IADC Committee Newsletter

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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This article gives a brief overview of the history of the Hazardous Communications Standard, as well as a look at its future in light of recent OSHA amendments and resulting litigation.

HAZCOM PRE-EMPTION - A POTENTIAL WEAPON FOR THE DEFENSE IN WARNINGS-RELATED TOXIC TORT CASES

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On its face, the concept of federal preemption under the Hazardous Communications Standard ("HazCom"), 29 C.F.R. 1910.1200, appears to offer a powerful defense to state common law failure-to-warn claims after 1985, particularly for labeling requirements in the chemical manufacturing industry. The argument is simple: if Congress enacts a statute or authorizes a federal agency to implement mandatory national labeling requirements, then a chemical manufacturer which complies with the applicable federal labeling laws should not also be required to comply with various state law standards that differ from the federal law, including common law tort claims alleging failure to comply with labeling requirements often created by a plaintiff's expert witness.

What seems simple is often complicated by the disagreement between state and federal courts over the application of the HazCom preemption doctrine in toxic tort failure-to-warn cases and where OSHA recently unilaterally acted to avoid preemption that should be applied in the federal chemical labeling law. This article will assist those defense lawyers who wish to take up the mantle of a preemption defense and counter OSHA's recent attempts to dismantle preemption under HazCom and preserve common law failure-to-warn claims.

A. The Preemption Doctrine Generally

The doctrine of federal preemption has its roots in the United States Constitution and the Supremacy Clause. The Constitution provides that the laws of the United States "shall be the supreme law of the Land; . . . any thing in the Constitution or Laws of any state to the contrary notwithstanding." U.S. Const. Art. VI, cl. 2. The preemption doctrine, when applicable to a particular subject matter, applies to bar the effect of both state statutory and common law. *Feldman v. Lederle Labs.*, 125 N.J. 117, 133-34 (1991), *cert. denied*, 505 U.S. 1219 (1992).

Congressional intent is the ultimate touchstone of any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The intent to preempt any state law may be either expressly stated within the four corners of a statute or implicitly contained in its structure and purpose. *Gonzalez v. Ideal Tile Importing*, 184 N.J. 415, 419 (2005); *R.F. v. Abbott Labs.*, 162 N.J. 596, 618 (2000) (*citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Express preemption is determined from an examination of the language used by Congress:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Cipollone, *supra*, 505 U.S. at 517. Where the intent to preempt an area is express, all state laws that fall within that are preempted even if they do not conflict with the federal scheme. *Gade*, *supra*, 505 U.S. at 103.

Absent express preemptive language, there are two types of implied preemption: field preemption and conflict preemption. *See Fidelity Fed. Savings & Loan Ass'n v. De La*

Cuesta, 458 U.S. 151, 152-53 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947). Under field preemption, the federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S. at 230. Conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Alternatively, conflict preemption also applies when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Consequently, when the preemption doctrine applies, it bars the effect of both state statutory and common law. *Feldman v. Lederle Labs.*, 125 N.J. 117, 133-34 (1991), *cert. denied*, 505 U.S. 1219 (1992).

B. Preemption Under the OSH Act and the Hazardous Communication Standard

In 1970, Congress passed the Occupational Health and Safety Act in response to public concern regarding deaths and injuries in the workplace. The Act sought "to assure[,] so far as possible[, that] every working man and woman in the Nation [has] safe and healthful working conditions." 29 U.S.C. § 651. Under the Act, the Occupational Health and Safety Administration (OSHA) was created and tasked with enacting and enforcing occupational health and safety regulations to prevent workplace injuries and protect employees from exposure to toxic substances. Section 6(b)(7) of the Act mandates that any standards promulgated under the Act "shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions for safe use or exposure." 29 U.S.C. 655 §6(b)(7).

