The Welding Fume Case and the Preemptive Effect of OSHA's HazCom Standard on Common Law Failure-to-Warn Claims

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INTRODUCTION

The Occupational Health and Safety Act (the OSH Act) affects more than ninety million workers in the United States. The OSH Act is administered by the Occupational Health and Safety Administration (OSHA), which promulgates health and safety standards for the workplace. Although OSHA standards do not regulate product manufacturers directly, they may affect liability when manufacturers are sued by workers who are injured by allegedly defective products provided by their employers. With increasing frequency, manufacturers are contending that the OSH Act or OSHA standards preempt these claims. In particular, manufacturers argue that the Hazard Communication Standard (HazCom Standard) should preempt failure-to-warn claims. This issue recently came to

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a head in *Welding Fume Products Liability Litigation*, which was decided by a federal district court in 2005.

In 2003, a large number of lawsuits against various manufacturers, suppliers, and distributors of welding rod products were transferred to the Northern District of Ohio under the federal Multi-District Litigation Statute. The plaintiffs were injured as a result of inhaling manganese fumes given off during welding operations and maintained that the defendants had failed to adequately warn them about this danger. The defendants moved to dismiss, arguing that the OSH Act and the HazCom Standard preempted the plaintiffs' failure-to-warn claims. In April, 2005, District Judge Kathleen O'Malley denied the defendants' motion and ruled that the plaintiffs' claims were not preempted.

The issue of OSH Act preemption is one of great importance to the chemical industry and other product manufacturers. Consequently, many parties participated in the proceedings and argued their respective positions vigorously and skillfully in pretrial briefs and motions. Judge O'Malley's opinion in *Welding Fume* was comprehensive, well reasoned and a major contribution to OSH Act preemption jurisprudence. For these reasons, the *Welding Fume* case and the question of OSH Act preemption are worth discussing in some detail and I will do so in this Article. Part I describes the OSH Act and the HazCom Standard. Part II discusses the law of federal preemption, particularly those cases that involved the preemption of common law tort claims. Part III examines the preemption of state law by the OSH Act and the HazCom Standard. The *Welding Fume* case is evaluated in Part IV and the Article concludes by predicting that the decision in that case will be upheld on appeal.

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7. Id. at 673.
8. See id.
9. Id.
10. Id. at 682.
I. REGULATION UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

A. OSHA and the OSH Act

The Occupational Health and Safety Act was enacted in 1970 in response to public concern about work-related deaths and injuries. Congress believed that many state occupational health and safety protection laws at that time were weak and ineffective. Consequently, the federal government intervened to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." The Act created two agencies, the Occupational Safety and Health Administration (OSHA) and the National Institute of Safety and Health (NIOSH), to administer the Act. NIOSH conducts research to determine the causes of occupational injuries and diseases, and develops strategies for reducing the incidence of such work-related injuries and diseases. OSHA promulgates and enforces the safety standards that result from NIOSH’s studies.

The OSH Act covers an estimated six million workplaces and ninety million employees. OSHA primarily relies on standards promulgated under section six of the OSH Act to carry out the Act’s regulatory objectives. These safety standards must adequately assure, to the


14. Id. § 655-70.

15. Id. § 671.

16. Id. § 671(a).

17. ROTHSTEIN, supra note 2, § 4.

extent feasible, that no employee will suffer a material impairment to his or her health during the course of employment.\textsuperscript{19} OSHA standards address both safety and health concerns. Safety standards protect against traumatic injuries, while health standards protect workers against exposure to toxic substances and harmful physical agents.\textsuperscript{20} OSHA standards are also grouped into various industrial categories, including (1) general industry;\textsuperscript{21} (2) construction;\textsuperscript{22} (3) maritime and longshoring;\textsuperscript{23} and (4) agricultural.\textsuperscript{24}

OSHA enforces its safety and health standards by means of on-site inspections.\textsuperscript{25} Inspectors are authorized to issue citations against employers for violations and these can result in either civil or criminal penalties.\textsuperscript{26} OSHA may also require employers to keep records and report information about the effects of hazardous substances in the workplace.\textsuperscript{27} This information assists OSHA in determining which hazards pose the greatest risk of harm to workers.\textsuperscript{28} In addition to complying with specific safety standards, the Act's "general duty" provision requires employers to maintain a workplace that is "free from recognized hazards that are causing or likely to cause death or serious physical harm" to their employees.\textsuperscript{29}


\textsuperscript{20} MINTZ, \textit{supra} note 18, at 38.


\textsuperscript{22} \textit{Id.} § 1926.

\textsuperscript{23} \textit{Id.} §§ 1915, 1917, 1918.

\textsuperscript{24} \textit{Id.} § 1928.


\textsuperscript{26} \textit{Id.}


\textsuperscript{29} 29 U.S.C. § 654(a)(1). For a discussion of the general duty clause, see \textit{ROTHSTEIN, supra} note 2, §§ 141-52.
The OSH Act's regulatory scheme is not exclusively federal, but contemplates that the states will continue to play a major role in the occupational safety and health area. For example, the Act does not override state workers' compensation laws or other provisions that provide compensation for occupational injuries or diseases. In addition, the states are free to regulate in any area where OSHA has not promulgated federal health and safety standards. Furthermore, the Act provides that states may assume responsibility for developing their own standards and enforcement programs by submitting a plan to OSHA for its approval. If OSHA approves a state plan, it will limit its activities within the state and the state plan will govern occupational health and safety within the state. In addition, OSHA will provide funds to the state to assist it in implementing its plan.

B. The HazCom Standard

OSHA promulgated the HazCom Standard in 1983 to ensure that employees receive the necessary information and training to allow them to safely handle hazardous substances in the workplace. The HazCom Standard requires chemical manufacturers and importers to evaluate chemicals produced or imported by them to determine if these chemicals are hazardous. OSHA has determined


32. Id. § 667(a); see also Puffer's Hardware, Inc. v. Donovan, 742 F.2d 12, 16 (1st Cir. 1984); W. Va. Mfg. Ass'n v. State, 714 F.2d 308, 313 (5th Cir. 1983); Green Mt. Power Corp. v. Comm'r of Labor & Indus., 383 A.2d 1046, 1051 (Vt. 1978).


34. Foote, supra note 12, at 1453.


that certain chemical substances are hazardous per se.\textsuperscript{38} If a chemical substance is not within this designated group, the manufacturer must evaluate the "available scientific evidence" to determine whether it is hazardous."\textsuperscript{39} If the substance is found to be hazardous, the manufacturer or importer must ensure that each container that leaves the workplace is labeled with the chemical identity, with appropriate hazard warnings, and with the name and address of the source.\textsuperscript{40}

Manufacturers or importers must also prepare a material safety data sheet (MSDS) that lists the chemical common names of each hazardous ingredient and any information that may be necessary for the safe use of the product.\textsuperscript{41} The manufacturer or importer must provide an MSDS to each employer who purchases a hazardous chemical.\textsuperscript{42} Once an employer has received an MSDS from a manufacturer or importer, it must develop a written hazard communication program that includes the use of labels, safety sheets, and employee training about the risks of hazardous chemicals in their work area.\textsuperscript{43} The safety sheets received from the manufacturer or importer must be kept in the workplace and be made available to employers near the work area during their shifts.\textsuperscript{44} Finally, employers must inform employees of their rights under the HazCom Standard, the availability of the MSDS, and the location of any hazardous substances in the workplace.\textsuperscript{45}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{38} \textit{Id.} § 1910.1200(d)(3)-(4).
\item \textsuperscript{39} \textit{Id.} § 1910.1200(d).
\item \textsuperscript{40} \textit{Id.} § 1910.1200(f)(1).
\item \textsuperscript{41} \textit{Id.} § 1910.1200(g).
\item \textsuperscript{42} The HazCom Standard allows an exception from the labeling and MSDS ingredient disclosure requirements when a manufacturer or importer claims that the chemical identity is a trade secret and sets forth a procedure for the disclosure of trade secrets when necessary. \textit{Id.} § 1910.1200(i) (2005).
\item \textsuperscript{43} \textit{Id.} § 1910.1200(e).
\item \textsuperscript{44} \textit{Id.} § 1910.1200(g)(8).
\item \textsuperscript{45} \textit{Id.}
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III. FEDERAL PREEMPTION LAW

A. General Principles of Federal Preemption

Although the states act as sovereign entities within our federal system, Congress can prevent the states from regulating in certain areas if it chooses. The principle by which federal law overrides state law is known as preemption. According to conventional wisdom, this power to override state law derives from the Supremacy Clause of the United States Constitution. The power to preempt ensures that federal law prevails over conflicting state statutes, local ordinances, and even state common law doctrines. In general, the party seeking to invoke federal preemption has the burden of proof on this issue. Furthermore, the Supreme Court has declared that it will

46. Parker v. Brown, 317 U.S. 341, 351 (1943) (characterizing the federal system as "a dual system of government in which, under the Constitution, the states are sovereign").


presume that Congress would not preempt state law in traditional areas of state concern, such as public health and safety, unless Congress makes its intent to supersede state law "clear and manifest." This principle is often referred to as the "presumption against preemption."

