Legal Backgrounder

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PRESIDENT OBAMA'S "PREEMPTION MEMO": MUCH TO DO ABOUT VERY LITTLE

by

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On May 20, 2009, President Obama sent to executive department and agency heads a Presidential Memorandum entitled "Preemption" (published at 74 Fed. Reg. 24693). The memorandum purports to curtail "regulatory preemption," in other words, issuance of federal regulations (as distinguished from enactment of federal statutes) that preempt state law, including state common law that underlies product liability and toxic tort claims. It directs federal departments and agencies to ensure that any preemptive regulations, including those promulgated during the past ten years, are "justified under legal principles governing preemption." The memorandum also requires federal departments and agencies to preempt state law through issuance of a "codified regulation" (i.e., through notice-and-comment rulemaking), not merely by indicating in a *Federal Register* preamble that particular regulations are intended to have a preemptive effect.

The American Association for Justice (formerly known as the Association of Trial Lawyers of America) immediately released a statement applauding what it mischaracterized as the "Obama Memo on Complete Immunity Preemption," a carefully worded phrase which perpetuates the trial bar's myth that federal preemption provides manufacturers with blanket immunity from product liability suits.[1] According to the Association's statement,

> [t]he Obama Memo on regulatory preemption makes it clear that the rule of law will once again prevail over the rule of politics. The memo overturned actions by Bush administration bureaucrats who were influenced by powerful, well-connected corporations who wanted to re-write and re-interpret Congressional legislation, undermine the Constitutional system of checks and balances and put the public at risk and compromise laws designed to give Americans basic rights to hold wrongdoers accountable.

Aside from giving the trial bar an opportunity to issue this inflammatory and misleading press release, the Obama preemption memorandum actually accomplishes, and changes, very little.

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[1] *See* Lawrence S. Ebner, *Four Myths About Federal Preemption of State Tort Claims*, LGL BACKGND. (Wash. Lgl Found.), June 5, 2009), available at http://www.wlf.org/Upload/legalstudies/legalbackgrounder/0605099Ebner_LB.pdf.

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Federal Agencies Still Have Authority to Preempt State Law

The Obama preemption memorandum announces a "general policy . . . that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." No matter how broad or narrow the "legitimate prerogatives of the States" may be (a subject that has been debated for more than 220 years), hardly anyone is going to disagree with this "policy" pronouncement explicitly acknowledging the authority of federal departments and agencies to preempt state law.

Nor can a Presidential policy memorandum alter the legal basis for federal preemption – the Constitution's Supremacy Clause, Art. VI, cl. 2 – which provides that "the Laws of the United States . . . shall be the supreme Law of the Land," and that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In other words, "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

As used in the Supremacy Clause, "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*¸ 486 U.S. 57, 63 (1988). For this reason, the Supreme Court repeatedly "has recognized that an agency regulation with the force of law can pre-empt conflicting state requirements." *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009); *see also Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."); *Fidelity Fed. S&L Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

The Obama preemption memorandum asserts that "executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles." This statement reflects a fundamental misunderstanding of the broad authority that federal departments and agencies have to preempt state law (including state common law), *regardless* of whether the statutes that they administer contain express preemption provisions.

More specifically, it is well settled that a federal department or agency can promulgate a regulation which expressly preempts state law *even if* the statute that it administers does not expressly authorize the agency to do so. *See de la Cuesta*, 458 U.S at 154 ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . ."). Furthermore, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law." *City of New York*¸ 486 U.S. at 63-64 (internal quotation marks omitted). Thus, federal departments and agencies, in implementing and enforcing the statutes that they administer, generally have the authority to determine what particular types of state law (including state common law) should be displaced and to promulgate regulations that preempt such law. S*ee generally* Alan Untereiner, *The Preemption Defense in Tort Actions* (U.S. Chamber Institute for Legal Reform 2008), at 283-84 ("Agency Power To Issue Preemptive Regulations").

