

Constitutional Law Committee Newsletter

Vol. 4, No. 2

May 2008

MESSAGE FROM THE CHAIR

Robin Kundis Craig

Most of us are familiar with preemption/Supremacy Clause issues in environmental and natural resources law. Or, perhaps more accurately, we are familiar with Congress's familiar patterns of limiting the scope of preemption in most of the major federal statutes. For example, most of these statutes have savings clauses that explicitly preserve private litigants' tort causes of action based on environmental law violations, although CERCLA does impose a federal discovery rule for the statutes of limitations in those action, preempting state statutes of limitations. In addition, in the pollution statutes, most preemption is unidirectional—states are only restricted from regulating in a manner that is less protective that federal law requires, but they are free to impose their own more stringent requirements on polluting entities.

Playing against this basic environmental law approach are the U.S. Supreme Court's recent and repeated explications of the Supremacy Clause and federal preemption, particularly with respect to state tort law. Thanks to Vice Chair Norman Dupont, this issue of the Constitutional Law Committee Newsletter explores those recent Supreme Court cases and their possible implications for environmental and natural resources law.

So far this term, the Supreme Court has decided two Supremacy Clause cases, *Riegel v. Medtronic, Inc.* and *Rowe v. New Hampshire Motor Transportation*

Association. Moreover, it is in the process of deciding a third case on the same issue, *Warner-Lambert Co. v. Kent*, hearing oral argument in late February. The Supreme Court appears to be strongly in favor of federal preemption of state health and safety laws and state tort laws. However, the potential impact of these decisions for environmental and natural resources practitioners is debatable.

In the next newsletter, the committee hopes to explore the ever-popular issue of standing in environmental and natural resources cases. Persons interested in contributing articles on that topic should contact Vice Chair for Publications Norman Dupont at NDupont@rwglaw.com.

MEMBERSHIP

Alan R. Sharett Vice Chair

When Newsletter Vice Chair Norman A. Dupont suggested that I write an insertion in this newsletter about soliciting new members, I realized that the guide was already available although unwritten. It consisted of the high intelligence, winning personalities, and knowledge of our current committee members. No one needs to instruct our members how to attract and retain members. Our individual expertise, enthusiasm, and desire to "spread the word" made us the leaders most of us are.

**Constitutional Law
Committee Newsletter
Vol. 4, No. 2, May 2008
Norman A. Dupont, Editor**

In this issue:

Message from the Chair
Robin Kundis Craig 1

Membership
Alan R. Sharett 1

Supreme Court Decides Supremacy
Clause Cases in FDA and FAA
Contexts—Does it Mean Anything for
the EPA Context?
Norman A. Dupont 3

© Copyright 2008. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



However, this newsletter may also serve as the general guide to be prepared for Keystone and afterward. As was previously stated, it could additionally serve as the critical reminder and fundamental directive of diversity, the American Bar Association essential membership goal of our responsible place in society, recruiting the best people with essential diversity, diversity matched with outstanding legal expertise. It is unfortunate that this has to be spelled out. I believe we are all aware of what this means in terms of integrity to the Bar and to Society, and we do not need special instructions to keep faith with Chair Robin K. Craig’s wise words in her 2007-2008 Action Plan to increase “both traditional diversity and area of practice diversity.”

As stated, looking at Keystone agenda, we see prominence of Constitutional Law. This point shall be a marketing reality, a marketing foundation. There may be American Bar membership that is unaware of the importance, relevance, and high level of intellectual interest and fascination in belonging to the committee. In priority, we are the catalyst to start this conversation and spark the interest in joining our group. Perhaps we may wish to interchange the word “mentoring” with “marketing.” Let us all become legal friends of newly mentored committee joiners.

And let us never forget that we should enlist new members who may be our mentors: leading litigators in prominent cases; professor; members of the judiciary.

In closing, we should keep in mind two important rules of Einstein’s introduction to modern physics/
membership: (1) Success is tantamount to members-renewal; (2) attorneys in transition: [those who have not renewed] are more likely to join other committees.

Alan R. Sharett, *environmental litigator and educator. Represented Marjory* Stoneman Douglas [pro bono General Counsel, Friends of the Everglades]; lectured several major universities, with Sen. Gaylord Nelson*; addressed hemispheric conference, prelude Agenda 21; Professorial Director, New York University Public Liability Institute; Lead Constitutional and Federal Practice, Asst. Atty. Gen., NY State *Recipients, Presidential Medal of Freedom.*

SUPREME COURT DECIDES SUPREMACY CLAUSE CASES IN FDA AND FAA CONTEXTS—DOES IT MEAN ANYTHING FOR THE EPA CONTEXT?