Courts and commentators traditionally divide preemption into two basic categories, express and implied, and further subdivide implied preemption into field preemption and conflict preemption. Express preemption occurs when a federal statute specifically excludes state regulation in a particular area. Federal agencies acting within the scope of their delegated authority may also preempt state law by regulation. Congress may impliedly preempt state law when a federal regulatory scheme effectively occupies the field and leaves no room for state regulation or when state law conflicts in some way with federal law. Field preemption involves a scheme of federal regulation that is so pervasive that it effectively excludes state regulation. Another form of implied preemption is known as conflict preemption and may occur when it is impossible to comply with both state and federal law or where state law stands


53. OWEN, supra note 4, § 14.4, at 895-919; but see Davis, supra note 52, at 1013 (disputing the existence of a presumption against preemption).


as an obstacle to the achievement of federal regulatory objectives.60

B. Preemption of Common Law Tort Claims

Federal statutes and administrative regulations can not only preempt state and local statutes, ordinances, and regulations, they can also preempt state common law tort doctrines. Cipollone v. Ligget Group, Inc.,61 decided in 1992, was one of the first Supreme Court cases to consider whether a federal regulatory statute could preempt common law tort claims. The Cipollone case was concerned with the preemptive effect of federal labeling requirements on tort claims against tobacco companies.62 The Court concluded that the Federal Cigarette Labeling and Advertising Act expressly preempted the plaintiffs failure-to-warn claims,63 but did not preempt claims based on breach of express warranty, misrepresentation, or conspiracy.64

The Cipollone Court also made several observations about preemption methodology: first, the Court acknowledged that it must construe the statute’s preemptive language “in light of the presumption against the pre-emption of state police power regulations.”65 Second, the Court declared that when a statute’s express preemption provision provided a “reliable indicium of congressional intent with respect to state authority, there was no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.”66 In other words, the Court should limit itself to an express preemption analysis, and not engage in implied preemption analysis, when the statute in question contains an express

63. See Cipollone, 505 U.S. at 524.
64. See id. at 525-30.
65. Id. at 518.
66. Id. at 517 (internal quotations and citation omitted).
preemption provision. 67 Third, the Cipollone Court reiterated its position that common law tort doctrines could have the same coercive effect as statutes, ordinances, and administrative regulations. 68 Fourth, the Cipollone Court stated that a statute did not have to mention tort remedies specifically in order to preempt them; instead, general language would be sufficient to preempt common law tort claims. 69 Finally, the Court chose to examine the plaintiff's tort claims on an individual basis, preempting some and upholding others. 70

Since Cipollone, the Supreme Court has reviewed a number of other cases involving federal preemption of state common law tort claims. 71 For example, in Freightliner Corp. v. Myrick, 72 the Court was called upon to decide whether the National Traffic and Motor Vehicle Safety Act 73 expressly or impliedly preempted a design defect claim against the manufacturers of certain eighteen-wheel tractor-trailers for failing to equip their vehicles with antilock brakes. The truck manufacturers contended that the federal statute and regulations adopted under its authority preempted the plaintiffs' claims. 74 The Act contained an express preemption provision that prohibited state and local governments from enacting motor vehicle safety standards unless they were identical to applicable federal standards. 75 The Act also contained a savings clause that declared that "[c]ompliance with [the federal] motor vehicle safety standard prescribed under this chapter does


68. See Raeker-Jordan, supra note 52, at 1412.

69. See Cipollone, 505 U.S. at 520-24.


74. See id.

not exempt a person from liability at common law.” The Court observed that truck manufacturers had successfully challenged the validity of federal motor vehicle safety standard 121, which had imposed stopping distances for trucks. As a result, the National Highway Traffic Safety Administration had withdrawn the regulation and had not replaced it. Since there was nothing to expressly preempt the plaintiffs' tort claims, they were preserved by the Act’s savings clause. Notwithstanding its rejection of Cipollone’s rule on implied preemption, the Court went on to consider the defendants’ implied preemption argument, but ultimately concluded that the plaintiffs’ design defect claims did not conflict with federal regulatory objectives.

In Medtronic, Inc. v. Lohr, the Court held that the Medical Device Amendments to the Federal Food, Drug and Cosmetic Act did not expressly preempt common law claims based on a cardiac pacemaker lead’s alleged defective design and inadequate labeling. The Medical Device Amendments contained a preemption clause that prohibited states from establishing “any requirement” that related to the safety or effectiveness of a medical device if the requirement was different from applicable federal standards. The issue before the Court was whether state tort liability rules might be “requirements” and, therefore, preempted when they imposed a higher standard of care on device manufacturers than the FDA. The Medtronic pacemaker was a Class III medical device and, as such, would normally have had to go through a rigorous pre-market approval (PMA) process. However, because the

76. Id. § 30103(e).
77. See Myrick, 514 U.S. at 285-86.
78. See id.
79. See id. at 286.
80. See Raeker-Jordan, supra note 52, at 1463.
81. See Myrick, 514 U.S. at 289-90.
85. See Medtronic, 518 U.S. at 502.
86. See 21 U.S.C. § 360k(a).
87. See Medtronic, 518 U.S. at 477.
defendant's pacemaker was "substantially equivalent" to devices that had already been approved for marketing, it was exempted from the PMA review and subjected to a much less rigorous § 510(k) process.\(^8\)

A four-justice plurality rejected the defendant's contention that the term "requirement" in § 360k(a) included all common law claims.\(^9\) The plurality then considered whether § 360k(a) preempted the design defect and failure-to-warn claims in this case. In doing so, the plurality relied on the FDA's interpretation of § 360k(a) which required that the FDA establish "specific counterpart regulations or . . . other specific requirements applicable to a particular device" in order to preempt state law.\(^10\) According to the plurality, the "substantial equivalent" focus of § 510(k) was not specific to pacemakers, but was applicable to any medical device.\(^11\) The plurality also declared that state law requirements would be preempted only if they were specifically concerned with medical devices.\(^12\) The plurality then concluded that "general state common law requirements" were not preempted because they had not been specifically developed for medical devices, but were entirely generic in nature.\(^13\) Justice Breyer concurred with the plurality's conclusion that the § 510(k) process was not device specific and, thus, provided the fifth vote needed to reject the defendant's preemption argument.\(^14\) He disagreed, however, with the plurality's conclusion that § 360k(a) could not preempt common law tort doctrines.\(^15\) The remaining four Justices rejected the specific device limitation on preemption as it applied either to FDA regulations or to state law.\(^16\)

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88. See id. The process is referred to as a "§ 510(k) process" because that was the section number in the original act. Id.

89. See id. at 487.

90. Id. at 498 (quoting 21 C.F.R. § 808.1(d) (1995)).

91. See id. at 492-94.

92. See id. at 501.

93. Id.

94. See id. at 503-08 (Breyer, J. concurring).

95. Id. at 504-05.

96. Id. at 512-14 (O'Connor, J., concurring in part and dissenting in part).
In *Geier v. American Honda Motor Co.*, the Court held that Federal Motor Vehicle Safety Standard 208 (FMVSS 208), which dealt with passive restraints in automobiles, preempted design defect claims against automobile manufacturers who failed to equip their vehicles with airbags. The Court observed that the National Transportation and Motor Vehicle Safety Act contained both an express preemption provision and a savings clause. Reading these two provisions *in pari materia*, the Court concluded that the plaintiff's design defect claim was not expressly preempted. However, the Court went on to determine that design defect claims based on an automaker's failure to install airbags would conflict with DOT's regulatory objectives, as embodied in FMVSS 208, which provided for a gradual phase-in of airbags.

In *Sprietsma v. Mercury Marine*, the Court held that the Boat Safety Act of 1971 did not impliedly preempt the plaintiff's common law design defect claim. The plaintiff argued that a boat engine manufactured by the defendant was defective because it did not have a shroud or guard around its propeller. The Federal Boat Safety Act authorized the Secretary of Transportation to establish safety standards for recreational boats and equipment. The federal Act contained an express preemption provision which prohibited the states from establishing safety standards that were not identical to the federal standards. It also contained a savings clause. The Court observed that an advisory committee had studied the question of propeller

98. *Id.* at 865.
99. *Id.* at 868.
100. *Id.*
101. *Id.* at 875.
104. *Sprietsma*, 537 U.S. at 69.
105. See *id.* at 55.
108. *Id.* § 4311(g).
guards, but had declined to recommend that they be required.\textsuperscript{109} The Court interpreted the federal act's preemption provision narrowly and concluded that it did not expressly preempt state common law.\textsuperscript{110} The Court also rejected the argument that the boat safety act impliedly preempted the plaintiff's tort claims.\textsuperscript{111}

The most recent Supreme Court preemption case, \textit{Bates v. Dow Agrosciences LLC},\textsuperscript{112} was decided in 2005. \textit{Bates} involved a suit by a group of Texas peanut farmers against the manufacturer of "Strongarm," a weedkiller that was registered by the EPA under the provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).\textsuperscript{113} The product's original label claimed that it could be used "in all areas where peanuts are grown."\textsuperscript{114} Unfortunately, Strongarm was not suitable for use in soil which had a pH of 7.2 or more and the plaintiffs claimed that it had damaged their peanut crops.\textsuperscript{115} The plaintiffs based their claim against the manufacturer on negligence and strict products liability and also alleged fraud, breach of express warranty, and violation of the Texas Deceptive Trade Practices-Consumer Protection Act.\textsuperscript{116} In response, the manufacturer, Dow, contended that the plaintiffs' claims were expressly and impliedly preempted by FIFRA.\textsuperscript{117}

As the Court observed, FIFRA contained an express preemption clause, § 136v(b), which prohibited states from imposing "any requirements for labeling or packaging in addition to or different from" those required by FIFRA.\textsuperscript{118} The Court concluded, however, that the term "requirements," as used in this provision, did not preempt common

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110. \textit{Id.} at 64.
111. \textit{Id.} at 69-70.
113. \textit{Id.} at 1792-93.
114. \textit{Id.} at 1793.
115. \textit{Id.}
116. \textit{Id.}
117. \textit{Id.}
law tort claims.\textsuperscript{119} The Court acknowledged that a duty of care imposed by state tort law could constitute a requirement, but determined that it did not do so in this case.\textsuperscript{120} In reaching this conclusion, the Court rejected the so-called "inducement test" that the Court of Appeals had applied.\textsuperscript{121} The lower court had concluded that the imposition of tort liability amounted to a "requirement" because it would induce the manufacturer to alter its label.\textsuperscript{122} Instead, the Court found that § 136v(b) permitted the state to impose "parallel requirements" and different or additional remedies than FIFRA.\textsuperscript{123} The Court also invoked the presumption against preemption to support its narrow interpretation of § 136v(b)\textsuperscript{124} and also rejected the defendant's contention that FIFRA imposed a high degree of centralization and uniformity on pesticide labeling.\textsuperscript{125} Consequently, the Court remanded the case to the Court of Appeals to determine whether § 136v(b) preempted the plaintiffs' fraud and failure to warn claims.\textsuperscript{126}

Although the Supreme Court's preemption jurisprudence is not particularly clear or consistent,\textsuperscript{127} it is possible to make a few observations based on the foregoing overview. First, the Court tends to focus on express preemption if the statute in question contains a preemption provision, although it sometimes engages in an actual conflict analysis under the guise of interpreting a statute's preemptive language.\textsuperscript{128} Second, the Court continues to

\begin{itemize}
\item \textsuperscript{119} Bates, 125 S. Ct. at 1803.
\item \textsuperscript{120} Id. at 1798.
\item \textsuperscript{121} Id. at 1799-1800.
\item \textsuperscript{122} Dow Agrosciences LLC v. Bates, 332 F.3d 323, 332 (5th Cir. 2003).
\item \textsuperscript{123} Bates, 125 S. Ct. at 1800-01.
\item \textsuperscript{124} Id. at 1801.
\item \textsuperscript{125} Id. at 1802.
\item \textsuperscript{126} Id. at 1803.
\end{itemize}
invoke presumption against preemption, although the presumption's exact procedural effect remains uncertain. In recent cases, the Court seems more willing to rely on savings clauses to support a narrow view of the preemptive scope of a statute. Finally, the Court often gives considerable weight to an agency's position on preemption, particularly if the agency has maintained this position consistently.


