Could There Be a Trend Towards Preemption in Asbestos Cases?

Marc S. Gaffrey
Sheryl A. Fay
Jacob S. Grouser

Recent case law in New Jersey analyzing the issue of preemption of state law claims in conflict with OSHA may lead to a trend toward preemption in other work place tort actions, such as asbestos litigation. Since the Court's decision in *Gonzalez v. Ideal Tile*, 184 N.J. 415 (2005), defense attorneys have argued that OSHA regulations regarding asbestos fibers preempt state law based claims for exposure to talc. While *Gonzalez* deals with preemption of a claim based on New Jersey law, the issue of preemption of state law based claims under OSHA can be applied in any jurisdiction for workplace tort actions.

As *Gonzalez* holds, OSHA regulations can preempt state law based third party claims against a manufacturer when an employee is injured in the work place. In *Gonzalez*, the plaintiff was seriously injured by a forklift operated by a co-worker. *Id.* at 417. The plaintiff sued the forklift's first-stage manufacturer, Komatsu, alleging that Komatsu should have installed additional warning devices on the forklift, such as an automatic audible alarm or a flashing light, in order to make its operation safe. *Id.* at 418. Komatsu moved for summary judgment on the ground that state tort claims for workplace injuries are preempted where the allegedly defective product was manufactured in compliance with federal standards. *Id.* In support of its argument, Komatsu pointed to two American National Standard Institute ("ANSI") regulations that the Secretary of Labor incorporated by reference into the Occupational Safety and Health Act "OSH Act" via 29 C.F.R. § 1910.178(a)(2). *Id.* at 423. The first required that forklifts be equipped with an operator controlled horn, whistle, gong, or other sound-producing device. *Gonzalez v. Ideal Tile Importing*, 371 N.J. Super. 349, 361 (App. Div. 2004).

The second regulation declared that other devices, visible and audible, suitable for the intended area of use, may be installed when requested by the user. *Id.* Based upon these regulations, Komatsu argued that it had manufactured the forklift in question in accordance with federal regulations, and that holding it to a higher state standard conflicted with federal regulations and, consequently, preempted the state regulations. *Id.* The trial court rejected plaintiff's argument that the ANSI standards only created a floor, or minimum safety standard, and that the failure of the ANSI standards to require additional warning devices allowed this area to be further regulated by the states.

On appeal, the New Jersey Appellate division provided a thorough analysis of express, field and conflict preemption and ultimately determined that plaintiff's theory of liability against Komatsu was preempted as

Marc S. Gaffrey of Hoagland, Longo, Moran, Dunst & Doukas (based in New Brunswick, NJ) is the Supervising Partner of his firm's Environmental/Toxic Tort Litigation Department. He has extensive experience in the litigation of toxic tort matters and mass tort litigation. Marc is a DRI member and has authored numerous articles in the toxic tort field and has been a frequent lecturer at the Lead Tech Conferences in Washington D.C.

Sheryl A. Fay of Hoagland, Longo, Moran, Dunst & Doukas is an associate in her firm's Environmental/Toxic Tort Litigation Department. Sheryl has litigated a wide variety of claims since her admission to the New Jersey Bar in 1999, including those in the areas of personal injury, automobile liability defense, general liability defense, defense of UM/UIM and PIP claims, insurance coverage, and toxic tort.

Jacob S. Grouser of Hoagland, Longo, Moran, Dunst & Doukas is an associate in his firm's Environmental/Toxic Tort Litigation Department. He was admitted to the New Jersey and Pennsylvania Bars in 2004. Jake concentrates his practice in the area of silica exposure and environmental claims.

it was in direct conflict with the federal regulations. In their analysis, the Appellate Division first determined that plaintiff's claims against Komatsu were not expressly preempted. Whether or not a claim is expressly preempted is determined by looking at the explicit, or express, language used by Congress. In this instance, the OSH Act contains both a saving clause and a preemption clause. Analysis of both clauses is required to determine if a claim is expressly preempted by OSHA. The savings clause states in relevant part,

> Nothing in this Act shall be construed to supersede or in any manner affect any workmens' compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. 29 U.S.C. § 653(b)(4). *See also Id.* at 363.

