Products Liability and Preemption: A Judicial Framework

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INTRODUCTION

THE federal government regulates products ranging from drugs such as the DPT vaccine[1] to flammable clothing,[2] and from automobiles[3] to cigarettes[4] to tampons[5] and food.[6] Because the federal government plays such a predominant role in regulating products, it is not surprising that federal preemption has become an increasingly popular defense in recent years in products liability cases.[7] Defendants in products liability cases argue that the state common law tort actions are preempted by federal regulations.[8] If the court accepts the argument, it will not hear the substantive issues plaintiffs raise because the federal regulation controls the case rather than state products liability laws. To the extent the federal preemption defense is successful, the merits of the case are never considered.[9] Instead, the court concludes that compliance with the federal regulation is all that is required and that a state common law tort claim alleging that the product is defective cannot be prosecuted. Since the manufacturers in these cases have complied with all federal regula-

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1. Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988); Public Health Service Act, 42 U.S.C. §§ 201-300aaa-13, (1982).
2. Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1988).
3. Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1988).
4. Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1332-1341 (1988).
5. Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988).
6. *Id.*
7. Most of the products liability cases discussed in Part III of this article, for example, were decided after 1985. *See infra* notes 106-227 and accompanying text.
8. For a discussion of the preemption doctrine in general, see *infra* notes 13-56 and accompanying text. For a discussion of the preemption doctrine in cases of alleged products liability see *infra* notes 106-227 and accompanying text.
9. *See infra* notes 13-15 and accompanying text.

tions, there generally is no basis for compensating the injured victim under federal law, and, if the products liability claim is preempted, the victim cannot be compensated pursuant to state law either. Thus, the question is whether or not the federal regulation alone should govern these cases and displace state products liability laws. In general, federal product regulations have enhanced product safety, but such regulations should not necessarily displace common law products liability claims.

In determining whether to preempt a products liability claim, courts should strive to balance two competing considerations: the preemption doctrine and the policies that underlie products liability law. This balance can be effected in a manner that is fair to both the person injured by a defective product and to its seller; courts should preempt only those cases where there is an express provision which mandates preemption, or where there is a conflict between the federal and state regulations that makes compliance with both impossible. Although there are additional preemption categories that courts must continue to consider, this article suggests that the other categories are generally not appropriate bases for preemption in products liability cases.[10] Products liability laws, in large part, are designed to benefit the public by making it easier for victims of defective products to receive compensation for their injuries.[11] Limiting preemption of products liability claims to cases of express preemption or cases in which compliance with both the state and federal law is impossible furthers the policies underlying products liability laws. Product manufacturers should, however, receive some benefit for compliance with federal regulations. Thus, in order to achieve a fair and equitable balance between protecting the consumer on one hand, and recognizing that the seller of the product has complied with the federal regulation on the other hand, this article suggests that where such compliance is found, damages be limited either to an absolute dollar amount or to compensatory damages.[12]

Part I of this article examines the preemption doctrine while Part II explores the development of the law of products liability. Part III analyzes products liability cases in which the preemption defense has been raised—focusing on cases involving cigarettes and automobiles—and ex-

10. *See infra* notes 235-47 and accompanying text.

11. *See infra* note 84 and accompanying text.

12. *See infra* notes 248-49 and accompanying text. Punitive damages, which are sometimes available under state law, *see, e.g.*, Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980); would not be available under this proposal. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

amines the approaches taken by the courts. Finally, Part IV articulates a framework for courts to use when the preemption defense is asserted in products liability cases.

I. THE PREEMPTION DOCTRINE

The preemption doctrine emanates from Article VI of the United States Constitution, which mandates the supremacy of federal law over state law.[13] When Congress or some other federal agency regulates a field of law also regulated by the state, the courts must determine whether the state regulation is preempted by the federal regulation.[14] Preemption may be based on an express or implied legislative or regulatory determination that federal law should preempt state law.[15] If a court finds that state law is either expressly or implicitly preempted, the state law cannot stand, and the federal regulation controls.

