Docket Call

Vol. 25 No. 4
Spring 2009
Meghan Cloud, Ed.

The newsletter of the Young Lawyers Conference of the Virginia State Bar

in this issue

Legislative Update

By Kenneth L. Alger II

The 2009 regular session of the Virginia General Assembly adjourned on Saturday, February 28. During the sixty-day work session, legislators introduced various bills addressing concerns of citizens across the Commonwealth. This article discusses several pieces of legislation that may be of particular interest to attorneys.

Use of PDAs behind the wheel. House Bill (HB) 1876 could have the most widespread impact. It prohibits a driver from text messaging or e-mailing while operating a motor vehicle. The bill, which has been codified as § 46.2-1078.1 of the Code of Virginia, forbids the use of any handheld personal communications device to manually enter multiple letters or text or to read text while operating a motor vehicle. Exceptions include the use of global positioning systems (GPS), review of caller identification information, and the use of such devices to report an emergency.

Expanded criminal liability for murder or manslaughter. Under common law, a prosecution for murder or manslaughter cannot occur if the victim dies more than a year and a day after the fatal injury was inflicted. Senate Bill (SB) 1256 creates Va. Code § 19.2-8.1, which provides that the passage of time between injury and death is no obstacle to the prosecution of an individual for murder or manslaughter.

Felony arrest warrants. Felony arrest warrants issued solely on the basis of a private citizen's complaints have been a source of contention in the Commonwealth for some time. HB 1874 and SB 1426 limit the power of magistrates to issue such warrants. These new amendments to Va. Code §§ 19.2-45, 19.2-71, and 19.2-72 prohibit magistrates from issuing felony arrest warrants based solely on the complaint of a private citizen without substantiation. Magistrates must now seek legal advice from the local Commonwealth's attorney or further investigation by a local law enforcement agency.

Sexual assault response teams. Legislation heavily supported by groups concerned with domestic violence and sexual assault creates sexual assault response teams. HB 2400 requires Commonwealth's attorney's offices to establish such teams, which will be charged with coordinating responses to assaults, establishing policies governing the collection and preservation of evidence, and creating guidelines for the community's response. The teams will consist of various professionals in relevant fields and meet at least annually to produce a coordinated and effective response.

Preliminary protective orders. Changes to Va. Code § 16.1-253.1, which deals with preliminary protective orders, are found in HB 1857. The new bill provides that a court may issue a preliminary protective order against a person who has been released from incarceration or will be released from incarceration within 30 days of the petition for the order. The petition must establish that the crime for which the abuser was incarcerated involved family abuse against the petitioner and that the abuser has made threatening contact with the petitioner while he was incarcerated, thereby renewing the threat. If a preliminary protective order is issued, the court may proceed to issue a "permanent" (two-year) protective order.

Novelty lighters sold to minors. HB 2578 provides that any individual who sells a novelty lighter to a juvenile is subject to a civil penalty up to $100. The newly created Code section, 18.2-371.4, defines a novelty

continued on page 5

see you in court

Michael Stodghill

News and Practice Tips for Virginia Litigators

Federal Preemption after *Wyeth v. Levine*

In *Wyeth v. Levine*, —- U.S. —-, 129 S.Ct. 1187 (March 4, 2009), the United States Supreme Court held that federal food and drug law did not preempt state-law failure-to-warn claims in a case concerning drug labeling. *Wyeth* has important implications for practitioners in any area in which federal preemption issues may arise.

Background. In 2000, Diana Levine received an intramuscular injection of Wyeth's anti-nausea drug Phenergan. Later that day, Levine received a second injection by IV-push (a rapid injection directly into the IV). The IV-push injection caused some of the Phenergan to enter the vein's surrounding tissue, leading to gangrene and the eventual amputation of Levine's right hand and forearm.

Levine sued Wyeth in Vermont state court, alleging negligence and strict liability/failure to warn. She claimed that Phenergan's labeling, which had been approved by the FDA in 1998, was defective because it did not warn against the risks of IV-push administration, and because it failed to instruct clinicians to use an IV-drip instead. The jury awarded Levine $7.4 million. Wyeth argued that the Federal Food, Drug & Cosmetic Act ("FDCA"), 21 U.S.C §301 *et seq.*, and associated FDA regulations preempted state tort law and that the jury's verdict was inconsistent with the FDA's approval of the warning label. The trial court disagreed, and the Vermont Supreme Court affirmed.