Norman A. Dupont

February is often a month that invokes images of Valentine's Day and romance. For this year's Supreme Court, however, the month of February was Supremacy Clause month. In what must be a record, the Court issued opinions in two separate Supremacy Clause cases and heard argument in a third case that resulted in a summary affirmance on March 3, 2008, due to a tie among the eight justices hearing the case. We examine the Supreme Court's two written decisions, its curious affirmance by virtue of a tie vote in a third case, and ponder the meaning of Supremacy Clause month's ruling on environmental law in general.

The Supremacy Clause is often invoked in the environmental context in an effort to preclude state laws that might regulate industry more closely than an arguably applicable federal standard. But, this will argue that the three most recent Supreme Court cases will have little, if any, bearing upon environmental law. Environmental laws such as the Clean Air Act and The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) expressly incorporate into many existing statutory schemes an unusual "cooperative federalism" system that allows for flexibility for state and local enforcement and variations.

The Decisions in *Riegel* and *Rowe*

In *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S. Ct. 999 (2008), the Court considered a mid-1970s statute that created a comprehensive scheme for the regulation of medical devices. The Court described the "Medical Device Amendments of 1976" as a "regime of detailed federal oversight" for medical devices spawned in part as a reaction to the Dalkon Shield tort litigation wars of the early 1970s. The Medical Device Amendments contained an express preemption clause that precluded state laws which were "different from, or in addition to" the federal requirements. The Court,

in an opinion authored by Justice Scalia, had little difficulty in determining in a 8-1 vote that "requirements" could come from private party tort suits as well as from state laws that sought to impose different requirements upon a manufacturer of medical devices also subject to federal law. The Court held that the "normal meaning" of the word "requirements" could include imposition of a common-law duty, and therefore, would be within the express words of the preemption provision of the Medical Device Amendments. Only Justice Ginsburg dissented, arguing that the Constitutional presumption is to avoid a federal overriding of state laws, particularly in an area that is one of "traditional state regulation" such as health and safety. 128 S. Ct. at 1013 (Ginsburg, J., dissenting). The key to preemption, Justice Ginsburg argued, is therefore the intent of Congress that must be examined and a review of the legislative history and statements from former Food and Drug Administration (FDA) counsel nowhere suggested an intent to "sweep aside" common law tort claims against medical device manufacturers. Rather, Justice Ginsburg observed, even though Congress in 1976 knew about the thousands of common law tort lawsuits against the Dalkon Shield IUD device, the absence of any express ban upon such state tort suits was "informative" about Congress' intent. 128 U.S. at 1014-15. Moreover, the FDA had previously (albeit not under the current administration) taken the position that state tort suits would supplement the FDA's pre-market review and this also appeared to be a persuasive indication of a lack of Congressional intent to preempt state tort suits. 128 U.S. at 1015-1016.

For the majority, however, the text of the amendments trumped all else. As Justice Scalia noted, the word "requirements" could include requirements imposed as a result of state tort lawsuits, and the FDA's prior positions (contradicted by its current position before the Court) are simply irrelevant. 128 U.S. at 1009. Finally, Justice Scalia suggests that a prior position by a regulatory agency is "deprived of all claim to deference" by the fact that it is no longer the agency position. *Id.*

In *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. ___, 128 U.S. 989 (2008), the Court was

confronted with a provision of the Federal Aviation Act which precluded state laws that regulated the “service” of an interstate carrier in a manner different than federal law. In this case, the issue was not an adverse decision by a single state court jury, but rather legislation from a potentially more sympathetic plaintiff—a state legislature wishing to limit the delivery of tobacco products to minors by mandating that common carriers obtain a written signature from an adult before dropping off interstate shipments of tobacco. 128 S. Ct. at 993-994. Nonetheless, the Court in an 8-1 majority opinion authored by Justice Breyer held that a Congressional mid-1990s effort to deregulate interstate transportation by barring state regulation of such common carriers barred the state of Maine’s tobacco delivery statute. Justice Ginsburg concurred, noting that the breadth of the 1994 statute’s preemption opinion, coupled with prior decisions of the Supreme Court, compelled the conclusion on preemption. Justice Ginsburg, however, noted that it was doubtful that the 1994 drafters anticipated the problem of interstate shipments of tobacco through Internet purchases. This, she suggested, was a problem that Congress has “the capacity to act with care and dispatch to provide an effective solution.” 128 U.S. at 999.