While the preemption clause states in relevant part,

> Nothing in this [Act] 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. 29 U.S.C. § 667(a). *See also Id.* at 365.

The court looked to the Supreme Court's analysis in *Geier v. Am. Honda Motor Co.* 521 U.S. 861 (2000), in concluding that express preemption did not apply to plaintiff's state law tort claim. The Court in *Geier* reasoned that when the preemption clause is considered with the saving clause, it appears only logical that the preemption clause be narrowly read. If the preemption clause were broadly read to expressly preempt common-law tort actions, as well as state statues or regulations in conflict with OSHA, there would be no need for a savings clause, as there would be no state law claims to be saved from preemption. *Id.* at 365. Accordingly, the Court held that plaintiff's state tort action, under OSHA, was not expressly preempted.

Preemption can be impliedly found, however, through a consideration of field preemption and conflict preemption principles. Field preemption occurs where the ". . .scheme of the federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Gade v. Nat'l Wastes Mgmt. Ass'n,* 505 U.S. 88 (1992). Upon review of the OSHA standards, the *Gonzales* court determined that the OSH Act clearly demonstrates the intent of Congress to allow states to have a role in maintaining safe and healthy work conditions. Therefore, field preemption does not apply. *Gonzalez*, 371 N.J. Super at 366.

The Appellate Division found it much more difficult to determine whether conflict preemption applied. *Id.* This was due to the United States Supreme Court's inability to reach an agreement in *Gade* as to OSHA's consequences for state tort law. *Id.* In *Gade*, the majority agreed that the OSH Act preempted state law claims when the state regulation or theory of liability at issue was not approved by the Secretary of Labor pursuant to 29 U.S.C. § 667(b). However, the majority of the Supreme Court did not agree on the type of preemption in *Gade*. Therefore, the Appellate Division did not consider *Gade* as controlling. *Id.* Had the Justices agreed on the type of preemption in *Gade*, the Appellate Division indicated that any unapproved state standard regarding forklift warning devices, even if purely supplemental, would conflict with the ANSI standards incorporated by OSHA.

The Appellate Court then looked to *Geier*, where the Court concluded that Plaintiff's claim that a manufacturer should have equipped a particular automobile with an airbag was in conflict with the gradual phase-in mandated by the federal regulation. *Id.* at 368 - 69. The federal regulation in question was only 10% mandatory and 90% optional. *Id.* at 369. *See also Geier*, 529 U.S. 861. The Court determined that the 10% was not a floor above which a state could regulate.

Applying the same reasoning to *Gonzalez*, the Appellate Division examined the ANSI forklift standards in the same manner that the Supreme Court had examined the phase-in regulation in *Geier* and concluded that the Plaintiff's product liability theory suggested a standard that was in direct conflict, and not merely supplemental, to the ANSI standards. *Id.* at 369. This conflict was demonstrated by the two ANSI standards at issue because they did not merely set a mandatory minimum for forklift safety devices, but regulated the universe of warning devices. *Id.* at 370. Therefore, liability could not be imposed upon a manufacturer for failing to include a safety device beyond that of an operator-controlled horn because those devices were left to the discretion of the owner/end user. *Id.* While

Plaintiff urged the application of a product liability standard regarding other warning devices to supplement the ANSI standards, the Appellate Division held that this would be against the intent of ANSI because these additional devices could tend to create additional dangers in the workplace. *Id.*

The Applicability of Gonzalez and Preemption to Asbestos Cases

The concept hammered out by the court in *Gonzalez* can be applied to other tort claims in work place settings. In New Jersey, defense counsel are exploring the argument that plaintiffs' theories of liability asserted in asbestos litigation – alleging exposure to non-asbestiform anthophyllite, tremolite and actinolite – could be considered to conflict with federal regulations and, therefore, preempted. Specifically, arguments are currently before the trial courts, asserting that OSHA's 1992 final rule and OSHA's regulatory definition of asbestos could, and should, compel preemption in state law claims based upon alleged exposure to non-asbestiform anthophyllite, tremolite and actinolite asbestos. While six minerals are regulated as asbestos, several of them have counterparts, and are classified as non-asbestiform, which are not harmful.

