Appellate Update

Since Chief Justice John Roberts' appointment in 2005, three more new justices have joined the United States Supreme Court—Justice Samuel Alito in 2006, Justice Sonia Sotomayor in 2009, and Justice Elena Kagan last year. While popular accounts often describe the justices as voting along predictable conservative or liberal lines, federal preemption is one important area in which such ideological lines often blur This Term there are four high-profile preemption cases, three of which already have been decided, that shed light on the direction of these justices and the Court on preemption.

The first preemption case decided this Term was *Bruesewitz v. Wyeth, LLC*, No. 09-152. This case addressed whether the National Childhood Vaccine Injury Act of 1986 (NCVIA), 42 U.S.C. § 300aa-22(b)(1), preempts state-law claims against vaccine manufacturers alleging design defects. (Disclosure: Quinn Emanuel successfully represented the vaccine manufacturers.) In the mid-1980s, vaccine manufacturers were facing hundreds of product-liability suits a year threatening them with damages many times their average sales. Several companies therefore stopped manufacturing vaccines, causing vaccine shortages. To encourage vaccine production, Congress enacted the NCVIA, which establishes a streamlined, no-fault compensation system. Parties dissatisfied with their recovery under this system may elect to reject the recovery and bring tort claims, but the Act preempts such claims "if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1).

In *Bruesewitz*, plaintiffs who rejected their administrative recovery asserted a design defect in the vaccine that allegedly harmed their daughter. In an opinion by Justice Scalia joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer and Alito, the Justices agreed that the NCVIA's express preemption clause was best read to preempt design defect claims in light of its language and the NCVIA's overall structure and purpose, which would be undermined if manufacturers were subject to suits for design defects. Justice Sotomayor, joined by Justice Ginsburg, dissented.

The day after *Bruesewitz* issued, the Supreme Court decided *Williamson v. Mazda Motor of America*, No. 08-1314. In *Williamson*, the plaintiffs alleged that their son died in a car accident due to an auto manufacturer's failure to install lap-and-shoulder belts in the rear aisle seat of its minivans. The manufacturer argued that the claim was preempted by a Federal Motor Vehicle Safety Standard allowing manufacturers to install either lap belts or lap-and-shoulder belts in rear aisle seats. Their argument was supported by *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000), which held that a prior safety standard giving auto manufacturers discretion whether to install airbags preempted state tort claims challenging the failure to install airbags.

Nevertheless, the majority found no preemption. It reasoned that, unlike the earlier airbag regulations, the seatbelt regulations gave manufacturers a choice merely because the Department of Transportation was unsure about the cost effectiveness of lap-and-shoulder belts in rear aisle seats. Finding this concern would not be undermined by common-law suits claiming lap-and-shoulder belts should have been installed, the majority found no preemption.

Concurring, Justice Sotomayor wrote separately to emphasize that the mere fact that a federal regulation allows a choice between options does not automatically preempt state-law claims challenging the option chosen. There must, she stressed, be some regulatory objective that depends upon manufacturers having that choice. Justice Thomas also concurred, reiterating his opposition to implied preemption based on mere congressional purposes and objectives and invoking a savings clause the rest of the justices found inconclusive.

In the third preemption case the Court has decided this Term, *AT&T v. Concepcion*, 09-893, the Court upheld a challenge to a California Supreme Court decision holding an arbitration provision in a consumer contract unconscionable because it effectively bars class actions. A five-justice majority (Justice Scalia, joined by Roberts, Kennedy, Thomas and Alito) held the California decision preempted. Although the Federal Arbitration Act (FAA) contains an express preemption provision requiring states to enforce agreements to arbitrate unless they are invalid "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2, the majority did not find express preemption. Instead, it held the California decision preempted because the decision defeated the objectives underlying the express preemption provision by effectively requiring arbitration in consumer contracts, which the majority found inimical to the informal, streamlined arbitration procedures that the FAA seeks to protect. Reiterating his objections to purposes-and-objectives preemption, Justice Thomas reluctantly concurred, and Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented.

In the one major preemption case still undecided, *Chamber of Commerce v. Whiting*, 09-115, an unusual coalition of the U.S. Chamber of Commerce and the ACLU sued to invalidate an Arizona law sanctioning employers for hiring unauthorized aliens. Although federal law expressly preempts state laws imposing sanctions for employing unauthorized aliens, see 8 U.S.C. § 1324a(h)(2), there is a savings clause for state licensing laws, which Arizona argues applies to its statute. The Arizona law also requires employers to participate in an E-Verification program which is voluntary under federal law. *Chamber of Commerce* was argued on December 8, 2010.

Although not too much should be read into the *Bruesewitz*, *Williamson* and *AT&T* cases since each preemption case involves specific statutory language, they do suggest, together with other recent preemption cases, that some patterns have emerged among the justices. One cohort (Chief Justice Roberts and Justices Scalia,Thomas and Alito) tends to favor federal preemption of state regulation or common-law tort suits where express preemption clauses permit as much; a smaller cohort (the same Justices minus Justice Thomas) tends to favor implied preemption of state law theories that conflict with federal purposes and objectives; and an emerging cohort (Justices Ginsburg and Sotomayor) appears to have stepped into retired Justice Stevens' shoes in applying a strong presumption against federal preemption--leaving Justices Kennedy and Breyer as swing votes in preemption challenges. An important additional factor in preemption cases is the U.S. government's litigation position, which prevailed in both *Bruesewitz* and *Williamson*. *Chamber of Commerce* will provide further insights on the evolution of the Roberts' Court's approach to preemption.