As the term suggests, express preemption requires an express statement in the federal regulation that prohibits the state regulation at issue.[16] For example, if a federal regulation provided that all widgets produced in the United States must be three-quarters of an inch in diameter, and further provided that "in the interest of uniformity, any state law regulating the diameter of widgets is hereby preempted," a court would find that a state law that allowed one inch widgets was expressly preempted.[17] Express preemption is rare. More often than not, Con-

13. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

14. Preemption may be based not only on federal legislation, but on actions taken by federal administrative agencies pursuant to the authority granted them by such legislation. *See* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1988) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."). *See also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982); Although this article discusses and therefore refers primarily to Acts of Congress, the same principles and arguments apply to acts of federal administrative agencies.

15. *See infra* notes 16-56 and accompanying text.

16. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977).

17. In Jones v. Rath Packing Co., 430 U.S. 519 (1977), the state of California and the federal government each enacted separate regulations governing the extent to which the actual weight of a package of meat could deviate from the stated weight on the package. The federal regulation required that a package of meat contain " 'an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That . . . reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary.' " *Id.* at 529 (citation omitted). The Secretary of Agriculture promulgated a regulation pursuant to the foregoing authority to permit reasonable variations due to specified factors. *Id.* The

gress has either been silent on the issue of preemption,[18] or, if it has included a preemption provision, it has not expressly preempted the precise state regulation at issue.[19] In such cases, a court faced with a preemption defense must determine whether the federal regulation preempts state law by implication.

Implied preemption may be based on several different grounds. First, the court may determine that the federal legislation is so comprehensive as to suggest a Congressional intent to occupy the field.[20] If Congress has occupied the field, even compatible state laws are not permitted.[21] The test for such federal exclusivity is whether the federal regulation is so comprehensive as to indicate an intent to occupy the field,[22] and/or whether the need for uniformity suggests that Congress

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federal act also had an express preemption provision that prohibited "the imposition of '[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' " the Act. *Id.* at 530 (citation omitted). Accordingly, the Court held that a California provision which provided that " 'the average weight or measure of the packages or containers in a lot of any commodity sampled shall not be less . . . than the net weight or measure stated upon the package.' " *Id.* at 526 (citation omitted), was expressly preempted by The Federal Meat Inspection Act. *Id* at 532.

18. *See, e.g.*, Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712 (1985) (construing the Public Health Service Act).

19. It is possible for Congress to have an express preemption provision in a statute without expressly preempting the precise state regulation in a given case. In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377-78 (1988), for example, the Court held that while Congress included an express preemption provision governing depreciation regulations for *inter*state communications, it did not preempt depreciation regulations relating to *intra*state communications. Likewise, in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), there were federal regulations that expressly preempted certain safety aspects of nuclear regulation. The Court held, though, that the regulation did not expressly preempt a common law tort claim in which there was an award of punitive damages. *Id.* at 258.

20. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) ("Congress has . . . occupied the field [of water pollution control] through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."); Campbell v. Hussey, 368 U.S. 297, 301 (1961) ("In . . . our view . . . Congress . . . preempted the field and left no room for any supplementary state regulation."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234 (1947) ("Congress did more than make the Federal Act paramount over state law in the event of conflict. It . . . terminat[ed] the dual system of regulation."). *Cf.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983) ("[T]he Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.").

21. *Silkwood*, 464 U.S. at 248 ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."); *Pacific Gas*, 461 U.S. at 212-13 ("State safety regulation is not pre-empted only when it conflicts with federal law."); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Campbell*, 368 U.S. at 302 ("We have then a case where the federal law excludes local regulation, even though the latter does no more than supplement the former."); *Rice*, 331 U.S. at 230.

22. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973) ("[T]he pervasive control vested in EPA and in FAA . . . seems to us to leave no room for . . . local controls."); *Rice*, 331 U.S. at 230 ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

intended to preempt any state regulation of the same subject matter.[23] It is no simple matter to determine whether Congress has occupied a field and, if it has, further to determine the scope of the occupied field. A court may find that Congress has occupied *a* field, but the field so occupied may not encompass the issue at hand.[24] Instead, the field may be very narrowly defined so as not to preempt the state regulation. In *Silkwood v. Kerr-McGee Corp.*,[25] for example, the Court found that Congress had occupied the field of nuclear safety concerns. Occupation of that field however, did not preempt common law tort claims raised by Karen Silkwood's estate after Silkwood was contaminated with high levels of plutonium, because Congress did not intend to interfere with state common law tort remedies available to those injured by nuclear incidents. Since the field Congress occupied did not encompass plaintiff's tort claim, that claim was considered on the merits and an award of punitive damages upheld.[26]

