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# **Silkwood v. Kerr-McGee Corp.: Federal Regulatory Scheme in Nuclear Energy Industry Does Not Preclude Application of State Tort Law**

## **I. Introduction**

The ability to impose punitive damages in a tort claim has traditionally been within the jurisdiction of a state court.<sup>1</sup> In *Silkwood v. Kerr-McGee Corp.*,<sup>2</sup> the United States Supreme Court reaffirmed this authority in the face of strong opposition.<sup>3</sup> This opposition, voiced largely by representatives of the nuclear energy industry and the federal agencies<sup>4</sup> charged with its regulation, was overcome by a slim margin in the Court.<sup>5</sup> This controversy was based on an action for personal injuries brought under Oklahoma common law tort principles.<sup>6</sup> Damages were sought for injuries suffered by decedent, Karen Silkwood, during a nine day period as a result of plutonium contamination.<sup>7</sup> The issue presented to the Court was whether the federal scheme of nuclear regulation<sup>8</sup> preempts an award of punitive damages under state common law.

This note will focus on the applicability of state tort law to a radiation injury that does not reach the level of an

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1. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 625 (1984).

2. *Id.*

3. Of the seventeen briefs filed with the Court, four were in opposition: Brief for Appellees, June 29, 1983; Brief of the Atomic Industry Forum as amicus curiae of Appellees, June 27, 1983; Brief for United States as amicus curiae in support of Appellees, June 25, 1983; Brief for United States as amicus curiae, November 30, 1982.

4. *See supra* note 3.

5. The decision was a 5-4 plurality. *Silkwood*, 104 S. Ct. 615 (1984).

6. *Id.* at 618.

7. *Id.*

8. Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981); *see infra* note 75.

“extraordinary nuclear occurrence”<sup>9</sup> (ENO) as defined by the Price-Anderson Act.<sup>10</sup> Attention will be given to the question of the extent of federal preemption in the nuclear energy industry. A review of the factual and legal background of the case, an examination of the reasoning of the Supreme Court and a discussion of the legal and social implications of the decision will follow.

## II. Background

Karen Silkwood was employed as a laboratory analyst in a nuclear fuel processing plant operated by defendants, Kerr-McGee Corporation,<sup>11</sup> from August, 1972 to November, 1974.<sup>12</sup> The facility was located in Cimarron, Oklahoma<sup>13</sup> and was licensed by the Atomic Energy Commission<sup>14</sup> (AEC). Observance of AEC regulations was a condition of the license.<sup>15</sup> As interpreted by the AEC<sup>16</sup> and the nuclear

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9. “Extraordinary nuclear occurrence” is defined as:

Any event causing a discharge or dispersal of source, special nuclear, or by-product material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Commission determines to be substantial, and which the Commission determines has resulted or will probably result in substantial damages to persons offsite or property offsite.

42 U.S.C. § 2014(j) (1976).

10. Pub. L. No. 85-256, 71 Stat. 576 (1957); *see infra* note 75.

11. Silkwood was employed by Kerr-McGee Nuclear Corp., a subsidiary of Kerr-McGee Corp. The jury found the subsidiary was the “mere instrumentality” of the parent. As a result, the parent was held liable for the activities of its subsidiary. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 617 n.1 (1984). (Both entities are hereinafter jointly referred to as Kerr-McGee).

12. Brief for Appellants, *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984) (available on Lexis, Genfed library, Briefs file).

13. The Cimarron plant was permanently closed in 1975. *Silkwood*, 104 S. Ct. at 618 n.2.

14. 42 U.S.C. § 2073 (1976) authorizes the Commission to license facilities such as Kerr-McGee who handle nuclear materials such as plutonium.

15. 42 U.S.C. § 2201(b) (1976) empowers the Commission to set standards governing the possession and use of nuclear materials; 42 U.S.C. § 2073(e) (1976) makes compliance with the Commission’s regulations a condition to licensing.