The Court's holding. The Supreme Court held that neither the FDCA nor Wyeth's asserted inability to comply with both federal and state law required preemption. The Court pointed out that, while federal law generally requires agency approval of label changes, an FDA regulation expressly permitted unilateral, pre-approval label changes designed to strengthen a warning. The Court also noted that the FDCA's legislative history demonstrated no intent to preempt state laws, and it refused to defer to language in a 2006 FDA regulation claiming that state failure-to-warn claims threaten the FDA's statutory role.

Implications. The Court's prior decisions had held that federal preemption can occur when it is impossible to comply with both state and federal law, *see Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), or when state law creates an "unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In *Wyeth*, the Court noted first that Congress's intent is the "ultimate touchstone" in every preemption case; and, second, that where Congress legislates in a field traditionally occupied by the states, the states' police powers presumably are not superseded "unless that was the clear and manifest purpose of Congress." 129 S.Ct. at 1194–95. Despite the FDCA's comprehensive scope, the Court found no preemption because its legislative history did not demonstrate the intent to require FDA pre-approval of all warnings, and because of the FDA regulation permitting labeling changes strengthening a warning. *Wyeth* thus suggests greater federal deference to the states' police powers and a greater emphasis on Congress's expressed intent, rather than the scope of the federal regulatory regime, in deciding preemption issues.

The *Wyeth* decision also has significant consequences for state tort law. In Virginia, for instance, violation of a failure-to-warn statute constitutes negligence *per se*; pleading and proof of common-law elements of negligence are not required. *See, e.g., McClanahan v. California Spray-Chem. Corp.*, 194 Va. 842, 852 (1953). After *Wyeth*, manufacturers of federally regulated products will be hard-pressed to argue that federal law mandates a different quantum of proof, absent a specific expression of congressional intent to preempt state law.

In addition, Virginia, like many states, has its own Drug Control Act, Va. Code §54.1-3400 *et seq.* Its misbranding provisions require, among other things, adequate instructions and warnings. Virginia also follows the Restatement (Second) of Torts § 388 in failure-to-warn cases generally. *See, e.g., Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949 (1979). Under § 388, the manufacturer of a chattel is liable for failure to warn when he: (1) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; (2) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (3) fails to exercise reasonable care to inform them of its dangerous conditions or of the facts which make it likely to be more dangerous. *Featherall*, 219 Va. at 962. Given extensive federal regulation of food and drugs, it is difficult to envision a situation in which Virginia statutory or common law requires a warning that is stronger than, or different from, that required by federal law. Should such an unlikely case arise, however, the manufacturer will find it more difficult to argue preemption after *Wyeth*.

Mike Stodghill is based in Arlington and is a litigation associate at the firm of Powers & Frost, LLP. You can reach him at mstodghill@powersfrost.com.

Docket Call

Virginia State Bar Young Lawyers Conference
707 East Main Street, Suite 1500
Richmond, VA 23219-2800

PRESORTED
STANDARD
U.S. POSTAGE PAID
RICHMOND, VA
PERMIT NO. 709

Michael Alan Stodghill, Esq.
1301 N Courthouse Rd Apt 810
Arlington, VA 22201-2503

Upcoming Events

6/18–21	Virginia State Bar 71st Annual Meeting
6/19	YLC Annual Membership Meeting and Reception
7/19–24	Oliver Hill/Samuel Tucker Pre-Law Institute
9/25	Professional Development Conference
9/26	YLC Leaders Conference
11/04	VSB YLC Admission & Orientation Ceremony
11/09–16	VSB 36th Annual Mid-Year Legal Seminar

For a complete, up-to-date list of events, please visit: http://www.vsb.org/site/events/

Address Change?

If you have moved or changed your address, please see the VSB Membership Department's page on the Web for an address update form, at www.vsb.org/site/members/.

Docket Call

A quarterly publication of the Young Lawyers Conference of the Virginia State Bar.

Editor:
Meghan Cloud

Board Liaison:
Brian R. Charville

Design & Production:
Madonna G. Dersch

Docket Call welcomes contributions from members of the YLC.

Send submissions to:
Meghan Cloud
McGuireWoods LLP
Suite 300
310 Fourth Street, NE
Charlottesville, VA 22902
mcloud@mcguirewoods.com

YLC Web Site

www.vayounglawyers.com