11-29-2010

Newsroom: Logan Gets Nod on Torts Blog

Roger Williams University School of Law

Newsroom

Logan Gets Nod on Torts Blog

Dean David Logan gets a nod in today's entry on the Torts Prof Blog, regarding federal preemption of state common law damages actions in products liability cases.

From TortsProf Blog: A Member of the Law Professor Blogs Network, Guest Blogger Mary Davis on "Preemption and Modern Tort Litigation"

November 29, 2010: I have spent the better part of the last decade thinking and writing about federal preemption of state common law damages actions, particularly in the products liability context. I think that federal preemption provisions should be narrowly construed to preserve state tort law — I am an unapologetic fan of the tort system with all its supposed faults. I think that state common law tort doctrine, and the private litigation that stems from it, adds value to our society that is largely immeasurable. Congressional intent, the "touchstone" of preemption analysis according to the Supreme Court, should be crystal clear if it is to displace that law. A longstanding "presumption against preemption" operates as a tool of discerning congressional intent in default of such clarity, but the Supreme Court wavers in its adherence to the presumption and, consequently, it is under attack.

The Supreme Court is poised to answer another preemption case this term in *Bruesewitz* v. *Wyeth* involving preemption under the National Childhood Vaccine Injury Act (Vaccine Act). The Vaccine Act contains an express preemption provision which the Court will have to interpret and the application of the presumption against preemption, in both express and implied preemption, will be in issue. Unlike most congressional legislation which affects products liability, the Vaccine Act created a compensation system for children who are injured by the unavoidable side effects of a vaccine. The legislation was the product of a substantial outcry by vaccine manufacturers in the mid-1980s about the effect of tort litigation on the vaccine supply— manufacturers would stop producing vaccines if Congress didn't do something. So Congress did. Over twenty years later, the Court must determine in Bruesewitz what Congress meant when it said that state tort law was preempted if a vaccine's side effects were "unavoidable." For those of you familiar with the Restatement (2d) of Torts § 402A on strict products liability, this language comes from comment k on liability for unavoidable risks.

In 1991, the Supreme Court began in earnest to address preemption in product liability claims and has decided over a dozen such cases using a confusing array of analyses with results that are sometimes difficult to reconcile. Bruesewitz is one of two products liability preemption cases the Court has agreed to

hear this term. The other involves preemption of product liability claims under the National Traffic and Motor Vehicle Safety Act of 1966. In *Williamson* v. *Mazda Motor of America Inc.*, the Court must determine whether the Motor Vehicle Safety Act impliedly preempts a claim based on the design of rear seat belt systems. This case will build on *Geier* v. *American Honda Motor Corp.*, decided in 2000, in which the Court found implied conflict preemption based on the federal seat belt standard in a case involving the failure to incorporate air bags into the vehicle's design. Geier found the plainitiff's claim preempted even though the legislation contains a savings clause that purports to save common law damages actions. There is obviously much more to these cases but delving into preemption in detail is not my major goal.

 While exploring the Vaccine Act and the preemption issue raised by *Bruesewitz* (because I never want to miss an opportunity to write something about preemption), **I happened to receive an e-mail from our Torts colleague (and my former professor) Dean David Logan from Roger Williams University School of Law**, forwarding [a] New York Times article by Binyamin Applebaum that I had not seen: This article reports on the increase in private financing of tort litigation. I was startled by it. The *Times* article reports that "Large banks, hedge funds and private investors hungry for new and lucrative opportunities are bankrolling other people's lawsuits, pumping hundreds of millions of dollars into medical malpractice claims, divorce battles and class actions against corporations — all in the hope of sharing in the potential winnings." I suppose that I should not have been surprised that private investors might be interested in the results of private litigation — law firms have to go somewhere for the funds to finance such litigation.

In the way that law professors do, I began to think about the intersection of my research into the Vaccine Act preemption issue, and my newfound knowledge of the abundance of private investment in tort litigation. The increase in preemption arguments since the early 1990s surely resulted in part from product manufacturers and other litigation targets trying to get out from under the "weight," perceived or real, of large-scale tort litigation. The occasional tort claim in the face of federal regulation never seemed to generate much preemption interest until truly large-scale tort litigation became the norm after the explosion in asbestos cases in the 1980s and 1990s. Traditional analysis of the preemptive scope of

most federal regulation had not resulted in findings of preemption until then; indeed, very few such arguments had been made.

Fast forward to 2010. Large-scale tort litigation is the norm. And every case in which there is a federal regulation presents an opportunity for defendants to pose preemption arguments. The presumption against preemption assumes that state common law tort doctrine operates as an important counterpoint to federal regulation. What else informs the presumption? Must we explore the way in which state common law damages actions proceed — with an understanding of the monetary influences and the pressure to settle — as part of the analysis? Common law tort claims survive federal preemption efforts depending on an assessment of congressional intent but does that assessment require an understanding of the modern way that those claims come to exist and are resolved? I had not included the litigation process into my own analysis but that may have been naive. I wonder whether the value of tort law as I have always believed in it is being thwarted by those who champion it just as it is by those who would displace it with the work of federal regulators. The use of class actions and other aggregate litigation directed toward settlement was largely unknown to the Congresses writing legislation which is now the subject of preemption analysis. The Vaccine Act was written explicitly against the background of a concern for large-scale litigation and yet Congress still explicitly preserved some state common law claims. That awareness may be critical to deciding the scope of the Vaccine Act's preemption provision. In hindsight, that seems a remarkable step.

I have often criticized product manufacturers who cry that “the sky is falling” because of the flood of alleged unmeritorious litigation that they face. Private financing of litigation does not render litigation unmeritorious; on the contrary, it may suggest the opposite. But as we end another semester of teaching torts to One-Ls, my belief in the importance of a robust state tort law unimpeded by an aggressive use of preemption, and my concern over the influence of private investment of large-scale tort litigation have collided in a way that makes me ponder how I will reconcile the conflict for my Torts students of the future. What will I tell my students next year when they ask me what the purpose of tort law is in the 21st century with the mass of federal regulation controlling conduct of product manufacturers and others, and the pressure on lawyers to provide a return on investment to the financiers of private litigation. I would be interested to hear your answers.

— Mary J. Davis, Associate Dean for Administration and Faculty Development and the Stites and Harbison Professor of Law, University of Kentucky College of Law

For full story, click here. [http://lawprofessors.typepad.com/tortsprof/2010/11/guest-blogger-mary-davis-.html]