Section 18(a) of the OSH Act declares that "[n]othing in this chapter 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 under section 667 of [the Act]." This language permits the states to regulate occupational health and safety in areas where OSHA has not promulgated standards, but by implication also preempts state regulation in areas where OSHA has promulgated standards.

In addition, the OSH Act contains a savings clause, § 4(b)(4) which states:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's 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

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130. Ausness, supra note 71, at 971-74.
132. Sprietsma, 537 U.S. at 66-68; Geier, 529 U.S. at 868; Medtronic, 518 U.S. at 495; but see Bates, 125 S. Ct. at 1801-03; Norfolk, 529 U.S. at 356 (refusing to defer to change in interpretation by agency).
134. See Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100 (1992) (declaring that "§ 18(a)′s preservation of state authority in the absence of a federal standard presupposes a background pre-emption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect").
under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.\textsuperscript{135}

This provision clearly saves state workers' compensation laws from preemption and arguably does the same for common law tort claims.

The HazCom Standard also contains preemptive language. OSHA has declared that its HazCom Standard "is intended to address comprehensively the issue of evaluating the potential hazards . . . and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject."\textsuperscript{136} The Standard goes on to say that "no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan."\textsuperscript{137}

III. PREEMPTION UNDER THE OSH ACT

A. OSH Act Preemption of State Legislation

1. Preemption Generally. In \textit{Five Migrant Farmworkers v. Hoffman},\textsuperscript{138} migrant farm workers sought to compel New Jersey's Commissioner of Labor and Industry to conduct preoccupancy inspections of migrant labor camps in the state to ensure that minimum housing and sanitation standards were being met.\textsuperscript{139} OSHA had approved a state plan submitted by New Jersey in 1972 which contained a preoccupancy inspection requirement.\textsuperscript{140} However, OSHA's approval was withdrawn when the state legislature failed

\begin{itemize}
\item \textsuperscript{135} 29 U.S.C. § 653(b)(4).
\item \textsuperscript{136} Hazard Communication, 29 C.F.R. § 1910.1200(a)(2) (2006).
\item \textsuperscript{137} \textit{Id}.
\item \textsuperscript{138} 45 A.2d 378 (N.J. Sup. Ct. 1975).
\item \textsuperscript{139} \textit{Id} at 379.
\item \textsuperscript{140} \textit{Id} at 380.
\end{itemize}
to enact legislation to implement the plan. The issue, then, was whether OSHA inspection standards displaced the state's requirements for the inspection of migrant labor camps. The court found that OSHA had occupied the field, declaring that the OSH Act was "so broad and sweeping as to encompass the entire gamut of migrant worker protection in the field of inspection and minimum standards of migrant workers’ housing quarters." This field preemption covered preoccupancy as well as post-occupancy inspections. Consequently, the plaintiffs could not compel the state to continue its preoccupancy inspection program.

In Puffer's Hardware, Inc. v. Donovan, the First Circuit Court of Appeals held that the OSH Act did not impliedly preempt a Massachusetts statute that governed elevator safety. The plaintiff in that case was cited by OSHA for violating the general duty provision of the OSH Act after an employee was killed in an elevator accident. The employer claimed that he was not liable because the elevator complied with the applicable provisions of the Massachusetts statute. OSHA argued that OSH Act preempted state law. The court observed that § 18(a) of the OSH Act would not preempt state law unless OSHA had promulgated a standard that related to the same area and since OSHA had not done so, there was no preemption. Furthermore, the court did not find a conflict between state law and federal law in this case because the employer could simply comply with the more rigorous regulatory standard.

141. Id.
142. Id. at 381.
143. Id.
144. Id. at 382.
145. 742 F.2d 12 (1st Cir. 1984).
146. Id. at 16-17.
147. Id. at 14.
148. Id. at 15-16.
149. Id.
150. Id.
151. Id.
2. Preemption of State Criminal Law. Concerns about lax federal enforcement of occupational safety and health laws led some states in the 1980s to initiate criminal prosecutions against employers who exposed their employees to unsafe working conditions. However, defendants often argued that the OSH Act preempted state criminal prosecutions in such cases. For example, in P & Z Co., Inc. v. District of Columbia, the defendants, who were convicted of failing to report employee injuries as required by the D.C. Industrial Safety Act, contended that the D.C. statute was preempted by the OSH Act. The court acknowledged that standards promulgated by OSHA would preempt state law, but observed that regulations would not. According to the court, OSHA implemented its reporting requirements under § 657(c) and § 673, not under its power to promulgate standards under § 655. The court concluded, therefore, that § 667 would not preempt the reporting requirements of the D.C. statute since there were no federal reporting requirements in place that were embodied in a standard.

In People v. Chicago Magnet Wire Corp., the state of Illinois brought criminal charges against the defendant corporation and five of its officers and agents for causing injury to employees by knowingly and recklessly exposing them to various toxic chemical substances. The charges included aggravated battery, reckless conduct, and conspir-

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152. See Rothstein, supra note 2, at § 33.
155. Id. at 1249-50.
156. Id. at 1250.
157. Id.
158. Id.
159. Id. at 1251.
161. Id. at 963-64.
acy to commit aggravated battery.\textsuperscript{162} The defendants contended that the OSH Act preempted the state from prosecuting them because OSHA standards established permissible exposure limits for the toxic substances that injured their employees and that OSHA regulated the activities that allegedly created the unsafe workplace.\textsuperscript{163} The lower court agreed with the defendants and ruled that the OSH Act preempted the state from prosecuting them for conduct that was already regulated by OSHA standards.\textsuperscript{164} On appeal, however, the Illinois Supreme Court reasoned that the state's enforcement of generic criminal statutes did not constitute an attempt to regulate occupational health and safety.\textsuperscript{165} The court observed that OSHA enforced its regulations primarily through civil sanctions and concluded that:

\begin{quote}
[\text{w}hile additional sanctions imposed through State criminal law enforcement for conduct also governed by OSHA safety standards may incidentally serve as a regulation for workplace safety, there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of State criminal law simply because of its incidental regulatory effect.\textsuperscript{166}]
\end{quote}

However, several courts reached the opposite conclusion, holding that the OSH Act did preempt state criminal law provisions.\textsuperscript{167} For example, in \textit{Sabine Consolidated, Inc. v. State}, a Texas intermediate appellate court reasoned that state prosecutions would "set up a body of state law affecting workplace safety issues already governed by federal standards . . . ."\textsuperscript{168} The Texas Court of Criminal Appeals, however, reversed, concluding that the application of criminal laws to the workplace would not

\begin{footnotes}
\item[162.] \textit{Id.} at 963.
\item[163.] \textit{Id.} at 965.
\item[164.] \textit{Id.} at 964.
\item[165.] \textit{Id.} at 966.
\item[166.] \textit{Id.} at 967.
\item[167.] \textit{See} People v. Hegedus, 425 N.W.2d 729 (Mich. 1988); \textit{Sabine Consol.}, 756 S.W.2d at 865.
\end{footnotes}
conflict with OSHA’s goal of assuring safe and healthful working conditions for employees. 169

In *People v. Hegedus*, 170 an employee died from carbon monoxide poisoning. 171 The accident occurred in a truck owned by the victim’s employer and the evidence showed that, as a result of deterioration and poor maintenance, carbon monoxide levels greatly exceeded OSHA standards. 172 The employee’s supervisor was charged with involuntary manslaughter. 173 When the trial court quashed the information against the defendant, the state appealed. 174 Although the defendant did not raise the preemption issue on appeal, the intermediate appellate court *sua sponte* determined that the OSH Act preempted criminal prosecutions for conduct in the workplace that was specifically regulated by the Act. 175 As the court pointed out, the state of Michigan regulated occupational health and safety under a plan approved by the Secretary of Labor pursuant to § 667(b). 176 The state statute provided for criminal penalties for violation of carbon monoxide standards (as did the OSH Act). 177 However, the state did not prosecute the defendant for violating these standards; rather, it prosecuted him under its generic manslaughter statute. 178 The court declared that this attempt to circumvent the penalties prescribed in the OSHA-approved state plan constituted “an attempt to assert jurisdiction over a federally covered occupational safety and health issue other than through an approved state plan.” 179

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169. 806 S.W.2d at 560.
171. *Id.* at 730.
172. *Id.*
173. *Id.*
174. *Id.* at 731.
175. *Id.* at 732.
176. *Id.* at 731.
177. *Id.*
178. *Id.*
179. *Id.*
3. Preemption of State Licensing, Certification, and Right-to-Know Laws. In the past, chemical manufacturers and others have argued that the OSH Act and OSHA’s HazCom Standard preempt state right-to-know laws insofar as they apply to the manufacturing sector. For example, in New Jersey State Chamber of Commerce v. Hughey, the Third Circuit Court of Appeals held that New Jersey’s right-to-know law was preempted by the HazCom Standard insofar as it pertained to the protection of employee health and safety in the manufacturing sector. The court refused, however, to preempt provisions of the state law that purported broader health and safety concerns. Another court took a similar approach in Manufacturers Association of Tri-County v. Knepper, holding that the HazCom standard preempted only those portions of the Pennsylvania “right to know” statute that applied to occupational health and safety in the manufacturing sector.