The second ground upon which implied preemption may be based is a conflict between the state and federal laws. For example, there may be a physical conflict which prevents compliance with both the federal and state provisions.[27] A physical conflict exists when differences in the requirements of federal and state regulations render it impossible to comply with both. In the widget example described above,[28] for example, if there were no express preemption provision but the federal law mandated that all widgets produced in the United States be three-quarters of an inch in diameter, while the state law mandated that widgets produced in that state be one inch in diameter, there would be a physical conflict that would render it impossible for a manufacturer to comply with both the

23. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579 (1981) ("It would undermine the Congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission."); Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act."); *Campbell*, 368 U.S. at 301.

24. In *Pacific Gas*, 461 U.S. 190, for example, the Court noted that Congress occupied the field of nuclear safety regulation. It held, however, that a state statute regarding nuclear power was not within the scope of the field occupied by federal regulation since the state provision was enacted for economic rather than safety purposes. *Id.* at 216. Since federal preemption was only of *safety* regulations, *economic* regulations were permitted. *See also* Perez v. Campbell, 402 U.S. 637 (1971).

25. 464 U.S. 238 (1984).

26. *Id.* at 258.

27. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (no physical conflict).

28. *See surpa* notes 16-17 and accompanying text.

federal and state regulations. When such a physical conflict exists, federal law controls.

A court may also find that a state regulation conflicts with federal provisions even though physical compliance with both state and federal law is possible. A conflict between state and federal law may be found "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[29] Determining whether there is an "objectives conflict" involves a two-pronged analysis. First, the court must ascertain the purpose of the federal regulation. Second, the court must decide whether the state regulation is compatible with that purpose.[30] This process requires an examination of the language and purposes of both the federal and state regulations to assess their compatibility.[31]

Finally, state and federal laws may conflict because the state law "interferes with the *methods* by which the federal statute was designed to reach" the Congressional goals.[32] Thus, even where the objective of the state and federal laws is the same, the state law may be preempted if it interferes with the manner in which the federal regulation seeks to achieve that goal.[33] In any conflict between state and federal law, whether it is a physical conflict, an objectives conflict, or a methods conflict, the conflict must "necessarily" exist—the mere possibility of a conflict is not enough for a court to find preemption.[34]

The implied preemption doctrine is easy to articulate but difficult to

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29. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See also* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1968); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

30. Making a preemption determination "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." Perez v. Campbell, 402 U.S. 637, 644 (1971).

31. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) ("This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."). Interpreting the federal and state regulations is virtually always required in preemption cases. *See infra* notes 35-38 and accompanying text.

32. International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (Court found that to allow state law claims would interfere with the permit system established by Congress under the Clean Water Act.).

33. *Id.* at 494 ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution.").

34. Goldstein v. California, 412 U.S. 546, 554-55 (1973):

> We must . . . be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those where conflicts *will necessarily* arise. 'It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state]

apply.[35] "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[36] Thus, whenever two sets of regulations are being examined for compatibility, the court must engage in the process of statutory construction. The necessary first step in such an analysis is for the court to examine the language of the federal regulation and its legislative history.[37] The court must then compare the language and purpose of the state regulation to determine the question of preemption.[38]

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sovereignty.'" (emphasis in original) (quoting THE FEDERALIST No. 32 at 243 (B. Wright ed. 1961)).

See also Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.").

35. Palmer v. Liggett Group Inc., 825 F.2d 620, 625-26 (1st Cir. 1987) ("[W]e do not find [the implied pre-emption categories] necessarily helpful, and certainly do not deem them determinative in ascertaining preemption. Rather, the gist of preemption is whether Congress . . . impliedly . . . meant to displace state law or state law concepts in enacting the federal law."). As Professor Tribe has explained, "[t]hese . . . categories of preemption are anything but analytically air-tight. For example, even when Congress declares its preemptive intent in express language, deciding exactly what it meant to preempt often resembles an exercise in implied preemptive analysis." L.TRIBE, AMERICAN CONSTITUTIONAL LAW, at 481 n.14 (1988).

36. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369 (1986). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (The "sole task is to ascertain the intent of Congress."); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 210 (1959) ("[T]he proper approach is to determine whether the continued existence of the state law is consistent with the general purpose of the federal statute by seeking to define the evil Congress sought to remedy and the method chosen to effectuate its cure.") (footnote omitted).

37. The Court often examines, in addition to the language of the statute or other regulation, Congressional Committee Reports, debates, hearings and other sources of legislative history. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 317-18 (1981); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 634-37 (1973). Although there has been a recent re-emergence of the "plain meaning rule" whereby advocates urge that legislative history be ignored, the better approach to statutory interpretation includes an examination of all relevant material. *See* Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988):

> American public law has quite properly recognized that statutory meaning is necessarily greatly influenced by statutory context. Legislative history is part of that context, and some aspects of it—such as committee reports—will frequently represent the most intelligent exposition available of what the statute is all about. Legislative history is, after all, merely evidence of intent. That it may not be perfectly reliable evidence is no reason to exclude it from consideration entirely.

Id. at 448. *See also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947). *See also infra* note 147.

38. The purpose behind the state statute can be dispositive on the issue of preemption. In Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983), for example, the Court noted that the state's prohibition on nuclear power plant construction could conflict with the federal statute. As the Court explained, "a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC [Nuclear Regulatory Commission]. . . that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal." 461 U.S. 190, 213 (1983). Since Congress had occupied the field of nuclear safety, the state statute would conflict with the federal if it were a safety measure.

There is a presumption against preemption that affects the analysis of whether express or implied preemption exists.[39] The presumption against preemption is based in part on principles of federalism[40] and a concomitant hesitancy to intrude unduly on state powers. Where areas of traditional state regulation such as health and safety are involved, the Supreme Court has been particularly reluctant to preempt state law.[41] Restraint concerning preemption of state laws addressing health and safety also extends to state tort laws.[42] Because of this presumption

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The state regulation was an economic one rather than one aimed at nuclear safety, though, and since the federal provisions were not designed to address the issue of economic regulation, there was no preemption. *See supra* note 24. This is not to suggest that any avowed state purpose will be given credence by the Court. The rationale for the Supreme Court's adherence to the state's avowed purpose in *Pacific Gas & Electric* was deference to the Court of Appeals for the Ninth Circuit which had thoroughly examined the state regulation. 461 U.S. at 213-14.

39. *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); Chicago & North Western Transportation Co, v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) ("Preemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' ") (quoting Florida Lime & Avocado Growers Inc., v. Paul, 373 U.S. 132, 142 (1963)); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *But see* International Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987) ("Although courts should not lightly infer pre-emption, it may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (footnote and citation omitted).

40. Goldstein v. California, 412 U.S. 546 (1973). In *Goldstein*, the Court, quoting from The Federalist, explained:

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

Goldstein, 412 U.S. at 552-53 (emphasis in original) (quoting THE FEDERALIST No. 32, at 241 (B. Wright ed. 1961)).

41. *See Rice*, 331 U.S. at 230 ("Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citation omitted). *See also* English v. General Elec. Co., 110 S.Ct. 2270 (1990); California v. ARC America Corp., 490 U.S. 93, (1989); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716, 719 (1985) (There is a presumption "that state and local regulation of health and safety matters can constitutionally coexist with federal regulation. . . .[T]he regulation of health and safety matters is primarily and historically, a matter of local concern.").

42. Silkwood v. Kerr-Mcgee, 464 U.S. 238, 255 (1984) ("Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted.") ; International Paper Co. v. Ouellette, 479 U.S. 481, 503-04 (1987) (Brennan, J. dissenting). This is not to say that the United States Supreme Court has never preempted a state common-law tort claim. *See, e.g.*, Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981). But the Court proceeds with caution when doing so. *See* Ferebee v. Chevron Chemical

against preemption, courts are inclined not to preempt a state regulation when the federal regulation is ambiguous about preemption, or where valid arguments can be made both for and against preemption.[43] Alternatively, courts conclude that the area of preemption is so narrow that it permits the state regulation.[44] Thus, when courts construe federal and state laws for compatibility they must do so keeping in mind the presumption against preemption.