Accordingly, on November 25, 1983, OSHA promulgated the Hazardous Communication Standard. *See* 29 C.F.R. 1910.1200. The stated purpose of HazCom is to "ensure that the hazards of all chemicals produced or imported are classified, and that information concerning the classified hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(a)(1). Thus, HazCom establishes a comprehensive and uniform regulatory scheme for the transmittal of information concerning the hazards of chemicals used in the workplace. This is accomplished through the use of Material Safety Data Sheets ("MSDS"). *See* 29 C.F.R. 1910.1200(g)(1). HazCom specifies the information that must be included on the MSDS for each chemical, including, the physical hazards of the chemical, including the potential for fire, explosion and reactivity; the health hazards of the chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical; the primary route(s) of entry of the chemical into the human body; and whether the chemical has been listed in the National Toxicology Program ("NTP") Annual Report on Carcinogens, or has been found to be a potential carcinogen in the International Agency for Research on Cancer ("IARC") Monographs. *See* 29 C.F.R. § 1910.1200(g)(2).

HazCom also includes an express preemption clause as follows:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating the

potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, expect pursuant to a Federally-approved state plan.

See 29 C.F.R. 1910.1200(a)(2) (1994) (emphasis added). Preemption under HazCom is derived from the OSH Act, which mandates that "nothing . . . shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect *to which no standard is in effect* under section 667 of [the OSH Act]." 29 U.S.C. § 667(a) (Emphasis added). "This language permits the states to regulate occupational health and safety in areas where OSHA has not promulgated standards, but by implication also preempts state regulation in areas where OSHA has promulgated standards." Richard C. Ausness, The Welding Fume Case and the Preemptive Effect of OSHA's HazCom Standard on Common Law Failure-to-Warn Claims, 54 Buffalo L. Rev. 103, 119 (2006).

On May 25, 2012, the HazCom standard was amended in order to conform the federal labeling requirements to the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals ("GHS"). The GHS was developed in response to the significant difficulties encountered by chemical manufacturers in attempting to comply with both national and international hazard communication standards, many of which impose different and sometimes conflicting classification systems and warning requirements for the same chemical.

As OSHA explained:

> Many countries already have regulatory systems in place for these types of [classification and labeling] requirements. These systems may be similar in content and approach, but their differences are significant enough to require multiple classifications, labels, and safety data sheets for the same

> product when marketed in different countries, or even the same country when parts of the life cycle are covered by different regulatory authorities. *This leads to inconsistent protection for those potentially exposed to the chemicals, as well as creating extensive regulatory burdens on companies producing chemicals.* For example, in the United States, there are requirements for classification and labeling of chemicals for the Consumer Product Safety Commission, the Department of Transportation, the Environmental Protection Agency, and the Occupational Safety and Health Administration.

See www.osha.gov/dsg/hazcom/ghs.html, *A Guide to The Globally Harmonized System of Classification and Labeling of Chemicals* (Emphasis added)

In discussing the importance of implementing the GHS system, OSHA recognized that different labeling and classification standards have a significant impact on both protection of workers and international trade:

> In the area of protection, users may see different label warnings or safety data sheet information for the same chemical. In the area of trade, the need to comply with multiple regulations regarding hazard classification and labeling is costly and time-consuming. Some multinational companies have estimated that there are over 100 diverse hazard communication regulations for their products globally. For small and medium size enterprises (SMEs) regulatory compliance is complex and costly, and it can act as a barrier to international trade in chemicals.

Id. Thus, OSHA itself has acknowledged the importance of developing a consistent national standard for hazard communication.

C. Judicial Interpretation of the HazCom Preemption Clause

Several courts that have addressed preemption under HazCom prior to the May 2012 amendments have ruled that the HazCom does not preempt state common law failure-to-warn claims. *See e.g. In re Welding Fume Products Liab. Litig.*, 364 F. Supp. 2d 669 (N.D. Ohio 2006) (Congress did not intend to pre-empt the field of chemical labeling requirements); *Fullen v. Phillips Electronics North Am Corp.*, 266 F. Supp. 2d 471, 477 (N.D. W. Va. 2002) (state law failure-to warn claims not preempted because HazCom is "nothing more than an intent to establish a uniform regulatory benchmark"); *Wickham v. Amer. Tokyo Kasei*, 927 F.Supp. 293 (N.D. Ill. 1996) (holding that HazCom does not preempt common law tort claims; *York v. Union Carbide Corp.*, 586 N.E. 2d 861, 866 (Ind. Ct. App. 1992) (The OSH Act savings clause "operates to exempt tort law claims from preemption).