The memo acknowledges, as it must, that preemption of state law by executive departments and agencies through issuance of duly promulgated preemptive regulations is a legally proper practice. The memorandum states that federal departments and agencies "should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption." As discussed above, the relevant legal principles enable federal departments and agencies,

acting within the scope of the statutes that they administer, to promulgate regulations that either expressly or impliedly preempt state law. The Supreme Court has indicated that a court "should not disturb" a preemptive federal regulation if it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *de la Cuesta*, 458 U.S. at 154 (internal quotation marks omitted).[2]

The memorandum also directs federal departments and agencies to ensure that preemptive regulations, including any issued within the past 10 years, are justified under the legal principles discussed in Executive Order 13132. That Executive Order, entitled "Federalism," was issued by President Clinton in August 1999. *See* 64 Fed. Reg. 43255 (Aug. 10, 1999). Although the Executive Order articulates certain "legal principles" that may be inconsistent with the Supreme Court's broad recognition of federal agency authority to preempt state and local law, it clearly acknowledges that departments and agencies have authority to issue such regulations.

Federal Agencies Can Still Express Their Views on Preemption

The Obama preemption memorandum states that departments and agencies "should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation." This was arguably aimed at the previous administration's Food and Drug Administration (FDA), which issued a prescription drug labeling rule that did not expressly preempt state law, but was accompanied by a *Federal Register* preamble asserting FDA's conclusion that approval of drug labeling impliedly preempts failure-to-warn claims against manufacturers of FDA-approved prescription drugs. *See Wyeth v. Levine,* 129 S. Ct. at 1200-01 (discussing same).

The Court indicated in *Wyeth* that although in certain cases it has given "some weight" to agency views on the impact of state tort law on federal statutory objectives, FDA's "preemption preamble" was entitled to "no weight." *Id.* at 1201, 1204. According to the Court, FDA's views, as presented in the Federal Register preamble, were "inherently suspect" in light of the agency's "procedural failure" in not offering any prior opportunity for state or public comment after reversing its own longstanding position on tort preemption. *Id.* at 1201-02. Thus, the Obama preemption memorandum merely instructs departments and agencies to refrain from engaging in a rarely utilized practice which the Supreme Court already has found to be problematic – expressing an agency's views on preemption in a *Federal Register* preamble in the absence of a duly promulgated regulation that expressly preempts state law.

Further, contrary to the wishful thinking of some trial lawyers who already have tried to make more out the Obama preemption memorandum than it really is, nothing in the memorandum affects, or could affect, the weight – which varies from case to case – that courts give to *amicus curiae* briefs expressing the views of the United States (or federal agencies) on the preemptive effect of duly promulgated regulations. The memorandum does not address *amicus* briefs at all, much less suggest that a cognizant federal department's or agency's views in an *amicus* brief on the preemptive effect of its own regulations (or statutes) is in any way improper or never entitled to at least some weight. In fact, the Supreme Court frequently invites the Solicitor General to submit *amicus* briefs expressing the views of the United States (which typically reflect the views of the relevant federal agencies) in cases involving federal preemption

[2]The Supreme Court appears to be less deferential to federal regulations that interpret express preemption provisions contained in federal statutes. *See, e.g., Riegel v. Medtronic, Inc.,* 128 S. Ct. 999, 1011 (2008) (stating that a Food and Drug Administration regulation interpreting the scope of a medical device-related statutory preemption provision "can add nothing to our analysis but confusion").

issues. *See, e.g., Am. Home Prods. Corp. v. Ferrari*, No. 08-1120 (June 8, 2009) (Order inviting the Solicitor General to express the views of the United States with respect to a certiorari petition seeking review of a Georgia Supreme Court decision holding that the National Childhood Vaccine Injury Compensation Act does not expressly preempt all design defect claims). The Court gives the government's views whatever weight it deems appropriate under the circumstances. *See, e.g., Wyeth*, 129 S. Ct. at 1203 n.13 (indicating that for the same reasons the FDA preemption preamble was entitled to no weight, "[t]he United States amicus brief is similarly undeserving of deference"); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("plac[ing] some weight upon DOT's interpretation of [a federal motor vehicle safety standard's] objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives") (internal quotation marks omitted).

Conclusion

The nation's trial lawyers claim that they are "heartened" (to use the American Association for Justice's term) by President Obama's preemption memorandum. But in reality, aside from burdening federal lawyers with the task of conducting a vague review of preemptive regulations, the memorandum should have little impact on existing or future federal preemption of state law. Indeed, any Administration that supports increased federal scrutiny of potentially hazardous products should support, rather than reflexively oppose, statutory or regulatory preemption that fosters, preserves, and protects the regulatory efforts and determinations of federal departments and agencies.

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