Some courts have also upheld state certification and licensing laws against claims of OSH Act preemption. The Second Circuit Court of Appeals, in Environmental Encapsulating Corp. v. City of New York, ruled that the OSH Act did not preempt New York City’s asbestos abatement regulations. In 1986, the City enacted an ordinance that required workers who might handle asbestos at a construction or demolition site to obtain a certificate by


181. 774 F.2d 587 (3d Cir. 1985).

182. See id. at 592.

183. See id. at 593; see also Hughey, 868 F.2d at 621.

184. 801 F.2d 130 (3d Cir. 1986).

185. Id. at 134.

186. 855 F.2d 48 (2d Cir. 1988).

187. Id. at 58.
completing a four-day training course approved by the city Department of Environmental Protection (DEP) and passing a two-hour written exam.\textsuperscript{188} OSHA's Revised Construction Standard also required training for asbestos handlers but allowed employers to provide this training in house and did not require that employees be certified.\textsuperscript{189} A group of asbestos abatement contractors brought suit, contending that the OSH Act and its regulations preempted the City's regulatory scheme.\textsuperscript{190} The district court found that the OSH Act neither expressly nor impliedly preempted the City's program because the DEP program was concerned with public health while the federal act was concerned with occupational health and safety.\textsuperscript{191}

The court first considered the plaintiffs' express preemption claim. Observing that the Revised Construction Standard had no express preemption clause, the court turned its attention to § 18. Rejecting the approach adopted by the Sixth Circuit Court of Appeals in \textit{Ohio Manufacturers Association},\textsuperscript{192} the court concluded that the OSH Act could preempt municipal ordinances as well as state statutes.\textsuperscript{193} In addition, the court acknowledged that OSHA's Revised Construction Standard was a standard within the meaning of § 18(a) and that the City had not obtained OSHA approval of its DEP program pursuant to § 18(b).\textsuperscript{194} The only question, then, was whether the DEP program constituted an "occupational safety or health standard."\textsuperscript{195} The City argued that its program was designed "to safeguard public health."\textsuperscript{196} The court, however, agreed with the district court that the DEP program

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at 51.
\item \textsuperscript{189} \textit{Id.} at 52.
\item \textsuperscript{190} \textit{Id.} at 50.
\item \textsuperscript{192} Ohio Mfrs.' Ass'n v. City of Akron, 801 F.2d 824 (6th Cir. 1986).
\item \textsuperscript{193} Envtl. Encapsulating Corp. v. City of New York, 855 F.2d 48, 54-55 (2d Cir. 1988).
\item \textsuperscript{194} See \textit{id.} at 55.
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.} (emphasis omitted).
\end{itemize}
\end{footnotesize}
was intended to protect public health as well as employee health and safety.\textsuperscript{197}

Thus, the court in \textit{Environmental Encapsulating} rejected the "primary purpose" approach employed by the Third Circuit\textsuperscript{198} in favor of a dual purpose analysis. Under this approach, if the City could show that there was a "legitimate and substantial purpose" for a DEP requirement apart from the protection of asbestos workers, the requirement would not be considered a state occupational safety and health requirement and, therefore, would not be preempted by § 18.\textsuperscript{199} Applying this test, the court concluded that, with the exception of two provisions that were solely concerned with asbestos workers, the DEP training requirements were intended to protect the health of members of the general public and not just asbestos workers.\textsuperscript{200} Turning to the issue of implied preemption, the court observed that the presumption against preemption applied and that the burden of overcoming this presumption was especially heavy "in those cases that rely on implied preemption, which rests in turn on inference."\textsuperscript{201} With that in mind, the court found that the Revised Construction Standard was not so comprehensive as to indicate that OSHA intended to occupy the field of worker education in asbestos abatement education.\textsuperscript{202} The court also rejected the plaintiffs' actual conflict argument. There was no evidence that OSHA intended for employers to be the exclusive educators of their employees, so the City's requirement for third-party training programs did not conflict with OSHA's regulation.\textsuperscript{203} Furthermore, the court found no indication that the OSH Act required uniform training programs.\textsuperscript{204} Therefore, the court determined that

\begin{flushleft}
\textsuperscript{197} Id. at 56.
\textsuperscript{199} \textit{Envtl. Encapsulating}, 855 F.2d at 57.
\textsuperscript{200} Id. at 57-58.
\textsuperscript{201} Id. at 58.
\textsuperscript{202} Id. at 58-59.
\textsuperscript{203} Id. at 59.
\textsuperscript{204} Id.
\end{flushleft}
the OSH Act did not impliedly preempt the City’s DEP regulations.205

Shortly thereafter, the Sixth Circuit Court of Appeals in Ohio Manufacturers’ Association v. City of Akron206 held that municipal right-to-know ordinances could also be preempted by the HazCom Standard. In 1984, the City of Akron, Ohio adopted an ordinance that required employers to provide information to various municipal agencies about any hazardous chemicals manufactured, used, or stored inside the workplace, as well as any hazardous chemicals that were discharged from the workplace or stored as chemical waste.207 The ordinance also required employers to inform employees about hazardous chemicals, to label such materials, to provide training, to keep records, and to file reports about hazardous materials to city officials.208

The Association argued that the local ordinance was preempted by the OSH Act and the HazCom Standard.209 Reviewing the text of the OSH Act and its legislative history, the court could find no evidence of an intent to preempt local law.210 However, the court also examined the HazCom standard itself and the preamble to the HazCom standard published in the *Federal Register*.211 In that preamble, OSHA declared that its proposed standard was in response to the regulatory burden imposed on businesses by the proliferation of state and local right-to-know laws.212 Although uniformity was not one of the OSH Act’s express goals, the court determined that “OSHA could legitimately determine that uniformity would aid in the administration and enforcement of, and compliance with, its standard.”213

205. *Id.*

206. 801 F.2d 824 (6th Cir. 1986).

207. *Id.* at 825.

208. *Id.* at 825-26.

209. *Id.* at 825.

210. *Id.* at 830. Subsequently, OSHA made it clear that § 18 applied to all “state or local laws which relate to an issue covered by a [f]ederal standard.” 52 Fed. Reg. 31,860 (1987).

211. *Id.* at 832.


213. *Ohio Mfrs.’ Ass’n*, 801 F.2d at 834.
Consequently, the court concluded that the HazCom Standard preempted Akron's right-to-know ordinance, at least as far as it applied to workplace safety.\textsuperscript{214}

The First Circuit Court of Appeals upheld a similar Massachusetts statute in \textit{Associated Industries of Massachusetts v. Snow}.\textsuperscript{215} Various OSHA standards, including the HazCom Standard, provided for the protection of workers in the asbestos abatement industry.\textsuperscript{216} In 1987, the Massachusetts Department of Labor promulgated even more stringent standards.\textsuperscript{217} Associated Industries of Massachusetts (AIM) challenged these state standards, claiming that they were preempted by OSHA's regulations.\textsuperscript{218} The district court, following the Second Circuit's approach in \textit{Environmental Encapsulating Corp. v. City of New York},\textsuperscript{219} upheld the Massachusetts statute and all but one of its regulations.\textsuperscript{220} On appeal, the court considered both express and implied preemption claims.

Rejecting both the primary purpose and the dual purpose tests, the court declared that it would "examine the effect that the Massachusetts standards have on their two stated purposes, the protection of 'the general public and the occupational health and safety of workers.'"\textsuperscript{221} If the Massachusetts statute's effect was to protect the public, it would not be preempted by the OSH Act; however, if the statute's effect was solely to protect workers, it would be preempted.\textsuperscript{222} Finally, if the effect of the statute was to protect the public by regulating some aspects of workplace safety, it would still be upheld since its ultimate effect was to protect the general public.\textsuperscript{223} Applying this methodology, the court found that § 18 of the OSH Act did not preempt

\begin{itemize}
  \item \textsuperscript{214} \textit{Id.}
  \item \textsuperscript{215} 898 F.2d 274 (1st Cir. 1990).
  \item \textsuperscript{217} \textit{See} 898 F.2d at 277.
  \item \textsuperscript{218} \textit{Id.} at 276.
  \item \textsuperscript{219} 855 F.2d 48, 57 (2d Cir. 1988).
  \item \textsuperscript{221} \textit{Associated Indus.}, 898 F.2d at 279-80.
  \item \textsuperscript{222} \textit{Id.} at 280.
  \item \textsuperscript{223} \textit{Id.}.
\end{itemize}
Massachusetts’ training, licensing, or certification requirements.\textsuperscript{224} The court also upheld the statute’s work practice requirements because their effect was to protect the public from exposure to asbestos.\textsuperscript{225} In addition, the court declared that the OSH Act did not preempt a state regulation that required asbestos abatement workers to wear disposable protective clothing.\textsuperscript{226} Finally, the court concluded that OSHA’s HazCom Standard did not preempt the Massachusetts statute except for state training programs aimed primarily at employee safety.\textsuperscript{227}

The court also rejected AIM’s contention that the OSH Act and its standards impliedly preempted the Massachusetts statute.\textsuperscript{228} The court found no evidence that OSHA had “occupied the occupational safety and health fields of asbestos and hazard communications.”\textsuperscript{229} Moreover, the court did not agree that the Massachusetts statute upset some sort of “balance” struck by Congress between worker safety and economic concerns. Rather, the court declared that “[t]he main thrust of the OSH Act and OSHA regulations is protecting the safety and health of the nation’s workers.”\textsuperscript{230} Finally, the court rejected the claim that the OSH Act intended to provide for the establishment of uniform occupational safety and health standards throughout the country.\textsuperscript{231}

B. Gade v. National Solid Wastes Management Association

The United States Supreme Court finally resolved the conflict of authority, discussed above, in \textit{Gade v. National Solid Wastes Management Association}.\textsuperscript{232} In 1988, the state of Illinois enacted two statutes that required hazardous waste equipment operators and workers to obtain

\begin{itemize}
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.} at 281.
\item \textsuperscript{226} See \textit{id.} at 281.
\item \textsuperscript{227} \textit{Id.} at 282.
\item \textsuperscript{228} \textit{Id.} at 283.
\item \textsuperscript{229} \textit{Id.}
\item \textsuperscript{230} \textit{Id.} at 282-83.
\item \textsuperscript{231} \textit{Id.} at 283.
\item \textsuperscript{232} 505 U.S. 88 (1992).
\end{itemize}
licenses. The training requirements necessary to obtain a state license were more rigorous and burdensome than the training requirements that operators and workers were obliged to meet under OSHA regulations. Consequently, the National Solid Wastes Management Association (Association), a trade association of businesses that remove, transport, and dispose of waste material, including hazardous wastes, sought to enjoin state officials from enforcing the Illinois licensing acts on the grounds that they were preempted by the OSH Act and applicable OSHA regulations. Finding that the licensing acts had a "legitimate and substantial purpose apart from promoting job safety," the district court rejected the Association's preemption claim. The Court of Appeals held that the OSH Act would preempt any state law that constituted "in a direct, clear and substantial way, regulation of worker health and safety" and remanded the case back to the district court to determine which, if any, of the licensing acts' provisions might be preempted.