In addition to state statutes, state common law causes of action may be preempted because an award of damages can have a regulatory effect.[45] For example, in *San Diego Building Trades Council v. Garmon*,[46] the Court held that a common law claim may be preempted. The issue before the Court in *Garmon* involved the jurisdiction of the National

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Co., 736 F.2d 1529, 1542 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984) (Determination of tort remedies "is a subject matter of the kind . . . traditionally regarded as properly within the scope of state superintendence.") (quoting Florida Lime & Avocado Growers Inc., v. Paul, 373 U.S. 132, 144 (1963)).

To preempt a common law cause of action would often leave the victim with no avenue for redress. Since states have a legitimate interest in compensating tort victims, courts have been hesitant to preempt such claims. *See* Gingold v. Audi-NSU Auto Union, A.G., 389 Pa. Super. 328, 340, 567 A.2d 312, 318 (Pa. Super. Ct. 1989) ("The presumption against preemption is explained on grounds which recognize, among other things, the States' long established interest in providing compensation for victims of torts."); Kociemba v. G.D. Searle & Co., 680 F. Supp. 1293 (D. Minn. 1988). *See also* International Paper Co. v. Ouellette, 479 U.S. 481 (1987). In *Ouellette* the Court did not preempt all state common law nuisance claims. Unlike *Silkwood*, however, there was an express savings clause which left certain authority to regulate water pollution in the hands of the states. *Id.* at 493.

43. *See Gingold*, 389 Pa. Super. at 340-41, 567 A.2d at 319 ("[I]f we are left in doubt as to congressional purpose, we should be slow to find preemption, 'for the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.' ") (quoting Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943)).

See also Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986), where the Court was confronted with the issue of whether the Communications Act of 1934 preempted state depreciation regulations used to set intrastate rates. In deciding that the Act did not preempt the states' ability to regulate intrastate depreciation, the Court noted that, "[l]ike many statutes, the Act contains some internal inconsistencies, vague language, and areas of uncertainty. It is not a perfect puzzle into which all the pieces fit. Thus, it is with the recognition that there are not crisp answers to all of the contentions of either party that we conclude that [the Act] represents a bar to federal pre-emption of state regulation over depreciation . . . for intrastate ratemaking purposes." *Id.* at 379.

44. *See supra* notes 24-26 and accompanying text.

45. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *Silkwood*, 464 U.S. at 249, 256 ("It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damage liability if it does not conform to state standards. . . .").

46. 359 U.S. 236 (1959).

Labor Relations Board,[47] and the normal presumption against preemption[48] did not apply. Instead there was a presumption in favor of preemption.[49] The Court's decision to preempt the common law claim in *Garmon* does not necessarily affect other cases where the normal presumption against preemption applies. Thus, while common law claims may be preempted, such preemption is relatively rare. In fact, courts have been more reluctant to preempt common law claims where the presumption against preemption was in force,[50] acknowledging that awards of common law damages do not have the same regulatory effect as legislation or administrative regulations.[51] Such awards simply require defendants to pay plaintiffs certain sums of money. They do not mandate any other action by defendants.

In *Silkwood*,[52] the Supreme Court acknowledged this distinction between an award of common law damages and regulation by statute and held that an award of punitive damages was not preempted by federal law, notwithstanding the Court's finding that Congress occupied the field of nuclear safety and that states were therefore prohibited from regulating safety aspects of nuclear development.[53] The Court acknowledged that the juxtaposition of an award of punitive damages with the exclusive power of the federal government to regulate the safety aspects of nuclear development created a certain "tension,"[54] but it concluded that Congress intended to permit that tension to exist.[55] As the Court explained:

> In sum, it is clear that . . . Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is a tension between the conclusion that safety regulation is the exclusive concern of the

47. *Id.* at 238.

48. *See supra* note 39 and accompanying text.

49. Garrett v. Ford Motor Co., 684 F. Supp. 407, 410 (D.Md. 1987).

50. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); English v. General Electric Co., 110 S.Ct. 2270 (1990).

51. Gingold v. Audi-NSU-Auto Union, A.G. 389 Pa. Super. Ct. 328, 345, 567 A.2d 312, 321 (Pa. Super. Ct. 1989) ("While we do not dispute that common law damage awards can have a regulatory impact, common law claims and regulation by state agencies or legislatures are not identical.") (citation omitted); Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1541 (D.C. Cir. 1984) ("[A common law damage award may] impose a burden on [defendant] but it is not equivalent to a direct regulatory command.").