The Non-Decision in *Warner-Lambert*

In its third and most unusual Supremacy Clause case heard and decided in February, the Supreme Court came to a 4-4 split vote. This result, made possible only by the recusal of the Chief Justice from a case involving a major drug manufacturer, Warner-Lambert, left the Second Circuit’s earlier decision in *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006), affirmed without written opinion. *Warner-Lambert Co. v. Kent*, 552 U.S. ___, 128 S. Ct. 1168 (*per curiam* affirmance based upon “equally divided court”). The oral argument transcript, however, revealed a Supreme Court much divided over the application of the Supremacy Clause in an area involving traditional tort law and a record that did not disclose what, if any, real burden the Michigan statutory scheme would impose upon the federal regulatory agency in question, the FDA. *Warner-Lambert Co., v. Kent*, No. 06-1498, Transcript of Argument for Feb. 25, 2008 at 12, lines 11-20

(question by Justice Stevens regarding potential “burdensome relationship” and response by counsel for Warner-Lambert).

Moreover, unlike the *Riegel* case where there was an express statutory provision that preempted state interference with FDA approved medical devices, in *Warner-Lambert*, the Court was confronted with a claim of federal preemption based upon the FDA’s regulatory authority over the “field” of pharmaceutical products. That is, as Warner-Lambert’s legal counsel put it in describing an earlier Supreme Court case, *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001), “tortious analysis as a matter of state law would inevitably conflict with the FDA’s responsibility to police fraud. A responsibility that the Court [in *Buckman*] recognized was essentially *cradle to grave covered by Federal law.*” *Warner-Lambert Co., v. Kent*, No. 06-1498, Transcript of Argument for Feb. 25, 2008 at 3, lines 17-21 (emphasis supplied). If federal law did indeed regulate a particular field from “cradle to grave,” then the entire “field” covered by that federal regulation is preempted.

It was, however, this less apparent preemption argument based upon the *structure* of a federal statutory scheme rather than the express words of that federal statute that caused a previously relatively united Court in *Riegel* to split beyond repair in *Warner-Lambert*. The Court also confronted in *Warner-Lambert* with not just a common law cause of action that potentially conflicted with FDA regulation, but rather a statute that gave as much deference to the FDA as it took away. The Michigan statute in question provided an absolute *defense* to any drug manufacturer whose product was FDA approved, unless the plaintiffs could affirmatively show that the approval was improperly procured through bribery or “fraud” upon the FDA. In some senses, the Michigan statute at issue gave much more deference to the FDA approval process for drugs than traditional state tort law. This unique factual setting may also explain the sharp divisions in the Court seen in *Warner-Lambert*.

Unfortunately, due to the divided Court, one is without the benefit of a written opinion in what would have been an important federal preemption case. One is left

like the supplicant at the oracle of Delphi, who heard various oral mutterings and came away with little definitive by way of a final message.

The Implications for EPA Regulation and Constitutional Preemption Claims

The environmental practitioner is often confronted with a potential preemption issue given overlapping federal and state agencies. The overlapping (and sometimes contradictory) demands of federal, state, and sometimes local jurisdictions all claiming to impose requirements for a particular cleanup, a body of water, or an air regulation would seem ripe for a preemption-based defense. But, *Riegel* and *Rowe* will provide little comfort for a preemption defense against state environmental regulations. This difference is due largely to the dramatically different statutory schemes of many environmental laws that contempt an express federal-state joint regulatory structure. Two federal statutes—the Clean Air Act from 1970 and the Comprehensive Environmental Compensation, Response and Liability Act of 1980—illustrate the major statutory differences that make a preemption challenge of state environmental requirements much more difficult.

The Clean Air Act of 1970 expressly contemplated that some states, particularly California, which had demonstrably worse air pollution problems than much of the rest of the country, might be able to enact more stringent state air pollution requirements. Other states could adopt the California standards for their own state requirements. As the D.C. Circuit put it, the basic structure of the Clean Air Act “makes the States and the Federal Government partners in the struggle against air pollution.” *Engine Manufacturers Ass’n v. EPA*, 88 F.3d 1075, 1078 (D.C. Cir. 1996). For example, although the Environmental Protection Agency (EPA) can promulgate federal standards for motor vehicles, it can also grant to California (and states following California) a waiver allowing the imposition of *different state* regulations over the motor vehicles sold in that state. Clean Air Act, Section 209(b), 42 U.S.C. § 7543(b). Similarly, as to “nonroad” vehicles (anything other than automobiles), California can obtain a “waiver” from EPA to implement stricter state standards. Clean Air Act, Section 213(a)(3),

42 U.S.C. § 7547 (b). Until December 2007, EPA had granted more than fifty such waivers to California in a variety of air regulations, including those over automobiles. Moreover, other states can avail themselves of the stricter “California” standard once EPA has issued a waiver to California. Clean Air Act, Section 177, 42 U.S.C. § 7507. Thus, the Congressional expression of a federal “preemption” in the area of the Clean Air Act is far from clear. Rather, Congress has expressly allowed for two types of automobiles under the Clean Air Act: automobiles whose exhaust standards conform to EPA regulations, and those automobiles whose exhaust standards conform to California (and adopting states) regulations.