Justice O'Connor, joined by three other Justices, wrote the plurality opinion which concluded that the OSH Act impliedly preempted the Illinois licensing statutes. Justice Kennedy concurred in the result, but argued that the Illinois statutes were expressly preempted by § 18(b). Looking at the overall design and structure of the OSH Act, the Court declared that "Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards." The Court relied primarily on §

233. See id. at 93.
234. See id. at 93-94.
235. Id. at 94.
236. Id.
238. See id. at 684.
240. Id. at 111 (Kennedy, J., concurring).
241. Id. at 99.
18(b) to support its conclusion that the states could not displace OSHA standards without an approved plan.\textsuperscript{242} According to the Court, the states could not merely supplement existing federal standards; their only choice was to displace federal standards completely by means of an OSHA-approved plan or to refrain from regulating in an area that was already subject to OSHA standards.\textsuperscript{243}

Furthermore, the Court declared that this view was also supported by other parts of § 18.\textsuperscript{244} For example, the Court found that "§ 18(a)'s preservation of state authority in the absence of a federal standard presupposes a background pre-emption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect."\textsuperscript{245} The Court also looked to § 18(c), which provided that standards in state plans that affected interstate commerce would only be approved if they were "required by compelling local conditions" and would not "unduly burden interstate commerce."\textsuperscript{246} According to the Court, "[i]t would make little sense to impose such conditions on state programs intended to supplant federal regulation and not those that merely supplement it" when the burden on interstate commerce might be just as great.\textsuperscript{247} In addition, the Court observed that § 18(f), which permitted the Secretary of Labor to withdraw approval of a state plan, indicated that a state would lose the power to enforce any occupational safety and health regulations in areas covered by federal standards once approval for the state plan was withdrawn.\textsuperscript{248} Finally, the Court noted that § 18(h), which allowed the Secretary to keep state laws in force during the § 18(b) approval process, also presupposed that federal jurisdiction was exclusive when a federal standard was in effect.\textsuperscript{249}

\textsuperscript{242} See id.
\textsuperscript{243} Id. at 99-100.
\textsuperscript{244} See id. at 100.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id. at 101.
\textsuperscript{248} Id.
\textsuperscript{249} See id. at 101-02.
Having concluded that the OSH Act would not permit the states to supplement OSHA standards, the Court then considered whether the Act also preempted "dual purpose" laws that purported to protect members of the general public as well as workers. The Court stated that it could, pointing out that "[o]ur precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act preemption simply because the regulation serves several objectives rather than one." \[250\] Instead, the Court declared, the Act would preempt any state regulation that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." \[251\] Thus, a state law directed at workplace safety would not be saved from preemption simply because it had some additional effect outside of the workplace. \[252\]

Finally, the Court distinguished between dual purpose regulations and "state laws of general applicability," such as traffic or fire safety laws, which regulated workers and nonworkers alike. \[253\] Even though such laws might have some "direct and substantial" effect on worker safety, they could not be considered occupational standards because they regulate workers, not as workers, but as general members of the public. \[254\]

C. Preemption of Common Law Tort Claims by the OSH Act

1. Preemption Generally. The preemptive effect of the OSH Act on tort claims has been considered by several courts both before and after the *Gade* decision. With one exception, these courts have concluded that the OSH Act does not preempt state tort law. This issue first arose in *Berardi v. Getty Refining & Marketing Co.* \[255\] In *Berardi*, the plaintiff, who had been hired to work on two water towers located on the roof of a building owned by one of the defendants, was injured when he fell from one of the

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250. *Id.* at 106.
251. *Id.* at 107.
252. *Id.*
253. *Id.*
254. *Id.*
towers.\textsuperscript{256} The plaintiff sued the owner of the building, alleging that it had failed to provide proper safety equipment as required by state law.\textsuperscript{257} The owner then impleaded the plaintiff's employer as a third party defendant.\textsuperscript{258} The owner moved to dismiss on the basis that the plaintiff's tort claim was preempted by the OSH Act.\textsuperscript{259} The court noted that the Act had a broad preemptive effect as far as the employer-employee relationship was concerned, but once outside this sphere, "the hold of the Act over state action is relatively weak and diminished."\textsuperscript{260} Furthermore, the court observed, state law regulated areas not covered by the OSH Act and utilized different enforcement tools to achieve its objectives.\textsuperscript{261} Consequently, the court concluded that the OSH Act did not preempt the plaintiff's claim.\textsuperscript{262}

A decade later, the First Circuit Court of Appeals considered the same issue in \textit{Pedraza v. Shell Oil Co.}.\textsuperscript{263} In that case, the plaintiff brought suit against Shell Oil Company, the manufacturer of Epichlorohydrin (ECH), a toxic chemical.\textsuperscript{264} According to the plaintiff, exposure to ECH in the workplace caused him to develop acute asthma symptoms.\textsuperscript{265} However, the district court found that because OSHA regulated workplace exposure to ECH and required employers to provide protective equipment to employees who worked with this material, the imposition of duties upon Shell based on tort law amounted to a form of state occupational health and safety regulation that was not permitted by the OSH Act.\textsuperscript{266} The district court's decision was reversed by the federal appeals court.\textsuperscript{267}

\textsuperscript{256} \textit{Id.} at 214.
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Id.} at 216.
\textsuperscript{261} \textit{Id.}
\textsuperscript{262} \textit{Id.} at 219.
\textsuperscript{263} 942 F.2d 48 (1st Cir. 1991).
\textsuperscript{264} \textit{Id.} at 49.
\textsuperscript{265} \textit{Id.} at 50.
\textsuperscript{267} \textit{Pedraza}, 942 F.2d at 54.
Pedraza court acknowledged that § 18(a) prohibited a state from promulgating any occupational safety or health standard relating to any issue that was already covered by a federal standard unless it first submitted a plan to OSHA for approval under § 18(b).\textsuperscript{268} However, the court then distinguished between positive standards and regulations that might conflict with existing OSHA standards and the establishment of "a neutral forum for the orderly adjustment of private disputes between, among others, the users and suppliers of toxic substances."\textsuperscript{269} The court went on to declare that this interpretation was reinforced by the OSH Act's savings clause, § 4(b)(4), which declared that the Act should not be construed to "diminish or affect in any other manner the common law . . . rights" of employees.\textsuperscript{270} The court observed that there was a "solid consensus" that § 4(b)(4) operated to save state tort rules from preemption.\textsuperscript{271}

A Massachusetts appeals court also refused to preempt a common law tort claim in Jones v. Cincinnati, Inc.\textsuperscript{272} The plaintiff, who was injured by a press brake, brought an action against the manufacturer of the machine for negligent design and breach of warranty.\textsuperscript{273} The machine was sold to the plaintiff's employer without any safety devices to protect the operator from injury.\textsuperscript{274} The manufacturer pointed out that an OSHA regulation provided that "[t]he point of operation of machines whose operation exposes an employee to injury shall be guarded" by the employer.\textsuperscript{275} The court observed that the OSH Act's savings clause stated that it did not intend to enlarge or diminish the common law rights of employers or employees.\textsuperscript{276} Furthermore, if tort claims were preempted, this would permit "manufacturers who negligently design or sell defective and dangerous machines to be free from all

\textsuperscript{268} Id. at 52.
\textsuperscript{269} Id. at 53.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{273} Id. at 336.
\textsuperscript{274} Id. at 337.
\textsuperscript{275} Id. at 338 (quoting 29 C.F.R. § 1910.212(a)(3) (2003)).
\textsuperscript{276} Id. at 339-40.
liability,” a result that would be contrary to the state’s public policy.277

A more recent case, *Dukes v. Sirius Construction, Inc.*,278 involved a negligence claim against the City of Missoula for failing to properly inspect scaffolding at a construction site as required by the state’s scaffolding act.279 In response, the City contended that the OSH Act and OSHA standards preempted the state law; if the scaffolding law was invalid, the City could not be held liable for failing to comply with its requirements.280 On appeal, the Montana Supreme Court invoked the presumption against preemption281 and determined that § 4(b)(4) of the OSH Act did not clearly and manifestly preempt the plaintiffs’ tort claim.282 Relying on the language of § 18(a), the court also rejected the City’s claim that the OSH Act occupied the entire field of occupational safety and health.283 Finally, the court refused to find that there was an actual conflict between the OSH Act and the state statute.284 The court observed that the state scaffolding act did not have substantive standards that were different than OSHA’s; rather the state statute merely authorized the state to enforce OSHA’s scaffolding standards.285 According to the court, the imposition of a duty to inspect on the City to ensure that contractors complied with OSHA standards would not subject them to “duplicative or supplemental occupational safety or health standards” and, therefore, would not create an obstacle to the achievement of the OSH Act’s regulatory objectives.286 Consequently, the court concluded that the federal statute did not expressly or impliedly preempt state law.