52. 464 U.S. 238 (1984).

53. *Id.* at 250.

54. *Id.* at 256.

55. *Id.*

> federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But . . . Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.[56]

In addition to express preemption and instances in which Congress has occupied the field, a state law may conflict with federal law because of a physical conflict, an objectives conflict, or a methods conflict. In addition, there is a presumption against preemption and a distinction between regulation by statute and regulation by a common law award of damages. With these principles in mind, the next section briefly discusses the development of the law of products liability in order to lay the foundation for analyzing the cases in section III, in which both products liability claims and preemption claims are at issue.

II. THE DEVELOPMENT AND EXPANSION OF PRODUCTS LIABILITY LAW

Products liability governs an individual's ability to receive compensation for personal injuries or property damage caused by a defective product.[57] Although there are today several theories upon which a plain-

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56. 464 U.S. at 256. Even Justice Blackmun, who, along with Justice Marshall, dissented in *Silkwood*, agreed that an award of compensatory damages would have only an indirect impact on the utility. They dissented because they felt that an award of punitive damages had too great a regulatory effect on defendant and that only compensatory damages should have been awarded. As they explain, "[t]he crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims." *Id.* at 263. Justices Blackmun and Marshall further described the distinction between direct regulation by legislation and indirect regulation by a common law award of damages:

> When a victim is determined to be eligible for a compensatory award, that award is calculated by reference to the victim's injury. Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. This presumably is what Congress had in mind when it preempted state authority to set administrative regulatory standards but left state compensatory schemes intact. Congress intended to rely solely on federal expertise in setting safety standards, and to rely on States and juries to remedy whatever injury takes place under the exclusive federal regulatory scheme. Compensatory damages therefore complement the federal regulatory standards.

Id. at 263-64 (Blackmun, J., dissenting).

57. M. MADDEN, PRODUCTS LIABILITY § 1.1 (2d ed. 1988). The product need not be defective if the cause of action is based on misrepresentation. *Id. See infra* note 85.

tiff may base a products liability claim,[58] until 1916, such claims depended upon privity between plaintiff and the manufacturer.[59] A plaintiff could recover for injuries sustained by a defective product only if he or she was the immediate purchaser or in privity with the seller.[60] A limited exception to the privity rule was established in cases where the product, to the manufacturer's[61] knowledge, was imminently dangerous.[62] In general, *caveat emptor* was the theory of the day.[63] This theory was based on the notion that buyers could protect themselves adequately by getting express warranties regarding product safety from sellers.[64]

Such limited ability to recover for damage caused by defective products perhaps helped spur the industrial revolution forward,[65] but it proved too harsh on victims of defective products.[66] For example, the privity requirement failed to account for purchases through middlemen, gifts, or injuries to bystanders. Moreover, many buyers were unaware that only an express warranty would protect them and therefore they never sought such protection. One response to the general rule of *caveat*

58. A products liability action may be based on breach of warranty (express or implied), negligence, strict liability or misrepresentation. M. MADDEN, *supra* note 57 at § 1.1.

59. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), is generally blamed for expanding the privity concept from contracts to torts.

60. W. PROSSER AND KEETON ON TORTS 681 (W. Keeton 5th ed. 1984) (hereinafter "PROSSER ON TORTS").

61. This section generally refers to "manufacturers." The rules set forth below, also apply to middlemen and other sellers as well. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1965).

62. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903).

63. Colorado Mortgage & Investment Co., Ltd. v. Giacomini, 55 Colo. 538, 136 P. 1039 (1913); Berg v. Rapid Motor Vehicle Co., 78 N.J.L. 724 (1910); Daley v. Quick, 99 Cal. 179, 33 P. 859 (1893).

64. PROSSER ON TORTS, *supra* note 60, at 679.

65. Heath v. Sears, Roebuck & Co., 464 A.2d 288, 123 N.H. 512 (1983); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); Atkins v. American Motors Corp., 335 S.2d 134 (Ala. 1976); Dippel v. Sciano, 155 N.W.2d 55, 37 Wis. 2d 443 (1967).

