Litigation Advisory

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Supreme Court Demonstrates Again That Its Product Liability Preemption Jurisprudence is Unpredictable

Only one day after issuing a split decision in *Bruesewitz v. Wyeth LLC*, No. 09-152 (Feb. 22, 2011), holding that a federal vaccine injury compensation statute expressly preempts common-law damages suits for defectively designed vaccines (see **MLA Litigation Advisory**), the Supreme Court has unanimously held in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (Feb. 23, 2011), that a federal motor vehicle safety statute and DOT safety standard do not either expressly or impliedly preempt a common-law damages suit against an automobile manufacturer for failing to install rear-seat lap-and-shoulder safety belts. The *Williamson* opinion (**click here**) goes to great lengths to distinguish the Court's earlier, frequently cited holding in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (holding that the same federal automobile safety statute and an earlier version of the same DOT safety standard do impliedly preempt common-law damages suits based on a manufacturer's failure to install airbags). *Williamson* demonstrates yet again that the Supreme Court's product liability preemption jurisprudence is highly nuanced, and that any one decision in this chronically turbulent area of law cannot reliably predict the outcome of another.

Both *Williamson* and *Geier* analyze the preemptive effect of the National Traffic and Motor Vehicle Safety Act of 1966, recodified at 49 U.S.C. § 30101 *et seq.*, and different versions of Federal Motor Vehicle Safety Standard 208, promulgated by the U.S. DOT. The Court's majority opinion in *Williamson,* authored by Justice Breyer, relies on two key holdings in *Geier*—(i) that due to the presence of a "saving" clause that expressly preserves common-law liability even when a manufacturer complies with federal safety standards, the federal statute's preemption provision does not bar common-law damages suits, and (ii) that the presence of the saving clause does not foreclose the operation of ordinary conflict preemption principles. Under well established conflict preemption principles, state law (including state common law) is impliedly preempted when it would "frustrate" or interpose an "obstacle" to accomplishment of the purposes and objectives of federal law. This is commonly referred to as "obstacle" preemption.

The versions of the DOT safety standard considered in *Geier* and *Williamson* both gave automobile manufacturers certain choices about what types of passenger safety restraints to install. But after reviewing the DOT safety standard's regulatory history and the Government's differing advocacy positions in the two cases, the Court held in *Williamson* that unlike the seatbelt vs. air bag choice at issue in *Geier*¸ the lap belt vs. lap-and-shoulder belt choice at issue in *Williamson* "is not a significant objective of federal regulation." Slip op. at 1. (Justice Kagan, who served as U.S. Solicitor General immediately prior to her appointment to the Court, recused herself from this case.)

The two concurring opinions in *Williamson* are quite remarkable and reflect the shifting winds of the Court's preemption jurisprudence. Justice Sotomayor concurred in the Court's opinion, but wrote separately to accuse lower courts and industry advocates of "overreading" *Geier* by erroneously reading into it "the proposition that any time an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be pre-empted." Slip op. at 2 -3 (Sotomayor, J., concurring). According to Justice Sotomayor, "[a]bsent strong indications from the agency that it needs manufacturers to achieve a significant . . . regulatory objective . . . state tort suits are not obstacle[s] to the accomplishment . . . of the full purposes and objectives of federal law." *Id.* at 3 (internal quotation marks omitted). This statement reflects the sentiment of the Supreme Court's "liberal" wing against *broad* (i.e., not carefully circumscribed) federal preemption of common-law liability suits involving federally regulated products.

Justice Thomas also wrote separately, concurring in the Court's judgment, but not in its opinion, which as discussed above, was based on conflict preemption principles. According to Justice Thomas, the Court simply needed to apply the federal statute's common-law liability saving clause to conclude that the plaintiffs' suit against the automobile manufacturer is not preempted. More importantly, Justice Thomas reasserted his individual, extreme position, articulated in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (prescription drug preemption), categorically rejecting the long-standing doctrine of obstacle preemption. In *Wyeth*, and now in *Williamson*, Justice Thomas concurred in the Court's judgment the common-law suits at issue were not preempted, but he "rejected purposes-and-objectives preemption" (i.e., conflict/obstacle preemption) "as inconsistent with the Constitution because it runs entirely on extratextual 'judicial suppositions.'" Slip op. at 2-3 (Thomas, J., concurring in judgment). Justice Thomas' position is that "[p]urposes-and-objectives pre-emption—which by design roams beyond statutory and regulatory text—is . . . wholly illegitimate." *Id.* at 3. He asserted that the *Williamson* Court "wades into a sea of agency musings and Government litigating positions and fishes for what the agency may have been thinking 20 years ago when it drafted the relevant position." *Id.* at 4.

Taken together, the Court's back-to-back opinions in *Bruesewitz* and *Williamson*, like their predecessors during the past two decades, do little to provide lower courts and litigants with clear guidance on how to analyze the preemptive effect of federal regulatory statutes, and federal agency regulatory schemes, on common-law product liability suits.

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