuries; in particular, they alleged that Wyeth negligently continued to market the version of the vaccine administered to Hannah despite possessing safer versions.

The Third Circuit rejected these arguments and held that the family's claims were preempted by federal law. In an expansive opinion authored by Judge D. Brooks Smith, the Third Circuit held that all design-defect claims were preempted by federal law, not simply those that were "unavoidable." The court held that a case-by-case inquiry into "avoidability" would essentially nullify the immunity that Congress conferred on vaccine manufacturers.

For many of the reasons described above, in reference to the *Williamson* case, the Supreme Court appears poised to return this case to the Third Circuit. Like in *Williamson*, the federal government itself supported the plaintiffs' position that state-law remedies were not preempted by the applicable federal legislation. Moreover, the Third Circuit's decision relied on its big-picture assessment of congressional intent to justify the refusal to give effect to key statutory language (namely, the limitation on lawsuits chosen by Congress: "avoidable" defects). This runs counter to the fundamental principle of statutory interpretation that courts must give effect to every word in a statute.

Chamber of Commerce v. Whiting

In recent years, the State of Arizona has grown increasingly vocal in its criticism of the federal government's failure to enforce its immigration laws. Arizona, perhaps rightly, asserts that its infrastructure and social programs bear the brunt of such lax federal efforts. In response, Arizona has enacted several laws designed to make life more difficult for unauthorized aliens residing in the state. The most prominent law in this vein – the enactment empowering police officers to detain anyone not carrying lawful

immigration papers -- has been preliminarily enjoined from taking effect on preemption grounds following a challenge by the U.S. Department of Justice.

Ironically, on the same day that the high-profile Arizona law went into effect, the Supreme Court agreed to review a different Arizona law that addressed illegal immigration. In *Chamber of Commerce v. Whiting*, the Court will evaluate an Arizona law that empowered state officials to revoke the license of any business in the state found to employ unauthorized aliens (essentially, the "corporate death penalty"). Another facet of this law required Arizona businesses to use a particular federal verification database to confirm that a candidate for employment has valid immigration status in this country.

The Ninth Circuit held that neither of these attempts to regulate illegal immigration were preempted by federal law. With respect to the "business license" provision, the court endorsed Arizona's effort to thread the needle of the relevant federal regulation in this area. The court noted that, while Congress enacted the Immigration Reform and Control Act to regulate the employment of unauthorized aliens, that statute expressly preserved state and local governments' "licensing and similar laws" in this area. The arguments marshaled in support of the second aspect of the Arizona law recall issues at the forefront of the *Williamson* and *Geier* cases discussed earlier. As in those cases, federal law made optional (use of the verification database) something that state law sought to make mandatory. Perhaps anticipating the erosion of *Geier*, the Ninth Circuit refused to hold that the "optional" federal standard preempted state-law regulation in the area.

If the Supreme Court resolves the preemption questions in *Williamson* and *Bruesewitz* as predicted here, don't expect *Whiting* to be reversed. Working backwards, the second preemption issue – making mandatory what federal law left optional – is virtually identical to the issue in *Williamson* (and *Geier*, before that), and the Court appears poised to soften its stance in *Geier*. Moreover, the Court is unlikely to hold that the "business license" law is preempted in light of the straightforward text of the federal statute's "express preemption" statement and the robust "presumption against preemption" that the Court has recently applied in other cases.

One last facet of this case bears mention. *Whiting* could produce an especially interesting opinion if any of the Justices chooses to address the issue of "field" preemption of the Arizona laws. The Department of Justice moved to enjoin enforcement of the "other" Arizona law earlier this year. Dicta supporting or refuting the notion that Congress exhibited an intent to "occupy the field" of immigration enforcement would be a shot across the bow in that ongoing litigation.

* * * * *

The three cases described above will likely yield important insights into the Supreme Court's current thinking on preemption doctrine. Don't be surprised if the Court continues to apply a "presumption against preemption" with gusto—a trend that could seriously complicate matters for the business community.