16. The AEC is now the Nuclear Regulatory Commission (NRC). 42 U.S.C. § 5814 (1976); 42 U.S.C. § 5841 (1976 & Supp. IV 1980).

energy industry, the AEC regulations were only a reflection of minimum safety standards. Compliance with them did not guarantee safety.<sup>17</sup> The licensees were expected to do more than the minimal requirements if necessitated by reasonable prudence.<sup>18</sup>

Fuel pins containing plutonium<sup>19</sup> were fabricated at the Cimarron plant. Plutonium, one of the most carcinogenic and dangerous substances known,<sup>20</sup> is classified in the Price-Anderson Act<sup>21</sup> as a "special nuclear material."<sup>22</sup> Silkwood's job required her to handle plutonium, through a glove box,<sup>23</sup> on a daily basis. All employees who handled plutonium made routine checks for radiation contamination.<sup>24</sup>

On three occasions, November 5, 6, and 7, 1974, Silkwood was found to be contaminated with plutonium.<sup>25</sup> There is little evidence to establish exactly how the contamination incidents occurred.<sup>26</sup> The first incident apparently occurred at the plant. It was discovered by Silkwood during a work break when she monitored herself with the plutonium detecting device supplied by Kerr-McGee in accordance with AEC regulations.<sup>27</sup> She was immediately

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17. Brief for Appellants, *supra* note 12.

18. *Id.*

19. Plutonium is an artificially produced radioactive chemical element which has been instrumental in the development of nuclear weapons and nuclear power. *Silkwood v. Kerr-McGee*, 667 F.2d 908, 913 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

20. *Id.*

21. Pub. L. No. 85-256, 71 Stat. 576 (1957), *see infra* note 75.

22. The term "special nuclear material" includes plutonium or any material that the NRC finds capable of releasing substantial amounts of atomic energy. 42 U.S.C. §§ 2014 (aa), 2071 (1976). The classification makes plutonium subject to regulation and licensing by the NRC. *Id.* at § 2073. *See supra* note 15.

23. A glove box is a supposedly impervious box surrounding the plutonium and the plutonium processing equipment which has glove-like holes permitting the operator to manipulate the material from outside the box. *Silkwood*, 104 S. Ct. at 618 n.3.

24. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 915 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

25. *Id.* at 913.

26. *Id.*

27. *Id.*

decontaminated at the plant and supplied with a voiding collection kit to monitor the contamination.<sup>28</sup> The next day she engaged in clerical work and did not work with plutonium at all.<sup>29</sup> Nevertheless, she tested herself and was again found to be contaminated.<sup>30</sup> The source of this contamination is unknown.<sup>31</sup> The third incident occurred away from the plant, presumably at home, since she was found to be contaminated upon her arrival at the plant.<sup>32</sup> Upon inspection by a Kerr-McGee decontamination squad,<sup>33</sup> her apartment was found to be contaminated as well.<sup>34</sup> Contaminated items from her apartment were confiscated and destroyed.<sup>35</sup> In addition, her urine and fecal samples were tested and it was determined that they were spiked with plutonium.<sup>36</sup>

Karen Silkwood was sent to the Los Alamos Scientific Laboratory in New Mexico to undergo further contamination testing.<sup>37</sup> She returned to work on November 13, 1974. On that day, Silkwood was killed in an automobile accident.<sup>38</sup> Thus, her radiation induced injuries, which form the basis for this tort action, covered a nine day period ending with her death.

This action was initiated in the United States District Court for the Western District of Oklahoma by Silkwood's father, as administrator of her estate. Her three children were named as beneficiaries. Defendants were Silkwood's employer, Kerr-McGee Nuclear Corporation, and its parent

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28. *Silkwood*, 104 S. Ct. at 618.

29. *Id.*

30. *Id.*

31. *Silkwood v Kerr-McGee Corp.*, 667 F.2d 908, 913 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

32. *Id.* at 914.

33. Briefs for Appellants, *see supra* note 12.

34. *Silkwood*, 104 S. Ct. at 618.

35. *Id.*

36. The samples contained insoluble, rather than naturally secreted, plutonium. *Id.* at n.4.

37. *Id.*

38. *Id.*

corporation, Kerr-McGee Corporation.<sup>39</sup> Plaintiff sought both actual and punitive damages.<sup>40</sup> The jury found the defendants liable on both strict liability and negligence principles,<sup>41</sup> and awarded actual damages of \$505,000<sup>42</sup> and punitive damages of \$10,000,000.<sup>43</sup> The verdict was accepted by the court and judgment was entered against the defendants.<sup>44</sup> The district court based its decision on a finding that the injury involved was not covered by the Price-Anderson Act.<sup>45</sup> The court reasoned that the Price-Anderson Act<sup>46</sup> was not intended to preempt state tort principles in a sub-threshold<sup>47</sup> nuclear incident.<sup>48</sup> Defendants then entered alternative motions for judgment notwithstanding the verdict or a new trial.<sup>49</sup> The district court denied both motions.<sup>50</sup>

On review the Tenth Circuit Court of Appeals<sup>51</sup> found that the lower court erred in not granting a judgment notwithstanding the verdict. Both the personal injury and

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39. *Silkwood*, 104 S. Ct. at 618 n.1; see *supra* note 11.

40. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 571 (W.D. Okla. 1979), *rev'd*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

41. *Id.* at 570.

42. \$5,000 for property damage and \$500,000 for special personal injury. *Silkwood*, 104 S. Ct. at 619.

43. *Id.*

44. 485 F. Supp. at 570.

45. Pub. L. No. 85-256, 71 Stat. 576 (1957), see *infra* note 75.

46. *Id.*

47. A sub-threshold nuclear incident does not meet the requirements to be classified as an extraordinary nuclear occurrence (ENO). See *supra* note 9 for definition of ENO.

48. A "nuclear incident" is defined as:

Any occurrence, including an extraordinary nuclear occurrence, within the United States causing ... bodily injury, sickness, disease or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material.

42 U.S.C. § 2014(q) (1976).

49. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 570 (W.D. Okla. 1979), *rev'd*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

50. *Id.*

51. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

punitive damage awards were reversed.<sup>52</sup> Adopting the defendants' contention that the personal injury award was precluded by the Oklahoma Worker's Compensation statute,<sup>53</sup> the court found that it could not be established that the contamination in question occurred away from the workplace. Therefore, it was determined that worker's compensation was the exclusive remedy. The punitive damages award of \$10,000,000 was set aside on the ground that the Atomic Energy Act<sup>54</sup> preempts all state law in the nuclear energy area.<sup>55</sup> Thus, a broad preemption policy was established by the Tenth Circuit. The court concluded that a judicial award of punitive damages designed to punish past acts or deter future acts was equivalent to state regulation.<sup>56</sup>

Silkwood appealed seeking review of the appellate court's ruling in regard to punitive damages.<sup>57</sup> Contrary to appellee's assertion,<sup>58</sup> the United States Supreme Court found that the decision below was reviewable by writ of certiorari.<sup>59</sup> The Court then addressed the central issue: whether the federal scheme of nuclear regulation preempts an award of punitive damages under state common law. The Court held, in a 5 to 4 decision,<sup>60</sup> that it did not.

### III. Discussion

The doctrine of federal preemption, which emanates from the Supremacy Clause of the United States Constitution,<sup>61</sup>

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52. *Id.*

53. Okla. Stat. Ann. tit. 85 §§ 1-180 (West 1970 & Supp. 1983-84).

54. 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981).

55. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 923 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

56. *Id.*

57. *Silkwood*, 104 S. Ct. at 620.

58. Brief for Appellees, *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984) (available on Lexis, Genfed library, Briefs file).

59. *Silkwood*, 104 S. Ct. at 621.

60. Justices White, Brennan, Rehnquist, Stevens, and O'Connor concurred in the majority opinion. Justices Marshall, Blackmun, Powell and Chief Justice Burger joined in the dissent. *Silkwood*, 104 S. Ct. 615 (1984).

61. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be

elevates federal law above state law. Once it is determined that the federal government has the power to regulate in a given area, the question is whether the federal regulation completely excludes state action over the same subject matter.<sup>62</sup> The federal regulatory authorities in the nuclear energy area are the Atomic Energy Act<sup>63</sup> and the Price-Anderson Act.<sup>64</sup> Preemption may be either express or, absent express preemptive language, Congress' intention to preempt may be implied.<sup>65</sup>

When compliance with both federal and state law is an impossibility, federal preemption is inescapable.<sup>66</sup> When there is no physical impossibility, the Court must premise its review on the assumption that the traditional powers of the state are not to be superseded unless clear congressional intent to the contrary is noted.<sup>67</sup> Where congressional intent is clearly in support of total preemption, the states may not enter the area.<sup>68</sup> Congress, however, does not typically act on a wholesale basis with regard to preemption.<sup>69</sup> Entrance into one area does not necessarily lead to preemption of a related area. Only when it is impossible to comply with both state and federal law does a conflict arise. This conflict is then resolved in favor of federal preemption.<sup>70</sup> In *Silkwood* there is no inevitable collision between federal and state

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made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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. Constitution art. VI, cl. 2.