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277. *Id.* at 340.
278. 73 P.3d 781 (Mont. 2003).
279. *Id.* at 783.
280. *Id.*
281. *Id.* at 785.
282. *Id.* at 786.
283. *Id.* at 788-93.
284. *Id.* at 793.
285. *Id.* at 793-94.
286. *Id.* at 794.
The only exception to this “no-preemption” consensus is Gonzalez v. Ideal Tile Importing Co., decided by the New Jersey Supreme Court in 2005. The plaintiff in that case, who was struck by a forklift operated by another employee, brought suit against the manufacturer, claiming it should have installed additional warning devices on the machine. OSHA had adopted several ANSI standards: one required forklifts to be equipped with an operator controlled horn, while another provided that additional warning devices could be installed when requested by the user, that is, the purchaser. The trial court granted the defendant’s motion for summary judgment, holding that the OSH Act preempted the plaintiff’s tort claim. This decision was affirmed by a New Jersey intermediate appellate court. On appeal, the New Jersey Supreme Court first determined that the OSH Act did not expressly preempt common law tort claims. Relying on the Supreme Court’s reasoning in Geier, the court determined that the OSH Act’s savings clause, section 4(b)(4), mandated that the Act’s preemption clause, section 18(a), should be read narrowly. The court also rejected the defendant’s field preemption argument. According to the court, sections 18(a) and 18(b) demonstrated that Congress did not intend to occupy the field of occupational health and safety, but instead wanted the states to play an important role in this area.

The court then considered the issue of conflict preemption and applied the Supreme Court’s approach in Geier In Geier, FMVSS 208 mandated that automobile manufacturers be allowed to choose among various passive

288. Id. at 1249.
289. Id. at 1252.
290. Id. at 1249.
292. Gonzalez, 877 A.2d at 1250.
293. Id.
294. Id. at 1251.
295. Id.
296. Id. at 1252.
restraints; hence, a standard imposed upon manufacturers by state tort law would conflict with congressional intent if it required them to install airbags in their vehicles in order to avoid tort liability. In Gonzalez, the court concluded that the OSHA standards were not minimum standards, but regulated the "universe of warning devices." OSHA's decision to give the forklift operators discretion to choose what warning devices to install (other than operator controlled horns) reflected its concern that some warning devices might create more dangers than they prevented and that operators, rather than third parties, were in the best position to make a judgment about these safety-related tradeoffs. As in Geier, a common law tort standard that required manufacturers to install other warning devices would strip them of this discretion and, therefore, would conflict with OSHA's policy. The court held, therefore, that the plaintiff's tort claim was impliedly preempted.

2. Preemption of Common Law Tort Claims by the HazCom Standard. The only case prior to Gade to consider the preemptive effect of the HazCom Standard on common law tort claims was York v. Union Carbide Corp. In York, an Indiana intermediate appellate court concluded that tort claims were not preempted. In that case, the widow of a steelworker who was asphyxiated by argon gas brought a products liability suit against the gas supplier, alleging that it failed to provide an adequate warning. The gas supplier argued that the plaintiff's claim was preempted by the OSH Act and the HazCom standard. Relying on the reasoning of Pedraza v. Shell Oil Co., the court held that

298. Gonzalez, 877 A.2d at 1253.
299. Id.
300. Id.
301. Id.
303. Id. at 866.
304. Id. at 862-63.
305. Id. at 864-65.
306. 942 F.2d 48 (1st Cir. 1991).
the OSH Act’s savings clause operated to exempt tort claims from preemption.\textsuperscript{307}

Since \textit{Gade}, several cases have considered the preemptive effect of the HazCom Standard on state statutes and tort law. For example, in \textit{Industrial Truck Association, v. Henry},\textsuperscript{308} the Ninth Circuit Court of Appeals held that the OSH Act’s HazCom Standard preempted certain provisions of California’s Safe Drinking Water and Toxic Enforcement Act,\textsuperscript{309} also known as Proposition 65.\textsuperscript{310} This provision required employers to warn workers who might be exposed to chemicals that were known to cause cancer, birth defects, or other reproductive harm.\textsuperscript{311} Although California’s original state plan had been approved by OSHA, some of the provisions mandated by Proposition 65 did not receive OSHA approval.\textsuperscript{312} A trade association of forklift manufacturers challenged the California law, arguing that it was preempted by the OSH Act and the HazCom Standard.\textsuperscript{313} The district court dismissed the lawsuit,\textsuperscript{314} but the decision was reversed on appeal. The appeals court determined that \textit{Gade} stood for the proposition that “the preemption worked by federal OSHA standards goes beyond conflict preemption” and “that principles of field preemption apply against any state law relating to the ‘issue’ or subject matter of a federal standard.”\textsuperscript{315} The court also declared that this field preemption rationale applied whether or not an approved state plan was in effect.\textsuperscript{316} Therefore, even though California had an approved state plan, those portions of Proposition 65 that were not part of the state plan would be

\textsuperscript{307} York, 586 N.E.2d at 866.  
\textsuperscript{308} 125 F.3d 1305 (9th Cir. 1997).  
\textsuperscript{309} CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1999).  
\textsuperscript{310} Henry, 125 F.3d at 1306.  
\textsuperscript{311} Id. at 1307.  
\textsuperscript{312} See id. at 1308.  
\textsuperscript{313} Id.  
\textsuperscript{315} Henry, 125 F.3d at 1310.  
\textsuperscript{316} See id. at 1311.
preempted with respect to safety issues already addressed by a federal standard.\textsuperscript{317}

The court then considered whether Proposition 65's warning requirements addressed an "issue" that was already covered by the HazCom Standard. For guidance, the court looked to OSHA's interpretation of the term "issue" in the HazCom regulation.\textsuperscript{318} The regulation declared that the HazCom Standard was intended "to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees . . . ."\textsuperscript{319} The court concluded that this language was broad enough to overlap with the state law requirements.\textsuperscript{320} The court also quoted from OSHA's commentary in the 1987 preamble to the HazCom Standard which declared:

\begin{quote}
Any State or local government provisions requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan.\textsuperscript{321}
\end{quote}

Therefore, the court held that those requirements in Proposition 65 that were not part of an approved state plan were preempted.\textsuperscript{322}

On the other hand, in \textit{Wickham v. American Tokyo Kasei, Inc.},\textsuperscript{323} a federal district court held that the HazCom Standard does not preempt common law tort claims. In that case, a worker brought suit against a chemical

\begin{itemize}
\item \textsuperscript{317} Id.
\item \textsuperscript{318} Id.
\item \textsuperscript{320} Henry, 125 F.3d at 1312.
\item \textsuperscript{322} Henry, 125 F.3d at 1314-15.
\item \textsuperscript{323} 927 F. Supp. 293 (N.D. Ill. 1996).
\end{itemize}
manufacturer for injuries he suffered when a container containing DMAD exploded.\textsuperscript{324} The plaintiff alleged that the defendant, in violation of the HazCom Standard, failed to warn about the chemical’s explosiveness, either through labeling, material safety data sheets, or catalog listings.\textsuperscript{325} The defendant argued that the OSH Act and the HazCom Standard expressly preempted the plaintiff’s claim.\textsuperscript{326} Relying on the \textit{Pedraza} case, the court concluded that the OSH Act’s savings clause, § 4(b)(4), protected state tort law from preemption.\textsuperscript{327} The court also rejected the defendant’s argument that all of the plaintiff’s remedies for violation of the OSH Act were limited to those that were expressly provided for in the Act.\textsuperscript{328} The court pointed out, however, that since the OSH Act was purely regulatory and did not provide any private remedies, preemption of common law tort actions would deprive injured workers of any recourse against manufacturers who violated OSHA standards.\textsuperscript{329} The court declared that “\textit{[i]t is obvious . . . that Congress, in enacting a statute designed specifically to protect employees and others from such potential hazards, did not intend such a result.”

\textbf{IV. THE WELDING FUME PRODUCTS LIABILITY LITIGATION}

The \textit{Welding Fume} litigation involved lawsuits by welders and other workers against manufacturers, suppliers, and distributors of welding rod products and their trade associations.\textsuperscript{330} The plaintiffs alleged they suffered neurological injuries as a result of inhaling manganese in the fumes given off during the welding process.\textsuperscript{331} The plaintiffs argued that the defendants failed

\begin{itemize}
\item \textsuperscript{324} Id. at 293.
\item \textsuperscript{325} Id.
\item \textsuperscript{326} Id. at 294.
\item \textsuperscript{327} Id.
\item \textsuperscript{328} Id. at 295.
\item \textsuperscript{329} Id.
\item \textsuperscript{330} \textit{In re} Welding Fume Products Liability Litigation, 364 F. Supp. 2d 669 (N.D. Ohio 2005).
\item \textsuperscript{331} Id. at 673.
\end{itemize}
to warn about these dangers. These cases were consolidated under the Multi-District Litigation statute for a pretrial proceeding. The defendants filed a motion to dismiss, arguing that the plaintiffs' common law tort claims were preempted by the OSH Act and the HazCom Standard. However, after reviewing the OSH Act and the HazCom Standard, a federal district judge concluded that neither the statute nor the OSHA regulation preempted the plaintiffs' claims.

A. The Welding Fume Court's Preemption Methodology.

The court began its preemption analysis by laying down some interpretive rules. Citing Medtronic and Cipollone, the court observed that "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." While this intent is normally derived from the text of the statute in question, the court, quoting from Medtronic, declared that it may also be revealed by the "structure and purpose of the statute as a whole," as well as by a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."

1. The Presumption Against Preemption. The court declared that a presumption against preemption applied to federal statutes that purported to limit the states' "historic police powers." Furthermore, this presumption not only applied to the threshold question of whether Congress intended to preempt state law at all, but also limited the scope of any preemption that Congress did intend. The presumption against preemption was reinforced by the existence a savings clause in the OSH Act. According to the court, the doctrine of federal preemption should be applied

332. Id.
333. Id.
334. Id.
335. Id. at 682.
336. Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).
337. Id. (quoting Medtronic, 518 U.S. at 486).
338. Id. (quoting Medtronic, 518 U.S. at 485).
339. Id. at 682-83.
narrowly in this case because the savings clause indicated that Congress did not intend to preempt state law completely. Finally, the court noted that when a preemption claim is based on agency regulations, it must examine these regulations carefully to determine exactly what they require and it should find preemption only when state law "directly conflicts with the federal regulations." This dictated that the HazCom Standard's preemptive language be narrowly construed.