66. Courts dissatisfied with these rigid requirements began to grant relief based on express warranty even where there was no privity. *See, e.g.*, Baxter v. Ford Motor Co., 12 P.2d 409 (Sup. Ct. Wash. 1932). In *Baxter*, plaintiff contended that Ford Motor Company expressly warranted that the windshield window of the car he purchased was made with shatterproof glass. Ford had distributed brochures which claimed that their cars were made with "Triplex shatter-proof glass windshield." Yet when a pebble hit plaintiff's car it caused the glass to shatter and injure plaintiff. The court permitted plaintiff's claim to go forward notwithstanding the fact that plaintiff had purchased the car from a car dealer and there was therefore no privity between plaintiff and Ford Motor Company.

It is not clear whether the *Baxter* court relied on an express warranty theory or whether it found misrepresentation on the part of Ford Motor Co. A products liability claim may be based on misrepresentation, RESTATEMENT (SECOND) OF TORTS § 402B (1966), as long as the misrepresentation is of a material fact that causes reasonable reliance by the consumer. *Id.* In such cases, the product need not be defective since liability is based on the representation by the seller rather than on the product. *Id.*

The courts that find *express* preemption, while paying lip service to the savings clause, essentially ignore it.[198] Their rationale is that section 1397(c) only applies to matters not covered by the FMVSS, or to claims of negligent compliance with the FMVSS.[199] Yet there is nothing in the Automobile Safety Act or its legislative history to support such a narrow construction.[200] The opinions that nevertheless give it this narrow construction are poorly reasoned. Savings clauses must be construed in a manner that furthers rather than impairs congressional intent.[201]

Most of the automobile cases in which preemption has been found have been based on implied preemption. Like the cigarette cases, the courts faced with preemption claims in automobile cases generally do not conclude that Congress has occupied the field,[202] or that there is a physical conflict between the federal statute and the state common law action.

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provides that air bags are not to be required by the Department of Transportation. *See supra* note 194. Section 1410(b) is not an absolute prohibition, however, on the Department of Transportation's ability to require airbags. It simply establishes the procedural prerequisites for doing so. *Id.*

198. *See* Staggs v. Chrysler Corp., 678 F. Supp. 270, 272-73 (N.D.Ga. 1987), where the court, after acknowledging the existence of § 1397(c) in an earlier part of the opinion, went on to state, "even though the.[Automobile Safety] Act does not speak to standards established by common law tort liability, the court concludes that Congress impliedly preempted the area of occupant restraint systems."

199. Cox v. Baltimore County, 646 F. Supp. 761, 764 (D.Md. 1986);Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D.Mo. 1986); Hughes v. Ford Motor Co., 677 F. Supp. 76, 83 (D.Conn. 1987).

200. *See* Taylor v. General Motors Corp., 875 F.2d 816, 825 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990) ("[W]e are inclined to reject the [defendants'] construction since it would render an entire section of the [Automobile] Safety Act superfluous."); Gingold v. Audi-NSU-Auto Union A.G., 389 Pa. Super. 328, 349; 567 A.2d 312, 323 (Pa. Super. Ct. 1989); Kolbeck v. General Motors Corp., 702 F. Supp. 532, 537 (E.D.Pa. 1988) ("The courts which find express preemption of passive restraint claims construe the savings clause to apply only to matters not covered by [federal safety standards] or in cases of negligent compliance with [them]. I am unable to find a basis to support such a narrow reading of the effect of section 1397(c).").

201. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (Savings clause in Coastal Zone Management Act precluded preemption of state law.); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (The court relied on savings clauses to conclude that state law was not preempted.). The existence of a savings clause is not conclusive, however, on the issue of preemption. *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

202. Kolbeck v. General Motors Corp., 702 F. Supp. 532, 536 n.6 (E.D.Pa. 1988) ("The Safety Act clearly was not designed to occupy the entire field of automotive safety standards."); Chrysler Corp. v. Rhodes, 416 F.2d 319, 325 (1st Cir. 1969). It seems clear from the language of the Automobile Safety Act itself that Congress did not occupy the field since § 1397(c) expressly reserves some authority for the states. *But see* Doty v. McMahon, Prod. Liab. Rep. (CCH) ¶ 11,273, at 31,372, 31,373, 1987 U.S. Dist. Lexis 13965 (D.D.C. 1987) ("Congress has legislated so comprehensively in the area of motor vehicle safety through the [Automobile] Safety Act that it has 'left no room for the States to supplement [Federal law.]' " (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).