62. *Florida Lime & Avocado Growers, Inc. v. Paul, Director of the Dep't. of Agric. of Cal.*, 373 U.S. 132 (1963).

63. 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981).

64. Pub. L. No. 85-256, 71 Stat. 576 (1957), *see infra* note 75.

65. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

66. *Florida Lime & Avocado Growers, Inc. v. Paul, Director of the Dep't of Agric. of Cal.*, 373 U.S. 132, 142-43 (1963).

67. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

68. *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

69. *Florida Lime & Avocado Growers, Inc. v. Paul, Director of the Dep't of Agric. of Cal.*, 373 U.S. 132, 142-43 (1963).

70. *Id.*



law. On the contrary, the extent of the tort remedies in personal injury cases is an area which the Court has traditionally regarded as properly within the scope of state supervision.<sup>71</sup>

An examination of congressional intent should precede any suggestion of preemption. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*<sup>72</sup> the Court concluded that federal law has occupied the entire field of nuclear safety except the limited powers expressly left to the states.<sup>73</sup> Kerr-McGee suggests that this holding is dispositive of the present controversy.<sup>74</sup> The Court disagrees basing its analysis on an examination of the legislative history of the Atomic Energy Act and its subsequent amendment, the Price-Anderson Act.<sup>75</sup> According to the Court, the record in *Silkwood* is void of preemptive intent.<sup>76</sup>

#### A. Federal Regulatory Scheme

Following World War II the federal government alone controlled the field of nuclear energy.<sup>77</sup> It soon became apparent that private involvement in the area was needed in order to hasten its development.<sup>78</sup> In 1954 Congress passed a revised Atomic Energy Act<sup>79</sup> which established the AEC.<sup>80</sup> The AEC was given jurisdiction over the atomic

71. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1984).

72. 103 S. Ct. 1713 (1983).

73. *Id.* at 1726, *quoted in Silkwood*, 104 S. Ct. at 622.

74. *Silkwood*, 104 S. Ct. at 622.

75. The Price-Anderson Act was added as § 170 to the Atomic Energy Act of 1954. *See also* text accompanying notes 85-90. Price-Anderson Act, Pub. L. No. 85-256, § 4, 71 Stat. 576 (1957) (current version at 42 U.S.C. § 2210 (1976)).

76. *Silkwood*, 104 S. Ct. at 623.

77. Atomic Energy Act of 1946, ch. 724, 35, 60 Stat. 755 (1946).

78. Maleson, *The Historical Roots of the Legal System's Response to Nuclear Power*, 55 S. Calif. L. Rev. 597, 601 (1982) [hereinafter cited as Maleson].

79. Ch. 1073, 68 Stat. 919 (1954)(current version at 42 U.S.C. §§ 2011-2296 (1976 & Supp. V 1981)).

80. *See supra* note 16.

energy industry.<sup>81</sup> Private industry had to conform to federal regulations and be licensed in order to be permitted to enter this potentially lucrative field.<sup>82</sup> However, private industry was still wary based on the potential of unlimited liability in the event of a major accident.<sup>83</sup> In response to this concern, Congress passed the Price-Anderson Act in 1957.<sup>84</sup>

Prior to the enactment of Price-Anderson Act,<sup>85</sup> Congress intended that all questions of liability for radiation injuries be submitted for determination under state tort law.<sup>86</sup> The Price-Anderson Act placed a ceiling of \$560 million on aggregate liability for a single accident.<sup>87</sup> In 1966 Congress amended the Price-Anderson Act and called for a waiver of certain key defenses<sup>88</sup> in order to assure the plaintiff the advantage of strict liability.<sup>89</sup> The waiver of defenses is not triggered unless the nuclear incident is classified as an ENO<sup>90</sup> by the Nuclear Regulatory Commission (NRC). The Price-Anderson Act is not directly applicable to this case because Silkwood's injury did not rise to the level of an "extraordinary nuclear occurrence."<sup>91</sup> Nevertheless, the Court reasoned that Congress assumed the applicability of state tort law remedies to nuclear accidents.<sup>92</sup> The relationship between the Price-Anderson Act and existing state tort law was described as viable unless the accident reached the proportions referred to in the Act.<sup>93</sup> Thus, the

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81. Note, *Implied Pre-Emption of Punitive Damages for Nuclear Accidents*, 29 Am. U.L. Rev. 741, 745 (1980) [hereinafter cited as *Implied Pre-Emption*].