2. The OSH Act's Savings Clause. The OSH Act's savings clause, § 4(b)(4), played a critical role in the Welding Fume court's preemption analysis. Relying on the Supreme Court's statements in Sprietsma and Geier, the court declared that the presence of a savings clause like § 4(b)(4) supported a narrow interpretation of the OSH Act's preemptive language. Furthermore, the court observed, "no other enactment contains a savings clause more broad." The savings clause not only declared that the OSH Act would "neither 'enlarge [n]or diminish' the common law," but it would also not "affect [the common law] in any other manner." In the court's view, "[i]t is difficult to imagine a more explicit statement of Congressional intention to preserve and not pre-empt state common law." This clear statement of congressional intent, coupled with the presumption against preemption, led the court to conclude that nothing in the OSH Act expressly preempted common law tort claims.

The court acknowledged that a savings clause would not necessarily prevent the OSH Act from impliedly preempts state tort law. However, it concluded that the existence of such a provision mandated that the court should define the scope of any implied preemption as

340. Id. at 683.
341. Id. at 684.
342. Id. at 683.
343. Id. at 687.
344. Id. at 688.
345. Id.
346. Id.
347. Id. at 683.
narrowly as possible. This meant that the court should not "hunt for a conflict" between state and federal law. The court then concluded that Congress intended to preempt state tort law, if at all, only "to the narrowest degree possible." The court observed that the savings clause was at least as broad and certainly more sweeping than the statutory language which gave the Secretary of Labor the authority to promulgate health and safety standards. Therefore, the HazCom Standard would preempt state tort law only when there was a clear, unavoidable conflict between them.

The court’s treatment of the OSH Act’s savings clause is consistent with the Supreme Court’s reasoning in Geier and Sprietsma and other preemption cases. In effect, a savings clause is an instruction from Congress to interpret the language of the statute’s preemption clause narrowly. Moreover, the savings clause is not limited to express preemption analysis, but might also be relevant to the implied preemption issue. This not only affects the scope of field preemption by narrowing any field that might be occupied by federal law, but it also affects conflict preemption analysis by foreclosing any "hunt for a conflict" by the court.

3. Implied Preemption. The court found that the OSH Act did not expressly preempt the plaintiffs’ common law tort claims. The court identified § 18(a) and § 18(b) as the textual sources of express preemption. Read together,
these two provisions delineated the OSH Act’s preemptive scope: “the states can set standards in areas where OSHA has not, but cannot set standards in areas where OSHA has” unless it does so as part of a state plan approved under the provisions of § 18(b). However, the court then interpreted the term “standard” to exclude tort law. The Welding Fume court was not alone in reaching this conclusion. The Supreme Court held in Gade that the OSH Act did not expressly preempt a state statute; and the Court’s reasoning in that case seems applicable to tort law as well. Furthermore, a number of other courts have also concluded that the OSH Act does not expressly preempt tort claims.

The court concluded that the HazCom Standard did not expressly preempt the plaintiffs’ failure-to-warn claims either. The court examined the HazCom’s preemption provision, which expressly preempted “any legal requirements” that purported to evaluate “the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees.” However, the court declared that this language applied only to workplace-specific regulations directed at employers and did not extend to the broader duty to warn under state tort law that applied to manufacturers and others.

4. Deference to Agency Interpretations. The HazCom Standard declared that it would preempt any “legal requirements” pertaining to “evaluating the potential hazards of chemicals” as well as “communicating information concerning hazards and appropriate protective

359. Id.
360. See id. at 689-90.
363. Id. at 690-91.
364. Id. at 693-94.
measures to employees." This language suggested that the HazCom standard would preempt the common law duty to warn as far as warnings directed at employees were concerned. However, the Welding Fume court largely disregarded OSHA’s interpretation. Instead, it found that the OSH Act’s savings clause defined the scope of OSHA’s power to preempt state tort law and that OSHA could not disregard congressional intent. This strategy enabled the court to avoid the Supreme Court’s dictate in Chevron Inc. v. Natural Resources Defense Council, Inc., which required courts to defer to agency interpretations.

Chevron Inc. v. Natural Resources Defense Council, Inc. teaches us that a court should not impose its own construction on the statute when a statute is silent or ambiguous about a specific issue, but should determine whether the agency’s position is based on a permissible construction of the statute. According to Chevron, if the agency’s interpretation is permissible, the court must defer to the agency, even if the court would have reached a different interpretation on its own. One could argue that the Welding Fume court should have applied the Chevron rule and deferred to OSHA’s interpretation of its power to preempt common law tort doctrines under the OSH Act. On the other hand, Chevron did not involve administrative preemption and some commentators believe that Chevron does not require courts to allow agencies to define the scope of their own powers. The court in Welding Fume obviously agreed with that view.

B. Substantive Preemption Issues

In its opinion, the Welding Fume court addressed a number of preemption issues. One was whether the OSH Act preempted state tort law to the same extent that it

366. Id. at 691-92.
368. Id.
369. Id. at 842-43.
preempted statutes or regulations. In addition, there were several issues more closely associated with the HazCom Standard. First, what sort of limits did the Act place on OSHA's power to expressly preempt state tort law when it promulgated the HazCom Standard? Second, did the HazCom Standard address the same "subject matter" as state tort law? Finally, did the HazCom Standard impliedly preempt state tort law on actual conflict grounds?

1. Tort Law Versus Positive Regulation. The court in *Welding Fume* distinguished *Gade* because that case involved positive regulations rather than principles of tort law. In *Gade*, the Court held that a state could not enforce an "occupational safety and health standard" of its own when an OSHA standard covered the same subject matter unless its standard was part of an approved state plan. On the other hand, the *Gade* Court declared that the OSH Act would ordinarily not preempt "state laws of general applicability" as long as they did not directly conflict with an OSHA standard. To avoid preemption, therefore, a tort-based duty to warn would have to be a law of general applicability and not a particularized occupational standard.

The court relied on the federal appeals court's reasoning in *Pedraza v. Shell Oil Co.* to conclude that the duty to warn was a law of general applicability. The *Pedraza* court had declared that common law torts did not constitute an "arrogation of regulatory jurisdiction over an occupational safety or health issue," but rather was more of "a neutral forum for the orderly adjustment of private disputes between, among others, the users and suppliers of toxic substances." According to the *Pedraza* court, this distinction between tort law and positive regulation was further strengthened by the OSH Act's savings clause. This provision expressly stated that the OSH Act "was not

373. *Id.* at 107.
374. 942 F.2d 48 (1st Cir. 1991).
376. *Pedraza*, 942 F.2d at 53.
377. *Id.* at 54.
intended to pre-empt state tort law even though tort liability might operate to regulate workplace conduct and implicitly set safety standards.”378

The Welding Fume court also considered whether principles of state tort law could be regarded as "occupational standards" for purposes of sections 18(a) and 18(b). The court observed that the OSH Act defined an occupational safety and health standard as one which "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."379 The court reasoned that this language contemplated something in the nature of “[workplace]-specific enactments of positive law by legislative or administrative bodies” rather than ex post application of broad legal standards to a particular set of facts by a judge or jury.380 Furthermore, the court declared, it made no sense to apply § 18(b) to common law tort principles. While a state could incorporate positive regulations into its plan for submission to the Secretary of Labor under § 18(b), it could hardly do so with common law tort principles.381 This suggested to the court that sections 18(a) and 18(b) were not intended to apply to state tort law.382 Apparently believing that there was safety in numbers, the court also pointed out that many other courts had reached the same conclusion.383

2. Preemption by the HazCom Standard. The court also considered whether OSHA had administratively preempted state tort law when it promulgated the HazCom Standard. The court concluded that the HazCom Standard did not

378. Id.
381. Id. at 690.
382. Id.
preempt state law because: (1) Congress did not authorize OSHA to preempt state tort law unless it created a clear and unavoidable conflict with OSHA standards; (2) the HazCom Standard's subject matter was limited to protecting employees, while the duty to warn under state tort law was much broader; and (3) since the HazCom Standard did not mandate any specific warning, it was possible for a manufacturer to comply with both legal obligations and, hence, there was no conflict between the HazCom Standard and the common law duty to warn.\footnote{384}

a) \textit{Statutory Limits on Administrative Preemption.} As mentioned earlier, the HazCom Standard expressly preempted "any legal requirements" which purported to evaluate "the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees."\footnote{385} This language, if read broadly, might be construed to preempt tort claims based on failure to provide adequate warnings. However, the court cautioned that the preemptive effect of this regulation could not exceed the preemptive scope of the agency's enabling statute.\footnote{386} In other words, a federal agency could preempt state law only when it acted within the scope of its congressionally delegated authority.\footnote{387} The court in \textit{Welding Fume} determined that the savings clause had limited the power of OSHA to preempt state tort law by enacting occupational health and safety standards.\footnote{388} Thus, any attempt by OSHA to expressly preempt state tort law entirely would be \textit{ultra vires}.\footnote{389} Instead, according to the court, the HazCom Standard could only preempt state tort law to the extent that there was a clear, unavoidable conflict.\footnote{390}

b) \textit{The HazCom Standard's "Subject Matter."} The HazCom Standard purported to preempt any state or local

\footnote{384. \textit{Id.} at 690-97.}
\footnote{385. \textit{Id.} at 690-91.}
\footnote{386. \textit{Id.} at 690.}
\footnote{387. \textit{Id.} at 691.}
\footnote{388. \textit{Id.} at 691-92.}
\footnote{389. \textit{Id.} at 692.}
\footnote{390. \textit{Id.}}
legal requirements “pertaining to this subject.”\textsuperscript{391} The “subject” referred to in the Standard was the evaluation of chemical hazards and the communication of information about such hazards to employees.\textsuperscript{392} The issue, therefore, was whether the subject matter of the HazCom Standard was the same as the subject matter of the common law duty to warn. If not, § 18(a) would leave the state free to regulate since there would be no OSHA standard that regulated the same activity.