Thus, the Supreme Court (or any other court) facing an industry mounted preemption challenge to a state regulation of air pollution would have to first examine whether or not the regulation in question had been issued pursuant to a “waiver” issued by EPA. *See, e.g., Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Ca. 2007) (holding no preemption of California regulations on global warming if EPA granted pending waiver application pursuant to Clean Air Act). Of course, there may still be cases in which EPA has not granted a waiver to California (and accompanying states) in which case a state law might be subject to a preemption challenge. *Pacific Merchant Shipping Ass’n v. Goldstene*, ___ F.3d ___, 2008 WESTLAW 509213 (9th Cir. Feb. 27, 2008). But, such cases may be relatively rare. Moreover, whatever the frequency with which a particular preemption challenge is brought against a state-based air regulation, the basic Congressional framework is a much more cooperative model of federal-state air pollution regulation than it is a “get out, we control this entire area” approach.

CERCLA was enacted in 1980, largely in response to a specific crisis that of the infamous Love Canal site and dangers to adjacent homeowners created by a long-abandoned waste area. This statute also provides for state regulations in addition to the federal statute in at least two separate ways. First, states are required to contribute to a share of unfunded cleanup costs and thereby encouraged to enact their own “mini-Superfund” statutes to provide for such cleanup

contributions and simultaneously establish additional “requirements” for the cleanup of hazardous substances in soils. CERCLA Section 104(c), 42 U.S.C. § 9604. Second, EPA’s National Contingency Plan requires cleanups to be conducted pursuant to “All Applicable and Relevant” (ARAR) standards. These standards often incorporate state-based regulations or standards even where no federal maximum contaminant level (or similar regulation) has yet been issued. Third, CERCLA expressly disclaims any preemption of any “State” imposing “additional” liability or requirements with respect to the release of a hazardous substance within such State. CERCLA Section 114(a), 42 U.S.C. § 9614. Given this background of a state-federal overlay of regulatory requirements, it would be very difficult for the chemical industry (for example) to argue that state clean-up standards are “preempted” by federal law.

There are clearly some viable preemption cases that can be brought under federal environmental laws. In *Fireman’s Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002), *cert. denied*, 538 U.S. 961 (2003), the Ninth Circuit concluded that a municipality’s efforts to regulate local industry under a city “Superfund” ordinance was generally not preempted by federal and state “Superfund” laws, although some specific provisions of the city’s ordinance were held to be preempted. In the case of the Clean Air Act, one can be assured that the automobile industry will not accept one or two adverse district court rulings on preemption without seeking further judicial review (and possibly reversal) on those very grounds. Nonetheless, in the face of the inevitable opinions that the Supreme Court has “swung” decisively in favor of federal agency preemption under the Supremacy Clause, one should note with care the precise statutory language in the *Riegel* and *Rowe* cases.

One might also consider whether a future Court might accord more deference to the unique local and health aspects of environmental regulations in considering whether in fact Congress meant to preempt state regulations. As Judge Calabresi wrote for the Second Circuit in the *Warner-Lambert* case, state legislative regulations of “matters of health and safety” is a

“sphere in which the presumption against preemption applies, indeed, stands at its strongest.” *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 94 (2d Cir. 2006), *aff’d sub nom., Warner-Lambert Co. v. Kent*, 552 U.S.____, 128 S. Ct. 1168 (per curiam).

In sum, an environmental lawyer must carefully consider whether any evidence exists of similar statutory language (or statutory structure) in the particular federal environmental statute before advancing a preemption claim.

Mr. Dupont is of counsel to the law firm of *Richards Watson & Gershon* where he practices in the field of environmental law and litigation.

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

Global Warming II: How the Law Can Best Address Climate Change (36th National Spring Conference on the Environment)

June 6, 2008

Baltimore, Maryland

(Cosponsored with the ABA Standing
Committee on Environmental Law)

ABA Annual Meeting

Aug. 7-12, 2008

New York, New York

16th Section Fall Meeting

Sept. 17-20, 2008

Phoenix, Arizona

***For more information, see the
Section Web site at
www.abanet.org/environ/.***