82. Maleson, *supra* note 78, at 611.

83. *Implied Pre-Emption*, *supra* note 81, at 742.

84. *See supra* note 75.

85. *Id.*

86. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 573 (W.D. Okla. 1979), *rev'd*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

87. 42 U.S.C. § 2210(e) (1976).

88. 42 U.S.C. § 2210(n)(1) (1976).

89. *Implied Pre-Emption*, *supra* note 81, at 747.

90. *See supra* note 9.

91. *See supra* note 47.

92. *Silkwood*, 104 S. Ct. at 623.

93. *Id.*

Court concluded that Congress' clear intention was to support the application of state tort law even though the NRC was the exclusive regulatory authority in the area of nuclear safety matters.

Consequently, the decision in *Pacific Gas & Electric*<sup>94</sup> was not determined to preclude a damage award under state tort law. Particular reference was made to the effect of the 1966 amendment to the Price-Anderson Act.<sup>95</sup> A direct effect of imposing strict liability on defendants in a nuclear accident is the resulting enlargement of the plaintiffs' rights. The rights of both plaintiffs and defendants in such a situation are established by state law.<sup>96</sup> "The entire [congressional] discussion surrounding the 1966 amendment was premised on the assumption that state remedies were available notwithstanding the NRC's exclusive regulatory authority,"<sup>97</sup> according to the Court. The AEC concurred in this determination.<sup>98</sup> Hosts of commentators have also supported this view.<sup>99</sup> Under the circumstances, the overwhelming weight of opinion suggests that the Price-Anderson Act sought to deal only with certain problems existing in state law that impair the ability of radiation-injured employees to recover under state law.<sup>100</sup> Therefore, the Price-Anderson Act may be viewed as an extension or expansion of state law in this area, not as a limiting factor. There is no preemption problem when, as here, Congress manifests its intention that state law play a specific role in the liability scheme.<sup>101</sup>

#### B. *Federal Preemption*

Finally, even where dual regulation is not expressly

94. 103 S. Ct. 1713 (1983).

95. *Silkwood*, 104 S. Ct. at 623.

96. *Id.* at 624.

97. *Id.* at 625.

98. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 573 (W.D. Okla. 1979), *rev'd*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 104 S. Ct. 615 (1984).

99. *Id.*

100. *Id.* at 574.

101. *Silkwood*, 104 S. Ct. at 624-25.

prohibited by Congress such a prohibition may be implied.<sup>102</sup> Key factors to determine whether Congress has, by implication, preempted an area may include a look at the statutory language itself, the legislative history, the pervasiveness of the federal scheme, the nature of the subject matter regulated, the requirement of uniformity and ultimately, whether state law would obstruct congressional objectives.<sup>103</sup> Here, there is no suggestion of either express or implied preemption. A tort action is a far cry from a regulatory system.

At this point some consideration must be given to appellee's argument that punitive damages are a form of regulation and, therefore, pose a threat to federal supremacy in the nuclear energy area.<sup>104</sup> The award of exemplary damages cannot hamper federal government regulation. This view is illustrated by the Court's decision in *Florida Lime & Avocado Growers, Inc. v. Paul, Director of the Department of Agriculture of California*<sup>105</sup> which held that a state regulation promulgating standards for avocados may stand alongside a federal regulation in the same area because no conflict existed and no evidence of congressional intent to preempt the field was apparent.<sup>106</sup> In *Florida Lime* both the federal and state statutes involved regulation schemes.<sup>107</sup> In *Silkwood* the state tort law remedy is an issue collateral to the one covered by the federal regulations. There is no direct overlap. Since conflict was not found in *Florida Lime*, none should be found here. The Court has evinced a reluctance to declare implied preemption in the absence of substantial evidence.<sup>108</sup> Here we are involved not with the possibility of direct

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102. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

103. *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

104. Brief for Appellees, *supra* note 58.

105. 373 U.S. 132 (1963).

106. *Id.* at 141.

107. *Id.* at 143.

108. *Silkwood*, 104 S. Ct. at 626.

interference as in *Florida Lime*, but with a tort action which cannot impede federal government regulation in the same way. As the Court states, tort law has always been deemed to be a matter of peculiar local concern.<sup>109</sup>

A contrary view may be seen in *Northern States Power Co. v. Minnesota*.<sup>110</sup> There the Court held that Minnesota could not impose state licensing and regulation on state power plants in the face of a similar federal regulatory scheme.<sup>111</sup> The clear intent of Congress was found to be preemption.<sup>112</sup> The Court in *Train v. Colorado Public Interest Research Group*<sup>113</sup> reinforced the view of *Northern States* when it held that the AEC had exclusive control over the discharge of nuclear materials.<sup>114</sup> Taken together, the cases support the view that any state action that competes with AEC regulation of radiation hazards associated with plants handling nuclear material should be held invalid.