As the court noted, the purpose of the HazCom Standard was to “ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees.”\textsuperscript{393} The common law duty to warn, on the other hand, was “a separate and different duty and does not arise out of the employer/employee relationship.”\textsuperscript{394} It was directed primarily at manufacturers and suppliers of welding rod products and not at the plaintiffs’ employers.\textsuperscript{395} Consequently, the court concluded that the “requirements” imposed by the common law duty to warn did not pertain to the same subject addressed by the HazCom Standard. This conclusion was reinforced by the fact that preempting common law tort claims would deprive injured workers of any remedy. Echoing \textit{Silkwood v. Kerr-McGee Corp.},\textsuperscript{396} the court in \textit{Welding Fume} expressed doubt that Congress without comment would allow OSHA to preempt tort claims, especially in light of the OSH Act’s savings clause.\textsuperscript{397}

Although the court’s narrow interpretation of the phrase “pertaining to this subject,” in the HazCom Standard, namely the communication of information by employers to employees, is plausible, it ignores the fact that the Standard was designed to ensure that warnings reached the \textit{ultimate} user, by imposing a duty on each party

\textsuperscript{392} Id.
\textsuperscript{393} Id. § 1910.1200(a)(1).
\textsuperscript{394} Welding Fume, 364 F.Supp. 2d at 693.
\textsuperscript{395} Id.
\textsuperscript{396} 464 U.S. 238, 251 (1984).
\textsuperscript{397} See Welding Fume, 364 F. Supp. 2d at 693.
in the distributive chain to pass the information along to the chain.\textsuperscript{398} Thus, while the HazCom Standard spoke in terms of employers and employees, its "subject matter" was arguably to communication of information from product manufacturer to workers at the end of the distributive chain like the plaintiffs.

c) The Absence of an Actual Conflict. Under the \textit{Gade} analysis, if the common law duty to warn was not concerned with the same subject matter as an OSHA standard, the standard would not preempt such laws of general applicability unless there was a substantial, clear or direct conflict between them.\textsuperscript{399} Using this approach, the \textit{Welding Fume} court concluded that no conflict existed because the defendants could comply with both state and federal warning requirements.\textsuperscript{400} In the first place, as the court noted, the HazCom Standard imposed no duty to warn at all on nonemployees or end-use consumers such as the plaintiffs.\textsuperscript{401} Furthermore, while the HazCom Standard required suppliers of chemical products to "convey the specific physical and health hazards of the chemicals" involved,\textsuperscript{402} it did not require them to use any particular language on their warning labels.\textsuperscript{403} Indeed, as the \textit{Welding Fume} court observed, manufacturers of welding products often used different language to comply with the HazCom Standard.\textsuperscript{404} Thus, it was clear that the common law duty to warn, whether based on negligence or strict liability in tort, did not conflict with the HazCom Standard's requirement that suppliers of chemical products provide "adequate" warnings.\textsuperscript{405}

\textsuperscript{398} For a discussion of the benefits of this type of arrangement, see Richard C. Ausness, \textit{Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information}, 46 SYRACUSE L. REV. 1185, 1226-39 (1996).

\textsuperscript{399} \textit{Gade}, 505 U.S. at 107.

\textsuperscript{400} \textit{Welding Fume}, 364 F. Supp. 2d at 694-95.

\textsuperscript{401} \textit{Id.} at 695.


\textsuperscript{403} \textit{Welding Fume}, 364 F. Supp. 2d at 695-96.

\textsuperscript{404} \textit{Id.} at 696.

\textsuperscript{405} \textit{Id.} at 697.
C. Policy Considerations

When congressional intent is ambiguous, as it is in the OSH Act, courts have considerable leeway when it comes to deciding preemption issues. In such cases, public policy considerations often play an important role in the court's decision. In this case, the decision in *Welding Fume* is consistent with such policies as federalism, product safety, and risk spreading. On the other hand, policies such as regulatory efficiency and tort reform arguably support a different result.

Federalism values would seem to support a narrow approach to preemption, especially when congressional intent to preempt is ambiguous. Under the American constitutional system of government, the states are considered to be "sister sovereigns" and not just mere political subdivisions of the central government. This arrangement is desirable because it encourages participation in the political process, thereby ensuring that government officials are more responsive to public needs and desires. In addition, the diffusion of power between state and federal governments protects citizens against overreaching or oppression by one branch of government by providing a counterweight. A federal approach also promotes diversity by allowing cultural differences to find expression in different places. Finally, the American federal system allows states to serve as "social


407. See Drummonds, supra note 30, at 522-23.

408. See New York v. United States, 505 U.S. 144, 154 (1992) (stating that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power") (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991)); Gregory, 501 U.S. at 458 (declaring that "[j]ust as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

laboratories," experimenting with new solutions to social and economic problems.\textsuperscript{410}

Even though the national government's powers have steadily increased over the years,\textsuperscript{411} the states continue to exercise substantial powers, especially in the areas of public health and safety.\textsuperscript{412} The Supreme Court has acknowledged the role of the states in the federal system, declaring that the historic police powers of the states will not be superseded by federal legislation absent the "clear and manifest" purpose of Congress.\textsuperscript{413} Occupational safety and health falls squarely within a traditional area of state responsibility. Consequently, a court should not allow either the OSH Act or the HazCom Standard to preempt state tort law when a congressional intent to preempt is not clearly manifested.

The promotion of product safety is also consistent with a narrow view of preemption. State tort law doctrines promote safety by shifting the costs of product-related injuries from consumers to product manufacturers. This forces manufacturers to choose between paying damages for product-related injuries or spending money to prevent them from occurring in the first place. However, this safety incentive is greatly weakened when the preemption doctrine protects manufacturers against liability for the sale of defective products. Consequently, product safety considerations caution against a finding of preemption when a federal statute says nothing about its effect on the validity of state tort law.\textsuperscript{414}

An important rationale behind strict products liability is risk-spreading, the mechanism by which losses are shifted from individual victims and spread among members of a larger group. In the case of defective products, losses

\textsuperscript{410} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

\textsuperscript{411} See Kaden, supra note 409, at 857-83.

\textsuperscript{412} See Drummonds, supra note 30, at 526.


are usually shifted to manufacturers who can spread losses more efficiently than individual victims. Since the preemption doctrine immunizes manufacturers from liability, it forces the victim, rather than the manufacturer, to bear the personal injury loss. Thus, when a federal regulatory statute is ambiguous, preemption should be disfavored to avoid denying compensation to those injured by defective products. Indeed, the Supreme Court in *Silkwood v. Kerr-McGee Corp.* echoed this sentiment when it declared that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."416

However, one can argue that the risk-spreading rationale is not as strong in OSH Act cases. Unlike most accident victims, losses are already spread for workers under the state workers compensation system. While workers compensation benefits are usually much lower than damage awards in tort cases, they are reasonably generous in many states.

On the other hand, a broad view of preemption may also help to achieve regulatory efficiency. Some commentators have argued that federal administrative agencies are more qualified than courts to establish product safety standards. Not only are administrative standards clearer and more specific than tort-based standards, but with their superior resources and technical expertise, federal agencies are usually better qualified than lay judges and jurors to develop technologically sound safety standards for complex products.419 Finally, agency decision-making


procedures are better suited than the courts to deal with complex social, economic, and scientific issues.\textsuperscript{420} This argument seems particularly applicable to OSHA standards. OSHA receives information from NIOSH and its safety and health standards are created by formal rulemaking procedures. This means that the agency receives comments on the proposed standard from industry representatives, scientists, and public interest groups.

Perhaps the most controversial argument for preemption is that it promotes “tort reform.” Preemption can be viewed as a “super-strong” version of the regulatory compliance defense for manufacturers whose products comply with regulatory standards.\textsuperscript{421} If one believes that regulatory standards are generally\textsuperscript{422} optimal, rather than minimal, a strong argument can be made for dismissing lawsuits that implicitly attack the adequacy of these standards. Therefore, if OSHA standards are also regarded as optimal, it may make sense to preempt lawsuits such as \textit{Welding Fume}. Preempting lawsuits against manufacturers by workers also forces workers to rely on workers compensation benefits and gets rid of the wasteful and duplicative system of dual compensation that currently exists.\textsuperscript{423}

D. A Final Assessment of the Welding Fume Decision

The \textit{Welding Fume} decision is doctrinally sound and seems to be consistent with Congress’s view of the roles of federal and state law in the area of occupational safety and health. The presumption against preemption and the savings clause support a narrow interpretation of the statute’s rather ambiguous preemptive language and suggest


\textsuperscript{422} Robert L. Rabin, \textit{Keynote Paper: Reassessing Regulatory Compliance}, 88 GEO. L.J. 2049, 2074 (2000) (stating that FDA regulations are intended to be optimal rather than minimal).

that Congress had no desire to foreclose tort claims by injured workers against product manufacturers.

The court’s treatment of the HazCom Standard is somewhat less persuasive. Although an administrative agency cannot preempt state law when Congress has clearly limited its powers, it is difficult to know what Congress’ intent was in this case. Likewise, one can question the court’s assertion that the HazCom Standard only regulates employer-employee relationships.

In addition, Welding Fume decision is consistent with federalism values. The states, as well as the federal government, have a significant interest in regulating occupational safety and health. Moreover, the states have a legitimate desire to ensure that workers receive fair compensation when they are injured. Finally, by allowing injured consumers to sue the manufacturers of defective products, the Welding Fume decision promotes many of the safety and risk-spreading goals of modern products liability law.

CONCLUSION

The structure of the OSH Act, with its savings clause and provision for state regulation, strongly suggests that it is not intended to preempt state tort claims.\textsuperscript{424} The HazCom Standard does contain a preemption provision which arguably preempts failure-to-warn claims. However, the court in Welding Fume concluded that OSHA had no authority to preempt such claims unless there was a direct and unavoidable conflict. The court’s reasoning in that case was persuasive and its decision seems consistent with congressional intent and public policy.

\textsuperscript{424} Owen, supra note 4, §14.4, at 918-19.