However, in New Jersey, the Appellate Division ruled that HazCom preempts common law failure-to-warn claims involving the chemical products governed by the federal standard. *See Bass v. Air Prods. & Chems.*,

Inc., App. Div. Docket No. A-4542-03T (May 26, 2006), *cert. denied* 188 N.J. 354 (2006). Plaintiffs in *Bass* were former employees at a paint manufacturing facility who alleged injuries as a result of exposure to several different chemicals in the workplace. Plaintiffs claimed that defendant manufacturers failed to adequately warn them of the potential harmful effects of the chemicals to which they were exposed. Defendants moved for summary judgment on the grounds that the failure-to-warn claims were preempted as a matter of law by the HazCom standard. The trial court dismissed the claims based on federal preemption. *Id.* at *8.

The Appellate Division affirmed on the issue of preemption, but remanded the matter to the trial court for a determination of whether the content of the MSDS at issue complied with federal law. The court explained:

> There can be no legitimate doubt about the preemption of all plaintiffs' state law claims regarding the content of defendants' warnings. The content of the materials provided by defendants with their products cannot form actionable failure to warn claims unless those warnings violated the requirements of federal law.

Id. at *21. Courts in other jurisdictions have come to a similar conclusion. For example, *see Hoffman v. Hercules Chem. Co.*, Case No. 03 C 5222, 2004 U.S. Dist. LEXIS 22505, *12 (N.D. Ill. 2004) ("The MSDS is a cornerstone of OSHA standards intended to address comprehensively the issue of communicating to workers information concerning potential hazards of chemicals in the workplace and appropriate protective measures, and to preempt state law on that subject."); *Torres-Rios v. LPS Labs, Inc.*, 152 F.3d 11 (1st Cir. 1998) (HazCom is designed to set a comprehensive standard for workplace safety and to preempt any legal requirements of a state pertaining to this subject. To succeed, plaintiffs must demonstrate that defendant's warnings failed to satisfy the federal standards.)

The United States Supreme Court has also provided guidance on the meaning of the term State's "requirements" as used in preemption clauses. In *Reigel v. Medtronic*, 552 U.S. 312 (2008), the Court considered the scope of the preemption clause under the Medical Device Amendments of 1976 (MDA), which provides that a State shall not "establish or continue in effect with respect to a device intended for human use any requirement-- . . . which is different from, or in addition to, any requirement applicable under [federal law] to the device, and . . . which relates to the safety or effectiveness of the device of to any other matter included in a requirement applicable to the device under" relevant federal law. 21 U.S.C. § 360k(a).

The Court held that absent other indication, reference to a State's "requirements" in a preemption clause includes its common law duties. 552 U.S. at 324. The Court explained:

> 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. As the plurality opinion said in Cipollone, common-law liability is

> "premised on the existence of a legal duty," and a tort judgment therefore establishes that the defendant has violated a state law obligation. *Id.* at 522. And while the common-law remedy is limited to damages, a liability award "'can be, indeed is designed to be, a potent method of government conduct and controlling policy.'"

Riegel, 552 U.S. at 323-324 (emphasis added).

D. OSHA's Attempt to Alter the Statutory Scheme On the Preemption Issue

Given the conflict between jurisdictions over the interpretation of the HazCom preemption clause, OSHA proposed two revisions to the clause as part of the May 25, 2012 amendments. First, the term "legal requirements" was removed from the first sentence of the clause and replaced with "legislative or regulatory enactments." 29 C.F.R. 1910.1200(a)(2) (2012). Second, the phrase "through any court or agency" was eliminated from the last sentence. OSHA explained that the revisions were necessary to remove any confusion about preemption under HazCom:

> The HCS does not preempt state tort failure to warn lawsuits, and OSHA does not intend to change that position in the final rule. Indeed, the OSH Act's "savings clause" explicitly preserves rather than preempts, State tort law. OSH Act § 4(b)(4), 29 U.S.C. 653(b)(4); *Lindsey v. Caterpiller, Inc.*, 480 F.3d 202, 209 (3d Cir. 2007); *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53-54 (1st Cir. 1991). While a limited preemption might be possible to the extent a state tort rule directly conflicted with the requirements of the standard, no commentor has provided any evidence that a manufacturer might be held liable under a State's tort law rules for complying with the GHS. However, to eliminate any confusion about the standard's preemptive effect, and to be consistent with the President's May 20, 2009 Memorandum on Preemption, OSHA has made two small changes to (a)(2) in the final rule, changing the words "legal requirements" to "legislative or regulatory enactments" in the provision's first sentence and eliminating the words "through any court or agency" in the last sentence.

