Preemption Redemption

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Law360, New York (April 30, 2014, 1:51 PM ET) -- Industry clients were dubious when some of us defense lawyers began arguing about 25 years ago that federal regulatory statutes' preemption provisions apply to state common-law tort claims as well as to state statutes and state agency regulations. And the plaintiffs' bar — which had been in the habit of conveniently ignoring comprehensive federal safety regulation of products such as automobiles, drugs, medical devices and pesticides — was incensed. The proposition that the preemptive effect of federal regulation of products and services extends to state common law, however, is now an invincible legal principle, which the U.S. Supreme Court most recently reaffirmed in Northwest Inc. v. Ginsberg, No. 12-462 (U.S. Apr. 2, 2014).

In Ginsberg, Northwest Airlines had terminated the plaintiff's participation in a frequent flyer program. Respondent Ginsberg sued the airline for more than $5 million in damages, alleging (in addition to breach of contract) state tort claims that included breach of the implied covenant of good faith and fair dealing. The Supreme Court held that Ginsberg's implied covenant claim was expressly preempted by the Airline Deregulation Act of 1978 ("ADA"), as amended. The ADA's preemption clause provides that "a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

The first question that the court addressed in Ginsberg "is whether, as Respondent now maintains, the ADA's pre-emption provision applies only to legislation enacted by a state legislature and regulations issued by a state administrative agency but not to a common-law rule like the implied covenant of good faith and fair dealing." Slip op. at 6. Justice Samuel Alito, writing for a unanimous court, had "little difficulty rejecting this argument." Id. The court explained that the ADA's preemption provision is "broadly worded" and that "[i]t is routine to call common-law rules 'provisions.'" Id. at 6, 8. Further, while "there surely can be no doubt" that a preemption provision's use of the terms "rules," "standards," or "requirements" encompasses common-law rules, their absence in the current version of the ADA did not diminish the scope of that statute's preemption provision. Id. at 7.

The court indicated in Ginsberg that "[e]xempting common-law claims would also disserve the central purpose of the ADA." Id. at 8. In a statement that is important to interpreting the scope of preemption provisions, the court explained that "[w]hat is important ... is the effect of a state law, regulation, or provision, not its form, and the [statute's] aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation." Id. at 8.

The specific tort preemption decisions that the Supreme Court has issued in a variety of contexts during the past two decades often have been difficult to reconcile with each other. Nonetheless, the court has steadfastly recognized that state common-law rules are no less a type of "state law" subject to the Supremacy Clause (U.S. Const., Art. VI, cl. 2) and federal preemption than are statutes enacted by state legislatures and regulations promulgated by state regulatory agencies.

The seminal case-in-point is Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992), which involved the preemptive effect of the federal cigarette labeling and advertising statute. The 1969 version of the statute contained a preemption provision barring "requirement[s] or prohibition[s] ... imposed under State law." Id. at 520. Rejecting the argument "that common-law damage actions do not impose 'requirement[s] or prohibition[s],'" the court held that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." Id. at 521. The court further noted that "[a]t least since Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." Id. at 522.

Sixteen years later, in Riegel v. Medtronic Inc., 552 U.S. 312 (2008), which involved the scope of the federal Medical Device Amendments preemption provision, the court could not have been more emphatic: "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a State's 'requirements' includes its common-law duties." Id. at 324. A "liability award 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" Id. (quoting Cipollone, 505 U.S. at 521).

It also is important to understand that federal preemption of state tort claims is not limited to federal statutes that contain express preemption provisions. The principles of implied conflict preemption also apply. See, e.g., PLIVA Inc. v. Mensing, 131 S.Ct. 2567 (2011) (holding that the Federal Food, Drug and Cosmetic Act impliedly preempts failure-to-warn claims involving generic drugs); Mutual Pharmaceutical Co. v. Bartlett, 133 S.Ct. 2466, 2470 (2013) (holding that state-law design-defect claims that turn on the adequacy of a drug's label warnings are preempted). The court explained in Mutual Pharmaceutical that state tort duties (e.g., the duty to strengthen the warnings on a product's label) are impliedly preempted if complying with such a duty would "require a private party to violate federal law" (e.g., federal law prohibiting a generic drug manufacturer from unilaterally strengthening the warnings on a product's label).

So don't allow the naysayers to deter you from advocating statutory constructions or legal principles that may not yet be widely recognized. Sooner or later, the Supreme Court will weigh in, and its yea or nay is the only one that really counts.

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