In 1984, OSHA considered clarifying the term "asbestos" to conform to the practice of other federal agencies, including the Mine Safety and Health Administration, the Consumer Product Safety Commission, the Environmental Protection Agency and the Department of Education. At that time, these agencies regulated only mineralogically correct asbestos, which included the asbestiform varieties of anthophyllite, tremolite and actinolite, but excluded non-asbestiform tremolitic talc. OSHA decided not to adopt the other agencies' definitions of asbestos, absent strong evidence that mineralogical distinctions were biologically relevant. 57 Fed. Reg. 24310, 24316 (June 8, 1992).

In 1986, OSHA issued a revised asbestos standard which included non-asbestiform tremolite, anthophyllite and actinolite in its regulatory definition of asbestos. 29 C.F.R. 1910.1001 (1986) (applying to general industry, now modified as reflected in 29 C.F.R. 1910.1001 (1992)). Several parties objected, namely manufacturers and producers of industrial talc, contending that non-asbestiform tremolitic talc did not cause asbestos-related health hazards. As a result, OSHA and manufacturers and producers of industrial talc agreed upon a judicial stay of those portions of the revised asbestos standards pertaining to non-asbestiform tremolite, anthophyllite pending further investigation by OSHA. 57 Fed. Reg. at 24315.

Subsequently, from 1986 to 1992, OSHA studied and evaluated non-asbestiform tremolitic talc. Following almost six years of research, OSHA altered the regulatory definition of asbestos found in 29 C.F.R. § 1910.1001. In doing so, it concluded that non-asbestiform anthophyllite, tremolite and actinolite, which includes non-asbestiform tremolitic talc, did not pose the high carcinogenic dangers of asbestos. 57 Fed. Reg. at 24326. OSHA further concluded that non-asbestiform tremolitic talc did not pose a significant risk of non-malignant respiratory disease. 57 Fed. Reg. at 24327. Accordingly, OSHA removed non-asbestiform anthophyllite, tremolite and actinolite from asbestos-regulatory coverage and qualified "tremolite" with the word "asbestos" where it subjected a product to regulation. 29 C.F.R. Part 1910.1001 (2002); *see also* 57 Fed. Reg. at 24330 (setting forth clarifications and deletions to existing regulations). Following the change in regulation, the reference to "non-asbestiform" included industrial talc sold by many manufacturers and, hence, removed the same from the scope of OSHA's asbestos regulations.

Based upon OSHA's failure to regulate a non-asbestiform material, toxic tort defense counsel are arguing that courts should find that the OSHA regulations, as discussed above, preempt state law based claims for exposure to non-asbestiform tremolite, anthophyllite and actinolite. The OSH Act clearly defines what isasbestos/asbestiform and what is not asbestos/non-asbestiform. It is also clear that non-asbestiform anthophyllite, tremolite and actinolite are not to be regulated as asbestos, and that they do not pose the magnitude of health risks of asbestos. Therefore, if a jury were to return a verdict in favor of a plaintiff who alleged exposure to non-asbestiform anthophyllite, tremolite or actinolite, the jury would have to find that the product in question contained asbestos. More importantly, a jury that returned a verdict in favor of a plaintiff advancing state law based asbestos claims would be constructively overruling OSHA's 1992 rule making de-

cision. Such a verdict would force manufacturers, suppliers and employers who produced, sold or used industrial talc to treat it as an asbestos-containing product subject to the warning requirements of the asbestos regulations of the OSH Act.

Conclusion

Plaintiffs may argue that the OSH Act only creates a floor, that absent a contrary federal standard there can be no preemption, and that their theory of liability supplements rather than supplants the federal regulations. However, the OSH Act, the regulatory history and OSHA's express admonition regarding review of state provisions addressing non-asbestiform talc cumulatively evidence a federal ceiling regarding the regulation of non-asbestiform talc. Support for this proposition can be found in case law which indicates that a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event, has as much preemptive force as a decision to regulate. *See Arkansas Elec, Coop. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 384 (1983); *Lindsey v. Caterpillar, Inc.,* 2005 U.S. Dist. LEXIS 16861 (D.N.J. Aug. 9, 2005).