Nevertheless, the pervasiveness of the federal scheme must be considered before preemption is found.<sup>115</sup> The application of state tort law is a matter collateral to the federal regulatory scheme. The two areas are not inextricably intertwined. Application of state tort law to isolated instances of radiation exposure would do nothing to obstruct the objectives of Congress.

### C. *Punitive Damages*

Although the Price-Anderson Act does not address the issue of punitive damages, this need not be read as precluding them in states that permit such damages.<sup>116</sup> Punitive damages are damages, other than compensatory damages, awarded for the purpose of punishment or

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109. *Id.* at 625.

110. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

111. *Id.* at 1154.

112. *Id.* at 1152.

113. 426 U.S. 1 (1976).

114. *Id.* at 24.

115. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

116. *Silkwood*, 104 S. Ct. at 624-25.

deterrence, and are based on the defendant's outrageous or reckless conduct.<sup>117</sup> The culpable mental state necessary for an award of punitive damages is a question for the jury.<sup>118</sup> A knowing and intentional disregard of the duties above and beyond those imposed by the federal regulations may constitute the gross recklessness and indifference to the safety of others that render punitive damages appropriate.<sup>119</sup>

Defendants argued that since they complied with federal standards they could not be found liable under state common law.<sup>120</sup> To do so, they insisted, would be to impose state standards where the federal government does not impose liability.<sup>121</sup> The dissent suggests that a judicial award of punitive damages is no less intrusive to the federal scheme than direct legislative acts of the state.<sup>122</sup> The Court recognized the tension between the determination that safety concerns are the exclusive province of the federal law and the determination that a state may award damages based on state tort law.<sup>123</sup> However, the potential overlap is one that Congress was willing to tolerate.<sup>124</sup> As the Court suggests, they "can do no less."<sup>125</sup> It is not inconsistent with congressional design to award punitive damages for the escape of plutonium caused by grossly negligent, reckless and willful conduct.<sup>126</sup> Indeed, the Court insists that the health and safety of the public must not be sacrificed.<sup>127</sup> "The promotion of nuclear power is not to be accomplished at all costs."<sup>128</sup> Adequate remedies must be available to

117. Restatement (Second) of Torts § 908 (1979).

118. W. Prosser, *Handbook of the Law of Torts*, § 2, (4th ed. 1971).

119. *Id.*

120. Brief for Appellees, *supra* note 58.

121. *Id.*

122. *Silkwood*, 104 S. Ct. at 635 (Powell, J. *dissenting*).

123. *Id.* at 625.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Pacific Gas & Electric Co. v. State Energy Resources Conserv. Dev. Comm'n*, 103 S. Ct. 1713, 1731 (1983), *quoted in Silkwood*, 104 S. Ct. at 626.

those injured by exposure to hazardous nuclear materials.<sup>129</sup>

The Court's decision appears to reflect the heightened public concern for safety in the nuclear energy industry. Technology is no longer to be encouraged to the complete exclusion of the public interest. In the final analysis a stand by the judiciary that emphasizes public safety may lead to greater accomplishments in the nuclear energy industry based on increased public confidence.

#### IV. Conclusion

The Supreme Court's decision that the award of punitive damages is not preempted by federal law<sup>130</sup> preserves the viability of state common law remedies in the nuclear energy field. Careful consideration was given to the Price-Anderson Act<sup>131</sup> by the Court. This scrutiny revealed Congress' intention that state law be applied in the area of tort remedies.<sup>132</sup> Preemption cannot be implied without a clear indication of congressional design. Until Congress acts to address the issue of punitive damages, the courts should uphold the state's interest in protecting its citizens in isolated cases of personal injury related to radiation. These interests must be adequately served and protected from those who would elevate technological advances above human dignity.

*Marcia H. Rimland*

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129. *Silkwood*, 104 S. Ct. at 626.

130. *Id.*

131. Pub. L. No. 85-256, 71 Stat. 576 (1957), *see supra* note 75.

132. *Silkwood*, 104 S. Ct. at 626.