77 FR 17694. While OSHA refers to these amendments as "small changes," they attempt to remove the very language that served as the basis for the holdings of those courts that applied preemption under HazCom. However, most important here is the fact that OSHA did not have the authority under the OSH Act to implement these revisions to the clause. A federal agency such as OSHA has no authority to pronounce on preemption absent congressionally-delegated authority. *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009); *Lindsey v. Caterpillar, Inc.*, 480 F. 3d 202, 206 (3d Cir. 2007). Preemption is within the purview of Congress, which drafted Section 18 of the OSH Act as follows:

> Nothing in this Act shall prevent any State or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

29 U.S.C. 667 § 18(a). In 1983, HazCom was promulgated pursuant to Section 6 of the OSH Act and set forth an express preemption clause based on the preemption mandate established by Congress under Section 18:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

29 C.F.R. §1910.1200(a)(2) (1983) (emphasis added). In 1994, the language of the HazCom preemption clause was amended as follows:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject.

29 C.F.R. § 1910.1200(a)(2) (2010).

Congress also established the scope of OSHA's authority to promulgate safety and health standards in Section 6 of the OSH Act. *See* 29 U.S.C. 655 § 6. Congress did not delegate to OSHA the authority to assert preemption, or to interpret or modify the construction of the clear preemption mandate set forth in Section 18(a) of the OSH Act. *See* 29 U.S.C. 667 § 18(a). Section 6(b) of the OSHA Act specifically states the limits of OSHA's authority to modify the HazCom standard as follows:

> The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

29 U.S.C. 655 § 6(b)(7) (emphasis added).

Accordingly, the argument goes that Congress conferred no authority on OSHA to legislate the preemptive effect of regulations promulgated under the OSH Act. Moreover, the issue of preemption is wholly unrelated to the stated purpose of the proposed amendments – to conform HazCom's technical regulations to the GHS system. As a result, if a company complies with federal HazCom requirements, Plaintiffs should be preempted from arguing that warnings are

inadequate under state law and should not be permitted to pursue such claims.

E. The Future of A Preemption Defense Under HazCom

Plaintiffs will argue that the recent OSHA amendments eliminate the HazCom preemption clause as well as the defense, and that their experts can opine on the adequacy of any warning, whether it complies or not. In effect, this argument flies in the face of federal and international labeling uniformity and sets the entire system back in time. With that said, the legal argument is there for the educated defense lawyer and a court which understands the importance of federal legislation, the limits of federal regulation, and obvious attempts by a federal agency to change the intent of Congress when it comes to preemption.

Preemptions remains a powerful weapon in the fight against inappropriate failure-to-warn and inadequate warning cases involving chemical products. The defense work-up should include a determination of whether the chemical at issue is governed by any federal labeling regulations and whether those regulations provide an argument for express or implied preemption.[1] The availability of the defense under the federal HazCom standard remains in question, particularly defense remains viable with the right arguments and a willingness to show that OSHA has overstepped its authority in recent amendments.[2] Forewarned is forearmed.

[1] *See e.g. See Gurrieri v. William Zinsser & Co. Inc.*, 321 N.J. Super. 229 (App. Div. 1999) (applying preemption to dismiss state law failure-to-warn claim under the Federal Hazardous Substance Act ("FHSA")); *Lewis v. American Cyanamid Company*, 294 N.J. Super. 53 (App. Div. 1996) (applying preemption to dismiss state law failure-to-warn claim under the Fungicide and Rodenticide Act); *Canty v. Ever-Last Supply Co.*, 296 N.J. Super. 68 (Law Div. 1996) (applying preemption to dismiss state law failure-to-warn claim under FHSA).

[2] Several industry groups have filed Petitions with the U.S. Court of Appeals for the District of Columbia challenging the revised HazCom standard. A Petition filed by the American Tort Reform Association ("ATRA") includes arguments that OSHA does not have authority to modify or amend the HazCom preemption clause. A ruling on these Petitions is expected late in 2012 or early 2013.

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